

Galej v Ponte Gadea Madison, LLC

2013 NY Slip Op 32393(U)

October 4, 2013

Sup Ct, New York County

Docket Number: 103503/2011

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 103503/2011
GALEJ, KRZYSZTOF
vs.
PONTE GADEA MADISON
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

is decided in accordance with the annexed decision.

FILED

OCT 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/4/13

CR, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
KRZYSZTOF GALEJ,

Plaintiff,

Index No. 103503/2011

-against-

DECISION/ORDER

PONTE GADEA MADISON, LLC, DOMAIN
CONSTRUCTION OF NY LLC, M&R SCHOENBACH INC.,
CASSIDY TURLEY and ROYALE CONSTRUCTION, LLC,

Defendants.

FILED

OCT 08 2013

-----X
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	5

Plaintiff commenced this action to recover for injuries he allegedly sustained in the course of his employment. He now brings this motion for partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240(1). Defendant Domain Construction of NY, LLC ("Domain") cross-moves for summary judgment dismissing all claims and cross-claims asserted against it on the ground that it did not owe a duty to plaintiff. For the reasons set forth below, plaintiff's motion is denied and Domain's cross-motion is granted without opposition.

The relevant facts are as follows. This is an action to recover monetary damages for

personal injuries suffered by the plaintiff as a result of a construction site accident that occurred on November 4, 2010 at 366 Madison Avenue, New York, New York (the "Building"). At the time of the alleged accident, defendant Ponte Gadea Madison, LLC ("Ponte Gadea") was the owner of the Building and defendant Cassidy Turley was the manager of the Building.

Defendant Royale Construction, LLC ("Royale") was retained by the owner to manage the demolition of floors 7, 8, 10 and 11 and the build-out of floors 10 and 11 in the Building (the "Project"). When the Project first commenced, Royale retained Domain to perform the demolition work and defendant M&R Schoenbach Inc. ("Schoenbach") to serve as the general contractor. Schoenbach subsequently hired defendant Hampton Electric Corporation ("Hampton") to perform the electrical work at the Project. Plaintiff was employed by Hampton as an electrician's helper.

On November 4, 2010, plaintiff was working at the Building in furtherance of his employment with Hampton. At that time, he was instructed to pull electrical cables through metal studs on the 11th floor, which required the use of a ladder. While performing this work, plaintiff alleges that the 6 foot A-frame ladder he was standing on "slipped and [he] started falling." According to plaintiff, while he was falling he was caused to cut his right hand, which resulted in an open fracture of the index finger on his right hand. Immediately following the incident, plaintiff's supervisor from Hampton who was working at the Building, Steven Schuessler, spoke with plaintiff to inquire how the accident occurred. According to Mr. Schuessler's affidavit, "[plaintiff] stated that he was pulling wires through studdings, and while doing so, he cut his fingers. [Plaintiff] never once mentioned that he fell off a ladder, or that he injured himself as a result of falling off a ladder."

On November 5, 2010, the day after the accident, Matthew Peter, president of Hampton met with plaintiff. At that time, Mr. Peter requested that plaintiff fill out an accident report. Plaintiff indicated that he could not write due to his injury so he dictated to Mr. Peter what had happened and Mr. Peter wrote out the report. The accident report states as follows: "Standing on ladder lacing NC cable through open metal stud wall. While doing so, cut the top of right index finger, 1st knuckle, on metal stud."

On or about March 23, 2011, plaintiff brought the instant action against defendants alleging causes of action for negligence, violation of Labor Law § 200, violation of Labor Law § 240(1) and violation of Labor Law § 241(6). Plaintiff now moves for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) on the ground that the record clearly demonstrates that plaintiff's injuries were sustained as a result of defendants failing to provide plaintiff with a secure ladder to perform his duties at the work site, which is a violation of Section 240(1) as a matter of law. Domain cross-moves for summary judgment dismissing this action in its entirety as against it on the ground that it owed no duty to plaintiff and as such cannot be held liable for plaintiff's injuries. The court notes that while plaintiff's notice of motion states that he is moving for partial summary judgment against all defendants, he clarifies in his reply papers that he is actually moving for partial summary judgment against Ponte Gadea, Schoenbach and Royale only. Accordingly, this court will only address plaintiff's motion as to those defendants.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be

granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

The court first turns to plaintiff’s motion for partial summary judgment as to liability under Labor Law § 240(1). Pursuant to Labor Law §240(1),

All contractors and owners and their agents . . . who contract for but do not 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.

Labor Law § 240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). “Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation

of Labor Law § 240(1). *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dept 1998), citing *Schultze v. 585 W. 214th St. Owners Corp.*, 228 A.D.2d 381 (1st Dept 1996); *see also Dowling v. McCloskey Community Service Corp.*, 45 A.D.3d 1232 (3d Dept 2007).

