Garcia v East Side 11th & 28th LLC

2014 NY Slip Op 30540(U)

January 24, 2014

Supreme Court, Bronx County

Docket Number: 307901/2011

Judge: Lucindo Suarez

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[* 1]
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
---X

ANDRES GARCIA,

Plaintiff,

- against -

EAST SIDE 11TH & 28TH LLC, STOKES DEMOLITION CORP., BILLY CONTRACTORS INC., EXPEDITE-DEM INC., LMW ENGINEERING GROUP LLC,

Defendants.

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DECISION AND ORDER

Index No. 307901/2011

EAST SIDE 11TH & 28TH LLC,

Third-Party Plaintiff,

- against -

ABSOLUT SERVICES, INC. and GAETA INTERIOR DEMOLITION, INC.,

Third-Party Defendants.

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Third-Party Index No. 83812/2012

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated June 11, 2013 and the affirmation and exhibits submitted in support thereof; the affirmation in opposition of defendant East Side 11th & 28th LLC dated September 16, 2013; plaintiff's affirmation in reply dated September 26, 2013 and the affidavit submitted therewith; and due deliberation; the court finds:

Plaintiff moves for partial summary judgment on his causes of action under Labor Law §§ 240(1) and 241(6) on the issue of the liability of defendant East Side 11th & 28th LLC ("East Side"), the owner of the premises upon which plaintiff was working when a scaffold is alleged to have collapsed. The motion is supported by plaintiff's deposition testimony.

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Labor Law § 240(1)

Plaintiff testified that he and several co-workers were dismantling structural steel from a building at the time of the accident. After one worker cut a beam, plaintiff and the others placed the beam onto a wooden support they had constructed on a twelve-foot-high scaffold. As soon as they placed the beam onto the support, "everything" collapsed, and plaintiff fell to the ground. Plaintiff testified that although there was nothing wrong with the scaffold and it was no different from any other scaffold he had used, no harnesses or tie-offs were available or provided. This was sufficient to establish plaintiff's *prima facie* burden that defendant violated Labor Law § 240 (1) and that such violation proximately caused plaintiff's injuries. *See Alvarez v. 1407 Broadway Real Estate LLC*, 80 A.D.3d 524, 915 N.Y.S.2d 263 (1st Dep't 2011); *Avila v. Ashton Mgt. Co.*, 24 A.D.3d 273, 807 N.Y.S.2d 24 (1st Dep't 2005).

In opposition, defendant argued that there was insufficient proof that the scaffold actually collapsed; however, plaintiff testified that a photograph shown to him during his deposition accurately depicted the scaffold as it appeared after the accident. The photograph shows a scaffold, otherwise intact, which has tipped over, which is a failing sufficient to support a cause of action under Labor Law § 240(1). *See e.g. Alvarez, supra*; *Avila, supra*; *Singh v. Hanover Estates, LLC*, 276 A.D.2d 394, 714 N.Y.S.2d 713 (1st Dep't 2000).

Defendant next points to a lack of corroborating evidence. Plaintiff's quantum of evidence was sufficient to establish his *prima facie* burden, *see e.g. Alvarez, supra*, and the fact that an accident may be unwitnessed does not, on its own, preclude summary judgment in plaintiff's favor, *see Prekulaj v. Terano Realty*, 235 A.D.2d 201, 652 N.Y.S.2d 10 (1st Dep't 1997). Defendant presented no admissible proof of a possible alternative explanation for plaintiff's fall. Defendant claims that an issue of fact exists as to whether plaintiff's fall was occasioned by his being propelled

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off the scaffold by his own momentum when the beam dropped, but there was no indication that the beam was dropped.

Defendant further argues that there is "ample" evidence that plaintiff was aware of the availability of safety devices and was a recalcitrant worker for failing to use them. Contrary to defendant's reading of plaintiff's deposition testimony, what plaintiff testified to was that his employer had harnesses in its office but that the workers did not have access to the office and the employer did not maintain an office at this particular site. Plaintiff further testified twice that there were no harnesses available at this site.

Defendant finally argues that the motion is premature in that discovery, including depositions, remains outstanding, without submitting any evidence in admissible form to create an issue of fact with respect to plaintiff's entitlement to summary judgment. *See Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); *see also A & E Stores, Inc. v. U.S. Team, Inc.*, 63 A.D.3d 486, 486-87, 880 N.Y.S.2d 634, 635 (1st Dep't 2009) ("speculation that useful information may be learned during discovery does not constitute grounds for denying the motion").

Labor Law § 241(6)

"Section 241(6) imposes a non-delegable duty on premises owners and contractors at construction sites to provide reasonable and adequate safety to workers. To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 146, 950 N.Y.S.2d 35, 41 (1st Dep't 2012) (citations omitted). "Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to

prevent or cure must also be irrelevant to the imposition of Labor Law § 241(6) liability." *Rizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1072-73, 670 N.Y.S.2d 816, 820-21 (1998). However, the Court of Appeals "has consistently rejected the notion that a violation of section 241(6) results in absolute liability irrespective of the absence of some negligent act which caused the injury." *Rizzuto*, 91 N.Y.2d at 349-50, 693 N.E.2d at 1071, 670 N.Y.S.2d at 819.

Plaintiff asserts a violation of 12 NYCRR 23-3.3(h) ("Demolition of structural steel by hand"), which states that "[e]very structural member which is being dismembered shall not be under any stress other than its own weight and such member shall be chained or lashed in place to prevent its uncontrolled swinging or dropping." Plaintiff argues that the beam was not chained or lashed to prevent swinging or dropping. While the section is sufficiently specific to support a cause of action under Labor Law 241(6), *see Sweeney v. Yonkers Contr. Co.*, 269 A.D.2d 590, 703 N.Y.S.2d 517 (2d Dep't 2000), plaintiff has not established *prima facie* that it applies. Plaintiff testified that he and his coworkers had already placed the beam on the wooden support they'd constructed on the scaffold before the accident occurred, and there is no testimony that they had any difficulty doing so. There is insufficient evidence that the event involved uncontrolled swinging or dropping, *see Kaminski v. 53rd Street & Madison Tower Dev.*, 2009 N.Y. Misc. LEXIS 3766 (Sup Ct N.Y. County Feb. 17, 2009), *mod on other grounds*, 70 A.D.3d 530, 895 N.Y.S.2d 76 (1st Dep't 2010), or was occasioned by the failure to secure the beam.

Plaintiff failed to meet his *prima facie* burden on this facet of the motion and the burden did not shift to defendant to raise a triable issue of material fact. His expert's affidavit, submitted, without explanation, only in reply, is disregarded. *See Henry v. Peguero*, 72 A.D.3d 600, 900 N.Y.S.2d 49 (1st Dep't 2010), *appeal dismissed*, 15 N.Y.3d 820, 934 N.E.2d 886, 908 N.Y.S.2d 152 (2010); *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 582 N.Y.S.2d 712 (1st Dep't 1992).

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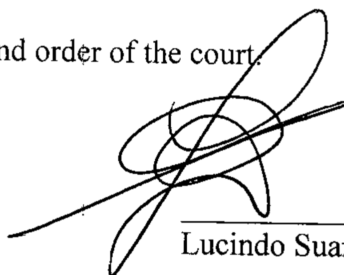
Accordingly, it is

ORDERED, that the application of plaintiff for partial summary judgment on his causes of action under Labor Law §§ 240(1) and 241(6) on the issue of the liability of defendant East Side 11th and 28th LLC is granted to the extent of granting the motion as to plaintiff's cause of action under Labor Law § 240(1); and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendant East Side 11th and 28th LLC on the issue of liability on plaintiff's cause of action under Labor Law § 240(1).

This constitutes the decision and order of the court.

Dated: January 24, 2014



Lucindo Suarez, J.S.C.