

Alpirez v WBB Constr., Inc.

2009 NY Slip Op 30695(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 106699/08

Judge: Michael D. Stallman

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

PART 7

Index Number : 106699/2008
ALPIREZ, ALEJANDRO
 VS.
WBB CONSTRUCTION
 SEQUENCE NUMBER : 003
 PARTIAL SUMMARY JUDGMENT

INDEX NO. 106699/06
 MOTION DATE 02/14/08
 MOTION SEQ. NO. 003
 MOTION CAL. NO. 6

In this motion to/for partial SJ

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M
 Answering Affidavits — Exhibits _____
 Replying Affidavits — Exhibit A

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1-2</u>
Answering Affidavits — Exhibits	<u>3</u>
Replying Affidavits — Exhibits	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion for partial summary judgment is decided in accordance with the original Memorandum Decision and Order.

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

FILED
 MAR 31 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 3/27/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7**

-----X
ALEJANDRO ALPIREZ,

Index No.: 106699/08

Plaintiff,

Decision and Order

- against -

WBB CONSTRUCTION, INC., 1107 BROADWAY LLC,
1107 BROADWAY MEZZ I LLC, 1107 BROADWAY
MEZZ II LLC, TESSLER DEVELOPMENTS LLC, 200 FIFTH
LLC AND 200 FIFTH AVENUE ASSOCIATES L.L.C.,

Defendants.
-----X

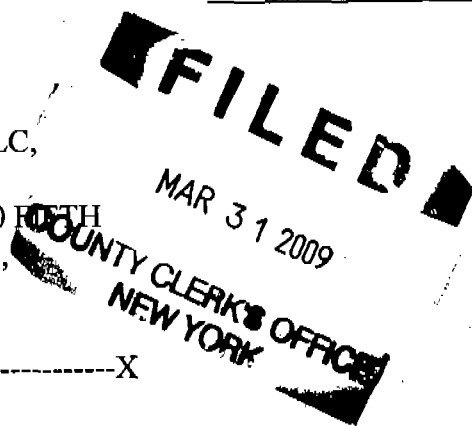
HON. MICHAEL D. STALLMAN, J:

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a worker when he fell from a scaffold while working at a construction site located at 1107 Broadway, New York, New York (the premises) on February 11, 2008.

In motion sequence number 002, plaintiff Alejandro Alpirez moves, pursuant to CPLR 2221, for leave to renew his motion for a default judgment against defendants 1107 Broadway LLC, 1107 Broadway Mezz I LLC, 1107 Broadway Mezz II LLC (together, 1107 Broadway), WBB Construction, Inc. (WBB Construction) and Tessler Developments LLC (Tessler) (together, defendants), dated July 14, 2008, which was denied by the Order of this court, dated August 6, 2008, without prejudice; and granting plaintiff the right to set the instant matter down for an inquest and assessment of damages against said defendants.

Defendants cross-move, pursuant to CPLR 5015 (a) (1), for leave to serve a late amended answer and to compel plaintiff to accept service of that answer.



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In motion sequence number 003, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) as against defendants.

BACKGROUND

A review of the documentary evidence in this case reveals that, on the date of the accident, defendants 1107 Broadway and Tessler, a development and marketing company, were the owners of the premises where the accident occurred, having previously purchased the building from non-moving co-defendant 200 Fifth Avenue Associates L.L.C. (Fifth Avenue Associates). Defendant WBB Construction was the general contractor for a construction project going on at the premises. WBB Construction hired plaintiff's employer, non-party All Waste Interiors, LLC (Waste), to perform demolition services at the premises.

Plaintiff was injured when, while standing on an unsecured scaffold with no guardrails, a piece of pipe that he was cutting swung down and hit the scaffold, causing it to violently shake and plaintiff to fall and become injured.

