

Marino v JT 1211, L.P.

2007 NY Slip Op 32518(U)

August 7, 2007

Supreme Court, New York County

Docket Number: 0114308/2005

Judge: Shirley W. Kornreich

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

PRESENT: Kornreich
Justice

PART 54

Index Number : 114308/2005
MARINO, JOSEPH
vs
JT 1211, L.P.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 114308/05
MOTION DATE 6-7-07
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1, 4	
2, 5	
3	

Cross-Motion: Yes No

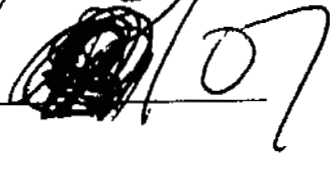
Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

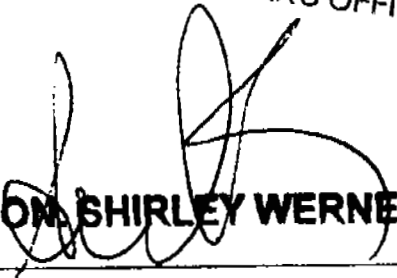
FILED

AUG 15 2007

NEW YORK
COUNTY CLERK'S OFFICE

8/7/07


Dated: _____


HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check it 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 54

-----X
JOSEPH MARINO and KAREN MARINO,

Plaintiffs,

-against-

JT 1211, L.P. and
McHUGH, DIVINCENT, ALESSI, INC.,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Index No.:
114308/05

**DECISION
ORDER
and
JUDGMENT**

FILED

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COUNTY
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This action arises from a construction accident. Plaintiff now moves for partial summary judgment on his Labor Law §240 claim, alleging that a defective ladder proximately caused his injuries. Defendant McHugh, DiVincent, Alessi, Inc. ("MDA") opposes the motion. Defendant JT 1211, L.P., ("JT") cross-moves to dismiss plaintiff's Labor Law §200 claim and further seeks common law indemnification from MDA.

I. Facts

This case involves an accident which allegedly occurred on July 19, 2005 at a construction site on the 32nd floor of 1211 Avenue of the Americas. One-half of the floor was being renovated. On the date of the accident, defendant JT was the building owner, defendant MDA was the general contractor and non-party Abco Peerless Sprinkler Corp. ("Abco") was a subcontractor retained for the installation of new sprinkler heads. Plaintiff was an Abco employee.

MDA's on-site construction supervisor, Charles Kaiser, testified that he coordinated the project, ensuring that all trades followed the schedule. There were approximately ten trades working on the renovation. Mr. Kaiser performed walk-throughs on the project to check for unsafe conditions. He had the ability to stop a contractor's work if the work was unsafe. However, he never instructed any of the Abco workers on how to perform their work. Abco employed a field supervisor – Chris Croener. Additionally, MDA provided no ladders for the subcontractors and had no ladders on the job site. Abco provided its own ladders. Mr. Kaiser recalled that plaintiff, at some point, told him that he had been hurt while working on a ladder.

JT's director of security, Edward O'Brien, testified that he visited the construction site at least once a day to make sure there was no smoking, drinking or loud radio playing taking place. He received no job progress reports nor did he see the daily logs for the construction work. He had no meetings with Mr. Kaiser and attended no meetings where the construction work was discussed. Plaintiff's accident was never reported to Mr. O'Brien, although he was the individual who filled out accident reports for the building. Mr. O'Brien testified that the building manager, Mr. Toland, had no responsibilities regarding the construction, never saw him on the site and never spoke to him about the project.

Plaintiff testified that he was working with a partner Daniel Monge, relocating sprinkler heads in a hallway, on the day of the accident. Mr. Monge was making up the sprinkler heads in another room, and plaintiff was replacing them. Plaintiff was using an Abco six-foot, wooden A-frame ladder to do his job. Sometime between 9:30 and 10:00 a.m., plaintiff left his ladder in place and took a coffee break. When he returned, the Abco ladder was gone. A different A-frame ladder, however, had been placed in an "open" position several feet from where plaintiff

had been working. Plaintiff spent several minutes searching for the Abco ladder, could not find it and decided to use the unidentified ladder, explaining: "I wanted to get my work done, you know, and I just figured somebody took the ladder, you know. Sometimes people ask us if they can borrow the ladder and sometimes it just disappears."

Plaintiff testified that he "looked at [the ladder] and [he] felt it and [he] thought it was okay." It too was made of wood, had metal arms, but had no rubber treads on the bottom. Plaintiff proceeded to slide the unidentified ladder into position underneath a line of sprinkler heads and began to climb it. As he reached the fourth step, the ladder started to "shake and wobble," tilted and fell, throwing him into the wall and onto the floor on top of the ladder. Plaintiff was unsure as to what caused the ladder to wobble, but, as he lay on the floor, he observed that the ladder's right arm appeared to be bent.

No one witnessed the accident. Plaintiff testified that two electricians working in another room were the first to find him lying on the floor. Within a few minutes, after "relaxing" to "make sure everything was ok," plaintiff and Mr. Monge resumed their work, though Mr. Monge assumed all ladder-related tasks for the rest of the day. Plaintiff stated that they found and used the Abco ladder to continue their work.

