

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

716

CA 23-00130

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

JOSEPH CALLOWAY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

AMERICAN PARK PLACE, INC., AND IRON SMOKE
WHISKEY, LLC, DEFENDANTS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

SEGAR & SCIORTINO, ROCHESTER (JASON D. POSELOVICH OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered January 13, 2023. The order, among other things, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for an injury that he sustained when he fell while working on a ladder in a building owned by defendant American Park Place, Inc., and leased by defendant Iron Smoke Whiskey, LLC. Plaintiff's employer was a contractor hired to install a new plumbing, heating and cooling system in the building. At the time of the incident, plaintiff and his coworker were removing the original ductwork. The ducts were in long strips, which were first removed from the straps holding them. Plaintiff and his coworker then carried the ducts, while resting them on their shoulders, down their respective ladders. Plaintiff was on his ladder when a duct that was being removed from its straps slipped from his hand, and then hit a wall and then hit plaintiff's ladder, causing the ladder and plaintiff to fall. Plaintiff moved for partial summary judgment on liability on his Labor Law § 240 (1) cause of action, and defendants cross-moved for summary judgment seeking dismissal of the complaint. Supreme Court, inter alia, granted plaintiff's motion and denied defendants' cross-motion with respect to the Labor Law § 240 (1) cause of action. Defendants now appeal, and we affirm.

Contrary to defendants' contentions, the court properly granted plaintiff's motion and properly denied defendants' cross-motion with respect to the Labor Law § 240 (1) cause of action. We conclude that

plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]," and the burden thus shifted to defendants to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident" (*Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012] [internal quotation marks omitted]; see also *Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]; *Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955, 955 [4th Dept 2000]). Defendants failed to meet that burden. Although defendants' expert averred that defendants did not violate Labor Law § 240 (1) because plaintiff was provided with a stable ladder that was sufficient for him to safely perform the job, evidence that the ladder was structurally sound and not defective "is not relevant on the issue of whether it was properly placed" (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1402 [4th Dept 2015] [internal quotation marks omitted]). In addition, although plaintiff's coworker testified at his deposition that he believed that the duct fell due to plaintiff's failure to hold it securely and that plaintiff then fell due to his failure to keep his balance, we conclude that such testimony established, at most, contributory negligence on the part of plaintiff (see *Miller v Rerob, LLC*, 197 AD3d 979, 980 [4th Dept 2021]). Because plaintiff established that a statutory violation was a proximate cause of his injury, he "cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; see *Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]).

For the same reasons, we conclude that defendants failed to meet their initial burden on their cross-motion with respect to the Labor Law § 240 (1) cause of action (see generally *Gonzalez v Romero*, 178 AD3d 1401, 1402 [4th Dept 2019]).