

Singleton v Avalon Bay Communities Inc.

2014 NY Slip Op 30417(U)

February 19, 2014

Supreme Court, New York County

Docket Number: 109095/09

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Hon. RICHARD F. BRAUN

PRESENT: _____ J.S.C. _____
Justice

PART 23

Index Number : 109095/2009
SINGLETON, PAUL, et al.
vs
TURNER CONSTRUCTION, et al.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE Feb 18, 2014
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for post hoc summary judgment on liability

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that this motion is denied.

*This constitutes the decision and order of
this Court. See separate Opinion.*

FILED

FEB 21 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: New York, New York February 18, 2014 ENTERED _____ J.S.C.

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

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: IAS PART 23**

-----X
PAUL SINGLETON and ROSE SINGLETON,

Index No. 109095/09

Plaintiffs,

OPINION

-against-

AVALON BAY COMMUNITIES INC., AVALON
WP I, LLC; AVALON WP II, LLC; AVALON WP III,
LLC; AVALON WP IV, LLC; AVALON AP V, LLC;
AVALON WP VI, LLC; and AVALON BAY, LLC,

Defendants.

-----X
AVALON WP I, LLC, AVALON WP II, LLC., AVALON WP II,
LLC., AVALON WP III, LLC.,; AVALON WP IV, LLC.,
AVALON AP V, LLC., AVALON WP VI, LLC., and
AVALON BAY, LLC.,

Index No. 590075/10

Third-Party Plaintiff,

-against-

DEL SAVIO MASONRY,

FILED

Third-Party Defendant.

FEB 21 2004

-----X
RICHARD F. BRAUN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

This is a personal injury action arising from a fall from a scaffold, including causes of action under Labor Law §§ 200, 240(1), and 241(6). Plaintiff moves for partial summary judgment on liability under Labor Law § 240(1) based upon the collapse of the scaffold upon which plaintiff was working. Defendants and the third-party defendant contend that issues of fact exist as to how the unwitnessed accident occurred.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto

as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; see *Vega v Restani Constr. Corp.*, 18 NY3d at 503).

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992][citations omitted]). This statutory duty is not diminished by contributory fault (see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), and is imposed regardless of whether the owner, general contractor, or statutory agent with the authority to control, actually exercises supervision or control over the plaintiff's work (see *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]; *Campanella v St. Luke's Roosevelt Hosp.*, 247 AD2d 294, 295-296 [1st Dept 1998]). Summary judgment is properly granted on the issue of liability under Labor Law § 240 (1) when the plaintiff demonstrates that the statute was violated and the violation was a proximate cause of his injuries (*Koumianos v State of New York*, 141 AD2d 189, 191 [3rd Dept 1988]). As the Court of Appeals explained in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 289 n 8 [2003]):

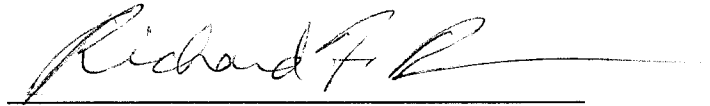
In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have (ever since *Steward v. Ferguson*, 164 N.Y. at 553, *supra*) continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection.

While the fact that an accident is unwitnessed does not bar summary judgment where there is no “substantiated challenge to [plaintiff’s] credibility” (*Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005]; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]), defendants have come forward with evidence contradicting plaintiff’s version of the events sufficient to raise issues of credibility warranting denial of summary judgment on liability (*see Vargas v City of New York*, 59 AD3d 261 [1st Dept 2009]; *Antunes v 950 Park Ave. Corp.*, 149 AD2d 332, 333 [1st Dept 1989]). Despite plaintiff claiming that the scaffold had been raised so that he fell from a height of approximately eight feet striking a dumpster, he was knocked unconscious, materials and debris fell on top of him, and he came to with workers standing over him, no one confirmed that account. Rather, his foreman Fernando reported that he saw plaintiff walking to the “block” catching his breath after the fall. In addition, there is evidence opposing the motion that the scaffold on which plaintiff had been working was only three feet high, and that there was no debris on the ground. Finally, it is questionable that plaintiff could have fallen to the dumpster where there was deposition testimony that the dumpster was located as much as 23 feet from where his scaffold was located. Further, third-party defendant has come forward with evidence raising an issue of fact as to whether the alleged Labor Law § 240(1) violation was a proximate cause of plaintiff’s injuries (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Cordeiro v Shalco Invs.*, 297 AD2d 486, 488 [1st Dept 2002]; *Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69-70 [1st Dept 1996]; *Knight v Conopco, Inc.*, 216 AD2d 893 [4th Dept 1995]).*

* Third-party defendant failed, however, to come forward with sufficient evidence in opposing the motion that plaintiff was the sole proximate cause of his injuries because he was directed to use a safety device that was readily available but that plaintiff failed to do so for no good reason (*see Peters v New Sch.*, 102 AD3d 548 [1st Dept 2013]; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004] [where the Court held that there were questions of fact as to plaintiff being the sole proximate cause of his accident, and denied his motion for summary judgment]).

Accordingly, by separate decision and order, dated February 18, 2014, plaintiff's motion for partial summary judgment on liability was denied. This constitutes the opinion of the court.

Dated: New York, New York
February 19, 2014



RICHARD F. BRAUN, J.S.C.

FILED

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