SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 25, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Clark, Kapnick, JJ.

15328 Brian Stankey, Index 150020/12
Plaintiff-Respondent,

-against-

Tishman Construction Corporation
of New York, et al.,
Defendants-Appellants.

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Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for appellants.

Brigitte M. Gulliver, Stony Point, for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about January 31, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, and denied defendants' cross motion for summary judgment dismissing those claims, unanimously affirmed, without costs.

Labor Law § 240(1) requires owners and general contractors to provide safety devices to protect workers from

elevation-related hazards (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Plaintiff's alleged injury was sustained while using a ladder to hang tarps at the World Trade Center construction site. His alleged injuries occurred while he was on the top half of an extension ladder approximately fourteen feet off the ground. Thus, plaintiff's work falls squarely within the scope of an elevation-related hazard protected under Labor Law § 240(1).

We find that the motion court properly determined that plaintiff established a prima facie entitlement to judgment as a matter of law under Labor Law § 240(1). Plaintiff presented evidence establishing that defendants did not provide "proper protection" within the meaning of Labor Law § 240(1). The record indicates that plaintiff "only saw the extension ladder" in the area where he was working. There was no scaffolding available to plaintiff. Plaintiff was not wearing a safety harness, and there was no appropriate anchor point to tie off the ladder.

We reject defendants' assertion that plaintiff's conduct was the sole proximate cause of his injuries. Plaintiff's knowing use of half of the extension ladder without proper rubber footings goes to his culpable conduct and comparative negligence. Comparative negligence is not a defense to a claim based on Labor

Law § 240(1), where, as here, defendants failed to provide adequate safety devices (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). Further, defendants failed to show that plaintiff refused to use the safety devices that were provided to him.

Defendants failed to raise a triable issue of fact as to its duty under Labor Law § 240(1) as it applies to owners, contractors, and their agents. The record establishes that defendants, as statutory agents of the owner, even if not general contractors, maintained sufficient control over plaintiff's work to be subject to liability under Labor Law §§ 240(1) and 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]).

The motion court correctly granted summary judgment as to plaintiff's Labor Law § 241(6) claim given the undisputed facts that plaintiff found an extension ladder separated into two pieces, and used the top half of ladder, which did not have any ladder footings. Accordingly, plaintiff established violations of the Industrial Code provisions upon which he relied (*see* 12 NYCRR § 23-1.21[b][3], and [b][4]).

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 25, 2015

DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13599 The People of the State Of New York, Ind. 1783N/09
Respondent,

-against-

James French,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia M. Nunez, J. at summary denial of suppression motion; Robert M. Stolz, J. at jury trial and sentencing), entered on or about December 8, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 17, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: AUGUST 25, 2015

DEPUTY CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15475 Thor Gallery at South DeKalb, LLC, Index 654003/13
Plaintiff-Appellant,

-against-

Reliance Mediaworks (USA) Inc.,
formerly known as Adlabs Films USA,
Inc.,
Defendant-Respondent.

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Matalon Shweky Elman PLLC, New York (Joseph Lee Matalon of counsel), for appellant.

Chugh LLP, Brooklyn (Diya A. Mathews of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy Bannon, J.), entered on or about October 21, 2014, which granted defendant's motion to dismiss the complaint on forum non conveniens grounds, and denied plaintiff's motion for summary judgment as academic, unanimously reversed, on the law and the facts, with costs, defendant's motion denied, and the matter remanded for consideration of plaintiff's cross motion for summary judgment.

The motion court properly exercised its discretion in considering defendant guarantor's forum non conveniens motion before plaintiff landlord's summary judgment motion, since the former required a determination regarding whether or not it was "in the interest of substantial justice" to retain jurisdiction

over this action (CPLR 327; *accord Anagnostou v Stifel*, 204 AD2d 61 [1st Dept 1994]). However, upon considering the motion on its merits, we find that the motion court abused its discretion in dismissing this case on forum non conveniens grounds.

Generally, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Waterways Ltd v Barclays Bank*, 174 AD2d 324, 327 [1st Dept 1991], quoting *Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]).

"The burden rests upon the defendant challenging the forum to demonstrate relevant . . . factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert den*ied 469 US 1108 [1985] [internal citations omitted]). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum" (*id.*).

The court may also consider the residency of the parties and where the transaction out of which the case arose occurred (*see id.*). "No one factor is controlling . . . [t]he great advantage

of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case" (*id.* [internal citations omitted]). Here, there is a substantial nexus to New York.