Plaintiff told Mr. Monge about the accident, reported the accident to Mr. Cronauer, his supervisor, three days later, and reported it to Mr. Kaiser but did not fill out an accident report. Plaintiff continued working on the premises for three more days and took on another job, through Abco, the following week; he did not work on any ladders. Plaintiff assumed one additional job before seeking medical treatment on September 24, 2005, the last day on which he worked.

Mr. Monge testified pursuant to subpoena. He stated that plaintiff was the foreman on the Abco job, that only he and plaintiff worked on the sprinkler relocation and that Abco supplied them with the ladder they used. Mr. Monge testified that he arrived at the accident site after hearing a "commotion," observed plaintiff getting up and asked him what had happened. Plaintiff told him that a "ladder had collapsed on him" and complained about his left shoulder. Mr. Monge did not recall seeing a ladder at the time. Mr. Monge did recall that during the course of the day, he heard Mr. Kaiser ask plaintiff for the ladder so that he could inspect it, but they could not find the ladder.

Plaintiff and Mr. Monge resumed work after the accident on a ladder that was not Abco's. They did not find their Abco ladder until about 2:00 p.m. It is unclear from Mr. Monge's testimony whether the ladder used was the one from which plaintiff fell. He testified that this was "possible, not probable." Mr. Monge confirmed that there were a number of contractors on site and they commonly used each other's ladders. When asked whether he had concerns about using another trade's ladders, Mr. Monge replied, "Not at all, as long as I feel it's safe to get on."

II. Conclusions of Law

B. *Marino's Motion for Summary Judgment*

Labor Law § 240 provides:

All contractors and owners and their agents ... in the crection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The purpose of the statute is to protect construction workers “against risks due in some way to relative differences in elevation” and to require the provision of safety devices whenever a worker is subjected to gravity-related dangers. *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 515 (1991). The statute imposes absolute liability on contractors, owners and their agents; plaintiff’s contributory negligence is not a defense. *Koenig v. Patrick Constr. Co.*, 298 NY 313, 318 (1948); *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 286-287 (2003).

It is settled law that a ladder which collapses, slips, shakes or otherwise fails in its supportive function is a violation of §240. *Mitchell v. Atlas Copco North America, Inc.*, 307 AD2d 635 (3d Dept. 2003). However, proof of a fall from a ladder, by itself, is not sufficient to establish liability under Labor Law §240. *Miro v. Plaza Const. Corp.*, 38 AD3d 454, 455 (1st Dept. 2007). Plaintiff must show that a violation of §240 proximately caused his injuries and that his own actions were not the sole proximate cause. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 290 (2003). That a plaintiff is the sole witness to the accident is not fatal. *See Klein v. City of New York*, 222 AD2d 351, 352 (1st Dept. 1995).

On this record, *material triable* issues of fact exist. To begin, defendants question whether the accident occurred. The ladder disappeared after the accident. Mr. Monge, who claimed he responded to the scene did not recall seeing the ladder and Mr. Monge was equivocal as to whether he subsequently used the ladder after the accident. In addition, plaintiff continued to work after the accident and for two more months before seeking medical attention and never filed an accident report.

Second, there is an issue as to whether the ladder was the proximate cause of the accident. The only testimony pointing to a defect in the ladder prior to the accident, is plaintiff's claim that it wobbled and lacked rubber treads. However, plaintiff also testified that he placed the ladder on a flat surface and did not know what caused it to wobble. Although he additionally stated that he observed that the ladder's right arm was bent, this observation occurred after the accident, not during his previous inspection.

B. JT's "Cross-Motion"

Defendant JT 1221, L.P., the premises owner, cross-moves for dismissal of plaintiff's Labor Law §200 claim and for common law indemnification against defendant MDA. MDA contends that this motion is untimely and should not be considered on its merits.

This court's order, dated February 2, 2006, required that all dispositive motions to be made within 60 days of the filing of the Note of Issue. Plaintiff filed the Note of Issue on January 17, 2007. This cross-motion was served on April 18, more than 90 days after the deadline.

Where "nearly identical" relief to a summary judgment motion is requested in a cross-motion, the court may consider the cross-motion even if it is not timely made. *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280 (1st Dept. 2006) citing to *Fahrenholz v. Security Mut. Ins. Co.*, 32 A.D.3d 1326, 1328 (4th Dept. 2006); *Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 (1st Dept.2006); *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 (2d Dept. 2005). "An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion." *Id.* Here, where the original

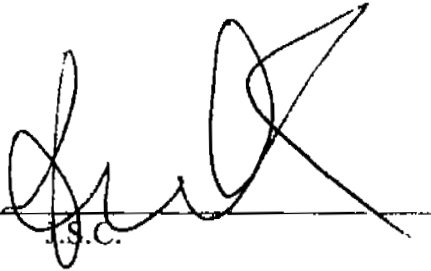
summary judgment motion raised only Labor Law §240(1) issues, it was untimely for JT to seek summary judgment on Labor Law §200, common law liability and indemnification.

Accordingly, it is

ORDERED that plaintiff Joseph Marino's motion for summary judgment is denied; and it is further

ORDERED that defendant JT 1211, L.P.'s cross-motion is denied.

Date: August 7, 2007

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