

Ritzer v 6 E. 43rd St. Corp.

2007 NY Slip Op 33188(U)

October 1, 2007

Supreme Court, New York County

Docket Number: 0112308/2005

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Justice

Index Number : 112308/2005

RITZER, JEFFREY

INDEX NO.

112308/05

vs

MOTION DATE

6 EAST 43RD STREET

MOTION SEQ. NO.

003

Sequence Number : 003

MOTION CAL. NO.

SUMMARY JUDGMENT

s motion ~~to~~ for summary judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

OCT - 4 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-1-07


MARCY S. FRIEDMAN 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

JEFFREY RITZER,
Plaintiff(s),

Index No.: 112308/2005

- against -

6 EAST 43RD STREET CORP. and PLAZA
CONSTRUCTION CORP.,
Defendant(s).

DECISION/ORDER

x

In this Labor Law action, plaintiff sues for injuries that occurred on June 6, 2005, when he allegedly fell off a scaffold while working at a construction site at 6 East 43rd Street in Manhattan. Plaintiff, a construction worker, employed by non-party Ess & Vee Acoustical Contractors, moves for summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims against defendants 6 East 43rd Street Corp. (“East 43rd”), the owner of the premises, and Plaza Construction Corp. (“Plaza”), the general contractor for the project.

Plaintiff claims that he fell off a baker scaffold that was not equipped with safety rails or locking devices for two of the four caster wheels. He further claims that while he was working on the scaffold, which was raised approximately three feet off the ground, “the baker rolled away from the wall and [he] fell in the gap between the baker and the wall.” (P.’s Dep. at 57, 60.) Defendants dispute whether plaintiff fell from the scaffold.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion,

regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

Labor Law §240(1) provides:

All contractors and owners and their agents, * * * in the erection, 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 section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.”

(Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury.” (Gordon, 82 NY2d at 559.)

It is further settled that under Labor Law § 240(1), “liability is contingent upon the existence of a hazard contemplated in [that section] and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” (Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267 [2001].) Liability is not established based on the mere fact that a plaintiff falls off a scaffold. Rather, it must be shown that proper protection was not provided. (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003].) Moreover, “violation of the statute is not enough; plaintiff is obligated to show that the violation was a contributing cause of his fall.” (Id. at 287 [internal quotation marks, brackets, and citation omitted].)

On this record, plaintiff makes a prima facie showing of entitlement to summary judgment on his Labor Law § 240(1) cause of action. As noted above, plaintiff testified at his deposition that while he was working, the scaffold shifted and he fell off, sustaining injuries to his back, head, and knee. (P.'s Dep. at 68-69.) This testimony is sufficient to support plaintiff's claim that defendants failed to provide him with safety devices adequate to secure the scaffold or to protect him from an elevation-related hazard. (See Casabianca v Port Auth. of New York & NJ, 237 AD2d 112 [1st Dept 1997] [fall from rolling scaffold elevated two feet off ground within protection of Labor Law § 240[1]]; see also Orellano v 29 E. 37th St. Realty Corp., 292 AD2d 289 [1st Dept 2002].)

In opposition, defendants submit evidence which shows inconsistencies in plaintiff's account of how the accident occurred and raises a triable issue of fact as to whether plaintiff in fact fell from the scaffold. Specifically, defendants submit the affidavit of William Hilberer, plaintiff's foreman at Ess & Vee, who attests that after the accident, plaintiff "mentioned in passing that he had slightly injured his knee while coming down from a Baker scaffold," and that plaintiff "said something to the effect that he 'jammed' his knee." (Hilberer Aff. In Opp, ¶ 4.) He further attests that plaintiff never mentioned that he fell from a height or sustained a neck injury. (Id., ¶ 5.) Contrary to plaintiff's contention, this version of how the accident occurred is not easily reconciled with plaintiff's claim that he fell off the scaffold. Moreover, plaintiff's inconsistent statements to his foreman are properly received against him on this motion as an admission. (See Buckley v J.A. Jones/GMO, 38 AD3d 461 [1st Dept 2007].)

Defendants further submit plaintiff's medical record from an emergency room visit on the date of his accident. The record states in the "History from Patient" section: "Fall - Approx 0

feet, patient was on a ladder and fell over against a firm surface injuring left elbow neck * * *

Injury to the right knee 2hrs ago while working.” (Ds.’ Aff. In Opp., Ex. E.) The record clearly identifies plaintiff as the source of the statement. Under the weight of recent authority, the statement is therefore admissible as an admission. (See Martinez v New York City Tr. Auth., 41 AD3d 174 [1st Dept 2007]; Amann v Edmonds, 306 AD2d 362 [2d Dept 2003]; Quispe v Lemle & Wolff, Inc., 266 AD2d 95 [1st Dept 1999]. See also Eitner v 119 W. 71st St. Owners Corp., 253 AD2d 641 [1st Dept 1998].)

The record accordingly presents issues of fact as to whether or not plaintiff fell off the scaffold, and thus as to whether plaintiff sustained an elevation-related injury or fell as a result of defendants’ failure to provide adequate safety devices. Summary judgment should accordingly be denied on plaintiff’s Labor Law § 240(1) claim. (See Holt v Welding Svcs., Inc., 264 AD2d 562 [1st Dept 1999], lv dismissed 94 NY2d 899 [2000]; Delahaye v Saint Anns Sch., 40 AD3d 679 [2d Dept 2007].) These issues of fact as to the proximate cause of plaintiff’s fall also preclude summary judgment on plaintiff’s Labor Law § 241(6) claim.

Finally, the branch of plaintiff’s motion seeking to strike defendant’s answer for failure to comply with this court’s discovery orders should be denied in view of this court’s April 12, 2007 order staying defendants’ depositions pending determination of the instant motion.

It is accordingly hereby

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear in Part 57 (80 Centre St., Room 328) for a previously scheduled compliance conference on Thursday, October 18, 2007.

This constitutes the decision and order of the court.

Dated: New York, New York
October 1, 2007


MARCY FRIEDMAN, J.S.C.

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