"Although the residence of a plaintiff is not the sole determining factor on a motion for dismissal on grounds of *forum non conveniens*, it has been held to generally be the most significant factor in the equation" (*Cadet v Short Line Term. Agency*, 173 AD2d 270, 270 [1st Dept 1991] [internal citations and quotation marks omitted]). As the motion court acknowledged, in this case *both* parties are authorized to do business in New York and the plaintiff's principal place of business is in New York. While the real property that is the subject of the lease and guaranty is located in Georgia, the actual property is not at issue in this case. In any event, the lease was actually executed in New York and some of the correspondence was sent to the nonparty tenant at a New York address. Moreover, the guaranty which is the subject of this litigation was executed in New Jersey and the defendant guarantor, a New Jersey corporation with its principal executive office in New Jersey, does not conduct any business in Georgia. While counsel for the nonparty tenant submitted an affidavit listing several potential witnesses

who are located in either Georgia *or* Tennessee, there is no indication as to what knowledge these proposed witnesses have relating to the issues in this case, or whether they would even testify.

Further, the motion court incorrectly identified the guaranty's forum selection clause as "binding," when it is, in fact, permissive, i.e., it provides that "all disputes arising . . . or relating to this Guaranty . . . may be adjudicated in the state courts of Georgia sitting in the county in which the Premises are located, . . . or the federal courts sitting in the County."

Finally, the guaranty's choice of law provision, which provides for the application of Georgia law, does not justify a dismissal of this case on forum non conveniens grounds, since New York courts are more than capable of applying the laws of other jurisdictions (*see Travelers Cas. & Sur. Co. v Honeywell Intl. Inc.*, 48 AD3d 225, 226 [1st Dept. 2008], and often do. This does not create any undue burden on New York courts. Nor does defendant set forth any other reasons establishing that it would be inconvenient to litigate in New York.

Accordingly, defendant did not sustain its burden of showing that "although jurisdictionally sound," this case "would be better adjudicated elsewhere" (*Islamic Republic*, 62 NY2d at 479).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 25, 2015

DEPUTY CLERK

Corrected Order - August 25, 2015

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Darcel D. Clark
Barbara R. Kapnick, JJ.

15513
Index 160169/13

_____x

Steven Laduzinski,
Plaintiff-Appellant,

-against-

Alvarez & Marsal Taxand LLC,
et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered September 30, 2014, which granted defendants' motion to dismiss the complaint alleging fraudulent inducement.

Law Office of Michael H. Joseph, PLLC, White Plains (Michael H. Joseph of counsel), for appellant.

Epstein Becker & Green, P.C., New York (J. William Cook and Robert D. Goldstein of counsel), for respondents.

ACOSTA, J.

This appeal raise several issues, namely whether plaintiff has stated a cause of action for fraudulent inducement, notwithstanding his at-will employment status, where he claims an injury resulting from his reliance on his employer's misrepresentations regarding the nature of his work, and whether the alleged misrepresentations are actionable statements of present fact or non-actionable future promises. We find that plaintiff had pleaded an injury separate and distinct from his termination, that is, that the representations on which he allegedly relied concerned the nature and not the duration or security of his employment, and therefore that his status as an at-will employee does not preclude his cause of action for fraudulent inducement. We also find that defendant's alleged misrepresentations are actionable statements of present fact. Thus, plaintiff's cause of action survives defendants' motion to dismiss.

In February 2012, plaintiff voluntarily quit his employment with J.P. Morgan, where he earned an annual salary of $150,000 plus an end-of-the-year bonus of $20,000 as a vice-president and senior tax-manager, to work for defendants Alvarez & Marsal Taxand LLC, and Alvarez & Marsal Holdings LLC (collectively, the Alvarez companies) in the capacity of senior director. Before

starting his employment with J.P. Morgan in March 2011, plaintiff had sent his resume to the Alvarez companies in search of a position. In September 2011, defendant Ernesto Perez, the managing director and head of the Alvarez companies, contacted plaintiff to discuss the possibility of employment. At their subsequent meeting, Perez told plaintiff that the Alvarez companies had "a lot of clients and were busy." After plaintiff said that he had personal and professional contacts in Miami, Florida, Perez expressed an interest in doing business with plaintiff's contacts. In a follow-up interview on October 24, 2011, Perez offered plaintiff a position with the Alvarez companies, reiterating the companies' interest in tapping into plaintiff's contact pool for prospective clients.

Before accepting the position, plaintiff attempted to bargain for a two-year contract "because he needed to expend a significant investment of time and energy to utilize his business and personal contacts to market the firm's services." However, after Perez told plaintiff that the position they were offering him as senior director did not focus on procuring clients and that plaintiff's role would not be devoted to business development but rather management of the Alvarez companies' sizable workload, plaintiff accepted defendants' offer of at-will employment as senior director for an annual salary of $160,000,

and quit his job at J.P. Morgan.

