



LEXSEE 14 N.Y.3D 83

[*1] Hugh Gallagher, et al., Appellants, v The New York Post, et al., Respondents, NYP Holdings, Inc., Respondent, v Francis A. Lee Co., Respondent.

No. 8

COURT OF APPEALS OF NEW YORK

2010 NY Slip Op 1014; 14 N.Y.3d 83; 2010 N.Y. LEXIS 18; 30 I.E.R. Cas. (BNA) 690

February 11, 2010, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

PRIOR HISTORY: *Gallagher v. New York Post*, 55 A.D.3d 488, 866 N.Y.S.2d 178, 2008 N.Y. App. Div. LEXIS 8066 (N.Y. App. Div. 1st Dep't, 2008)

DISPOSITION: **[**1]** Order, insofar as appealed from, reversed, with costs, plaintiffs' motion for summary judgment as to liability on their *Labor Law* § 240(1) claim granted, and certified question answered in the negative.

COUNSEL: Scott N. Singer, for appellants.

Richard C. Imbrogno, for respondents The New York Post and NYP Holdings, Inc.

Howard K. Fishman, for respondent Francis A. Lee Co.

JUDGES: Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

OPINION BY: PIGOTT

OPINION

PIGOTT, J.:

On June 28, 2004, plaintiff Hugh Gallagher, an ironworker, was assigned to remove a section of metal decking from the second floor of a building in the Bronx owned by defendant NYP Holdings, Inc. ("NYP"), in preparation for the installation of new flooring. He [*2] was partnered with another ironworker, Jim Gaffney; the two men worked under the direction of foreman Joe Nover. Gallagher was cutting the metal with a two-handed, powered saw, enlarging an opening created by other workers. According to Gallagher, he was holding both handles of the saw when its blade jammed, propelling him forward so that he fell through the uncovered opening. Gallagher landed on a temporary floor situated between the first and second [*2] levels, sustaining injuries.

Gallagher and his wife commenced this personal injury action against NYP, ¹ alleging, among other things, violations of *Labor Law* §§ 200, 240 (1) and 241 (6). Relevant to this appeal, plaintiffs allege that NYP failed to provide Gallagher safety devices to prevent a fall from an elevated work site, in violation of *Labor Law* § 240 (1).

¹ Plaintiffs sued NYP as "The New York Post

and NYP Holdings, Inc."

At his deposition, the assistant project manager at the NYP work site, Jonathan Schreck, testified that "safety harnesses with shock-absorbing lanyards" and "retracting lanyards that we refer to as yo-yos" were available for use at the project site on the date of the accident, but he could not say whether any such safety devices were in the area from which Gallagher fell. Schreck also testified that, at the time of the accident, there was a "standing order," issued by project manager Mark Piazza to the project foremen, that the ironworkers should "have a harness on and be tied off." However, he could not recall whether these instructions had been given to the ironworkers.

Schreck, who had taken Gallagher to the hospital after the accident, testified that Gallagher [**3] had given him the impression that he had been holding the saw with only one hand and that he had fallen as he reached to grab the jammed saw with his other hand. He stated that Gallagher had told him that he had not been cleared by his doctor to return to work, following a 2002 accident and related surgeries to his right hand. Gallagher himself stated at his deposition that he could not complete a grip with his right hand, because the tip of his little finger was missing. But he insisted that he had been cleared to return to work by the date of his accident.

Plaintiffs moved for partial summary judgment on their *Labor Law* § 240 (1) claim, pointing to an affidavit by Gaffney stating that "there were no safety lines, lifelines or stanchions in the work area, and [he and Gallagher] were not provided with safety belts, harnesses or yo-yos in order to tie off." NYP cross-moved for summary judgment dismissing the complaint in its entirety². NYP relied in large part on Schreck's deposition testimony that safety devices were available for use at the project site, and concerning the "standing order." NYP also [**3] argued that Gallagher had not been medically cleared to return to work following [**4] his 2002 accident, and that his premature return was the sole proximate cause of his injuries.

² NYP also commenced a third-party action against Gallagher's employer, Francis A. Lee Co.; that action is not before this Court.

In further support of their motion, plaintiffs introduced an affidavit signed by Nover, Gallagher's foreman, who, according to Schreck, would have been

the person responsible for relaying safety instructions to the ironworkers. Nover stated that Gallagher had not been "provided with a safety harness or lifeline, nor were any stanchions or safety cables in the accident area at the time of the accident."

