Munoz v City of New York
2014 NY Slip Op 31253(U)
May 12, 2014
Supreme Court, New York County
Docket Number: 108634/2007
Judge: Cynthia S. Kern
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[* 1]

SCANNED ON 5/15/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ______________________ PART ______

Justice

Index Number : 108634/2007
MUNOZ, JORGE
vs
CITY OF NEW YORK
Sequence Number : 011
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.

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

FILED
MAY 15 2014
COUNTY CLERK'S OFFICE
NEW YORK

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Dated: 5/12/14

[signature], 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

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

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JORGE MUNOZ and JONATHAN SALAZAR,

Plaintiffs,

Index No. 108634/2007

-against-

DECISION/ORDER

THE CITY OF NEW YORK, BATTERY PARK CITY AUTHORITY, SOUTH COVE II ASSOCIATES, REGATTA CONDOMINIUM and BOARD OF MANAGERS OF REGATA CONDOMINIUM,

Defendants,

-and-

ARK GENERAL CONSTRUCTION, INC.

Additional Defendant on Cross-Claims.

---x

FILED

MAY 15 2014

COUNTY CLERK'S OFFICE
NEW YORK

THE BOARD OF MANAGERS OF REGATTA CONDOMINIUM and BATTERY PARK CITY AUTHORITY,

Third-Party Plaintiffs,

-against-

ADMIRAL INDEMNITY COMPANY and CLERMONT SPECIALTY MANAGERS, LTD.,

Third-Party Defendants.

---x

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

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

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Affirmations in Opposition...	2
Reply Affidavits..	3
Exhibits..	4

Plaintiffs commenced the instant action to recover damages stemming from injuries they allegedly sustained while performing work on top of a scaffold. Plaintiffs now move for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) against defendants Battery Park City Authority ("Battery Park") and Regatta Condominium ("Regatta"). Defendant Ark General Construction, Inc. ("Ark") cross-moves for an Order pursuant to CPLR § 3212 dismissing all of plaintiffs' claims and causes of actions and all cross-claims and third-party claims asserted against it for contribution and indemnification. For the reasons set forth below, plaintiffs' motion is granted and Ark's cross-motion is denied.

The relevant facts are as follows. Defendants Battery Park and Regatta own the land and building located at 21 South End Avenue, New York, NY (the "building"). On or about July 7, 2006, plaintiffs Jorge Munoz ("Munoz") and Jonathan Salazar ("Salazar") were performing work at the building on behalf of Ark, a painting contractor, when they were caused to sustain injuries. Specifically, on that date, plaintiffs were standing on top of a movable scaffold painting an overhang when the scaffold toppled over causing them to fall approximately twenty feet to the ground (the "accident"). The scaffold herein at issue was approximately twenty feet high and was on wheels to allow plaintiffs to move it from one location to the next to complete their job. The scaffold also had outriggers on it, which allegedly provided stability to the scaffold when they are extended out. In the picture of the scaffold taken after plaintiffs' accident, the outriggers are shown folded in.

According to Salazar's testimony, when he and Munoz started using their paint rollers, the scaffold started "weaving side-to-side, side-to-side" and then eventually kept going and

toppled over. Munoz collaborated this version of how the accident occurred during his deposition. However, Loraine Doyle, who appeared for a deposition on behalf of Regatta, testified that she was told by her co-worker Anna Seddio that plaintiffs' co-worker had been pushing the scaffold with plaintiffs still on top when the scaffold's wheel got caught in a tarp causing it to fall over. Doyle was not present at the time of the accident but was told this information when she arrived at the building shortly after the accident.

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 plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim. 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 painting 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). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006); *see also Alvarez v. 1407 Broadway Real Estate LLC*, 80 A.D.3d 524 (1st Dept 2011).

In the instant action, plaintiffs have established their prima facie right to summary judgment on the issue of liability on their Labor Law § 240(1) claim against Battery Park and Regatta as they have shown that their injuries occurred due to defendants' failure to provide an adequate safety device to prevent them from falling twenty feet to the ground in violation of Labor Law § 240(1). As an initial matter, plaintiffs' injuries clearly occurred due to a gravity-related hazard as their accident flowed directly from the application of the force of gravity onto plaintiffs when the scaffold they were working on tipped over and fell. Further, the fact that the scaffold on which they were working toppled over is prima facie proof that there was a failure to provide adequate safety devices to protect plaintiffs from such a fall pursuant to Labor Law § 240(1).

