Calabrese v City of New York
2022 NY Slip Op 32691(U)
August 10, 2022
Supreme Court, New York County
Docket Number: Index No. 152458/2016
Judge: Margaret Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**

Justice

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PAUL CALABRESE, MEG CALABRESE

Plaintiffs,

- v -

CITY OF NEW YORK,

Defendant.

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INDEX NO. 152458/2016

MOTION DATE 12/18/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57

were read on this motion to/for JUDGMENT - SUMMARY.

In this action arising out of injuries sustained by plaintiff Paul Calabrese while working at a construction site owned by defendant City of New York, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment as to liability on their claims under Labor Law §§ 240 and 241(6). Defendant opposes the motion.

Background

Plaintiff was injured on September 9, 2015, while working at a project to provide protective coating for the Riverside Drive Bridge (Bridge) located at 125th Street and 12th Avenue in Manhattan (the Project). Defendant owns the Bridge and contracted with non-party Commodore Construction (Commodore) to perform a painting job (NYSCEF # 35-Deft's Dep. at 10-12; NYSCEF # 37-Bid Contract). Plaintiff, a union bridge painter, was hired by Commodore to remove and abate lead paint from the Riverside Drive Viaduct (the viaduct), which is the steel structure supporting the Bridge and roadway above (NYSCEF # 34-Pltf's Dep. at 10; 41-44).

Plaintiff testified at his deposition that on the date of the incident, his assignment was to sandblast the outside face of the viaduct in order to remove old lead paint (*id* at 50). To access the location, plaintiff climbed a stair-tower approximately thirty-feet high to the safe span deck and then climbed onto a scaffold known as a Sky Climber or Gorilla Scaffold, which was twenty-feet high by thirty-six-inches wide (*id.* at 65, 82). Once on the safe span deck, and before proceeding onto the scaffold, plaintiff put on a five-point harness and a double lanyard attached to an independent safety line (*id* at 75-76). Plaintiff did not have to lean over the scaffold to sandblast, but he needed to lean over to "make sure that

[he] covered every portion" (*id* at 116). Plaintiff testified that because the scaffold is suspended, it moves and "teeter-totters . . . [and] . . . the whole point of the guardrails is to keep you in and if you are leaning over you are going to be touching the guardrails" (*id.* 115-116).

At the time of the accident, plaintiff was sandblasting from the scaffold and leaning on the top guardrail when he felt himself falling (*id.* at 112). He tried to break his fall by reaching out to grab the steel of the viaduct with his right hand, thus injuring his right shoulder. His lanyard activated and caught him (*id*, at 132-134). Plaintiff subsequently learned that the U-clamp on the top right rail broke free, and the rail went down causing him to fall (*id.*, at 121).

Commodore issued an incident/investigation report on the accident date, which states that plaintiff fell "when the scaffolding railing gave way" and identified "the root cause" of the accident as "the nut retaining U-bolt became loose". (NYSCEF #40, at 2, 6). The corrective actions listed in the report included: "[u]pgrade existing hardware to nylon self-locking nuts on U-bolts; check all nuts and U-bolts prior to working on scaffold; daily visual inspection" (*id.*, at 7; *see also* NYSCEF # 35 at 71-75).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012] [internal citations and quotation omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Hous. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240(1)

Plaintiffs argue that they are entitled to summary judgment as to liability on their Labor Law § 240(1) claim as the record establishes that plaintiff was working at an elevated scaffolding when a U-clamp securing the top rail broke causing plaintiff to fall and injured his shoulder. These facts, plaintiffs argue, establish that an insufficient safety device was a proximate cause of the plaintiff's injuries resulting from an elevation risk.

Defendant counters that plaintiff's decision to lean over to check his work was the sole proximate cause of plaintiff's injuries. And citing plaintiff's testimony that his work could be performed by blasting "from pretty much straight up and down," defendant contends that although it was a customary practice to lean or brace against any part of the suspended scaffold for support, leaning over the railing was not a mandatory practice for sandblasting (NYSCEF # 34, at 116).

In reply, plaintiff asserts that leaning on the railing of the scaffolding does not constitute negligence and points to evidence that plaintiff was required to check and inspect his sandblasting work and was expected to lean on the rail (NYSCEF # 34, at 115; NYSCEF # 35, at 65).

