

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

JAMIE PETERSON.

Plaintiff,

-against-

PARK VIEW FIFTH AVENUE ASSOCIATES LLC and BOVIS LEND LEASE LMB,. INC.,

Defendant(s).

Index No. 308438/2009

DECISION AND ORDER

Hon. Sharon A. M. Aarons:

Plaintiff moves to renew a prior motion, and on renewal, for summary judgment pursuant to CPLR 3212 on the issue of liability under Labor Law 240(10, (3), and for an assessment of damages. Defendants PARK VIEW FIFTH AVENUE ASSOCIATES LLC and BOVIS LEND LEASE LMB,. INC. (BOVIS) submit written opposition. The motion is granted.

In this personal injury Labor Law action, plaintiff seeks damages for an accident which occurred on April 27, 2009, during construction at 1280 Fifth Avenue in New York County. Plaintiff alleges that while he and another worker were removing plywood, the scaffold and planking on which he was standing collapsed, causing him to fall some 5 to 6 feet to the ground Plaintiff previously moved for the same relief, but inadvertently failed to annex the deposition transcript of the plaintiff's examination before trial. In an order dated March 27, 2013, this Court denied the prior motion with leave to renew.

In support of the motion, plaintiff submits the papers submitted on the prior motion; the pleadings and bill of particulars; the sworn, certified deposition testimony of the plaintiff; the affidavit of Howard Washington sworn to August 23, 2012; photographs of the accident site; accident reports; the unsworn, uncertified deposition testimony of Anthony Corso on behalf of defendant Bovis.[1] The affidavit of

[1]The deposition transcript is unsworn and uncertified. However, no party has challenged the accuracy of the transcripts, nor challenged the failure to submit the certification. Under these circumstances these deficiencies are deemed waived by the parties. (*Rosenblatt v. St. George Health*

Howard Washington sworn to August 23, 2012, recites that he was working on a separate part of the scaffold 7 or 8 feet from the plaintiff, and that he and the plaintiff were provided with safety harnesses, by that there was no place to "tie off" the harnesses. There were no safety railings on the scaffold. The scaffold collapsed, and the plaintiff fell approximately 6 feet to the ground. Plaintiff's deposition testimony recites that the scaffold was at a heigh of 9 feet, that there was no place to attach the supplied safety harness, and that plaintiff fell when the scaffold suddenly collapsed. The plaintiff did not indicate in his deposition that safety railings were missing.

The deposition testimony of defendants' witness Mr. Corso indicates that he was the site safety manager employed by BOVIS, who prepared a written report of the incident, which states that plaintiff "slipped" off of the scaffold.[2] He was not present at the site on the date of plaintiff's accident. He learned of the happening of the accident from co-worker Paul Birnbaum, also a BOVIS employee, so that he could create a written report. He had no personal knowledge of the facts in the report, having received all of his information verbally from Paul Birnbaum, employees of Pinnacle Industries, and from Howard Washington. However, Mr. Corso specifically recalled speaking directly with Howard Washington and taking a statement from him, which he incorporated into the accident report.

In opposition, defendants submit no evidence, but maintain that issues of credibility warrant denying the motion. Defendants maintain that the version of the accident now offered by plaintiff and his co-worker Howard Washington differs from earlier accounts that the plaintiff "slipped off" the

---

& Racquetball Assoc., LLC, 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 [2d Dept. 2014] [failure to submit to the Supreme Court a certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect]; *Gomez v. Shop-Rite of New Greenway*, 110 A.D.3d 483, 973 N.Y.S.2d 65 [1st Dept. 2013] [appropriate to rely on unsigned, certified deposition transcript where transcript was not challenged as inaccurate]).

[2]The written report states at one point, "As per Pinnacle Industries report of first aid case, employee was stripping plywood in the basement and slipped off the scaffold/shoring and injured his right ankle/foot. Injured employees partner Howard Washington also stated that Mr. Peterson ...slipped off and broke his ankle."

scaffold.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404.)

Labor Law § 240 (1) applies in the context of the "special hazards" against which the statute is designed to protect, namely, "the exceptionally dangerous conditions posed by elevation differentials at work sites" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491, 657 NE2d 1318, 634 NYS2d 35 [1995]). However, not every gravity-related injury is within the ambit of Labor Law § 240 (1) (see *Carey v. Five Bros., Inc.*, 106 A.D.3d 938, 966 N.Y.S.2d 153 [2d Dept. 2013] [fall into open manhole not within Labor Law 240 (1)]; *Coleman v Crumb Rubber Mfrs.*, 92 AD3d 1128, 1128-1129, 940 NYS2d 170 [2012]; *Meslin v New York Post*, 30 AD3d 309, 310, 817 NYS2d 279 [2006].)

It has been held that when differing versions of an accident each support a finding that Labor Law 240(1) was violated, summary judgment may be granted in favor of the plaintiff. "A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff mis-stepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident." (*Vergara v. SS 133 W. 21, LLC*, 21 A.D.3d 279, 800 N.Y.S.2d 134 [1st Dept. 2005].) Similarly, it has been held that, "Appellants' argument that plaintiff and his foreman's conflicting versions of the accident preclude summary judgment on the issue of liability under section 240 (1) is unavailing where, as here, the statute was violated under either version of the accident." (*Romanczuk v. Metropolitan Ins. & Annuity Co.*, 72

A.D.3d 592, 899 N.Y.S.2d 228 [1st Dept 2010]; see also, *Dias v. City of New York*, 110 A.D.3d 577, 973 N.Y.S.2d 210 [1st Dept. 2013] [§ 240 (1) was violated under either version of the accident].)

Here, both the plaintiff and his co-worker Howard Washington asserted that the scaffold collapsed, and both workers asserted that there was no location to attach a harness. In addition, the plaintiff's co-worker asserted that the scaffold lacked hand rails. The defendants have not refuted any of these contentions, not produced any evidence to the contrary. Therefore, whether the plaintiff "slipped off," or the scaffold collapsed, the defendants failed to provide appropriate sdafety devices to prevent the fall.

Accordingly, the motion is granted. For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion is granted with regard to liability only against defendants PARK VIEW FIFTH AVENUE ASSOCIATES LLC and BOVIS LEND LEASE LMB,. INC. under Labor Law 240(1); and it is further,

ORDERED that an immediate trial of the aforesaid issues of fact including damages shall be had before the court; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of Motion Support, and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: September 16, 2014

SHARON A. M. AARONS. J.S.C.