This action was commenced by the filing of a summons and verified complaint on May 14, 2008. Upon information and belief, on May 30, 2008, service was made via the Secretary of State upon defendants pursuant to Section 306 of the Business Corporation Law. As plaintiff had not received notice of appearance from defendants within the statutory time provided by the CPLR, nor had an extension of time to answer been granted, plaintiff moved for a default judgment against defendants via Notice of Motion, dated July 14, 2008. Said motion was denied by this court, by Order, dated August 6, 2008, "without prejudice," on the ground that the "concluding, parallel allegations of the complaint, and the concluding allegations of the 'Affidavit of Merit' ... are legally

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insufficient to demonstrate either ownership or liability” (Plaintiff’s Notice of Motion, Exhibit B, Order of August 6, 2008).

As plaintiff’s initial motion for default was denied “without prejudice,” plaintiff moves to renew his original motion for default, pursuant to CPLR 2221, based upon “new facts not offered on the prior motion that would change the prior determination” of this court.

DEFENDANTS’ CROSS MOTION FOR LEAVE TO SERVE A LATE AMENDED ANSWER AND TO COMPEL PLAINTIFF TO ACCEPT SERVICE OF THAT ANSWER

Defendants are entitled to leave to serve a late amended answer and to compel plaintiff to accept service of that answer, as they have demonstrated a reasonable excuse for their delay in answering the complaint, and the possibility of a meritorious defense (*Rickert v Chestara*, 56 AD3d 941, 942 [3d Dept 2008]; *Pagan v Four Thirty Realty LLC*, 50 AD3d 265, 265 [1st Dept 2008]; *City Line Auto Mall, Inc. v Citicorp Leasing, Inc.*, 45 AD3d 716, 716 [2d Dept 2007]). In addition, plaintiff has not demonstrated that he has “suffered any prejudice as a result of the delay” (*Pagan v Four Thirty Realty LLC*, 50 AD3d at 265). “This State’s public policy favors determinations on the merits” (*id.*; *City Line Auto Mall, Inc. v Citicorp Leasing, Inc.*, 45 AD3d at 716).

WHETHER DEFENDANTS HAVE DEMONSTRATED A REASONABLE EXCUSE

The AIA Contract between WBB Construction, as general contractor, and Waste, as demolition subcontractor, dated November 7, 2007 (the subcontract), required that Waste indemnify and hold harmless defendants for all damage and injury arising as a result of Waste’s negligent performance under the contract. Specifically, the indemnification provision of the contract provides,

[*5]
in pertinent part:

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor ... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract ... but only to the extent caused by the negligent acts or omissions of the Subcontractor ... anyone directly employed by them or anyone for whose acts they may be liable

(Defendants' Notice of Cross Motion, Exhibit D, WBB/Waste AIA Contract, § 4.6 Indemnification, at 7). In addition, in the event of a legal action covered by the indemnification agreement, upon written request, Waste was obligated to cause its insurer, Selective Insurance Company (Selective), to have its attorneys appear for the owner, general contractor and their agents and provide defense for the same.

Non-party CBS Coverage Group (CBS), defendants' insurance broker, secured insurance coverage for the premises under a policy issued by Mt. Hawley Insurance Company (Mt. Hawley) to Fifth Avenue Associates. Defendant 1107 Broadway was a named insured on the Mt. Hawley policy, which covered minimal interior demolition during the period April 1, 2007 to April 1, 2008.

On March 14, 2008, defendants Tessler and WBB received letters from plaintiff's attorney that it had been retained by plaintiff to "institute action against [you] for injuries sustained by reason of your negligence in the ownership, operation, maintenance and control of 1107 Broadway, New York, NY" (Defendants' Notice of Cross Motion, Plaintiff's Attorney Letter, dated March 14, 2008, Exhibit H). This letter was also sent to defendant 1107 Broadway on April 3, 2008.