Labor Law §240(1) provides that: "[a]ll contractors and owners and their agents... in the... altering of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... ladders, slings ... ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The provision imposes absolute liability on owners and contractors whose failure to provide "proper protection to workers employed on a construction site, proximately causes injury to a worker" *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal citation and quotations omitted]). Whether a plaintiff is entitled to recover under section 240(1) also "requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*id*, [internal citation omitted]). In ascertaining whether there is liability under the statute, the issue to be determined is whether plaintiff's injuries were a direct consequence of a failure to provide adequate protection against injury resulting from a fall from a significant height differential (*Runner v New York Exchange, Inc.*, 13 NY3d 599, 603 [2009]). Thus, it is well settled that where an elevated work surface fails to remain stable or erect and results in injury of a worker, there is prima facie liability under 240(1) (*Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012]).

In this case, it is undisputed that the bolts retaining the U-clamp became loose, causing the scaffold railing to give way and failed to provide plaintiff with adequate protection to prevent him from falling from the elevated platform on which he was working (*see Verdon v Port Authority of New York and New Jersey*, 111 AD3d 580, 581 [1st Dept 2013] [summary judgment as to liability warranted based on "evidence that the protective device, i.e., the guardrail, proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person"][internal citation and quotation omitted]).

And, contrary to defendant's argument, it cannot be said that plaintiff was the sole proximate cause of his injuries since the unconverted record shows that the railing was defective. Thus, evidence that plaintiff was leaning over the railing in

the performance of his work is insufficient to raise a triable issue of fact. In this regard, defendant's argument that *Robinson v East Med. Ctr, L.P*, (6 NY3d 550 [2006]) supports its position is unavailing. In *Robinson*, although the record showed that plaintiff knew where eight-foot ladders were stored on the job site, he opted to use a six-foot ladder that "he knew was not tall enough to perform the task" (*id.* at 554-555). Thus, the *Robinson* court found that "[p]laintiff's own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries" (*id*, at 555). In contrast, here, plaintiff was using the safety devices provided to him and was injured when the railing collapsed because it was not properly secured to the scaffolding. Under these circumstances, the record does not raise a triable issue of fact as to whether plaintiff's actions were sole proximate cause of his injuries.

Accordingly, plaintiffs are entitled to summary judgment as to liability on their Labor Law § 240(1) claim.

Labor Law § 241(6)

Labor Law § 241(6) creates a non-delegable duty on owners and contractors mandating compliance with the Industrial Code of the State of New York (*see Ross Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Liability under the statute is established by showing that there was a violation of a provision of the Industrial Code which provides a specific, positive command (*Rizzo v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 349 [1998]).

Here, in support of their Labor Law § 241(6) claim, plaintiffs assert that that the uncontroverted evidence demonstrates the failure to comply with State Industrial Code provisions as to safety railings (23.1.15 [e] and 23-5.1[j]; 23-5.3[e]), which are applicable to a suspension scaffold (*see Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]), was a proximate cause of plaintiff's injuries.

Defendant does not deny that the Industrial Code provisions relied on by plaintiff apply and were violated but argues that there are issues of fact as to whether plaintiff's contributory negligence was a proximate cause of his injuries. Specifically, defendant argues that defendant's negligence in leaning on the railing to inspect the work constituted contributory negligence.

In reply, plaintiff argues that when it is established that defendant violated the Industrial Code, existence of factual questions as to whether plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries do not preclude a grant of summary judgment (citing *Rodriguez v City of New York*, 31 NY3d 312 [2018] [holding that to be entitled to summary

judgment as to liability under Labor Law § 241(6), plaintiff is not required to demonstrate the absence of comparative fault]).

In this case, as plaintiffs have provided uncontroverted evidence that the violation of the three cited Industrial Code provisions regarding safety railings were a proximate cause of plaintiff's injuries, summary judgment is granted as to defendant's liability under Labor Law § 241(6), with the issues related to plaintiff's comparative negligence to be decided by the factfinder (*id.* at 324-325 [finding that "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault"] *see also Natoli v Trader Joe's East Inc.*, 198 AD3d 572, 573 [1st Dept 2021][holding that summary judgment in favor of plaintiff was warranted in negligence action where defendant failed to submit evidence to raise an issue of fact as to its liability and plaintiff was not required to eliminate issues of fact as to his own comparative negligence]).

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion for summary judgment as to liability under Labor Law §§ 240(1) and 241(6) is granted.

This constitutes the Decision and Order of the court.

8/10/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE