SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: WALTER B. TOLUB PART 15

Index Number : 400957/2005

GALLAGHER, HUGH

VS

NEW YORK POST

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/31/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion as detailed in accordance with the accompanying memorandum decision.

FILED
JAN 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/07

WALTER B. TOLUB J.S.C.

IN THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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HUGH GALLAGHER and RITA GALLAGHER

Plaintiffs,

-against-

THE NEW YORK POST and NYP HOLDINGS, INC.,

Defendant.

----------x

Index No. 400957/05
Mtn Seq. 002

WALTER B. TOLUB, J.:

By this motion, plaintiffs Hugh Gallagher ("plaintiff")[1] and Rita Gallagher ("Mrs. Gallagher") move for summary judgment under Labor Law §240(1). Defendants NYP Holdings, Inc. ("NYP") and The New York Post ("Post")(collectively, "defendants")[2] cross-move for summary judgment and dismissal of plaintiffs' complaint.

This action arises out of an accident which occurred on a construction site in 2004 (the "construction site" or "project"). Defendant Post owns the premises where the construction site was located. Defendant NYP is the entity which retained Francis A. Lee Company to perform remedial designs and construction work at the site. Plaintiff is an employee of Francis A. Lee Company ("Francis A. Lee"). Mrs. Gallagher is plaintiff's wife.

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[1] For simplicity, this court chooses to identify Mr. Gallagher as plaintiff so as to be able to adequately explain the facts of this case.

[2], The cross-motion papers identify the defendants as NYP Holdings, Inc., s/h/a The New York Post. Again, for simplicity, the court chooses to identify each entity individually in order to explain the facts of this case.

In June, 2004, defendants commenced a construction project at a building located at 132nd Street in the Bronx. On June 28, 2004, plaintiff reported to work at the construction site where he was responsible for the removal of steel decking. Plaintiff testified at deposition that while this job normally required the use of a torch, on the day in question he used a saw for the removal process. Plaintiff further testified that the directive to use a saw rather than a torch came from his foreman, Joseph Nover. Mr Nover is also an employee of Francis A. Lee (see, Notice of Motion, Exhibit G, Tr. Of J. Schreck p. 27).

Plaintiff claims that while he was using the saw to cut the metal decking, the saw got caught in the metal, and the force of the saw propelled him some eight to eleven feet from where he had been working into a hole in an open area of the floor. Plaintiff testified at his deposition that at the time of the fall, there was no planking or decking covering the opening in the floor, and further testified that on the day he was injured, he had not been instructed to use any type of safety harness on the job, nor were any safety devices provided.

The court notes that plaintiff's description of the accident is corroborated by one witness, James Gaffney, who was working at the construction site at the time of plaintiff's accident. In support of their claims, plaintiffs additionally offer the testimony of nonparty Jonathan Schreck, the assistant project

manager of Francis A. Lee, who testified that he did not provide and did not witness the providing of any type of safety harness to plaintiff on the date of his accident (See, Notice of Motion, Exhibit G).[3] Based on this testimony, plaintiffs assert that pursuant to Labor Law §240(1), they are entitled to judgement as a matter of law, and further assert that Mrs. Gallagher is entitled to summary judgment on her derivative claim.[4]

In opposition to plaintiffs' motion and in support of their own cross motion, defendants assert that they are entitled to summary judgment on the portion of plaintiffs' complaint which asserts Labor Law §200 violations as defendants did not directly supervise or control plaintiffs' activities. Defendants further assert that they are entitled to summary judgment on plaintiffs' Labor Law §240(1) claims based on worker recalcitrance, and on the Labor Law §241(6) claims advanced based on the contention

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[3] Mr. Schreck's testimony is as follows (Tr. p. 49-50):
Q: Did you ever personally give Hugh Gallagher any instructions on what safety equipment to use or not to use at any time?
A: No.
Q: Did you ever personally hand Hugh Gallagher a harness?
A: No.
Q: Did you ever personally hand Hugh Gallagher a yo-yo?
A: No.
Q: Did anyone in your presence ever hand Hugh Gallagher a harness or yo-yo or any of the devices Counsel asked you about?
A: No.