Plaintiff began working for defendants on March 1, 2012, and was immediately asked to compile a list of his contacts for Perez. He soon realized that defendants were not busy and that they did not want him to manage their existing workload. Plaintiff alleges that defendants only wanted his contacts and that they tried to "commandeer" the relationships he had developed and to prevent him from performing the work he had generated. Indeed, during his performance evaluation on November 7, 2012, plaintiff was told by Perez that he was doing a good job bringing in opportunities but that he "needed to hand over the relationships for others in the firm to exploit." Eight days later, on November 15, 2012, after plaintiff surrendered all of his contacts to defendants, he was terminated because, defendants said, there was no work for him. In evaluating a motion to dismiss for failure to state a claim, the court must accept the allegations of the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

> "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other

> party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Plaintiff alleges that Perez knowingly and purposely misrepresented the nature of the work plaintiff would be doing for defendants by telling him that he would be managing the sizeable workload of the company rather than bringing in business, when in fact defendants intended the opposite, that Perez made these representations to induce him to leave his employment and go to work for defendants, and that, in reliance on Perez's misrepresentations, he left his stable and well compensated employment with J.P. Morgan, which brought about a setback in his career. All the elements of a claim for fraudulent inducement are alleged. The motion court erred in finding that plaintiff's at-will employment status precluded an action for fraudulent inducement.

An at-will employee, who has been terminated, can not state a fraudulent inducement claim on the basis of having relied upon the employer's promise not to terminate the contract (*Smalley v Dreyfus Corp.*, 10 NY3d 55, 59 [2008]), or upon any representations of future intentions as to the duration or security of his employment (*see Meyercord*, 38 AD3d 315 [1st Dept 2007]*; Hobler v Hussain,* 111 AD3D 1006 [3d Dept 2013]). However,

where an at-will employee alleges an injury "*separate* and *distinct* from termination of the [his] employment," he may have a cause of action for fraudulent inducement (*Smalley*, 10 NY3d at 59 [emphasis added]; *see e.g., Stewart v Jackson & Nash*, 976 F2d 86 [2d Cir 1992]; *see also Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 184 [1st Dept 2010] [reviving at-will employee's claim of breach of contract for earned commissions]). The at-will employee must **allege** not that his employer wrongly fired him, but that "[he] would not have taken the job in the first place if the true facts had been revealed to [him]" (*Navaretta v Group Health*, 191 AD2d 953, 954 [3d Dept 1993]).

Plaintiff does not allege that defendants wrongfully terminated him. He claims that they misrepresented the nature of the job that they were hiring him to do, that they were only hiring him to gain access to his contacts and that if they had told him this he would not have left his job at J.P. Morgan to work for them. Indeed, plaintiff's injury preceded his termination.

Nor are plaintiff's damages speculative, since he alleged that they stem not from his loss of employment with defendants, but from his loss of employment with J.P. Morgan. These damages represent "the sum necessary for restoration to the position occupied before the commission of the fraud" (*Orbit Holding Corp.*

v Anthony Hotel Corp., 121 AD2d 311, 315 [1st Dept 1986] [internal quotation marks omitted]).

Furthermore, contrary to defendants' argument, the alleged representations were not expressions of future expectations, which do not sustain a fraudulent inducement cause of action (*see International Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641-642 [1st Dept 2011]). Rather, defendants' representations of present intentions constitute statements of material existing fact, which are sufficient to support a fraud claim (*see Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]). As this Court held in *GoSmile, Inc. v Levine* (81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]),

> "A misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced plaintiff to sign it, and therefor involves a separate breach of duty."

Here, as noted above, the alleged misrepresentations centered around the precise nature of plaintiff's employment with defendants. Because plaintiff pleaded that Perez made his promise "with a preconceived and undisclosed intention of not performing it," and because the promises largely focused on defendant companies' financial health, the motion court erred in concluding that defendants' representations were nonactionable

future statements (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Defendants' argument that the merger clause of the contract precludes this action because it renders any reliance by plaintiff unreasonable is also of no avail. Where a merger clause is "generally and vague," i.e., merely an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made," the merger does not preclude parole evidence establishing fraudulently inducement to enter into the contract (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]). The merger clause in this case states, "This Agreement constitutes the entire agreement between the parties with respect to subject matter and supersedes all previous understandings, representations, commitments or agreements, oral or written." This boilerplate language is too general to bar plaintiff's claim since it makes no reference to the particular misrepresentations allegedly made here by [defendants]" (*LibertyPointe Bank v 75 E. 125th St., LLC*, 95 AD3d 706, 706 [1st Dept 2012] [internal quotation marks omitted]).

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered September 30, 2014, which granted defendants' motion to dismiss the complaint alleging

fraudulent inducement, should be reversed, on the law, without costs, and the motion denied.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 25, 2015

DEPUTY CLERK