Kircher v City of New York
2014 NY Slip Op 30424(U)
February 18, 2014
Sup Ct, New York County
Docket Number: 100527/09
Judge: Jeffrey K. Oing

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 100527/2009
KIRCHER, TIMOTHY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance of the accompanying memorandum decision/order of this court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/18/14

JEFFREY K. OING J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
----------x

TIMOTHY KIRCHER,

Plaintiff,

- against -

THE CITY OF NEW YORK and ROOSEVELT ISLAND OPERATING CORP.,

Defendants.

----------x

Index No.: 100527/09

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff, Timothy Kircher, moves, pursuant to CPLR 3212, for an order granting him partial summary judgment against defendant Roosevelt Island Operating Corp. ("RIOC") on the issue of statutory liability pursuant to Labor Law § 240[1].

Background

Plaintiff allegedly sustained injuries as a result of an accident that occurred on or about January 19, 2008 on the Manhattan side of the Roosevelt Island Tram, a tramway that connects Roosevelt Island to Manhattan (the "tram"). The tram is owned by defendant, The City of New York, and leased to defendant RIOC for ninety-nine years.

On the date of the alleged accident, nonparty Doppelmayer, a contractor hired by defendant RIOC to inspect, service, and repair the tramway, employed plaintiff as a mechanic. Plaintiff had been working as a mechanic on the tram since September 2007. As a mechanic, plaintiff's duties included inspecting the tram

and performing necessary and emergency repairs on bearings as needed. Among those items that needed occasional repair were the bearings located in the roller chain assembly area.

The bearings consist of a rolling chain that rolls whenever the tram cabins move to keep four "track ropes," wire ropes that move along with the tram, on the proper tracks. Plaintiff testified at his EBT that although they do not require regular maintenance the bearings must be in perfect working condition in order for the tram to run properly (Kircher 10/5/10 EBT at pp. 40-43). The bearings are located between two cement walls and two pieces of glass (Id. at p. 43). To access this enclosed area to make repairs, employees would have to use a ladder to climb an approximately eight-foot tall cement wall (Id. at pp. 40-43). Once at the top, employees would slide down the other side of the wall and land on a wooden platform (Id. at p. 42).

Beneath the wooden platform where the accident occurred is an approximately seven-story high open space that leads to the basement. The platform consisted of removable wooden planks, approximately eight-inch wide, two-inch thick, and twelve-foot long. The removable planks are twenty feet above the street level (Kircher 5/15/09 50-h Hearing at pp. 43-44). According to Armando Cordova, Doppelmayer's manager at the time of the alleged accident, mechanics had to stand on these planks in order to replace a bearing (Cordova 2/14/11 EBT at p. 28). Cordova

testified at his EBT that as a general rule workers wear a harness for safety all over the tram "just in case" (Id. at p. 29). No harness, however, could be attached in the enclosed area with the bearings because there was no place to tie it on. According to Cordova's EBT testimony, "because it's enclosed ... there is no need to [use the harness]" when changing a bearing (Id.). Plaintiff testified at his EBT that he was "told to wear" the harness, but that there was nowhere to tie it (Kircher 10/5/10 EBT at pp. 61-62).

On or about January 19, 2008, after receiving an emergency repair work order for a bearing, plaintiff retrieved his safety harness, hard hat, and a new bearing from the tool room, took the tram over to the Manhattan side, and, when on the other side, made his way over to the bearing area (Kircher 10/5/10 EBT at pp. 50-52). Plaintiff then testified that, wearing his safety harness, he climbed up the ladder, got onto the cement wall, slid down on his back, got down on the platform and started walking around to look for the bad bearing (Id. at pp. 55-56, p. 64). To locate the part of the chain with the defective bearing, he had to walk on the wooden platform while looking up at the chain assembly area above him (Id. at p. 74). While walking on the platform in the enclosed bearing area, plaintiff's right foot fell through a hole between the planks and then through safety netting that was located directly underneath the planks (Id., pp.

