Saffioti v Trinity Bldg. & Constr. Mgt. Corp.
2015 NY Slip Op 32348(U)
December 14, 2015
Supreme Court, New York County
Docket Number: 158423/13
Judge: Kelly A. O'Neill Levy
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JOHN SAFFIOTI,

Plaintiff,

-against-

TRINITY BUILDING AND CONSTRUCTION MANAGEMENT CORP., THE CENTER BAR RESTAURANT and THE RELATED COMPANIES,

Defendants.

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Index No. 158423/13

Motion Seq. # 002

DECISION & ORDER

HON. KELLY O'NEILL LEVY, J.:

Plaintiff seeks summary judgment on the issue of liability pursuant to Labor Law 240(1) (Scaffold Law) for injuries he allegedly sustained while working as a carpenter at the Time Warner Center in Manhattan. The defendants oppose this application and cross-move to dismiss the complaint for failure to comply with discovery demands, preclude plaintiff from offering evidence concerning the alleged injuries and special damages claim, or compel responses to certain outstanding discovery.[1] By so-ordered stipulation following a conference on the motions (Singh, J.), defendants were to advise the court as to the efforts made to subpoena non-party eye witness Roger Chandler and plaintiff was to appear for further deposition. Following Justice Singh's transfer to the Commercial Division, this matter was transferred to this court. After several attempts to resolve the case, the motions were marked submitted.

Discussion

Issues of fact preclude the grant of summary judgment here. The plaintiff contends that he was required to carry wall segments up four flights of stationary escalators because the freight elevator was not operating at the time. He claims that he and his co-worker were each carrying

[1] The parties have resolved this portion of the application.

one end of a wall segment which weighed approximately 100 pounds. He was lifting the back end and his co-worker was carrying the front. Plaintiff states that his co-worker pulled the wall quickly, causing him to shift his grip, and ultimately the wall slipped over his head and he fell backwards causing the injury. The plaintiff argues that the absence of a safety device was the proximate cause of the injury and a violation of the scaffold law.

The defendants argue that summary judgment must be denied as all requested documents have not been produced. Additionally, defendants argue that the plaintiff has failed to submit documents in admissible form in that two deposition transcripts are unsigned and uncertified. Further, defendants claim that issues of fact as to how and when the accident occurred preclude summary judgment. Specifically, the defendants argue that the documents provide multiple versions as to how the accident occurred, the location of the accident, and when the accident happened. Among the documents the defendants point to is the Accident Report prepared a month after the alleged occurrence wherein plaintiff listed the job name as Duane Reade Reception Office and the job address as 40 Wall Street, 22nd floor. Further it states that the injury occurred from heavy lifting with no mention of the fall. In addition defendants argue that the medical records from Central Medical Services of Westrock state that the plaintiff sustained injuries when he heard a "pop noise" when carrying a wall up the stairs with no mention of a fall. In addition, medical records from Community Medical Center state that plaintiff presented to the Emergency Room on August 31, 2012 because of an injury caused by heavy lifting. The defendants also point out that Employee Workers' Compensation claim forms indicate two different dates as to when the injury occurred, and who was notified along with how the plaintiff was injured. The defendants also argue that the deposition testimony of David Kellogg, the traveling construction superintendent employed by Trinity Building and Construction

Management, raises issues of credibility. Specifically, Mr. Kellogg testified that there was never an accident and that had there been an accident, he would have been required to complete an accident report which he never did. He also states that the freight elevator and the escalator were operating every day.

Additional discovery uncovered several more factual issues in dispute. Nonparty eyewitness Mr. Chandler testified at his deposition that in 2012, he was employed by the Atlantis company and was the "overseer" of the project at Columbus Circle and saw the incident at issue take place. He stated that the wall segments were carried by escalator not because the freight elevator was not in service but because the materials would not the fit in the elevator. He further testified that the die wall was lifted using straps and that it was not "that heavy" but "long and awkward." As to the cause of the accident, Mr. Chandler stated that when the individuals on the opposite side of the unit "let their side of the strap go," the unit went flying backwards" and pressed plaintiff against the escalator bulkhead. Mr. Chandler stated that following the incident, plaintiff "[kind] of blew it off...[a]nd we successfully walked it the rest of the way without incident." Mr. Chandler stated that plaintiff complained to him later that day of discomfort of the "shoulders, lower back, somewhere in there." Mr. Chandler recalled another workplace incident which he described as "nasty" occurring on the fourth floor of the Time Warner Center involving plaintiff several days following the complained-of accident. He stated that on that day, while plaintiff was working on a "long coffin item" weighing "probably 520 or 550 pounds," other crew members pushed him off a platform and he landed on his left leg on concrete, resulting in his right leg being on the platform, his left leg down on the concrete below the unit was cradled in his abdomen with his two hands underneath one of the corners." He recalled that

after the unit was lifted off him, plaintiff staggered backwards "and was clearly not feeling good."

Plaintiff testified at his supplemental deposition that he did not use straps while working under Roger Chandler. He denied having another accident at the Time Warner Center following the one at issue in this action.

"[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If there is any doubt as to the existence of a trial issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dep't 2002). Here the various factual inconsistencies and discrepancies as to the accident and its aftermath preclude the grant of summary judgment. *See Barker v. Manhattan and Bronx Surface Trans. Operating Auth.*, 184 A.D.2d 287, 287 (1st Dep't 1992). Accordingly, plaintiff's motion is denied.

This constitutes the decision and order of the court.

ENTER:

Kelly O'Neill Levy

Dated: December 14, 2015
New York, New York

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY