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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 114780/2009
CUENTAS, HECTOR
VS.
SEPHORA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 114780/09

MOTION DATE

MOTION SEQ. NO. 002

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

SEP 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: SEP 14 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Hector Cuentas,

Plaintiff (s),

-against-

Sephora USA, Inc., Mall at Smith Haven, LLC, Simon Property Group, LP and Simon Property Group, Inc.,

Defendant (s).

---x

Sephora USA, Inc., Mall at Smith Haven, LLC, Simon Property Group, LP and Simon Property Group, Inc.,

Third Party Plaintiff,

-against-

Rectenwald Brothers Construction, Inc.,

Third Party Defendant.

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DECISION/ ORDER
Index No.: 114780/09
Seq. No.: 002

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

T.P. Index No.:
591135/10

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

Papers	**Numbered**
Cuentas n/m (PSJ) w/LD affirm, HC affid, exhs	1
Defs' opp w/NAS affirm, exhs	2
Cuentas reply w/LD affirm	3
Defs' further opp w/NAS affirm, exh	4
Cuentas supp affirm in support w/LD affirm, exhs	5

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

GISCHE J.:

This is an action by plaintiff Hector Cuentas for personal injuries arising from

alleged violations of the Labor Laws of the State of New York ("Labor Law § ___"). Cuentas now moves for summary judgment solely on the issue of liability on his Labor Law § 240 (1) cause of action. Issue has been joined and a third party action was commenced by the defendants (T.P Index No. 591135/10). A second branch of Cuentas' motion is for an order severing that action pursuant to CPLR §§ 603 and 1010. Defendants oppose both branches of the motion. Although the note of issue has not been filed, summary judgment relief is available and the motion will be decided on the merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

Facts and Arguments Presented

On the day of the accident, December 11, 2006, Cuentas was employed by non-party Cleaning Contractor's Corporation ("CCC"). CCC had a contract with Rectenwald Brothers Construction Inc. ("Rectenwald"), also a non-party, to build out space for a new Sephora Store at the Smith Haven Mall in Lake Grove, New York. Rectenwald was the general contractor for the project pursuant to Rectenwald's Construction Agreement with Sephora USA, Inc dated October 2, 2006 ("construction agreement").

Cuentas contends he was injured when, while standing on a 6 foot A-frame ladder, he lost his balance and he fell to the ground. He contends that the failure to provide him with a safety device, other than the ladder itself, establishes his prima facie case that defendants violated Labor Law § 240 (1), entitling to summary judgment as a matter of law.

Cuentas was deposed and testified that his supervisor, Javier Suarez ("Suarez"), also a CCC employee, gave him a six foot A-frame ladder to do his job which was to clean the large storefront windows at Sephora. When Cuentas opened the ladder up, he

noticed it was "shaky" and "loose." He tried the ladder out and climbed up onto it. Once at the top, he noticed that not only was it unsteady, it was not tall enough for him to easily reach the top of windows that he had to clean.

Upon noticing these problems, Cuentas went to his foreman (Suarez) and told him what was wrong. He specifically asked Suarez for a different ladder. Suarez, according to Cuentas, dismissed his concerns and instructed him to "finish up with that one [the ladder] because we're about to leave." Cuentas testified that Suarez was known for his bad temper and rudeness and he was afraid of him. Cuentas stated that once Suarez made up his mind, you "cannot say anything" to him which is why he did not press the issue any further. He also did not ask Suarez to hold the ladder steady for him nor did Suarez offer to do so. Although other CCC employees were present, including Juan Martinez and Carlos, Suarez did not instruct either of these men, or any one, else to help Cuentas by holding the ladder steady.

Cuentas testified that on prior occasions, when he was required to use a taller ladder, someone would hold the ladder steady for him. No one, however, had ever held a 6 foot tall ladder steady for him when he had to use one. He had not complained about this, however, because on those occasions, he had been supplied with a steady ladder, unlike the ladder in question which was unsteady.

According to Cuentas, John Justin Allen ("Allen") was present when the accident occurred and is an eyewitness. Allen was the union shop steward sent to the job site to make sure the project was completed using union employees, etc. Cuentas did not ask Allen to hold the ladder for him because Allen was "the boss from the union. I'm no one to give him orders."

Cuentas climbed the ladder and began to do his work. It entailed him using a rag.

He steadied himself on the wobbly ladder by holding on to the edge of the wall and proceeded to wipe the window frame above him. As he was stretching himself to reach a corner of the window, the ladder toppled over and he fell backwards.

In opposition to plaintiff's motion, defendants principally rely on the deposition testimony of Suarez. Suarez testified that he provided Cuentas with the ladder used by him on the day of the accident and that he inspected the ladder before giving it to Cuentas to use. Suarez testified the ladder was secure and not wobbly or loose. Suarez denies Cuentas complained about the ladder or asked for a taller one. Suarez confirmed, however, that the 6 foot ladder was the only ladder available for Cuentas' use in the store on the day of the accident but other, taller, ladders were available on the CCC truck parked outside. According to Suarez, Cuentas knew where the ladders were and were the truck was parked. Suarez testified that no safety devices were ever provided to his workers who had to use a 6 foot ladder.