Supreme Court denied plaintiffs' summary judgment motion³. Initially it did so on the ground that Schreck's deposition testimony raised a question of fact as to whether safety devices had been provided to Gallagher. On reargument, Supreme Court acknowledged that it had overlooked Nover's affidavit and decided that no trial issue of fact existed as to whether Gallagher had been provided with appropriate safety devices. Nevertheless, Supreme Court ruled that the summary judgment motion should be denied -- apparently on the basis that Gallagher may have returned to work [**5] prematurely, and that the weakness of his grip on the saw may have been the sole proximate cause of his accident.

³ Supreme Court granted NYP's cross-motion to the extent of dismissing the *Labor Law* § 200 claim but, on reargument, reinstated the claim. The Appellate Division dismissed the § 200 claim. Plaintiffs do not appeal this part of the Appellate Division order.

The Appellate Division agreed with Supreme Court's initial rationale for denying plaintiffs summary judgment, holding that Schreck's testimony was sufficient to raise issues of fact as to whether Gallagher had been provided with adequate safety devices and instructed to use them, but had declined to do so. Two Justices dissented. The Appellate Division granted plaintiffs leave to appeal, and we now reverse.

Through the affidavits of Gaffney and Nover, plaintiffs made a prima facie showing that NYP violated *Labor Law* § 240 (1) by failing to furnish adequate safety devices to Gallagher. Both men asserted that the ironworkers were not provided with necessary safety devices, corroborating Gallagher's own similar testimony. The burden then shifted to NYP to raise a question of fact as to whether there was a violation of *Labor Law* § 240 (1). [**6] NYP argues that it met this burden through evidence that adequate safety devices were provided to Gallagher or, in the alternative, evidence that the sole proximate cause of Gallagher's fall was that he prematurely returned to work.

NYP relies on our decision in *Modntgomery v*

Federal Express Corp. (4 NY3d 805, 828 N.E.2d 592, 795 N.Y.S.2d 490 [2005]). In *Montgomery*, we held that a worker who injured himself when he jumped from an elevator motor room to a roof, rather than use a "readily available" ladder, was not entitled to recover under *Labor Law* § 240 (1). Similarly, in *Robinson v East Med. Ctr., LP* (6 NY3d 550, 553, 847 N.E.2d 1162, 814 N.Y.S.2d 589 [*4] [2006]), we held that a plumber who lost his balance and injured himself, when he used a six-foot ladder to install pipes at a height of 12 to 13 feet from the floor, could not recover under § 240 (1), because he knew that there were eight-foot ladders on the job site and exactly where they could be found. Both cases stand for the same proposition. Liability under § 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good [**7] reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury (see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40, 823 N.E.2d 439, 790 N.Y.S.2d 74 [2004]).

This is not such a case. There is no evidence in the record that Gallagher knew where to find the safety devices that NYP argues were readily available or that he was expected to use them. Although Schreck testified that appropriate safety devices were available at the project site on the date of the accident, nowhere in his testimony did Schreck state that Gallagher had been told to use such safety devices. Schreck referred to a "standing order" issued to the project foremen, directing workers to "have a harness on and be tied off," but could not say whether the order had been conveyed to the workers. Moreover, the affidavit of Gallagher's foreman, Nover, who was not

deposed, does not support NYP's claim that Gallagher was told about safety devices. Nover stated that Gallagher had not been provided with the requisite safety devices, a proposition that is consistent either with Gallagher's ignorance of the availability of safety devices or with his knowledge thereof. Even viewed in [**8] the light most favorable to NYP (as it must be when we consider plaintiffs' motion for summary judgment), the evidence does not raise a question of fact that Gallagher knew of the availability of the safety devices and unreasonably chose not to use them.

Finally, even if Gallagher's grip on the saw was not up to full strength as a result of his prior injury, such weakness in his hand would at most have contributed towards his loss of balance, and cannot as a matter of law have been the sole proximate cause of his fall from the second floor to the temporary floor.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, plaintiffs' motion for summary judgment as to liability on their *Labor Law* § 240 (1) claim granted, and the certified question answered in the negative.

* * * *

Order, insofar as appealed from, reversed, with costs, plaintiffs' motion for summary judgment as to liability on their *Labor Law* § 240(1) claim granted, and certified question answered in the negative. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

[*5] Decided February 11, 2010