Bolaj v Park Line Asphalt Maintenance, Inc.
2016 NY Slip Op 31962(U)
July 29, 2016
Supreme Court, Suffolk County
Docket Number: 11-37376
Judge: Peter H. Mayer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 11-37376
CAL. No. 15-01196OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-24-15 (#002)
MOTION DATE 8-21-15 (#003)
MOTION DATE 10-2-15 (#004 & #005)
ADJ. DATE 10-2-15
Mot. Seq. # 002 -MG # 003 -MD
004 - XMD # 005 - XMD

---X

LESLIE BOLAJ,

Plaintiff,

-against-

PARK LINE ASPHALT MAINTENANCE, INC., THE OUTER MARKER LLC and VALDAS VISINSKAS, d/b/a VALDAS PAINTING,

Defendants.

---X

DANIEL J. HANSEN, ESQ.
Attorney for Plaintiff
776 Third Avenue, 24th Floor
New York, New York 10017

CAMACHO MAURO MULHOLLAND, LLP
Attorney for Defendant Park Line Asphalt
350 Fifth Avenue, Suite 1501
New York, New York 10018

STEVEN M. BURTON, ESQ.
Attorney for Defendant The Outer Marker
P.O. Box 697
Central Islip, New York 11722

VLADAS VISINSKAS, ProSe
176 Hill Circle
Calverton, New York 11933

Upon the reading and filing of the following papers in this matter: (1) Notice of Motions/Order to Show Cause by plaintiff, dated June 30, 2015, and defendant Park Line Asphalt Maintenance, Inc. dated July 22, 2015, and supporting papers (including Memorandum of Law dated September 17, 2015); (2) Notice of Cross Motions by defendant Outer Marker, LLC, dated September 16, 2015, and defendant Park Line Asphalt Maintenance, Inc. dated September 17, 2015, and supporting papers; (3) Affirmations in Opposition by defendants Park Line Asphalt Maintenance, Inc. and Outer Marker, LLC, respectively dated August 16, 2015 and September 17, 2015, and by plaintiff dated August 3, 2015, and September 24, 2015, and supporting papers; (4) Reply Affirmations by defendants Park Line Asphalt Maintenance, Inc. and Outer Marker, LLC, respectively dated September 30, 2015 and October 1, 2015, and supporting papers; (5) Other __ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers,

the motion is decided as follows: it is

ORDERED that the motion (002) by plaintiff Lesvin Bolaj and the motion (003) by defendant Park Line Asphalt Maintenance, Inc. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Lesvin Bolaj for, inter alia, summary judgment in his favor on the issue of liability with respect to his Labor Law §240 (1) claim is granted ; and it is

ORDERED that the motion by defendant Park Line Asphalt Maintenance, Inc. for, inter alia, an order vacating the note of issue and dismissing the complaint based on plaintiff's alleged failure to comply with certain outstanding discovery demands is denied; and it is

ORDERED that the cross motion by defendant Outer Marker, LLC for summary judgment dismissing the complaint against it is denied; and it is

ORDERED that the cross motion by defendant Park Line Asphalt Maintenance, Inc. for, inter alia, summary judgment dismissing the complaint against it is denied.

Plaintiff Lesvin Bolaj commenced this action to recover damages for personal injuries he allegedly sustained on October 11, 2009 while he was painting the ceiling of an air hanger on the premises of the Francis S. Gabreski Airport, located in the Town of Southampton, Suffolk County, New York. Plaintiff allegedly was injured when he fell off the side of a scaffold equipped with wheels. Defendant Outer Marker, LLC ("Outer Marker"), leased a parcel of the airport's premises from its owner, nonparty County of Suffolk, for the purpose of building air hangers for aircraft storage. Outer Marker then retained defendant Park Line Asphalt Maintenance, Inc. ("Park Line"), as the general contractor for the project. At the time of the accident, plaintiff was an employee of defendant Valdas Visinkas d/b/a Valdas Painting ("Valdas"), a subcontractor hired by Park Line to provide painting services. By way of an amended complaint, plaintiff alleges causes of action based on common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

Although plaintiff's amended complaint designated Bronx County as the venue for his action, the Supreme Court, Bronx County (Suarez, J.) granted a motion by Park Line seeking to transfer the case to the Suffolk County. By order dated December 12, 2014, this court denied a motion by plaintiff for partial summary judgment on the issue of liability, as the parties had failed to commence any discovery in the proceeding. The court further directed the parties to complete discovery and file the note of issue prior to the submission of more substantive motions. Preliminary conferences were held, and the date for the filing of the note of issue was extended to July 28, 2015 to permit, among other things, plaintiff to appear for independent medical examinations. Plaintiff ultimately filed the note of issue on July 29, 2015.

Plaintiff now moves for partial summary judgment on the issue of liability with respect to his Labor Law §§240 and 241 (6) claims, arguing that defendants violated the statute when they provided him with a manually propelled scaffold that was not equipped with safety railings or other safety devices designed to prevent him from falling and injuring himself. Plaintiff further argues, with respect to his Labor Law §241

(6) claim, that defendants violated Industrial Code provisions 22 NYCRR 23-5.18 (b), 22 NYCRR 23-5.18 (c), 27 NYCRR 23-1.7 (b), 27 NYCRR 23-1.15, 27 NYCRR 23-1.16, 27 NYCRR 23-1.17 and 27 NYCRR 23-5.1. By way of a separate motion, Park Line moves, pursuant to CPLR 3126, for an order vacating the note of issue and dismissing the case based on plaintiff's failure to comply with certain outstanding discovery requests. Alternatively, Park Line seeks an order compelling plaintiff to appear for independent medical examinations and extending the time for it to file dispositive motions in the case. Outer Marker also opposes plaintiff's motion and cross-moves for dismissal of the complaint against it on the basis plaintiff failed to sue the County of Suffolk, the owner of the land on which the air hanger was being constructed, as a necessary party to the action. Outer Marker further argues that plaintiff failed to submit sufficient evidence to meet his prima facie burden, as he admitted that he could not remember the accident and failed to submit an affidavit by his brother, who was the alleged sole witness to the accident. Additionally, Outer Marker asserts that it should not be regarded as an owner for the purposes of the Labor Law, as it never contracted for plaintiff's work and did not possess the authority to control the worksite at the time of his accident. With respect to plaintiff's Labor Law §241 (6) claim, Outer Markers argues that plaintiff failed to assert specific applicable violations of the Industrial Code in support of his claim.

