Bridgemohan v Cornell Group, Inc.

[*1] Bridgemohan v Cornell Group, Inc. 2017 NY Slip Op 50100(U) Decided on January 30, 2017 Supreme Court, Queens County McDonald, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 30, 2017
Supreme Court, Queens County

Deboraj Bridgemohan, Plaintiff,

against

Cornell Group, Inc., "JOHN DOE", DAVID LOPEZ AND YOLANDA LOPEZ, Defendants.

704711/2015
Robert J. McDonald, J.

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR § 3212, granting summary judgment:

Papers/Numbered

Notice of Motion-Affirmation-Exhibits EF 22

Affirmation in Opposition-Exhibits EF 34 - 36

Affirmation in Reply EF 37

This is a negligence action to recover damages for personal injuries allegedly sustained by plaintiff on June 17, 2014 when he fell from a ladder at the premises located at 76-01 Dumont Avenue, Howard Beach, New York.

Plaintiff commenced this action against defendants Cornell Group, Inc. and "John Doe" by filing a summons and verified complaint on April 24, 2015. Defendant Cornell Group, Inc. joined issue via service of a verified answer dated Jule 1, 2015. Thereafter, plaintiff commenced action against defendants David Lopez and Yolanda Lopez by service of an amended summons and amended verified complaint on July 7, 2015. Defendant Cornell Group, Inc. served an answer to the amended complaint on August 10, 2015. Defendants David Lopez and Yolanda Lopez served a verified answer to the amended complaint on September 29, 2015. On November 18, 2015, a Stipulation of Discontinuance Without Prejudice was executed by all parties, discontinuing the action and all cross-claims against defendants Cornell Group, Inc. and "John Doe". A Note of Issue was filed on August 17, 2016.

Plaintiff now moves for summary judgment against defendants David Lopez and Yolanda Lopez (collectively hereinafter defendants) on the issue of liability under New York Labor Law § [*2]240(1) on the grounds that plaintiff was exposed to elevation-related risks for which no safety devices were provided, and that such failure resulted in his fall and was a proximate cause of his injuries.

In support of the motion, plaintiff submits an affirmation from counsel, James E. Romer, Esq.; a copy of the Note of Issue and Certificate of Readiness; a copy of the pleadings; a copy of the Stipulation of Discontinuance Without Prejudice; a copy of the Verified Bill of Particulars; and copies of the transcripts of the examinations before trial of plaintiff and defendant David Lopez.

At his examination before trial, taken on June 1, 2016, plaintiff testified that Jose Soriano, who was retained by defendants to perform work at the subject premises, asked

him to assist with the subject job. The work being performed was filling cracks in the walls of the garages with cement. To perform the work, plaintiff was utilizing a straight, aluminum ladder that was leaning against the garage. Prior to the incident, he had been up and down the ladder approximately ten times. He was filling cracks at the top of the garage when Mr. Soriano, standing at the bottom of the ladder, asked him to hand a bucket to Mr. Lopez. Mr. Lopez was approximately twenty to thirty feet away from plaintiff, on the other side of the garage. He descended the ladder to get the bucket from Mr. Soriano. He was approximately five feet from the ground when Mr. Soriano handed him the bucket. He took it with his right hand and started back up the ladder. As he was ascending the ladder, the ladder slipped, and both plaintiff and the ladder fell to the ground. He did not know what caused the ladder to slip. Plaintiff fell onto the concrete ground onto his left side, striking his left shoulder and left side of jaw against the ground. He had an arrangement with Mr. Soriano whereby Mr. Lopez would pay Mr. Soriano, and then Mr. Soriano would pay him. Prior to the incident, he did not have a discussion with anyone as to how much he was going to be paid for the subject work. Approximately two weeks after the incident, Mr. Soriano gave him $50 or $60 for the six or seven hours of work performed on defendants' premises.

Mr. Lopez appeared for a deposition on June 20, 2016. He testified that he owns the subject premises, which is a two-story, four-family house, that is divided into four separate apartments. Defendants reside in one apartment. The other units are leased to tenants. There are also four separate garages, all attached to the main building. He hired Mr. Soriano to perform the subject work. He did not hire plaintiff to perform work at the subject premises. He provided all materials and equipment for the job, including the ladders that were used. He owned and provided the ladder that plaintiff was using at the time of the incident. He put the ladder in position. There were no rubber feet on the ladder. He assisted with the work by handing things to plaintiff and Mr. Soriano, coordinating, and supervising. He directed the workers in what to do, and was there most of the time. He compensated Mr. Soriano for the work. He was aware that plaintiff was assisting Mr. Soriano with the subject job. He did not tell plaintiff not to work, but he did infer it. He was on the neighbor's property on the other side of a seven foot cement wall looking for more cracks when plaintiff fell. At the time of plaintiff's fall he could see plaintiff from the torso up. He could not see plaintiff's legs or feet. Mr. Lopez testified that plaintiff fell because he attempted to do a jump turn on the ladder. He did not provide any safety equipment for the subject job.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable [*3]issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

To prevail in an action based upon a violation of Labor Law § 240(1), a plaintiff must prove that the statute was violated and that such violation was the proximate cause of the plaintiff's injuries (see Blake v Neighborhood Hous. Servs. of NY City, 1 NY3d 280 [2003]; Ordonez v C.G. Plumbing Supply Corp., 83 AD3d 1021 [2d Dept. 2011]; Rudnik v Brogor Realty Corp., 45 AD3d 828 [2d Dept. 2007]). Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]).

There can be no liability under Labor Law § 240(1) where the plaintiff's actions are the sole proximate cause of his or her injuries (see Robinson v East Med. Ctr., LP, 6 NY3d 550 [2006]). Liability attaches if plaintiff failed to use safety devices which were readily available at the work site and plaintiff knew he was expected to use them but chose not to do so (see id. at 554). However, where such safety devices are not readily available or that plaintiff knew he was expected or instructed to use them, the plaintiff's actions are not the sole proximate cause of his injuries (see Gallagher v New York Post, 14 NY3d 83 [2010]; Przyborowski v A & M Cook, LLC, 120 AD3d 651 [2d Dept. 2014]).

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) against defendants by submitting competent evidence, including the transcript of his examination before trial testimony in which he asserted that his fall from the unsecured ladder occurred when the ladder shifted as he was climbing it (see Seferovic v Atlantic Real Estate Holdings, LLC, 127 AD3d 1058 [2d Dept. 2015]; Hai-Zhong Pang v LNK Best Group, Inc., 111 AD3d 889 [2d Dept. 2013]; Gonzalez v AMCC Corp., 88 AD3d 945 [2d Dept. 2011]). Plaintiff demonstrated that the ladder did not provide him with proper

protection as it did not have rubber feet and was not secured to the garage against which it was leaning (see Melchor v Singh, 90 AD3d 866 [2d Dept. 2011]). Plaintiff further demonstrated that defendants' failure to provide him with adequate safety devices was the proximate cause of his injuries (see Guaman v New Sprout Presbyterian Church of New York, 33 AD3d 758 [2d Dept. 2006]; Lopez v Melidis, 31 AD3d 351 [2d Dept. 2006]; O'Connor v Enright Marble & Tile Corp., 22 AD3d 548 [2d Dept. 2005]).

Since plaintiff met his initial burden on the summary judgment motion, the burden shifts to the opposing parties to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition, defendants submit an affirmation from counsel, John J. Morris, Esq., contending that plaintiff is not in the special class of individuals protected by Labor Law § 240(1) and, even if plaintiff was in the protected class, plaintiff was the sole proximate cause of his injuries. Counsel also argues that plaintiff's deposition testimony that he did not expect to get paid by Mr. Lopez demonstrates that plaintiff was a volunteer rather than an employee, and thus, not covered by Labor Law § 240(1)(citing Stringer v Musacchia, 11 NY3d 212 [2008]]). Lastly, counsel points to Mr. Lopez's testimony that plaintiff fell because he attempted a jump turn while on the ladder to establish that plaintiff's own negligence was the proximate cause of his injuries.

Upon a review of the motion papers, opposition, and reply thereto, this Court finds that defendants failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of his accident. Here, it is undisputed that the ladder was not secured to a wall or [*4]secured in any way, was not being held by anyone, and did not have rubber feet. Although defendants argue that plaintiff was not a member of the protected class because he was a volunteer, it is undisputed that plaintiff was contacted by Mr. Soriano to assist in the work on the subject premises. It is also undisputed that Mr. Soriano would and did pay plaintiff for the work. Thus, unlike the plaintiff in Stringer v Musacchia who in return for being allowed to participate in a hunt, volunteered to construct a shed, plaintiff here was asked to work at the subject premises and expected to and did get paid for that work.

Furthermore, although Mr. Lopez testified that plaintiff attempted to do a jump turn, causing him to fall, Mr. Lopez also testified that he could not see plaintiff's feet, legs, or lower body at the time of the incident. Thus, Mr. Lopez's limited visibility of plaintiff and of the ladder which plaintiff testified slipped, renders his opinion as to the cause of the incident speculative, and as such, insufficient to defeat summary judgment (see

Klein v Byalik, 1 AD3d 399 [2d Dept. 2003]). Even assuming that plaintiff was negligent in attempting to do a jump turn, that act alone is insufficient to strip him of statutory protection and did not constitute an unforeseeable or extraordinary act which was a superseding cause of the accident (see Rico-Castro v Do & Co New York Catering, Inc., 60 AD3d 749 [2009]; Chlebowski v Esber, 58 AD3d 662 [2d Dept. 2009]; Pichardo v Aurora Contrs., Inc., 29 AD3d 879 [2d Dept. 2006]; Vouizianas v Bonasera, 262 AD2d 533 [2d Dept. 1999]). Where, as here, a violation of Labor Law §240(1) is a proximate cause of the plaintiff's accident, plaintiff's conduct cannot be deemed solely to blame for it.

Accordingly, plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1) is granted.

Dated: January 30, 2017

Long Island City, NY

ROBERT J. McDONALD

J.S.C.