

Head v Pike Co., Inc.
2013 NY Slip Op 34126(U)
April 17, 2013
Supreme Court, Tompkins County
Docket Number: 2011-0687
Judge: Robert C. Mulvey
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

AARON C. HEAD,

Plaintiff,

vs.

Index No. 2011-0687

**THE PIKE COMPANY, INC., and
ITHACA COLLEGE,**

Defendants.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

**APPEARANCES: Michael R. Cardinale, Esq.
Attorney for Plaintiff**

**Michael Rubin, Esq.
Attorney for Defendants**

DECISION & ORDER

Mulvey, Robert C., J.

On April 14, 2010, the plaintiff was seriously injured as a result of a fall from a ladder while employed at a construction site on the campus of Ithaca College. He commenced this action on July 18, 2011, seeking an award of damages against defendant Pike as the general contractor and against defendant Ithaca College as the owner of the premises. Issue was joined thereafter and the only party deposition conducted to date is that of the plaintiff in October 2012. Non-party depositions had been scheduled for February 2013 yet cancelled due to the filing of this motion. The defendants commenced a third-party action by service of a Third-Party Summons and Complaint on Charles F. Evans, Inc. on January 15, 2013.

The plaintiff seeks partial summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules on the First and Second Causes of Action under Section 240(1) of the Labor Law.

The plaintiff has alleged that he gained access to an elevated work site by use of an extension ladder positioned by other workers and secured to the structure with wires. While working at the elevated site, the ladder was either re-positioned, altered or replaced. When he attempted to descend the ladder, it collapsed or failed, causing him to fall approximately forty-five feet to the ground, sustaining multiple injuries including a leg injury resulting in amputation. He contends that these undisputed facts establish that the ladder failed to provide proper protection. He also notes that investigations by OSHA and Ithaca College concluded that the primary cause of the fall was the positioning of the ladder and its insufficient load capacity.

The defendants oppose the motion as premature and contend that issues of fact exist which preclude summary judgment.

DISCUSSION

1. General Principles

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue Napierski v. Finn 229 AD2d 869 (Third Dept., 1996), quoting Moskowitz v. Garlock 23 AD2d 943, 944 (Third Dept., 1965); it must clearly appear that no material and triable issue of fact is presented (see, Lustyik v. Manaher 226 AD2d 852 (Third Dept., 1996); Bulger v. Tri-Town Agency 148 AD2d 44 (Third Dept., 1989), appeal dismissed 75 NY2d 808 (1990); Stata v. Village of Waterford 225 AD2d 163 (Third Dept., 1996).

It is well-established that the function of the court upon a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found to exist, summary judgment must be denied **Super v. Abdelazim** 108 AD2d 1040 (Third Dept., 1985).

When making a motion for summary judgment, the initial burden is on the movant to establish a prima facie entitlement to judgment as a matter of law by the submission of competent evidence, see, **Amedure v. Standard Furniture Co.**, 125 AD2d 170 (Third Dept, 1987) Once the movant has met this initial burden, it becomes the obligation of the opponent to assemble and lay bare affirmative proof to demonstrate that the matters alleged are real and capable of being established upon a trial **Couch v. Schmidt**, 204 AD2d 951 (Third Dept., 1994).

It is fundamental that a party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact **Zolin v. Roslyn Synagogue** 154 AD2d 369 (Second Dept., 1989); **Dugan v. Sprung** 280 AD2d 736 (Third Dept., 2001).

When considering whether a triable issue exists, the evidence in the record is viewed in the light most favorable to the party opposing summary disposition (see **Torosian v. Bigsbee Vil. Homeowners Assn.**, 46 AD3d 1314 (Third Dept., 2007).

The Court finds that the plaintiff has sustained his initial burden by establishing, prima facie, that the ladder failed to provide proper protection and that its failure was the proximate cause of his injuries.

The Court must now consider whether the defendants have demonstrated that issues of fact exist and/or whether the motion is premature.

2. Defendants' Showing

The defendants cite the availability of a boom lift on the job site as proof that proper equipment should have been used by the plaintiff, which could suffice as a basis for a finding that his negligence was the sole proximate cause of the accident.

They also contend that there may be evidence that the plaintiff was a recalcitrant worker in that he disregarded his employer's instructions to use the lift and to not use other contractors' equipment.

Non-party deposition subpoenas have been served on two other employees of John

Lowery, Inc., the plaintiff's employer, to explore, inter alia, further evidentiary bases for these defenses. They have commenced a third-party action against Charles P. Evans Co., Inc. on the ground that it owned the allegedly defective ladder or was responsible for moving it prior to the accident. The defendants contend that counsel for the plaintiff had agreed to hold off on depositions of the defendants' representatives until after the appearance of the third-party defendant.

CONCLUSION

The Court finds that the defendants have demonstrated that further discovery is required to more fully develop the record. Consequently, the plaintiff's motion is hereby denied without prejudice to renew upon completion of discovery, **Stockwell v. Town of New Berlin**, 69 AD3d 1266 (Third Dept., 2010).

This shall constitute the Order of the Court. Transmittal of this Decision and Order by the Court shall not constitute notice of entry.

Signed this 17th day of April, 2013 at Ithaca, New York.

Hon. Robert
C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
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