

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Aspromonte v. Judlau Contr., Inc.

2018 N.Y. Slip Op. 04288 (App. Div. 2018) (Supreme Court of the State of New York Appellate Division First Department 2018) · No. 6846; 155793/14 · Decided June 12, 2018

SUMMARY

The Appellate Division, First Department affirmed the denial of the plaintiff’s motion for partial summary judgment on liability under Labor Law § 240(1). Although the plaintiff’s testimony and corroborating evidence established a prima facie case, defendants’ expert affidavits raised a triable issue of fact concerning whether the accident occurred as described.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Richter, J.P.; Webber, J.; Kahn, J.; Kern, J.; Oing, J.
JURISDICTION	New York
DECIDED	June 12, 2018
DOCKET	6846; 155793/14
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order denying his motion for partial summary judgment on liability under Labor Law § 240(1).
STANDARD OF REVIEW	Whether plaintiff established entitlement to partial summary judgment as a matter of law and whether defendants raised a triable issue of fact.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Frank Aspromonte v. Judlau Contracting, Inc., Metropolitan Transportation Authority

TOPICS

- construction law
- summary judgment
- personal injury
- civil procedure

PRACTICE AREAS

- construction law
- personal injury
- civil procedure

QUESTIONS PRESENTED

1. Whether plaintiff was entitled to partial summary judgment on liability under Labor Law § 240(1) based on his account of an accident involving a rail that broke or gave way and caused him to fall down a shaft.
2. Whether defendants' expert evidence created a triable issue of fact regarding whether the accident occurred in the manner plaintiff described.

HOLDINGS

1. Plaintiff established a prima facie entitlement to judgment as a matter of law through his testimony and corroborating witness testimony, but partial summary judgment was properly denied because defendants raised a triable issue of fact concerning the manner in which the accident occurred.

KEY QUOTATIONS

*“In opposition, defendants raised a triable issue of fact as to whether the accident occurred in the manner described by plaintiff.” (*1)*

*“Contrary to plaintiff's contention, the fact that the expert's conclusions contradict plaintiff's account and other evidence corroborating his account does not render the experts' conclusions speculative.” (*1)*

FACTUAL BACKGROUND

Plaintiff testified that a rail improperly wedged against a wall broke or gave way when he leaned on it while moving a broken light fixture, causing him to fall a considerable distance down a shaft. Testimony from a coworker, foreman, and defendants' safety personnel was consistent with plaintiff's account. Defendants submitted expert affidavits from a neuroradiologist and a biomechanical engineer opining that plaintiff's injuries were inconsistent with the alleged fall.

PROCEDURAL HISTORY

Supreme Court, New York County, denied plaintiff's motion for partial summary judgment against Judlau Contracting, Inc. and the Metropolitan Transportation Authority. The Appellate Division unanimously affirmed the order insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449-450 (1st Dep't 2013)
- Cassidy v. Highrise Hoisting & Scaffolding, Inc., 89 A.D.3d 510, 510-511 (1st Dep't 2011)
- Vargas v. Sabri, 115 A.D.3d 505 (1st Dep't 2014)
- Valentine v. Grossman, 283 A.D.2d 571, 573 (2d Dep't 2001)

OPINION

PER CURIAM.

Aspromonte v Judlau Contr., Inc. (2018 NY Slip Op 04288) Aspromonte v Judlau Contr., Inc. 2018 NY Slip Op 04288 Decided on June 12, 2018 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on June 12, 2018 Richter, J.P., Webber, Kahn, Kern, Oing, JJ. 6846 155793/14 [*1]Frank Aspromonte, Plaintiff-Appellant, vJudlau Contracting, Inc., et al., Defendants-Respondents, Skanska USA Civil Inc., et al., Defendants.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant. Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents. Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered May 18, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim as against defendants Judlau Contracting, Inc. and the Metropolitan Transportation Authority, unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law through his testimony that a rail improperly wedged against a wall broke or gave way when he leaned on it while moving a broken light fixture out of the way, causing him to fall a considerable distance down a shaft. Plaintiff also submitted the testimony of his coworker, his foreman, and defendants' safety personnel regarding their observations shortly after the accident, which was consistent with plaintiff's account (see *Alonzo v Safe Harbors of the Hudson Hous.*

Dev. Fund Co., Inc., 104 AD3d 446, 449-450 [1st Dept 2013]; *Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 510-511 [1st Dept 2011]). In opposition, defendants raised a triable issue of fact as to whether the accident occurred in the manner described by plaintiff. Defendants submitted the expert affidavits of a neuroradiologist and a biomechanical engineer, who both opined that plaintiff's injuries are inconsistent with the alleged fall (see e.g. *Vargas v Sabri*, 115 AD3d 505 [1st Dept 2014]; *Valentine v Grossman*, 283 AD2d 571, 573 [2d Dept 2001]).

Contrary to plaintiff's contention, the fact that the expert's conclusions contradict plaintiff's account and other evidence corroborating his account does not render the experts' conclusions speculative. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: JUNE 12, 2018 CLERK