

**Cu v The I. Grace Co. Commissioned Private
Residences, Inc.**

2013 NY Slip Op 30118(U)

January 23, 2013

Supreme Court, NY County

Docket Number: 105483/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

MARID CU

INDEX NO. 105483/2010

-v-

MOTION DATE _____

I. GRACE COMPANY

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN
ACCORDANCE WITH THE ACCOMPANYING DECISION/ORDER.

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

FILED

JAN 24 2013

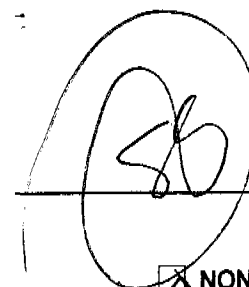
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

JAN 24 2013

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 1/23/13

 _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Cu alleges that, on February 16, 2010, he was working on the third floor, pulling cables up through the ceiling. To perform his work, Cu stood on an 8-foot wooden, A-Frame ladder that belonged to his employer, ASR Electrical. Cu claims that as he descended the ladder, he stepped down to the second rung, which fell apart and broke. At his deposition, Cu testified "I was coming off the ladder, the step broke, the ladder slipped forward and caused me to fall back." Cu commenced this action seeking to recover damages for the injuries he sustained as a result of his fall. He asserted negligence and Labor Law §§200, 240(1) and 241(6) causes of action.

Cu now moves for summary judgment on his Labor Law §240(1) claim asserted against I. Grace and Drefin. Cu argues that defendants violated §240(1) because they failed to provide proper protection to prevent Cu from harm directly flowing from the application of the force of gravity. Cu also argues that defendants failed to provide other safety devices to protect him in the event that the ladder failed.

In opposition, I. Grace argues that there is a triable issue of fact as to whether Cu was the sole proximate cause of his accident. I. Grace argues that Cu is the sole proximate cause of his accident because he tampered with the ladder. I. Grace submits an affidavit from Dr. George Kyanka ("Dr. Kyanka"), a mechanical engineer, who inspected the ladder on November 18, 2010. Dr. Kyanka states that "the ladder had a loose second step with a missing truss block and a loose truss rod without a nut or washer." According

to Dr. Kyanka, the “nut on the truss rod at the second step was manually removed at some time prior to my inspection as indicated by the condition of the end of the truss rod.”

I. Grace also submits the deposition testimony of Aaron Oeser, I. Grace’s project manager, who inspected the ladder after the accident. Oeser stated that the “way the ladder broke seemed as if it wasn’t a mechanical failure, it seemed as if it was tampered with.” He also stated that when he inspected the ladder on the day of the accident, “[t]here was one nut missing and washer, all the other ones on that side of the ladder was still tight. If that one was to fall off the rest of the side should have been loose.” Oeser also testified that he inspected the site for unsafe conditions three to four times per day.

I. Grace also argues that Cu did not fall from the ladder. I. Grace submitted an affidavit from Alvin Antonio (“Antonio”), a laborer who worked on the project with Cu. Antonio stated that he did not hear Cu fall although he was five feet from the accident. I. Grace also submits an affidavit from Luis Lorenzi Ramos (“Ramos”), another laborer who worked with Cu. Ramos stated that two or three weeks before the accident, Cu told him that “falling off a ladder would be a quick way to make money.”

In reply, Cu argues that the affidavits of Antonio and Ramos should be disregarded because I. Grace failed to disclose the identity of these two witnesses until two years after the accident. I. Grace claims that it conducted a diligent search for witnesses and found Antonio and Ramos shortly before they signed their affidavits.

Discussion

A movant seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to 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, 562 (1980). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Labor Law § 240(1) imposes absolute liability on building owners, construction contractors and their agents with regard to elevation-related risks to workers at construction sites. *See Rodriguez v. Forest City Jay St. Assocs.*, 234 A.D.2d 68, 68 (1st Dep't. 1996). The statute was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. *See Runner v. New York Stock Exchange*, 13 N.Y.3d 599, 604 (2009); *Luongo v. City of New York*, 72 A.D.3d 609, 610 (1st Dep't. 2010).

If a plaintiff makes a *prima facie* showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device. *Kosavick v. Tishman Construction Corp.*, 50 A.D.3d 287, 288 (1st Dep't 2008). The burden then

shifts to the defendant, who may defeat plaintiff's summary judgment motion only if there is a "plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 289 n. 8 (2003); *Kosavick*, 50 A.D.3d at 288.

Here, I find that Cu made a *prima facie* showing that the ladder he was using collapsed. Cu testified that one of the ladder rungs broke as he was climbing down from the ladder. However, I. Grace raised a triable issue of fact as to whether Cu tampered with the ladder, which tampering was the sole cause of the accident. I. Grace submitted the testimony of Dr. Kyanka who opined that the nut for the second rung ladder was manually removed, and the nut could not have been displaced by normal use or by Cu's alleged fall. In addition, Oeser testified that although the ladder had one missing nut and washer, all of the other nuts and washers on the same side were tight and in place, which would be inconsistent with a break on the second rung.

I. Grace's submission of Dr. Kyanka's affidavit and the deposition testimony of Oeser is sufficient to raise a triable issue of fact to defeat Cu's motion for summary judgment. However, I find that the affidavits of Antonio and Ramos are also admissible to support the motion for summary judgment. Although I. Grace failed to identify Antonio and Ramos as witnesses in response to Cu's discovery demands, I. Grace offered an excuse for failing to disclose the two witnesses and there is no evidence that this

failure was willful. *Anagnostaros v. 81st Residence Corp.*, 269 A.D.2d 150, 150 (1st Dep't 2000); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003, 1004 (2d Dep't 2009). Moreover, the record indicates that Cu had knowledge of Antonio and Ramos because they worked together at the site. *Yax*, 67 A.D.3d at 1004.

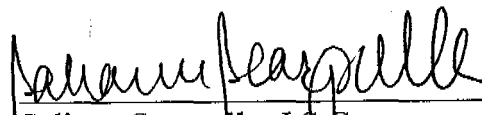
In accordance with the foregoing, it is hereby

ORDERED that plaintiff Mario Cu's motion for partial summary judgment against defendants I. Grace Commissioned Private Residences, Inc. and Drefin Investments Limited on the issue of liability based on Labor Law § 240(1) is denied.

This constitutes the decision and order of the Court.

Dated: New York, NY
January 23, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED
JAN 24 2013
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