

Carlson v A1 229 W. 43rd St. Prop. Owner, LLC

2010 NY Slip Op 32749(U)

October 1, 2010

Sup Ct, NY County

Docket Number: 101716/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 101716/2009
CARLSON, THOMAS L.
vs.
A1 229 WEST 43RD STREET
SEQUENCE NUMBER : 001
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

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Oct 1, 2010

HON. JUDITH J. GISCHE 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: IAS PART 10**

-----x
Thomas L. Carlson,

Plaintiff (s),

-against-

AI 229 West 43rd Street Property Owner, LLC
c/o Africa Israel Properties and Development
USA and Turner Construction, Co.,

Defendant (s).

-----x

AI 229 West 43rd Street Property Owner, LLC
s/h/a AI 229 West 43rd Street Property
Owner, LLC c/o Africa Israel Properties and
Development USA and Turner
Construction Company,

3rd Party Plaintiffs,

-against-

Hugh O'Kane Electric Company,

3rd Party Defendants.

-----x

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Pltff n/m (§3212) w/SMK affirm, exhs	1
Defs' x/m (§§3124, 602) w/LGA affirm, exhs	2
Pltff reply w/SMK affirm, exhs	3
Defs' reply w/LGA	4

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

GISCHE J.:

DECISION/ ORDER
Index No.: 101716/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Third Party Index No.
59066/09

FILED
OCT 05 2010
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NEW YORK

This is an action in which plaintiff, a journeyman, contends he was injured because he was provided with an unsecured ladder to perform his work. Defendants, who are jointly represented, are the Turner Construction, Co., the general contractor ("general contractor") and AI 229 West 43rd Street Property Owner, LLC c/o Africa Israel Properties and Development USA, the owner of the project ("owner").

Issue has been joined and the plaintiff now moves for summary judgment on his Labor Law § 240 [1] claim. The general contractor and owner ("defendants") have cross moved for an order compelling certain discovery. Since summary judgment relief is available once issue is joined, these motions will be decided on the merits (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]).

The court's decision and order on this motion and cross motion is as follows:

Arguments

Plaintiff, employed by Hugh O'Kane Electric Company, was instructed to install certain electrical equipment in the 4th floor hallway of the building located at 229 West 43rd Street, New York, New York. He described the item he was installing – BX conduit – as looking like a garden hose. From his employer's shanty, plaintiff selected a wooden A-frame ladder that was 6 feet tall to do his work. The other ladders he observed were the same height so he chose the one closest to him.

Plaintiff, while standing on the third rung of the ladder, grabbed the BX conduit box and began to pull it over to the other side when the ladder slipped out from under him and pushed away from his body, causing him to fall down to the ground, towards the right. No one was holding the ladder steady for plaintiff while he was performing this task and he was working alone. Plaintiff claims he has established a prima facie

Labor Law § 240 (1) cause of action because he has proved defendants failed to provide him with a safe and secure ladder on which to work or any required safety devices to protect him from elevation-related work hazards of the work he was doing.

Defendants cross move for additional discovery. They contend that plaintiff was injured in a rear end collision in October 2008 and that he has refused to provide any information about that law suit, unless defendants pay for the copies. Defendants also claim the plaintiff's EBT was extremely contentious and unproductive because plaintiff's attorney interjected comments and made frequent objections. They claim the attorney's objections were invalid and merely obstructionist tactics. They seek supervision of discovery by court personnel (i.e. JHO, etc.) and that plaintiff be re-deposed.

Defendants also seek an order transferring this case to Staten Island so that it can be consolidated with the motor vehicle action because they believe plaintiff's alleged injuries are due to that accident, not his fall off the ladder. They claim that since plaintiff is seeking damages for the same injury in that other action, the cases should be heard together to avoid inconsistent decisions.

Defendants point out that plaintiff has twice supplemented his Bill of Particulars. The first supplement withdrew a claim that plaintiff had suffered a neck fracture. Although the second supplement, amplifies his existing claims, they claim it should be stricken because under the CPLR he is only permitted one amendment as of right.

Defendants also seek discovery sanctions, such as a motion to compel, because plaintiff has not responded to their post EBT demands.

Law applicable to summary judgment motions

"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.

Discussion

Labor Law § 240 (1), commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007] citing Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). Labor Law §240(1) requires property owners and contractors to furnish or cause to be furnished safety devices, such as ladders and scaffolds, which are "so constructed, placed and operated as to give proper protection" to workers. The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed (Panek v. County of Albany, 99 N.Y.2d 452 [2003]). In order to prevail on a Labor Law § 240 [1] cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]; Camlica v Hansson, 40 AD3d 796 [2007]).

