Clifford v City of New York

2009 NY Slip Op 31684(U)

July 27, 2009

Supreme Court, New York County

Docket Number: 111016/05

Judge: Judith J. Gische

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SCANNED ON 7/29/2009

[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART

Index Number : 111016/2005
CLIFFORD, KEVIN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/27/09

JUDITH J. GISCHE, J.S.C. 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: IAS 10

---x

Kevin Clifford,

Plaintiff, Decision/Order

-against- Index# 111016/05
Seq. # 001

The City of New York,

Defendants.

---x

Hon. Judith J. Gische:

Pursuant to CPLR §2219(a) the following numbered papers were considered by the court on this motion:

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS	NUMBERED
Notice of Motion, KC affd., LS affd., exhibits	1
LRK affirm., exhibits	2
KC affd., LS affd., exhibits	3

Upon the foregoing papers the decision and order of the court is as follows

Plaintiff, Kevin Clifford ("Clifford"), has moved for partial summary judgment on the issue of liability in connection with his claims made under Labor Law § 240 (1). Defendant, the City of New York ("City') opposes the motion. Issue has been joined and the motion was brought less than 120 days after the filing of the Note of Issue. The motion will, therefore, be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Summary of the Arguments

Clifford is a construction worker that claims to have suffered an ankle fracture when he fell off a scaffold while working at a construction site on May 16, 2005.

According to Clifford, he was a member of a gang assigned to dynamite rock in a tunnel that was an extension of New York City's Water Tunnel Number 3. As part of the process of inserting dynamite into the upper levels of the rock, a scaffold was erected by placing wooden planks on steel bars that inserted into the rock. Clifford claims he was directed to stand on the lower level of the scaffold to help construct a higher level. He claims that the planks he was directed to stand on were loose and did not cover the entire steel bar on which they rested. He claims that as he was lifting planks for the second level of the scaffold and standing on the first level, the planks he was standing on "slid and shifted" causing him to fall to the bottom of the tunnel. He further claims that his left foot struck a water pump on the way down and that he was injured as a result.

In opposition, the City claims that Clifford failed to prove his *prima facie* case because they did not prove that the city is either the owner or contractor at the construction site. They further claim that based upon an "Employees' Report of Injury" there are issues about whether Clifford's injuries were due to him losing his balance. Finally the City claims that because Clifford helped erect the scaffold, there is a question about whether Clifford's own actions were the proximate cause of his injuries.

In reply, Clifford shows that while the City has not admitted itself to be the owner of New York City Water Tunnel Number 3 in this case, in numerous other cases it has so admitted.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

A plaintiff, in order to be awarded partial summary judgment on a claim based upon Labor Law § 240(1), must demonstrate, by admissible evidence, that the statute was violated and that such violation was the proximate cause of his/her injuries. Kyle v. City of New York, 268 A.D.2d 192, 196 (1st Dep't 2000). Labor Law §240(1) provides in pertinent part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

It imposes absolute liability on owners, contractors and their agents for failure to provide workers with safety devices that properly protect against elevation-related special hazards. Streigel v. Hillcrest Heights Development Corporation, 100 NY2d 974 (2003). Where a ladder or scaffolding is not secured

or inadequately secured and thereby slides or falls, causing the worker to fall, there is liability under Labor Law §240. Lopez v. Melidis, 31 AD3d 351 (1st dept. 2006); Smith v. 21 West LLC Limited Liability Company, 308 AD2d 312 (1st dept. 2003). Notwithstanding that Labor Law §240(1) is an absolute liability statute, if plaintiff's actions were the sole proximate cause of the accident, there is no liability. Blake v. Neighborhood Housing Services of New York City, 1 NY3d 280 (2008).

Here, plaintiff has established, and the uncontroverted evidence shows, that he fell from scaffolding where the planking was inadequately secured. Plaintiff has also made a *prima facie* showing that the defendant violated Labor Law § 240 (1) by failing to provide him with adequate safety devices to afford him proper protection for the work he was performing, and that this failure constituted a proximate cause of his accident. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 (1991); Ross v. Curtis-Palmer Hydro Electric Co., 81 NY2d 494, 501 (1993); Melo v. Consolidated Edison Co. of N.Y., 92 N.Y.2d 909 (1998).

In opposition, the City has failed to come forward with any material triable issues of fact that the ladder was secured or that plaintiff was provided with any of the devices enumerated in Labor Law § 240 [1].

Clifford has accounted for how this accident took place. The City's only basis for questioning the credibility of this account is an unsigned document indicating that Clifford lost his balance and fell. This statement, standing alone, is not an evidentiary basis to disbelieve plaintiff's account of the accident. The

absence of eye witnesses to the accident is not, alone, a reason to deny plaintiff's motion. Antenucci v. Three Dogs LLC, 41 AD3d 205 (1st dept. 2007). Nor is the aforementioned statement even inconsistent with Clifford's account as to why he lost his balance. In any event, inconsistencies in the record as to how an accident happened do not necessarily raise a triable issue of fact. Heer v. North Moore Street Developers, L.L.C., 61 A.D.3d 617 (1st Dept 2009). Since plaintiff's injuries were attributable at least in part to defendants' failure to provide him with proper protection as mandated by the statute, plaintiff has made a *prima facie* showing that he is entitled to summary judgment on the issue of liability. Ray v. City of New York, —AD2d — (1st Dept 2009), 2009 WL 1444224 (5/26/09).

The City has not raised any issue about whether plaintiff was the sole proximate cause of the accident. There is no evidence that plaintiff constructed the first level of the scaffold from which he fell. The only evidence is that Clifford was directed to stand on such scaffold to help build the next level. Even is the City is correct in claiming that the gang of workers of which Clifford was a member constructed the first level of scaffolding, the argument would still fail, because the defense is limited only to those circumstances where the plaintiff is the sole proximate cause of the accident and does not apply if plaintiff is only contributorily negligent.

The City's additional argument that Clifford failed to prove that it was either the owner or contractor at the premises must also fail. While the plaintiff

should have put such proof in its motion in chief, he has provided in reply incontrovertible evidence that the City was the owner at the time of the accident. The City has not come forth with any information that raises a question about this issue.[1]

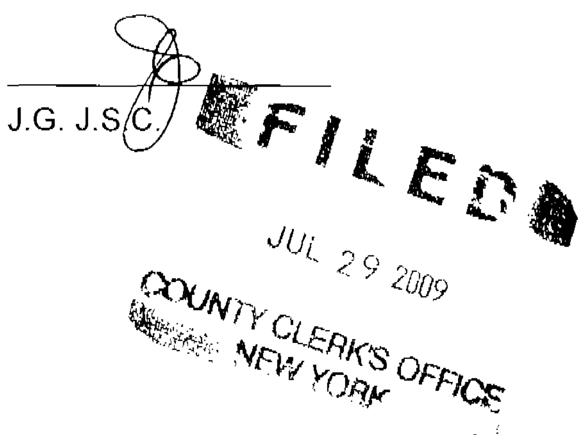
Accordingly the motion for summary judgment on this issue of liability under Labor Law §240(1) is granted. Plaintiff in his complaint raises alternative basis for liability, including negligence, Labor Law §241(6) and Labor Law §200. These alternative basis for liability as well as the issue of damages remain to be tried. This case is presently scheduled for mediation, which, if not successful, will result in this case being put on the trial calendar. The case should proceed accordingly.

Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the Court.

Dated: New York, NY
July 27, 2009

SO ORDERED:

J.G. J.S.C.



[1] The court would certainly have allowed a sur-reply if the City could have raised any issue about its ownership of the premises.