72-33). Plaintiff further testified that as he was walking he fell through the netting, and that his right foot and right-side lower half of his body, up to his waist, fell through and was hanging below the planks, and his left side was on top of the planks (Id. at pp. 73, 78, 80). Plaintiff testified that he had to hold on to a piece of track rope with both hands to keep from falling further as he called for help (Id. at pp. 78, 82). He alleges he

remained in that position for fifteen minutes (Id. at p. 82). After fifteen minutes, the tram started to take off and the ropes started moving, pulling plaintiff up (Id. at p. 83). As the track rope pulled plaintiff out of the hole and onto the platform, his back hit the planks and his head hit the glass surrounding the planks (Id.).

Plaintiff testified that after he regained his composure he climbed back over the wall, down the ladder, and made his way over to the tram's cabin attendant, Greg Paravati (Id. at pp. 83-84). Plaintiff testified that he told Paravati about the accident, and Paravati accompanied him back to Roosevelt Island on the tram where Paravati called an ambulance (Id. at 85).

Discussion

Labor Law § 240[1] places an obligation on contractors and owners to provide employees working in elevated areas with adequate protection from gravity-related risks, such as falling

workers and objects (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]). In that regard, section 240[1] holds contractors, owners, and their agents strictly liable if they violate the statute and the violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 284 [2003]). An injured worker's contributory negligence is immaterial (Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]). Furthermore, the duty to provide adequately for and protect employees from falling risks is nondelegable (Id.). This duty rests upon ownership and imposes liability on all owners "without regard to encumbrances, and that the duty to provide safe working conditions is nondelegable regardless of control" (Gordon v Eastern Railway Supply, 82 NY2d 555, 559 [1993]). That is, the statute imposes strict liability whether or not the owner or lessor directly contracted with the injured party (Id.).

Section 240[1] does not, however, extend this duty to other occupational hazards that do not involve tasks that expose workers to gravity-related risks (Rocovich, 78 NY2d at 513, supra). For example, if, while in an elevated position, plaintiff punctured his foot because of a carelessly placed nail in the floorboard, he would not be protected under section 240[1]. Plaintiff must show that "[t]he hazard posed by working at an elevation is that, in absence of adequate devices (e.g.,

scaffolds, ladders), a worker might be injured in a fall" (Narducci, 96 NY2d at 268, supra).

I. Plaintiff's alleged testimonial inconsistencies

Defendant RIOC's argues that plaintiff's summary judgment motion should be denied. In that regard, RIOC points out that there are several inconsistencies in plaintiff's own testimony concerning the events on the day of the accident.

RIOC asserts that the first version of events is plaintiff's June 11, 2008 affidavit. There, plaintiff indicated that he arrived and inspected the accident area because he "noticed that parts of the bearing chain had broken off" (Kircher 6/11/08 Aff., ¶ 2). RIOC also notes that in this affidavit plaintiff failed to mention if or why he was sent to the location to perform an inspection.

RIOC claims that plaintiff illustrated a second version of the accident at the 50-h Hearing. RIOC points out that plaintiff's claim in his summary judgment motion is that he was sent to the Manhattan side to make an emergency repair (Kircher 10/5/10 EBT at pp. 47-52). According to RIOC, that conflicts with his 50-h testimony wherein he denied he was performing any type of inspection (Kircher 50-h Hearing at p. 37). RIOC notes that plaintiff suggested at the 50-h hearing that someone else previously inspected and identified an issue with the bearings.

RIOC claims the third version is found in plaintiff's October 5, 2010 sworn EBT. There, plaintiff testified that he fell because there was a hole in the planks (Kircher 10/5/10 EBT at p. 73). Yet, RIOC notes that plaintiff testified at the 50-h hearing that he fell because the planks shifted to create the hole (Kircher 50-h Hearing at pp. 46-47).

The fourth inconsistency is in plaintiff's February 27, 2012 affidavit submitted in support of his summary judgment motion. There, plaintiff states he was inspecting the area, but does not mention that he was sent to inspect the area by his supervisor, which is purportedly inconsistent with his 50-h hearing statements.