Both parties relies on the deposition testimony of Allen, the shop steward and an eyewitness to plaintiff's accident. Allen testified at his EBT that he was brought in to make sure the union workers were safe, being paid and getting their benefits. He referred to CCC and another contractor as being his "employer." He also testified that the windows of the store were "probably nine to ten feet high and like maybe seven feet wide." According to Allen, CCC had, at any given time, ladders available ranging in size from 3 feet to 12 feet tall, but the 6 foot ladders were the most frequently used. An 8 foot ladder was available on CCC's truck outside the store approximately 30 feet away.

Allen saw Cuentas climb up the ladder and then come down and go talk to Suarez. When Allen overheard Suarez tell Cuentas, "just use the ladder that you're using," Allen went over and intervened. He told Cuentas to get a taller ladder from the truck because

"you can't reach the top of this window with this ladder you're using." Allen then proceeded to argue with Suarez about his instructions to Cuentas and Cuentas and Suarez had an exchange in Spanish that Allen could not understand. After that exchange, Cuentas did exactly what his foreman, Suarez, instructed him to do, which was to continue using the same ladder to complete his cleaning job. Allen states that he observed Suarez standing on the very top of the ladder, reaching across the window trying to clean it just before he fell. According to Allen, the ladder Cuentas was using was "brand new."

Defendants urge the court not to consider Cuentas' sworn affidavit because there is no translator's affidavit certifying the translation from Spanish to English is accurate. Next, defendants deny there was any violation of Labor Law § 240 (1) by them. They argue that plaintiff is the sole proximate cause of his accident because Allen instructed him to get another ladder, but he disobeyed that instruction. They argue further that the ladder was new, not wobbly or loose, and that Cuentas had used the ladder before without any incident. According to defendants, there are triable issues of fact that defeat plaintiff's motion.

Defendants contend that no other safety device (belt, harness, etc.), was necessary for Cuentas to safely use the ladder, based on Cuentas' own testimony that at other times when he had used a 6 foot ladder he had not been provided with such equipment. They also emphasize Allen's testimony, that there is no requirement that someone hold a 6 foot ladder steady when a worker is working on it.

In support of plaintiff's motion to have the third party action severed, Cuentas argues that the action was brought a year after the complaint in the main action was filed, discovery is almost complete, and having the indemnification issues in the same case as

his personal injury action is prejudicial. Defendants deny the third party action was commenced late to prejudice the plaintiff. They contend they brought it as soon as it became clear to them that they could not reach an amicable resolution with the third party defendant.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

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] imposes a non-delegable duty upon owners, contractors and their agents to supply necessary security devices for workers at an elevation, to protect them from falling (Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]). An owner, contractor or agent who breaches that duty may be held liable in damages, regardless of whether it has actually exercised supervision or control over the work (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). Therefore, a violation of this duty results in absolute liability where the violation was a proximate cause of the accident (Meade v. Rock-McGraw, Inc., 307

A.D.2d 156 [1st Dept. 2003]).

To establish a prima facie case, the plaintiff must show that there is a Labor Law § 240 (1) violation and that such violation proximately caused the injuries sustained (Quattrocchi v. F.J. Sciame Const. Corp., 44 A.D.3d 377 [1 Dept. 2007]). Summary judgment should be granted under Labor Law § 240 (1) where the effects of gravity cause an injury due to the failure of one of the devices enumerated in the statute to be properly constructed, operated or placed. A ladder is within the category of "safety devices" under Labor Law § 240 (1). Thus, where a ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1) (Schultze v. 585 W. 214th St. Owners Corp., 228 A.D.2d 381, 644 N.Y.S.2d 722 [1st Dept 1996]).

Initially, the court addresses the issue of whether Cuentas' sworn affidavit should be considered. The court decides it will be. The affidavit is not materially different than what he testified at his deposition and CPLR § 2101 [b] applies – as aptly noted by plaintiff– to situations where the plaintiff is offering an affidavit in a foreign language. This affidavit is in English.

Although plaintiff objects to Suarez's deposition testimony being considered in opposition to his motion on the basis that Suarez did not sign it, the transcript has been considered. Where a witness fails to sign and return the deposition transcript within sixty days, it may be used as fully as though signed (CPLR 3116 [a]).

Turning to the merits of the parties' dispute, it does not matter (under the facts of this case) whether the ladder Cuentas was using was new, or shaky and loose, as Cuentas alleges. It is unrefuted that the only elevation-related safety device provided to

Cuentas was a 6 foot tall ladder. Even if there are triable issues of fact whether the ladder itself was defective, or whether it was tall enough for him to safely do his job, it is unrefuted that no one was holding the ladder Cuentas was using while he attempted to clean the windows outside the Sephora store. The failure to provide Cuentas with a safety device that could have prevented his fall establishes his *prima facie* Labor Law § 240 [1] claim against the defendants (Picano v. Rockefeller Center North, Inc., 68 A.D.3d 425 [1st Dept 2009]). Therefore, it does not avail defendant to argue that the ladder itself was not defective.

