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

PRESENT: MARCY S. FRIEDMAN PART 57

Justice

Index Number : 103222/2009
COLON, CARLOS ALBERTO
VS.
HILTON RESORTS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 103222/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED
1, 1A thru 1F
2
3, 3A, 3B, 3C, 4-8

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 & cross-motions are:

FILED
OCT 17 2011
NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

Dated: 10-12-11

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

CARLOS ALBERTO COLON,

Plaintiff,

- against -

HILTON RESORTS CORPORATION and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendants.

Index No.103222/2009

DECISION/ORDER

HILTON RESORTS CORPORATION and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK.

Third Party Plaintiffs,

- against -

REBAR LATHING CORPORATION

Third Party Defendant.

Third-Party Index No. 590753/2009

In this Labor Law action, plaintiff seeks damages for injuries sustained on April 24, 2008 while working as a concrete worker. Defendants Hilton Resorts Corporation (Hilton) and Tishman Construction Corporation of New York (Tishman) move for summary judgment dismissing plaintiff's claims under Labor Law §§240(1), 241(6), and 200, and plaintiff's claim for common law negligence. Third-party defendant Rebar Lathing Corporation (Rebar) cross-

moves for summary judgment. Plaintiff cross-moves against all defendants for summary judgment on his Labor Law §240(1) claim.

At the time of the accident, plaintiff was employed as a concrete worker by non-party Century Maxim (Century). (P.'s Dep. at 22.) Century was hired by Tishman to do concrete work at the construction of a building at 102 W. 57th Street, New York, New York. (P.'s Aff. in Support, ¶ 13.) Tishman is identified as the contractor under the subcontract between Tishman and Century. (Hilton Ex. D.) Hilton owned the site in question. (D.'s Aff in Support, ¶ 10.) As discussed more fully below, the parties dispute the cause of plaintiff's injury.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law §240(1)

Labor Law §240(1) provides:

> All contractors and owners and their agents, * * * 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.)

It is well-settled that "an accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

Comparative negligence is not a defense to a Labor Law §240(1) claim. (Gordon, 82 NY2d at 562.) In order for a plaintiff's acts to constitute a defense to a §240(1) claim, such acts must have been "the sole proximate cause" of the plaintiff's injuries. (Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875; Blake, 1 NY3d at 290.) "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." (Id.) A worker may be recalcitrant where he "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice, he would not have been injured." (Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35, 40 [2004].) "The general availability of safety equipment at a worksite does not relieve the defendants of liability." (See Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 11 [1st Dept 2011].)

Defendants seek summary judgment dismissal of plaintiff's §240(1) claim on two

grounds: that the accident did not occur as plaintiff stated in his testimony; and that, if the accident did occur as plaintiff avers, he was the sole proximate cause of his injury or a recalcitrant worker. (See D.s' Aff. in Support, ¶ 12, 49.) Plaintiff contends that he was injured when he descended a fly wall at the instruction of his foreman. (P.'s Aff. in Support, ¶ 16-17.) Defendants claim that plaintiff was injured when he caught his ankle in a web of steel rebar. (D.s' Aff. in Support, ¶ 12.)

In support of their claim that plaintiff tripped on rebar, defendants submit three reports regarding the accident. The first, filed by site safety manager, John Asaro states: "As reported to my by the [sic] foreman Mike Casa [sic], Carlo [sic] Colon a concrete worker for Century Maxim concrete while walking on the web of rebar on the deck of the 26th floor snagged his ankle in the steel. * * * " (D.s' Ex. H.)[1] The second report is the Tishman Incident Report, and states that foreman Mike Casa said that plaintiff "caught his leg in the steel web and fell." (Id.) The third is the employer's report to the New York State Workers' Compensation Board, which also states that the accident occurred when plaintiff "snagged ankle in steel." (Id.)

In opposition, and in support of his own motion, plaintiff relies on his detailed testimony that he fell while descending a fly wall. (P.'s Dep. at 55-56.)

The accident reports on which defendants primarily rely are insufficient, without more, to raise a triable issue of fact. The first two reports are based on hearsay statements, and the source is not identified in the last. "Hearsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted." (Navedo v 250 Willis Ave.

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[1]Although the foreman is referred to as Mike Casa, his full name is Michele Caseli. (Caseli Dep. at 8.)

Supermarket, 290 AD2d 246, 247 [1st Dept 2002]; see also Mermelstein v Singer, 85 AD3d 440 [1st Dept 2011].) Similarly, defendants' reliance on the testimony of Lawrence Long, Tishman's project superintendent, is unavailing. Long stated that his understanding was that plaintiff fell on a twenty sixth floor deck with exposed rebar, as depicted in a photograph annexed to Asaro's accident report. (D.s' Ex. H.) However, Mr. Long stated that he did not witness the accident, and was relying on hearsay from other workers. (Long Dep. at 74.)

The picture of plaintiff lying on top of the rebar also cannot serve to raise a triable issue of fact as to whether plaintiff was injured when he tripped on rebar, rather than while descending the fly wall. Defendants do not submit any competent evidence to support their contention that plaintiff fell in the location of the picture, on the rebar. Plaintiff's foreman acknowledged that he did not know whether or not plaintiff was brought to that location. (Caseli Dep. at 30.) Moreover, plaintiff testified, without contradiction, that after the accident, he climbed with assistance to the deck. (P.'s Dep. at 65.)

