Supreme Court of the State of New York
County of Kings

Part LL1 M

VINCENT MILLETTE AND DIANNE ROBERTS-MILLETTE,

Plaintiffs,

against

HORTIN CORP.,

Defendant.

Index Number 512394/2021
Seqs. 001, 002

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 001) and defendant's cross-motion for summary judgment (Seq. 002) is decided as follows:

Factual Background

The following facts are undisputed: plaintiff Vincent Millette was hired by defendant Hortin Corp. (Hortin) to perform ceiling construction, repair and/or renovation work in an apartment at 1040 Bushwick Avenue, Brooklyn, NY. Hortin owned the apartment complex located at 1040 Bushwick Avenue. David Hortin (David) was the owner of Hortin and negotiated contracts on behalf of the corporation. David's son, Matthew Hortin (Matthew), was the superintendent for the apartment complex.

Plaintiff, a tenant in the building, was hired by Hortin to perform three to four construction jobs each year. Plaintiff was typically hired to peform plastering work for Hortin. Plaintiff operated under the Millette Company, a sole proprietorship he had started that is registered in New York.

In January of 2020, Hortin hired plaintiff to perform plastering work in apartment C-11 of the subject premises. By verbal agreement, David and plaintiff determined the scope of

plaintiff's work and what the plaintiff would be compensated (Hortin EBT at 16). Plaintiff required a Baker scaffold to plaster the ceiling of the unit where he was working (*id.*). Hortin provided the scaffold which was stored in the building's basement when not in use (*id.*). The scaffold was approximately 30 years old (*id.* at 28). David testified the only work done to the scaffold was to power wash it from time to time (*id.* at 29). David further testified that he last assembled the scaffold about one to two weeks before plaintiff started his work on this project (*id.* at 26).

Plaintiff had been using the scaffold for one week prior to the accident. Plaintiff testified that on the day of the accident, he moved the scaffold to the entrance area of the apartment, locked the wheels, and climbed on top of the platform to continue plastering the wall.

On the afternoon of the plaintiff's accident, Matthew told plaintiff that he wanted to leave the apartment to take down the debris he had cleaned up from the construction work (Millette EBT at 50). The scaffold plaintiff was standing on was blocking the entrance, so plaintiff asked Matthew to wait while he smoothed out drying plaster and descended from the scaffold (*id.*). Suddenly, the platform collapsed, and plaintiff fell to the ground (*id.* at 50–51). Matthew witnessed the scaffold collapse and immediately told plaintiff to call David (*id.* at 58). Plaintiff called David and his wife, and an ambulance arrived at the scene (although plaintiff did not recall if he called for one) (*id.* at 59). David testified that he was "under the impression that [Matthew] was on the way up there to clean the apartment" (Hortin EBT at 23); however, there is no testimony from the superintendent to confirm this version of events.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100

NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

"Labor Law § 240 (1) imposes a nondelegable duty upon owners, general contractors, and their agents, to provide scaffolding which is 'so constructed, placed and operated as to give proper protection' to employees using it (Labor Law § 240 [1])" (*Cruz v R.C. Church of St. Gerard Magella*, 174 AD3d 782, 783 [2d Dept 2019]). "The collapse of a scaffold or ladder for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the ladder or scaffold did not afford proper protection" (*id.*). Plaintiff moves and defendant cross-moves for summary judgment under this provision of the Labor Law.

Here, plaintiff testified that he was engaged in plaster repair work at a height and that he was provided with a Baker scaffold that failed, which resulted in plaintiff sustaining harm. That testimony is sufficient to make out a prima facie case for summary judgment under Labor Law § 240 (1) (*see Cruz*, 174 AD3d at 783).

In opposition, defendant advances two arguments. First, defendant argues that there are material issues of fact based on conflicting accounts of where the superintendent was and what he was doing at the time of plaintiff's accident. However, there is no admissible evidence to support defendant's account of events—David's "impression" about what Matthew doing and defense counsel's speculation about how the accident may have occurred are inadequate to resist summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, even if the superintendent struck the scaffold while entering or exiting the room, the scaffold collapsing *still* constitutes a safety device failure under Labor Law § 240 (1) and would warrant summary

judgment in favor of the plaintiff (*see e.g. Wang v 161 Hudson, LLC*, 60 AD3d 668 [2d Dept 2009]).

Defendant's second argument is that plaintiff's claim is barred by Workers' Compensation Law § 11. In relevant part, that statute reads:

> 1. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury.

Workers' Compensation Law § 10 establishes employer's obligation to compensate injured employees. That statute states in relevant part:

> 1. Every employer subject to this chapter shall in accordance with this chapter . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury.

Here, even if the court were to accept *arguendo* that plaintiff was employed by defendant, there is no evidence that defendant "secure[d] compensation" for plaintiff by purchasing or otherwise ensuring the existence of a Workers' Compensation policy that covered the plaintiff. Therefore, pursuant to Workers' Compensation Law § 11 (1), plaintiff is entitled to "maintain an action in the courts for damages on account of such injury." In essence, an employer is not entitled to the benefit of section 11's protections unless it first complies with section 10's requirement to secure worker's compensation for its employees (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 674 [2d Dept 2018]). Defendant also has not shown that plaintiff had a general employer that secured compensation for him and elected to receive worker's compensation from that employer,

which is a pre-requisite for defendant's argument that it should be shielded from liability as a special employer (*see Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 1221 [2d Dept 2019]). The court therefore need not reach the merits of defendant's contention that plaintiff was a special employee of the defendant.

Conclusion

Plaintiff's motion for summary judgment (Seq. 001) is granted; defendant's cross-motion for summary judgment (Seq. 002) is denied.

This constitutes the decision and order of the court.

March 25, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court