

Calaco v Scoop Mgt. Inc.

2007 NY Slip Op 30934(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0100753/2006

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Justice

Index Number : 100753/2006

CALACO, RONALDO

vs

SCOOP MANAGEMENT

Sequence Number : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 4/23/07

SO ORDERED

[Signature]

ROLANDO T. ACOSTA ^{S.C.}

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 61

Ronaldo Calaco and Camila Calaco,

Plaintiffs,

– against –

Scoop Management Inc., Scoop 14, Inc., and
 Madison Tower NY, LLC,

Defendants.

DECISION/JUDGMENT

Index No. 100753/06

Seq. No. 3

Present:

Rolando T. Acosta
 Supreme Court Justice

The following documents were considered in reviewing plaintiff's motion for an order granting him summary judgment as to liability against defendants Scoop Management Inc., Scoop 14, Inc. ("Scoop"), and Madison Tower NY, LLC ("Madison Tower"), pursuant to Labor Law § 240(1):

Papers	Numbered
Notice of Motion, Affirmation & Affidavit	1 (Exhibits A-M)
Madison Tower's Affirmation in Opposition	2 (Exhibit A)
Scoop's Affirmation in Opposition	3 (Exhibits A-C)
Reply Affirmation	4 (Exhibits A-C)

On July 19, 2005, plaintiff Ronaldo Calaco was injured when he fell from a scaffold he was using at a store called Scoop Kids located in a building located at 430 West 14th Street in New York County owned by Madison Tower. Calaco was an employee of A.G.I. Construction Co., Inc ("A.I.G"), the general contractor. Scoop had hired A.I.G. to build out raw space at the premises into retail space.

On the date of the accident, plaintiff was performing spackling work from a height of approximately six to eight feet while standing on a plank attached to a scaffold. According to plaintiff, he attempted to move the scaffold a short distance by shifting his weight while standing on the scaffold. As he did so, two wheels came off the scaffold, causing the

scaffold to tip over sending plaintiff to the floor below. The scaffold, according to plaintiff, was not equipped with any safety devices to prevent him from falling or to prevent the scaffold from tipping or falling, nor did it have any railings. See Plaintiff's Exhibit K (a photograph of the scaffold). Plaintiff commenced this action asserting Labor Law §§ 200, 240(1), 241(6) and common law negligence claims against defendants, and now moves for summary judgment on his Labor Law § 240(1) claim.

Plaintiff has established it prima facie entitlement to summary judgment on liability pursuant to Labor Law § 240(1). Whether plaintiff's own negligence contributed to the accident is of no moment inasmuch as there is no question that his injuries are at least partially attributable to defendants' failure to provide guardrails, safety netting or other proper protection, such as secure wheels. Laquiadara v. HRH Construction Corp., 283 A.D.2d 169 (1st Dept. 2001); see also Veragara v. SS 133 West 21, LLC, 21 A.D.3d 279 (1st Dept. 2005) ("There is no dispute that the six-foot-high, manually propelled scaffold, which plaintiff was directed to use in order to plaster a 15-foot-high ceiling, had no side rails, and no other protective device was provided to protect him from falling off the sides."). Plaintiff having established his entitlement to summary judgment, the burden shifted to defendants to raise triable issues of fact, which they have failed to do.

Defendant's main arguments are that plaintiff is not credible and that there are triable issues of fact as to whether plaintiff's negligence was the sole proximate cause of the accident. See Blake v. Neighborhood Housing Services of N.Y.C., Inc., 1 N.Y.3d 280 (2003). The credibility argument is premised on the fact that, unlike plaintiff's affidavit where he mentions the wheels coming off the scaffold, plaintiff never mentioned the wheels coming off at his deposition. As counsel notes, however, defendants never asked plaintiff about the wheels at the deposition even though several months before the deposition, he had provided defendants with a bill of particulars where it was stated that the wheels came off. Also, approximately six weeks prior to plaintiff's deposition, Avi Griff (who worked for A.I.G.) stated at his deposition that plaintiff told him about the wheels. Defendants cannot now use the fact that they failed to ask plaintiff about the wheels at the deposition to attack plaintiff's credibility.

Last, there is no indication in the record to suggest that plaintiff was the sole proximate cause of the accident. There is no question that the scaffold had no railings or netting and it fell apart. Scoop's assertion that plaintiff was "violently shifting and shaking his body" in an attempt to move the scaffold is simply not supported by plaintiff's testimony. Rather, plaintiff testified that he merely shifted his body weight in an attempt to move the scaffold several centimeters.


Accordingly, based on the foregoing it is

ORDERED that plaintiffs' motion for summary judgment against defendants on liability pursuant to Labor Law § 240(1) is GRANTED.

This constitutes the Decision and Judgment of the Court.

Dated: March 23, 2007

ENTER

SO ORDERED

 Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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