In the instant action, plaintiff has established his *prima facie* right to partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) as against Ponte Gadea, Schoenbach and Royale as plaintiff has demonstrated that said defendants failed to ensure that the ladder he was using at the Building remained steady and erect. Plaintiff testified at his deposition that the ladder he was standing on, which was provided by his employer, slipped out from underneath him causing him to fall and that it was during his fall that he cut his finger. The fact that the ladder all of a sudden slipped out from under him causing him to fall is sufficient to demonstrate that defendants failed to ensure that the ladder provided to plaintiff remained steady and erect while being used, thereby constituting a violation of Labor Law § 240(1).

In response, however, defendants have raised an issue of fact precluding summary judgment by presenting evidence that contradicts plaintiff's testimony that he was injured due to the fact that he fell off of an unsecured ladder. It is well settled that where there are conflicting versions concerning how an incident allegedly occurred, this raises a triable issue of fact for jury determination precluding summary judgment. *See, e.g., Maldonado v. Townsend Ave. Enters. Ltd. Partnership*, 294 A.D.2d 207, 208 (1st Dept 2002); *see also Robinson v. Goldman Sachs Headquarters, LLC*, 95 A.D.3d 1096 (2nd Dept 2012). Here, there is conflicting evidence in the record as to whether plaintiff's injuries were the result of him falling off of a ladder or whether he simply cut his finger while standing on a ladder. Pursuant to the accident report written the day after the accident, plaintiff was "standing on ladder lacing NC Cable though [an] open Metal

stud wall” and “while doing so cut the top of [his] right index finger, 1st Knuckle on [a] metal stud.” The report makes no mention of plaintiff falling from a ladder or of a ladder sliding out from underneath him. Additionally, during his deposition, Mr. Peters testified that while plaintiff was relaying to him how the accident occurred he never once mentioned that he fell off of a ladder. Additionally, Mr. Schuessler testified that on the date of the alleged accident he spoke to plaintiff to inquire how his accident occurred and plaintiff told him he cut his finger while pulling wires through the studs, but never mentioned that a ladder fell or that he injured himself because a ladder slipped out from underneath him. Indeed, there is absolutely no other evidence that plaintiff fell off of a ladder other than plaintiff’s own testimony of the event. Thus, as there are conflicting pieces of evidence in the record as to how plaintiff sustained his injuries, a material issue of fact remains as to Ponte Gadea, Schoenbach and Royale’s liability under Labor Law § 240(1) and plaintiff’s motion for summary judgment must be denied.

Additionally, to the extent that defendants argue that Royale cannot be held liable as it was only a construction manager for the Project, the court need not address this issue on this motion as Royale has failed to cross-move for summary judgment on this ground.

The court now turns to Domain’s unopposed cross-motion for summary judgment. As an initial matter, Domain has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the causes of action alleging violation of Labor Law § 240(1) and § 241(6) insofar as asserted against it by establishing that it was neither an owner, a contractor, nor a statutory agent under those provisions. Pursuant to the explicit statutory language of Section § 240(1) and § 241(6), the duties created under these statutes only apply to “contractors and owners and their agents.” “A party is deemed to be an agent of an owner or general contractor under the

Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured.” *Medina v. R.M. Resources*, 107 A.D.3d 859 (2nd Dept 2013); *see also Kennan v. Simon Prop. Goup, Inc.*, 106 A.D.3d 586, 589 (1st Dept 2013). “Thus, unless a defendant has supervisory control and authority over the work begin done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law.” *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 864 (2005). Here, it is undisputed that Domain is neither the owner of the building, nor was it the general contractor at the work site. Additionally, there is no evidence in the record that Domain had any supervisory control or authority over plaintiff’s work. Instead, the undisputed evidence demonstrates that Domain was only a subcontractor hired to demolish floors 7 through 11 and that it had completed its work at the Building weeks before the plaintiff’s accident.

Additionally, Domain has established its *prima facie* entitlement to judgment as a matter of law dismissing plaintiff’s Labor Law § 200 and common law negligence causes of action as it has established that it did not owe plaintiff a duty of care. Section 200 of the Labor Law is a codification of the common-law duty to provide an employee with a safe place to work. *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury.’” *Id.* (quoting *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981)). Here, as the court noted above, the undisputed evidence demonstrates that Domain had no authority to control plaintiff’s work as it was merely a subcontractor who had completed its work at the Building several weeks prior to plaintiff’s accident. Accordingly, Domain did not owe plaintiff a duty of care and cannot be held liable for plaintiff’s injuries.