[4] Plaintiffs' complaint is comprised of two causes of action. The first asserts negligence and violations of the Labor Law (200, 240 and 241) and Industrial Code. The second asserts a derivative claim for loss of consortium.

that there is no admissible evidence establishing violations of the Industrial Code.

Discussion

Inasmuch as the instant motion and cross-motion seek summary judgment, this court is solely concerned with whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotations omitted]. See generally, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2005] §37:91-92). If the party opposing the motion is unable to produce evidentiary proof, in admissible form, that is sufficient to establish the existence of material facts thereby requiring trial, (Zuckerman v City of New York, 49 NY2d 557 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340 [1st Dept 2003]), summary judgment is often granted.

One of the main issues raised in the instant motions before this court is whether plaintiff was instructed to use a safety device on the construction site and whether said device was offered to him. At deposition, plaintiff stated that he was never told by anyone to wear a safety harness while working at the construction site (Notice of Motion Exhibit E. Tr. Hugh

Gallagher p. 89) and never saw anyone using a safety harness on the construction site (Id.). However, the testimony offered by plaintiff's employer through the deposition of Mr. Schreck raises a question of fact as to whether safety devices were being provided to employees on the construction site, including Mr. Gallagher.[5] Inasmuch as this fact weighs heavily in determining whether or not summary judgment on a Labor Law §240 claim is warranted, both plaintiffs' motion, and the related portion of defendants' cross-motion are denied.

The portion of defendants' cross-motion with respect to claims advanced by plaintiffs under Labor Law § 241(6)[6] is also denied. To prevail under this cause of action, plaintiff is required to demonstrate that his injuries were "proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (Rivera v.

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[5] Mr. Schreck testified as follows (p. 21-24):
Q. What type of safety devices do you recall being at the project site that would have involved ironworkers?
A. We had safety harnesses with shock-absorbing lanyards, and we also had retracting lanyards which we refer to as yo-yos. [***]
Q. Do you know if these devices were on the job site and were available for use on June 28th of 2004?
A. Yes.
Q. Do you know who provided these devices? Was it this other safety company that we are discussion, or was it Francis A. Lee?
A. No, it was Francis A. Lee
Q: Were these devices the property of Francis A. Lee?
A. Yes.

[6] The court notes defendants' papers erroneously identify this claim as Labor Law §240(6).

Santos, ___ NYS2d ___, 2006 WL 3733844 [2nd Dept. 2006]. See also, Ares v. State, 80 N.Y.2d 959 [1992]; Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 [1993]). Since all of the claimed violations of the Industrial Code are related to the issue of whether plaintiff was provided safety equipment at the construction site, again, this court is precluded from awarding summary judgment at this juncture.

The portion of defendants' cross-motion seeking summary judgment on the claims advanced by plaintiffs under Labor Law §200 however, is granted. "An owner's responsibility for an injury at a worksite under Labor Law §200 and common law, requires a showing that it had "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Carty v. Port Authority of New York and New Jersey, 32 AD3d 732 [1st Dept. 2006], quoting Rizzuto v. Wenger Contr. Co., 91 NY2d 343, 352 [1998]). Inasmuch as the record before this court is devoid of any evidence indicating that defendants were responsible for the supervision, control and direction of plaintiff's work activities, a claim under Labor Law § 200 cannot lie (Carty, 32 A3d 732). Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the portion of defendants' cross motion seeking summary judgment on the claims advanced by plaintiffs under Labor

Law § 240(1) and § 241(6) are denied; and it is further

ORDERED that the portion of defendants' cross-motion seeking summary judgment on the claims advanced by plaintiffs under Labor Law § 200 and common law negligence theories is granted; and it is further

ORDERED that the clerk enter judgment in favor of defendants in accordance with this decision.

Counsel for the parties are directed to appear for the scheduled compliance conference in this matter on January 12, 2007 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the court.

Dated: 1/3/2007

HON. WALTER B. TOLUB, J.S.C.