On March 17, 2008, these letters were forwarded to CBS, which then forwarded them to Mt. Hawley. In a letter, dated March 31, 2008, Mt. Hawley tendered plaintiff's claim against defendants

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to Selective, and demanded indemnification and defense of defendants based upon the requirements of the subcontract, as set forth above. In a letter, dated April 1, 2008, Mt. Hawley denied coverage to defendants on the grounds that WBB and Tessler were not insureds under the policy issued to Fifth Avenue Associates, and that the project at issue was not covered under its policy at the time of the loss (Mt. Hawley letter). However, Mt. Hawley noted that it had written a letter to Selective “tendering the defense and indemnification of the above-mentioned parties of the claim of Mr. Alpirez,” and that, once it received a reply from Selective, it would forward that reply immediately (Defendants’ Cross Motion, Exhibit K, Mt. Hawley Letter). On April 3, 2008, defendants forwarded the Mt. Hawley letter to CBS. In addition, shortly after May 14, 2008, defendants also forwarded plaintiff’s summons and complaint to CBS.

Defendants put forth the affidavits of Joseph Fernandez (Fernandez), WBB’s project manager, and Natalie Toledano (Toledano), vice president of Tessler, wherein they assert that, after promptly turning over the summons and complaint to CBS, they reasonably relied upon (1) the contractual obligation of Waste’s coverage for the claim, (2) the advice of Mt. Hawley and CBS that Selective had been properly tendered and should assume defense and indemnification, and (3) the fact that Selective had not disclaimed the tender demand.

In his affidavit, dated October 29, 2008, Fernandez stated that, on February 12, 2008, he wrote to Waste regarding an investigation by the New York City Department of Buildings, which determined that plaintiff’s injury could have been avoided if he had followed a proper safety protocol. In that letter, Fernandez advised Waste that any legal action arising out of the violation aimed at WBB would trigger the contractual indemnification provision and hold harmless clauses between the two parties. Fernandez maintained that he believed that this written communication,

as well as other such communications, satisfied WBB's obligation to set forth a written demand to have Waste's insurance company provide an attorney to defend defendants.

In addition, Fernandez stated that Waste had assured him that the matter was being taken care of. He also maintained that he never received a disclaimer of coverage from Selective to the effect that the tender for indemnification and defense was being denied. Fernandez also noted that, in September of 2008, when he learned that there were questions about coverage, he demanded a meeting with Waste and Selective. After several phone calls, Selective agreed to provide coverage.

In her affidavit, dated October 28, 2008, Toledano, who maintained that she was responsible for the placement of insurance for defendants, stated that Fernandez advised her that he had made a written demand that Waste defend and indemnify defendants, pursuant to the subcontract between Waste and WBB. Toledano asserted that she never received any disclaimer of coverage or other notice from Selective that the tender for indemnification and defense had been denied.

Toledano also stated that, after defendants received a Notice of Entry of the August 6, 2008 Order of this court that plaintiff's motion for default against these defendants was denied, Toledano immediately contacted CBS to inquire as to what needed to be done, since they had contacted their insurer and had not yet received a denial. Further, on or about September 11, 2008, after plaintiff's motion to renew the default was served upon defendants, Toledano again contacted CBS to inquire as to what was being done on the claim, though, at that time, it was still her understanding that Selective was still providing defense and indemnification to defendants. Toledano stated that it was not until September 24, 2008, that CBS advised her, for the first time, that "defendants' written notice demanding coverage, and Mt. Hawley's tender, as well as their limited efforts to secure coverage from a [sic] Selective were insufficient to request defense in this matter," and that they

