Supreme Court of the State of New York
County of Kings

Part LL1M

FELIPE C. FRANCO,

Plaintiff,

against

ADASS, INC. AND TRIANGLE 613, LLC,

Defendants.

Index Number 522133/2021
Seqs. 001

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	Var.
Other	

Upon the foregoing papers, plaintiff's motion for partial summary judgment (Seq. 001) is decided as follows:

Procedural History and Factual Background

Plaintiff commenced this action for injuries he claims to have sustained when he fell from the fifth rung of an A-frame ladder at the jobsite located at 1508 Coney Island Avenue, Brookyln, New York (jobsite).

The underlying facts of this case are largely undisputed. Plaintiff testifies as follows: on March 10, 2020, he was employed by Magellan Concrete Structures (Magellan) and was building walls in the basement of the jobsite (Franco Aug. 25, 2022 EBT at 47–49). At the time of the accident, plaintiff and two Magellan coworkers, Jefferson Silva and "Reginaldo," were placing forms on either side of a metal structure for concrete to be poured inside to create the walls (*id.* at 88–90). The forms were 2 feet wide and 4–8 feet tall weighing 50 pounds, and the metal structure was approximately 12 feet high (*id.* at 92, 98).

As part of the mandatory 10-hour OSHA training provided by Magellan, the workers were instructed on how to properly check the ladder prior to climbing and instructed that they were not required to be tied off if they were less than six-feet off the ground (Silva aff. at ¶ 8).

The Magellan workers were using an 8-foot A frame ladder. One worker would climb to the top of the structure, and another would climb approximately halfway up the ladder (Franco Aug. 25, 2022 at 94–98). The worker on the ground would then pass the forms up to his co-worker on the ladder, and he in turn would pass it to the worker at the top of the structure (*id.* at 94–98). Prior to climbing, plaintiff checked that the ladder was positioned correctly, that it was locked off, and that the surrounding area was clean, level, and free of debris (*id.* at 105–106).

At the time of the accident, Mr. Silva was on the top of the structure. Plaintiff was positioned with both feet on the fifth rung of the ladder and Reginaldo was passing the forms from the ground (*id.* at 107–108). Reginaldo passed a form to the plaintiff, and as the plaintiff was passing the form up to Mr. Silva the ladder shook and moved for no reason (Franco Aug. 25, 2022 EBT at 110, Silva aff. at ¶ 7). As a result, the plaintiff lost his balance, threw the form he was holding to the side, and fell five feet to the ground landing on his back first (Franco Aug. 25, 2022 EBT at 107–110). Mr. Silva witnessed the ladder shift and the plaintiff's fall (Silva aff. at ¶ 7).

Prior to the accident on March 10, 2020, plaintiff had sustained an injury to his back on February 28, 2020, at the jobsite while mixing cement (Franco Aug. 25, 2022 EBT at 71). Felix Fonesca, a human resources representative for Magellan, claims that plaintiff was instructed by Paulo Andre, his supervisor on the jobsite, to perform only light duty chores and that plaintiff was not to be on any ladder until further notice (Fonesca aff. at ¶ 7). However, since there is no

statement from Mr. Andre in either an affidavit or a deposition to confirm when or whether this instruction was given, this contention is unsubstantiated hearsay.

Analysis

On a motion for partial 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 N.Y.2d 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)

"Liability under Labor Law § 240 (1) [is] 'absolute' in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993)]).

The defenses of sole proximate cause and recalcitrant worker only apply when the plaintiff's conduct alone was the sole proximate cause of the harm suffered (*Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280, 291 [2003]). It is "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*id.* at 291). Thus, if a violation of Labor Law §240 (1) is partly to blame for plaintiff's injury, the defenses of recalcitrant worker and sole proximate cause are unavailable (*id.*).

Here, it is undisputed that the plaintiff was engaged in covered work at the time of the accident. Plaintiff's undisputed testimony, supported by an affidavit from an eyewitness, Mr.

Silva, establishes that the ladder plaintiff was using inexplicably shook and moved, causing him to fall. These undisputed facts are sufficient to make out his prima facie entitlement to partial summary judgment under Labor Law § 240 (1) (*Cabrera v Arrow Steel Window Corp.*, 163 A.D.3d 758 [2d Dept. 2018]).

In opposition, defendants raise three arguments. First, the defendants argue that there is no evidence that that the ladder failed, and that a triable issue of fact exists over whether defendants violated Labor Law §240 (1). This argument is unavailing, as a violation of Labor Law § 240 (1) occurs when there is undisputed testimony that the ladder a plaintiff was working on moved for no reason and caused him to fall (*see Cabrera v Arrow Steel Window Corp.*, 163 A.D.3d 758, 759–760 [2d Dept. 2018]; *Alvarez v Vingsan Ltd. Partnership*, 150 AD3d 1177, 1179–1180 [2d Dept. 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747–748 [2d Dept. 2016]).

Second, defendants argue that the plaintiff was a recalcitrant worker and the sole proximate cause of his injuries. Defendants claim that because the plaintiff ignored instructions from his supervisor to not perform work on a ladder, he was the sole proximate cause of his injuries. However, defendants have not provided admissible evidence that plaintiff was instructed not to work on a ladder or controverted plaintiff's testimony that he was performing that work that he was instructed to do (Franco Aug. 25, 2022 EBT at 88–89, 92–93). The purported statement from Mr. Andre that he instructed plaintiff not to work on ladders is hearsay, and "hearsay evidence alone is insufficient to raise a triable issue of fact" (*see e.g. Salazar v City of New York*, 104 AD3d 931 [2d Dept 2013]).

Finally, defendants contend that the plaintiff's prior back injuries sustained on February 28, 2020, were the cause of his injuries. However, plaintiff's motion is for partial summary

judgment solely on the question of liability under Labor Law §240 (1) and not on the question of damages. Defendant's argument as to causation of the plaintiff's injuries is inapplicable to the instant motion.

Conclusion

Plaintiff's motion for summary judgment on the issue of liability under Labor Law §240 (1) (Seq. 001) is granted.

This constitutes the decision and order of the court.

April 11, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court