Here, plaintiff has shown that he was instructed to do certain work at an elevation. He was provided with a ladder to do the work. The ladder was not secured in any way, and no one was holding the ladder for him. Where a ladder is the safety device offered to a worker to perform his job, the failure to properly secure the ladder, to ensure that it remains steady and erect while being used, establishes a prima facie violation of Labor Law § 240 because the risk that the ladder may fail is within the protections of the statute (Kijak v. 33 Madison Ave. Corp., 251 A.D.2d 152 [1st Dept. 1998]; Wasilewsk v. Museum of Modern Art, 260 A.D.2d 27 [1st Dept. 1999]). The plaintiff does not have to prove that the ladder was defective, only that the defendants' failure to provide adequate safety devices to secure the ladder on which he was working was a proximate cause of the accident. Therefore, plaintiff has established a prima facie violation of Labor Law § 240 [1] and his entitlement to summary judgment on the issue of liability, as a matter of law.

The other claims made by defendants in their cross motion do not raise triable issues of facts to defeat summary judgment on the issue of liability. Although defendants contend the EBT was highly contentious and plaintiff's counsel engaged in obstructionist tactics, the court disagrees as it has not seen any evidence of those tactics in the transcript. Some of the friction between counsel was due to defendants' attorney repeating plaintiff's testimony in her questions, but paraphrasing what he said. This is the reason for most of plaintiff's counsel's objections. It is of no moment that plaintiff's counsel objected numerous times during the course of the EBT, given the length of plaintiff's examination. Although defendants' refer to questions they asked to have marked for rulings, they never brought a motion for a ruling by the court. Instead,

for the first time, and several months later, they raise these issue in response to plaintiff's motion for summary judgment. The "coaching" that defendants refer to is not evident in the transcript and the court sees nothing palpably improper about the EBT or any reason to have plaintiff recalled for his EBT on that basis.

The motion to have this case transferred Staten Island and consolidated with a motor vehicle case presently pending in that county is not only denied, it borders on the frivolous. The court has the discretion to order the consolidation of actions where common questions of law or fact exist (CPLR § 602 [a]; Bradford v. John A. Coleman Catholic High School, 110 AD2d 965 [3rd Dept. 1985]. Although it is unnecessary that all the facts and issues be the same, these two cases have absolutely nothing in common.

The motion to have plaintiff comply with defendants' post EBT demands and disclosure demand of April 7, 2010 is denied, without prejudice. A motion for summary judgment stays discovery (CPLR3214 [b]). Now that the summary judgment motion has been decided, discovery can resume and, although plaintiff is now obligated to respond, an order to compel is premature.

Each party should bear initial burden of financing his own suit, and it is party seeking discovery of documents who should pay the cost of their reproduction (Rubin v. Alamo Rent-A-Car, 190 A.D.2d 661 [2nd Dept 1993]). Plaintiff has correctly notified defendants' counsel that the court file in the motor vehicle action is 1,200 pages and the cost to copy it is .75 cents a page. The pleadings are a matter of public record and available at the court. Therefore, defendants' motion to have the court compel plaintiff to provide copies free of charge is denied.

Defendants are, however, entitled to a further EBT of plaintiff on damages only since plaintiff has yet to provide the documents about the motor vehicle case. The EBT shall take place no later than 30 days after defendants obtain those documents.

The court, however, denies defendants' motion for an order striking the second supplemental Bill of Particulars. The supplemental bill was served pre-note of issue and defendants have shown no prejudice, particularly since, as they claim, the bill only amplifies already existing claims on damages, and therefore, it is not a source of surprise or prejudice to defendant (Debellis v. NYU Hospitals Center, 12 A.D.3d 320 [1st Dept 2004]; Stevens v. Dacion Corp., 184 A.D.2d 377 [1st Dept 1992]). The defendants still have a right to discovery on those issues (see decision, *infra*). In any event, the second supplemental bill of particulars, served without leave of court can, under the facts of this case, be deemed an amended bill of particulars (CPLR 3042 [b]; Vargas v. Villa Josefa Realty Corp., 28 A.D.3d 389 [1st 2006]).


Conclusion

Plaintiff's motion for summary judgment on its Labor Law § 240 [1] claim on the issue of liability is granted. Defendants' cross motion is denied for the reasons stated.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 1, 2010

So Ordered:


Hon. Judith J. Gische, JSC

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NEW YORK