obtain private counsel.¹

This court finds that defendants' reliance in this case forms the basis for a reasonable excuse for their not obtaining independent counsel, and now, to seek leave to serve, and to compel plaintiff to accept, a late answer (*see Seccombe v Serafina Rest. Corp.*, 2 AD3d at 516 [defendants reasonably relied on the insurer of the defendant to interpose an answer after defendant timely delivered the summons and complaint to his insurer, and the carrier failed to disclaim coverage or answer]; *Fire Is. Pines v Colonial Dormer Corp.*, 109 AD2d 815, 816 [2d Dept 1985]; *Berrios v David Wiess, Inc.*, 20 Misc3d 1105(A), 2008 NY Slip Op. 51240[U] [Sup Ct, Kings County 2008] [where defendant promptly forwarded the summons and complaint through proper channels, and insurance company failed to disclaim coverage or file an answer, court found that defendant's handling of the matter was not unreasonable]). What constitutes a reasonable excuse lies "within the sound discretion of the court" (*Grutman v Southgate At Bar Harbor Home Owners' Assn.*, 207 AD2d 526, 527 [2d Dept 1994]; *Martinez v D'Alessandro Custom Bldrs. & Demolition, Inc.*, 52 AD3d at 787]; *Lemberger v Congregation Yetev Lev D'Satmar, Inc.*, 33 AD3d 671, 672 [2d Dept 2006]).

WHETHER DEFENDANTS HAVE DEMONSTRATED A MERITORIOUS DEFENSE

In this case, plaintiff was injured when a pipe that he was removing swung down and struck an unsecured scaffold that he was standing on, causing him to fall and become injured. In his

¹ In her affidavit, Toledano acknowledged that she recently discovered that, on June 17, 2008, Mt. Hawley had sent a letter to Toledano c/o 200 Fifth Avenue, which stated that the complaint was tendered to Selective on June 12, 2008, and recommended that a private attorney be contacted in order to avoid a default. However, for unexplained reasons, 200 Fifth Avenue did not forward the letter to her. In any event, the court has discretion to accept law office failure as a reasonable excuse (*Roussodimou v Zafiriadis*, 238 AD2d 568, 569 [2d Dept 1997]; *see also Guzman v New York Holding Co. Assoc.*, 294 AD2d 142, 143 [1st Dept 2002] [where detailed affidavits confirmed that the case was lost in the Liquidation Bureau's system, Court found a reasonable excuse even if not technically falling within the ambit of law office failure]).

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affidavit, plaintiff stated that, at the time of his accident, he “was not provided with any safety devices prior to or at the time of [his] fall from the scaffold” (Plaintiff’s Notice of Motion, Exhibit C, Alpirez Affidavit). In addition, in his affidavit, plaintiff’s co-worker, Jelber Perez, also maintained that, aside from hard hats, he and plaintiff were not provided with any safety equipment prior to or at the time of the accident.

However, in his affidavit, Igor Mazler, WBB’s on-site construction supervisor, asserted that, at the time that the demolition job started, Waste “had safety equipment available for its workers and, upon information and belief, All Waste had instructed their workers in its use” (Defendants’ Notice of Cross Motion, Exhibit E, Melzar Affidavit). He also stated that he spoke with representatives from Waste immediately following the accident and was advised that there were safety harnesses on the floor next to the scaffold. In addition, Fernandez noted that, when he visited the job site on February 11, 2008, shortly after the accident, he observed safety harnesses on the floor adjacent to the scaffold.

While this type of injury generally may implicate the statutory liability imposed by Labor Law § 240 (1), defendants assert that plaintiff’s own conduct, or recalcitrance, rather than a violation of the statute, was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), requires all owners, contractors and their agents to provide to persons employed in specified construction activities certain safety devices:

All contractors and owners and their agents ... in the erection, demolition, repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such

labor, scaffolding ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). Where, as here, "the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1) and the burden shifts to the defendant" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008]).

"When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d at 1188; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Initially, it should be noted that, the striking of the scaffold by the swinging pipe was not such an extraordinary event as to constitute a superceding cause, and thus, plaintiff's actions in cutting the pipe were not the sole proximate cause of his injuries (*see Nimtrovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762-763 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required

to satisfy Labor Law § 240 (1)]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004]; *Spaulding v Metropolitan Life Ins. Co.*, 271 AD2d 316, 316 [1st Dept 2000] [defendant owner's liability was established as a matter of law by the uncontradicted evidence that plaintiff was knocked off his ladder and caused to fall when a length of heavy cable struck him]).

“Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute” (*Cruz v Turner Constr. Co.*, 279 AD2d 322, 322-323 [1st Dept 2001]; *Cordova v 360 Park Ave. S. Assoc.*, 33 AD3d 750, 750 [2d Dept 2006] [defendants failed to raise a triable issue in support of their allegation that the accident was caused by the injured plaintiff's own negligence, when a severed pipe struck the ladder on which he was standing, causing him to fall]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 175 [1st Dept 2004] [striking of ladder by falling object was not such extraordinary event as to constitute superceding cause, and plaintiff's actions in cutting pipe were not sole proximate cause of his injuries]).

However, as defendants assert that, if permitted to conduct further discovery, they may be able to state a meritorious defense by showing that plaintiff was a recalcitrant worker and the sole proximate cause of his accident. Whether plaintiff was a recalcitrant worker and the sole proximate cause of his accident depends on whether plaintiff was provided with safety devices, whether he was instructed to use those safety devices, and whether he intentionally chose not to use those devices in direct violation of those instructions (*see Gallagher v New York Post*, 55 AD3d 488, 490 [1st Dept 2008] [plaintiff ignored a standing order to ironworkers to be in a harness and to tie off when working around any floor opening]; *Christiano v Random House, Inc.*, 51 AD3d 579, 579 [1st Dept 2008]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008] [generic

statements of availability of safety devices were insufficient to create an issue of fact as to whether the plaintiff was the sole proximate cause of his injury]; *Leniar v Metropolitan Tr. Auth.*, 37 AD3d 425, 426 [2d Dept 2007] [no Labor Law liability where plaintiff was provided with safety devices, was present for several safety meetings where he was instructed to use said safety devices, and yet, he intentionally chose not to use those devices in direct violation of the instructions]).

Plaintiff argues that, in view of the fact that defendants had personal knowledge of the relevant facts underlying the accident, their purported need to conduct discovery does not warrant denial of plaintiff's motion (*see Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 737 [2d Dept 2007]; *Pina v Merolla*, 34 AD3d 663, 664 [2d Dept 2006]).

However, a review of the affidavits put forth in this case reveals that defendants may not have had personal knowledge of the relevant facts needed to state a recalcitrant worker defense. Toledano stated that no one from 1107 Broadway or Tessler was present at the work site on the date of plaintiff's accident. In addition, Mazler and Fernandez stated that they were not present at the time of plaintiff's accident, and thus, they had no personal knowledge of what transpired at that time. Further, there is no indication in the record as to which entity was responsible for giving plaintiff his work instructions for the project, or which entities witnessed those instructions.

Thus, as defendants have put forth a reasonable excuse for their delay, as well as the possibility of a meritorious defense, following further discovery, defendants are entitled to leave to file a late amended answer, and an order compelling plaintiff to accept service of that amended answer (*see Defendants' Notice of Cross Motion, Exhibit A, Defendants' Second Amended Answer*). Accordingly, plaintiff's motion for leave to renew his default motion is denied as moot. In addition, plaintiff's motion for partial summary judgment on the issue of Labor Law § 240 (1)

liability is denied as premature, especially in light of the fact that multiple issues of fact exist as to defendants' liability in this matter.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Alejandro Alpirez's motion (motion sequence number 002), pursuant to CPLR 2221, for leave to renew his motion for a default judgment against defendants 1107 Broadway LLC, 1107 Broadway Mezz I LLC, 1107 Broadway Mezz II LLC, WBB Construction, Inc. and Tessler Developments LLC (together, defendants) is denied as moot; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 5015 (a) (1), for leave to serve a late amended answer, and to compel plaintiff to accept service of that answer, is granted; and it is further

ORDERED that defendant shall serve the late amended answer to the complaint within 30 days of the date of this decision and order; and it is further

ORDERED that plaintiff shall accept service of defendants' answer; and it is further

ORDERED that plaintiff's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) against defendants is denied as premature; and it is further

ORDERED that counsel shall appear at a discovery conference in IAS Part 7, 111 Centre Street on May 21, 2009 at 9:30 AM.

DATED: March 27, 2009
New York, New York

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.