Defendants also claim that plaintiff was the sole proximate cause of his accident or a recalcitrant worker, in that he chose on his own to descend the fly wall in order to reach the platform below. (D.s' Aff in Support, ¶ 35, 49.) Plaintiff claims that he was instructed by his foreman to descend the fly wall. (P.'s Aff in Support, ¶ 14.)

Defendants claim that the proper means to descend the fly wall was via the walkway, and that the foreman expected plaintiff to descend in this manner. (D.s' Aff. in Support, ¶ 14.) Defendants submit the testimony of the foreman that there was a path or walkway to the platform. (Caseli Dep. at 47.) When asked the leading question, "Did you ever give instructions to Century Max laborers to always use walkways" to get to the platform, Mr. Caseli testified,

"Yes, safety first." (Caseli Dep. at 48.) However, Mr. Caseli acknowledged that he never told plaintiff to use the walkway to get to the platform, although he stated that the walkway was the only way to get there. (Id.) Mr. Caseli's testimony as to whether he ever instructed other Century workers to descend by the walkway was equivocal. When asked if Century workers were told to use only the walkway to get to the platform, he responded, "Yes, 90 per cent, though, were always carpenters." (Id. at 50.)

In contrast, plaintiff contends that his foreman instructed him to lower two safety brackets to the floor below by climbing down the fly wall to the platform below. (P.'s Aff. in Support, ¶ 15.) Plaintiff testified that he was instructed by Mr. Caseli to "walk [the safety brackets] down to the bottom of the fly wall. I picked up the two safety brackets, and I started walking down the fly wall." (P.'s Dep. at 56.) Plaintiff further testified that there was only one way to climb down or descend the fly wall. (P.'s Dep. at 84.) He also submits the testimony of his co-worker, Andres Alvarez, that the foreman first asked him to climb down the fly wall, and he refused because it was very unsafe. Alvarez testified that the foreman then asked plaintiff to do it and plaintiff was hesitant. (Alvarez Dep. at 10.) Alvarez further testified that there was no other way plaintiff could have descended, and that there was no back staircase. (Id. at 35.) In addition, plaintiff cites the testimony of Kevin Moylan, a foreman of third party defendant Rebar (see Moylan Dep. at 8), that he had no knowledge of a back stairway or staircase utilized by workers. (Id. at 27.)

On this record, neither party eliminates triable issues of fact as to whether plaintiff knew there was an alternate means of descending to the fly wall platform, or whether plaintiff was instructed by the foreman to descend by climbing down the fly wall. Issues of credibility should not be resolved on a summary judgment motion. (S.J Capelin Assoc. v Globe Mfg. Corp., 34

NY2d 338, 341 [1974]; Shapiro v Boulevard Housing Corp., 70 AD3d 474 [1st Dept 2010].) The court accordingly holds that defendants' motion should be denied and plaintiff's cross-motion for summary judgment should also be denied.

Labor Law §§241(6), 200, and Common Law Negligence

Defendants seek summary judgment dismissing plaintiff's §§241(6), 200, and common law negligence claims. This branch of defendants' motion is granted without opposition.

Rebar's Cross-Motion

Rebar was retained by Century to install rebar on the upper floors of the premises in question. (Rebar Aff. at ¶ 21.) Rebar did not deliver, store or maintain rebar at the site, and was responsible for the material only at the time of installation. (Id.)

Rebar bases its cross-motion primarily on the claim that plaintiff's accident was not caused by its work at the job site. As held in connection with plaintiff's Labor Law §240(1) claim, defendants/third-party plaintiffs fail to raise a triable issue of fact as to whether plaintiff's accident was caused by his snagging his foot on rebar, as opposed to falling while descending the fly wall. As Rebar's work was thus not a cause of the accident, Rebar is entitled to summary judgment dismissing the third and fourth causes of action of the third-party complaint for contribution and indemnification, respectively. Rebar is also entitled to summary judgment dismissing the second cause of action for failure to procure insurance, as defendants/third-party plaintiffs acknowledge that Rebar did in fact procure the requisite insurance. (D.s' Aff. in Opp. to Rebar's cross-motion, ¶ 51.) Finally, while it appears highly unlikely that defendants/third-party plaintiffs have a valid claim against Rebar for contractual indemnification, given that

Rebar's work was not a cause of plaintiff's accident, Rebar fails to annex a copy of the contract at issue. The court therefore declines on this record to dismiss the first cause of action for contractual indemnification.

It is accordingly hereby ORDERED that the motion of defendants Hilton Resorts Corporation (Hilton) and Tishman Construction Corporation of New York (Tishman) for summary judgment is granted only to the extent of dismissing plaintiff's claims against them under Labor Law §§241(6), 200, and for common law negligence; and it is further

ORDERED that the cross-motion of plaintiff for summary judgment on his Labor Law §240(1) claim is denied; and it is further

ORDERED that the cross-motion of Rebar for summary judgment is granted to the extent of dismissing the second, third and fourth claims against it; and it is further

ORDERED that plaintiff's claims and defendants/third party plaintiff's remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
October 12, 2011

MARY FRIEDMAN, J.S.C.