Additionally, RIOC argues that non-party witness testimony conflicts with plaintiff's testimony. Cordova testified at his EBT that a repair of the kind plaintiff described requires shutting down the tram (Cordova 2/14/11 EBT at p. 30). Cordova claimed that shutdown is never performed during the day, and is only permitted at night (Id.). RIOC contends that Cordova testified that no record of a shutdown the morning of January 19, 2008 exists (Id. at pp. 40-41). RIOC also points out that Tony Zhao, plaintiff's supervisor, testified that he did not provide plaintiff with a work order for an emergency repair and that he was unaware that plaintiff was working on the Manhattan side of the tram (Zhao 12/21/11 EBT at p. 17).

A triable issue of fact does not necessarily exist when a plaintiff delivers different versions of the accident (Nascimento v Bridgehampton Const. Corp., 86 AD3d 189, 195 [1st Dept 2011]). In Rodriguez v New York City Hous. Auth., the First Department granted a plaintiff's motion for summary judgment pursuant to section 240[1] even though the parties disagreed on some facts regarding the accident's details (194 AD2d 460, 461 [1st Dept 1993]). The Appellate Court held that when no factual inconsistencies exist as to whether the accident occurred and under either version the defendant would still be liable the motion may be granted (Id. at 461). This holds true even if the plaintiff, as here, is the sole witness (Id. at 462 ["Plaintiff's unrebutted contention is that he fell from the top of the unsecured ladder when it slipped and gave way" and "[t]he fact that plaintiff was willing to stand on the ladder without it being adequately supported does not diminish defendants' responsibility"]).

Here, plaintiff's four allegedly inconsistent versions do not alter RIOC's liability. There is no dispute that plaintiff was working in an elevated position, that there were no areas in which he could secure his safety harness, and that there was a known hole between two planks, e.g., Cordova testified at his EBT that "there was maybe a hole [t]here, but that was covered with mesh to keep pigeons out" (Cordova 2/14/11 EBT at p. 24), thus

resulting in his fall. The non-party witnesses' testimony conflicts with plaintiff's testimony only as to whether he had authorization to be on the Manhattan side of the tram or whether he may have negligently carried out his duties. Further, absent from the record is any evidentiary proof to raise a fact issue that plaintiff was the sole proximate cause of his injuries (Blake, 1 NY3d at 290, supra).

II. Labor Law § 240[1]

RIOC's also argues that wooden planks are not scaffolding under section 240[1]. Instead, RIOC claims that the wooden planks' purpose is to be permanent flooring within a permanent room. Therefore, RIOC contends it is not liable under section 240[1] if the wooden planks caused plaintiff's injuries. RIOC's argument is unavailing.

In Baharestani, supra, a plaintiff alleged that the defendant was liable under section 240[1] because a wooden platform was used as a makeshift scaffold, and defendant failed to provide any safety devices, such as a safety belt (281 AD2d at 116). The First Department held that the defendant was liable explaining that section 240[1]'s principle is to protect employees from elevation-related risks (Id.). The fact that the plaintiff was injured as a result of a "permanent concrete floor," as opposed to a temporary wooden platform, does not

change the injured party's risk from working at an elevated height (Id.).

Like Baharestani, whether the wooden planking is considered a permanent floor or a scaffold is of no material relevance in the instant action. The purpose of section 240[1] is to ensure that employees are provided with the appropriate protective instruments to guard them from gravity-related risks while working at elevated levels, not to define work platforms (Id.) As the First Department observed, "[t]he list of safety devices enumerated in Labor Law § 240(1) refers to tasks that 'entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positions or secured'" and "'[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for ... because of a difference between the elevation level of the required work and a lower level.'" (Id. at 117-118 quoting Rocovich v Consolidated Edison Co., 78 NY2d at 514).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240[1] claim is granted; and it is further

ORDERED that a trial on the issue of damages shall be held forthwith; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon counsel for defendant and upon the Clerk of the Trial Support Office, and shall serve and file with said Clerk a note of issue and statement of readiness, and shall pay any appropriate fee therefor, and said Clerk is respectfully directed to place this matter on the Part 40 calendar for such trial.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/18/14

HON. JEFFREY K. OING, J.S.C.