Nor is it helpful for defendants to argue that Cuentas himself was negligent by failing to go look for a taller ladder which was only 30 feet away. Suarez testified that he gave plaintiff the shorter ladder to use in the first place, even though the windows Cuentas had to clean were very tall. Suarez does not deny he saw Cuentas use the 6 foot ladder to do his work or that it was too short. Suarez's testimony is simply that Cuentas knew where there was a taller ladder. He did not instruct Cuentas to get a taller ladder, but told Cuentas the work was almost done. These factual disputes are hardly material and do not require a trial of this claim because defendants have failed to raise a triable issue of fact that plaintiff's own actions were the *sole* proximate cause of the accident (Robinson v. East Medical Center, LP, 6 N.Y.3d 550, 554 [2006]. Plaintiff did not choose to use the shorter 6 foot ladder and disobey an order. The ladder was simply provided to him and he was instructed to use it.

Arguments that Cuentas should have heeded Allen's "instructions" suggest that Allen was Cuentas' boss or Suarez's superior when, in fact, he was not. Allen was a union steward and in charge of making the project proceeded with union personnel. Like Cuentas, Allen was also an employee of CCC or its affiliate Best Cleaning. Furthermore,

any argument that plaintiff should have disobeyed Suarez and listened to Allen instead impermissibly shifts defendants' statutory obligations to the plaintiff.

This is not a case where plaintiff was a recalcitrant worker who was specifically instructed to use a safety device but refused to do so (Robinson v. East Medical Center, LP, supra; Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 39 [2004]). If a worker follows the orders of his supervisor, his actions cannot be the sole proximate cause of his accident (Harris v City of New York, 83 AD3d 104 [1st Dept 2011]). In any event, where plaintiff's negligence is, at most, only a concurrent cause of the accident, it is not a defense to liability under Labor Law § 240 and will not defeat plaintiff's motion (Romanczuk v. Metropolitan Ins. and Annuity Co., 72 A.D.3d 592 [1st Dept. 2010]).

Defendants' separate argument, that it had no obligation to provide Cuentas with a taller ladder or a safety device for a 6 foot ladder or that he could have safely used a 6 foot ladder for his assignment is offered without any support, such as legal authority or even an expert's opinion. Allen's statement, and comments by Cuentas, that CCC regularly expected its employees to use a 6 foot ladder to work around the store without any safety device, does not raise triable issues of fact that this is an acceptable practice. Allen merely stated that this is how things were done; he is not an expert witness on industry practice.

Plaintiff has proved that defendants failed to provide him with an adequate safety device and that the ladder he was instructed to use was not suitable for his assignment. When he asked for a different safety device, his request was rejected and he was instructed to do complete his job using the only ladder that was available to him in the store (Rice v. West 37th Group, LLC, 78 A.D.3d 492 [1st Dept 2010]). He has, therefore, proved that defendants violated Labor Law § 240 (1) and is entitled to partial summary

judgment against defendants on the issue of liability.

Third Party Action

The third party action is for indemnification (common law and contractual), breach of contract (failure to obtain/maintain insurance) and contribution, all disputes among the 3rd party plaintiff and defendant. Plaintiff has no claims against the 3rd party defendant and he did not delay in bringing this motion to sever (Hickson v. Mt. Sinai Medical Center, 87 A.D.2d 527 [1st Dept 1982]).

Although discovery is almost complete in the main action, there is no indication that discovery has even begun in connection with the claim for contractual indemnification, etc. The reasons provided by defendants about why their third party action should not be severed are greatly outweighed by the compelling arguments presented by plaintiff about why the third party action should be severed and continued separately. Severance is appropriate because the third party action will prejudice the plaintiff by delaying the trial. Defendants/third-party plaintiffs, on the other hand, have not shown severance of the third party action will harm them (see, Abreo v. Baez, 29 AD3d 933 [2nd Dept 2006]; Singh v. City of New York, 294 A.D.2d 422 [2nd Dept 2002]).

In an exercise of its discretion, the court grants plaintiff's motion to sever the third party action (Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332 [1st Dept 2005]). The third party action is hereby severed and shall continue as a separate plenary action, provided that third party defendants obtain a new index number and file a new RJI within Thirty (30) Days from service of an entered copy of this decision and order.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action is granted solely on the issue of liability; and it is further

ORDERED that the issue of damages will be decided at trial along with the remaining causes of action; and it is further

ORDERED that plaintiff's motion for the severance of the third party action is granted. The third party action is hereby severed and shall continue as a separate plenary action, provided that third party defendants obtain a new index number and file a new RJI within Thirty (30) Days from service of an entered copy of this decision and order; and it is further

ORDERED that any relief requested that has not been addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 14, 2011

So Ordered:

Hon. Judith J. Gische, JSC