In response, Battery Park and Regatta have failed to rase an issue of fact sufficient to defeat plaintiffs' motion for partial summary judgment. As an initial matter, Battery Park and

[* 6]

Regatta's contention that a material issue of facts exists as to whether the plaintiffs were the sole proximate cause of their injuries as they were "recalcitrant workers" is without merit. It is well settled that the "recalcitrant worker" defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer." *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920 (1993). "[A]n instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device.'" *Id.* Here, Battery Park and Regatta have failed to present the court with any evidence that plaintiffs refused to use a safety device that was provided by them or Ark. Instead, Battery Park and Regatta rely solely on the photograph of the scaffold after it had fallen showing that the outriggers on the scaffold were folded in to support their position. However, such evidence is insufficient to support a recalcitrant worker defense. As an initial matter, the recalcitrant worker defense is inapplicable for such act as the instruction to extend the outriggers to help stabilize the outrigger is an instruction to not engage in unsafe practices and is not a "safety device." Moreover, while the photograph does show that the outriggers were folded in after the scaffold fell, there is no evidence that the outriggers were not extended when the accident occurred. Indeed, the outriggers could have folded in during the course of the accident when the scaffold fell and any finding to the contrary would be based on pure speculation. Moreover, Battery Park and Regatta have failed to put forth any proof that had the outriggers been extended the scaffold would not have fallen - i.e. that the non-extended outriggers was the sole cause of the accident.

To the extent Battery Park and Regatta contend that a material issue of fact exists as to whether plaintiffs were the sole proximate cause of their injuries as Salazar testified that he and Munoz were causing the scaffold to rock back and forth for approximately five to ten minutes before it fell, such contention is without merit. While defendants try to characterize plaintiffs'

actions as "purposeful rocking," the deposition testimony of both plaintiffs makes clear that the rocking was solely caused by using their paint rollers in furtherance of the job they were hired to do. Thus, such fact is insufficient to raise a material issue of fact as to whether plaintiffs were the sole proximate cause of their injuries as they were merely performing their job and Battery Park and Regatta, as owners, were required to provide adequate safety devices to protect them from falling when performing said work. Clearly, the fact that the scaffold swayed back and forth as they were performing their job and eventually fell demonstrates that the scaffold provided did not provide plaintiffs proper protection as required under Labor Law § 240(1).

Additionally, to the extent that Battery Park and Regatta contend that Doyle's deposition testimony raises an issue of fact as to how the accident occurred requiring a trial, such contention is unavailing to defeat summary judgment as Doyle's testimony is impermissible hearsay. The First Department has made clear that while hearsay evidence may be utilized in opposition to a motion for summary judgment, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition is predicated. *See Sumitomo Mitsui Banking Corp. v. Credit Suisse*, 89 A.D.3d 561 (1st Dept 2011); *Arnold v. New York City Hos. Auth.*, 296 A.D.2d 355, 356 (1st Dept 2002). Here, Doyle's hearsay testimony regarding how the accident occurred is the only proof submitted in connection with Battery Park and Regatta's claim that the scaffold was being rolled by a co-worker from one location to another when it tipped over. Thus, it is insufficient to defeat summary judgment.

The court now turns to Ark's cross-motion for summary judgment dismissing all of plaintiffs' claims and causes of actions and all cross-claims and third-party claims as against it. As an initial matter, the portion of Ark's motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim is denied. Ark's sole argument in support of its motion is that

summary judgment should be granted as plaintiffs cannot establish what safety device defendants failed to provide that caused their accident. However, such contention is without merit as it misunderstands plaintiffs' theory of liability in the present action and the broad protection of Labor Law § 240(1). As stated above, pursuant to Labor Law § 240(1), owners have a non-delegable duty not only to provide safety devices but safety devices that provide "proper protection" against gravity-related hazardous. Thus, merely providing a safety device does not satisfy an owner's obligation when that safety device fails to properly prevent plaintiff from falling. Here, plaintiffs do not assert that no safety device was provided but that the device provided was inadequate as the scaffold failed to remain steady and erect while being used and properly protect them from falling. Additionally, Ark's reliance on *Basmas v. J.B.J Energy Corp.*, 232 A.D.2d 594 (2nd Dept 1996); *Beesimer v. Albany Ave./Route 9 Realty Inc.*, 216 A.D.2d 853 (3rd Dept 1995), to support its motion for summary judgment is misplaced as said cases are inapposite to the instant action. In those cases, unlike here, there was no evidence that the scaffold from which the injured plaintiff fell moved, collapsed or otherwise failed to perform its function of supporting the worker and his materials.

Finally, the remainder of Ark's motion seeking summary judgment dismissing the rest of plaintiffs' claims and all cross-claims and third-party claims asserted against it is denied. While Ark's notice of cross-motion requests an order dismissing all of the plaintiffs' claims and causes of action and all cross-claims and third-party claims asserted against it, its affirmation in support fails to set forth any arguments to support a grant of said relief. Indeed, only the merits of plaintiffs' Labor Law § 240(1) claim is addressed in Ark's motion papers. Thus, Ark has clearly failed to make out its prima facie entitlement to judgment as a matter of law dismissing the remainder of plaintiffs' claims and all cross-claims and third-party claims asserted against it at

this time.

Based on the foregoing, plaintiffs' motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) against Battery Park and Regatta is granted and Ark's cross-motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 5/12/14 Enter: ______________________
J.S.C.

FILED
MAY 15 2014
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