

Reyes v Ortiz

2015 NY Slip Op 32179(U)

October 1, 2015

Supreme Court, Bronx County

Docket Number: 310938/2011

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

CARLOS HERRERA REYES,

INDEX NUMBER: 310938/2011

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

**TERESA ORTIZ, JASON ORTIZ, TERESA ORTIZ
AND JASON ORTIZ AS JOINT TENANTS WITH
RIGHTS OF SURVIVORSHIP, BH&B
CONSTRUCTION INC. AND AL-ARSH
CONSTRUCTION CORP.,**

Defendants.

**TERESA ORTIZ, JASON ORTIZ, TERESA ORTIZ
AND JASON ORTIZ AS JOINT TENANTS WITH
RIGHTS OF SURVIVORSHIP,**

Third-Party Plaintiffs,

-against-

**BH&B CONSTRUCTION INC. AND AL-ARSH
CONSTRUCTION CORP.,**

Third-Party Defendants.

**TERESA ORTIZ, JASON ORTIZ, TERESA ORTIZ
AND JASON ORTIZ AS JOINT TENANTS WITH
RIGHTS OF SURVIVORSHIP,**

Second Third-Party Plaintiffs,

-against-

MANU GENERAL CONSTRUCTION, INC.,

Second Third-Party Defendants.

The following papers numbered 1 to 3,

Read on this Plaintiff's Motion for Summary Judgment

On Calendar of 5/4/15

Notice of Motion-Exhibits, Affirmation _____ 1

Affirmation in Opposition _____ 2

Reply Affirmation _____ 3

Upon the foregoing papers, plaintiff's motion for summary judgment is granted for the reasons set forth herein.

The within action involves personal injury claims asserted by plaintiff as a result of an accident on November 21, 2011 when he was allegedly caused to fall from a single, unsecured plank that moved while in the course of facade restoration of a 3-family dwelling located at 674 Union Avenue, Bronx, New York. Plaintiff claims that he was directed by his foreman to work on the second floor level of the scaffold and use it as an elevated work platform. Plaintiff further claims that the scaffold had only one plank at that location and it was unsecured against movement. Plaintiff alleges that he was caused to fall when the plank moved and he fell down onto the sidewalk bridge, more than seven feet below. The accident happened while in the course of his employment with second third-party Manu General Construction, Inc. (hereinafter "Manu"). Manu was a subcontractor to defendant/third-party defendant Al-Arsh Construction Corp. (hereinafter "Al-Arsh"). The project involved major construction, pointing, facade restoration, alteration and repair work.

Plaintiff testified at his deposition that the accident occurred while he was in the process of passing a bucket full of bricks up to a co-worker that was replacing bricks on the next upper level of the scaffold on the front facade of the building. As plaintiff was performing this work, the bricks started to fall down onto him. When that occurred, the plank moved and caused plaintiff to fall down through an unprotected opening in the scaffold. Prior to his accident, plaintiff reached the second floor of the scaffold by climbing a ladder that was part of the scaffold. Plaintiff testified that he was wearing a safety helmet and boots, but was not provided with any safety devices to prevent or break his fall. There were no guardrails or safety railings around the

unsecured plank and plaintiff was not provided with a safety harness, lifeline or horizontal safety netting. Plaintiff was directed to go on the scaffold by his boss, Bitu. The scaffold was already set up when plaintiff arrived at the job site. The day of the accident was his first day at this work site.

The Deed to the property shows that the owners of the property were defendants Teresa Ortiz and Jason Ortiz (hereinafter "Ortiz"), as Joint Tenants with Right of Survivorship. Ortiz admitted at his deposition he and his mother were the owners of the property. He described the premises as a three-family brick building. He lives there as well as two tenants. Defendant Ortiz testified that there was a construction project on the building on the date of plaintiff's accident. The workers that he observed were either taking off brick or putting in the new brick. He hired Al-Arsh as the general contractor for the work. Ortiz learned after plaintiff's accident that Al-Arsh had hired Manu as a subcontractor. Ortiz did not see any of the workers wearing safety harnesses.

Plaintiffs move for summary judgment on their Labor Law §240(1) and §241(6) claims arguing that he was not provided with proper protection sufficient to prevent his fall from the scaffold. Defendant opposes the motion arguing that there are issues of fact as to whether Mr. Jabbie was the sole proximate cause of his accident.

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 (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 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). 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, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to

establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: “[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... 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.” Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York, 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y.2d at 317. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Id.

Plaintiff has adduced evidence that he was performing work covered by §240(1) of the Labor Law and that he is a member of the protected class contemplated by the statute. Plaintiff has further submitted evidence that he fell from an elevated scaffold while performing his work. Moreover, he has submitted evidence in admissible form that the scaffold he was working on was unstable, that had only one plank and was unsecured against movement and that he was not provided with the necessary safety equipment or safeguards. See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985) (“Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker ‘proper protection’, absolute liability is

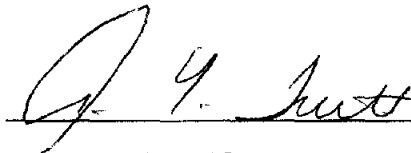
'unavoidable' under §240(1).") Additionally, he has submitted evidence that the hazardous hole on the floor and the failure to provide adequate safety measures were the proximate cause of his injury. Defendants fail to offer any proof to the contrary. Defendant's submission of an uncertified letter purporting to allege that "Mr. Reyes tripped his foot (sic)" is not considered by the Court as it is not in admissible form. Regarding defendant's contention about the photographs submitted in support of plaintiff's motion, it should be noted such argument is moot as this Court did not consider the photographs in reaching this decision. Defendant's contention that there are no known witnesses to plaintiff's accident is also without any merit. The fact that there were no other witnesses to plaintiff's accident does not alter this result. Verdon v. Port Authority of New York and New Jersey, 977 N.Y.S.2d 4 (1st Dept. 2013); Marrero v. 2075 Holding Co. LLC, 964 N.Y.S.2d 144 (1st Dept. 2013); Noble v. 260-61 Madison Avenue, 954 N.Y.S.2d 918 (1st Dept. 2012); Gambino v. William M. Crow Construction Co., 655 N.Y.S.2d 537 (1st Dept. 1997); Casabianca v. Port Authority of New York and New Jersey, 655 N.Y.S.2d 2 (1st Dept. 1997); Klein v. City of New York, 635 N.Y.S.2d 634 (1st Dept. 1995). Finally, defendants' contention that the deposition transcript submitted by plaintiff in support of his motion is inadmissible because it is unsigned is without merit. See, Franco v. Rolling Frito-Lay Sales, Ltd., 962 N.Y.S.2d 54 (1st Dept. 2013) (Plaintiff's unsigned deposition transcript was admissible where the transcript was certified by the reporter and plaintiff did not challenge its accuracy). In the instant matter, plaintiff's deposition transcript is certified by the court reporter who took the sworn testimony.

Having granted plaintiff's motion based upon Labor Law 240(1), the Court declines to consider plaintiff's argument for summary judgment on his Labor Law §241(6) cause of action as the arguments are academic. See, Fanning v. Rockefeller University, 964 N.Y.S.2d 525 (1st Dept. 2013); Carchipulla v. 6661 Broadway Partners, LLC, 945 N.Y.S.2d 4 (1st Dept. 2012); Torino v. KLM Construction Co. Inc., 257 A.D.2d 541 (1st Dept. 1999).

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) is granted.

This constitutes the decision and Order of this Court.

Dated: 10/1/15



 Hon. Alison Y. Tuitt