Park Line cross-moves for dismissal of the complaint on a similar basis, arguing, inter alia, that as plaintiff has no memory of the accident, he and cannot identify the type of scaffold he was utilizing at the time of the accident or whether he was provided with other safety equipment designed to prevent him from falling. Park Line further argues that plaintiff's failure to identify the type of scaffold on which he was working, or to assert violations of specific applicable sections of the Industrial Code, require the dismissal of his Labor Law §241 (6) claim. Park Line asserts that plaintiff's Labor Law §200 and common law negligence claims should be dismissed, as his work was solely controlled by his employer, and he failed to identify any defect with the tools or equipment provided to him. It further asserts that, having failed to also address these claims in his motion papers, plaintiff has abandoned them. Further, Park Line seeks summary judgment on it common law indemnification cross claim against Valdas, arguing that it was responsible for plaintiff's safety, and that Park Line's liability, if any, for plaintiff's injuries, is vicarious.

Plaintiff opposes both cross motions on the bases the underlying facts establishing his prima entitlement to summary judgment on his Labor Law §§240 (1) and 241 (6) claims are undisputed, that affidavits by himself and non-party witness Matthew McGill further establish these claims, and that the deposition transcripts and OSHA reports submitted in support of the motion are in admissible form, as they respectively were, either certified without objection, or was admissible as a public document. Plaintiff further opines that he alleged violations of specific and applicable sections of the Industrial Code as predicates for his Labor Law §241 (6) claim, and that defendants failed to demonstrate that they lacked notice of his unsafe working conditions, or that they lacked the authority to control the method and manner of his work.

The application by Park Line for an order vacating the note of issue and dismissing the case based on plaintiff's alleged failure to comply with its request for outstanding discovery, namely, its requests for additional independent medical examinations, is denied. The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the

motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [c]). Although Park Line has submitted an affirmation in support of its motion, the purported affirmation is bereft of any evidence that Park Line conferred with plaintiff's counsel in a good faith effort to resolve the outstanding discovery issues, or provide any explanation indicating good cause why no such communications occurred (***Matter of Greenfield v Board of Assessment Review for Town of Babylon***, 106 AD3d 908, 908, 965 NYS2d 555 [2013]; *see* ***Murphy v County of Suffolk***, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]; ***Deutsch v Grunwald***, 110 AD3d 949, 950, 973 NYS2d 335 [2013]). Moreover, in response to the motion, plaintiff has submitted undisputed evidence that he has already complied with or scheduled for completion, the additional independent medical examinations (*see* ***Delarosa v Besser Co.***, 86 AD3d 588, 926 NYS2d 910 [2d Dept 2011]; ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; ***ACME ANC Corp. v Read***, 55 AD3d 854, 866 NYS2d 359 [2d Dept 2008]). Park Line's request for an extension of time to make dispositive motions in this action also is denied, as moot, as it has submitted a timely motion seeking summary judgment.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

Labor Law §240(1), commonly known as the Scaffold Law, "imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (***Bland v Manocherian***, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; *see* ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]; ***Greenberg v. City of New York***, 81 AD2d 284, 440 NYS2d 332 [2d Dept 1981]). Specifically, Labor Law § 240(1) requires that safety devices, such as scaffolds, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Blake v Neighborhood***

Hous. Serv. of N.Y. City, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]).

The statute is liberally construed to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor . . . instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 N.E. 2d 133 [1948]). The term 'owner' within the meaning of the Labor Law includes a lessee "who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'"(***Zaher v Shopwell, Inc.***, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], *quoting* ***Copertino v Ward***, 100 AD2d 565, 566, 473 NYS2d 494 [2d Dept1984]; *see* ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]). Indeed, "a lessee in possession is deemed an 'owner' within the meaning of the statute and will be held liable for accidents resulting from the violation of the statute's nondelegable duties (***Tate v Clancy-Cullen Storage Co.***, 171 AD2d 292, 295, 575 NYS2d 832 [1st Dept 1991]; ***Glielmi v Toys "R" Us, Inc.***, 62 NY2d 664, 476 NYS2d 283 [1984]).

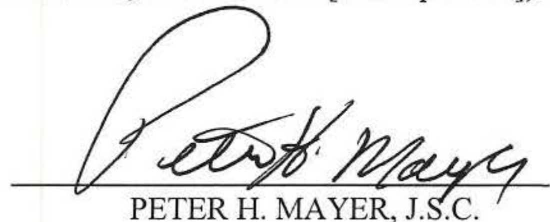
Here, plaintiff established his prima facie entitlement to partial summary judgment on the issue of liability with respect to his Labor Law §240 (1) claim by demonstrating that he was injured when he fell from a mobile scaffold which lacked safety rails on the sides, and that he was not provided with any other safety device designed to prevent him from falling (*see* ***Viera v WFJ Realty Corp.***, 140 AD3d 737, 31 NYS3d 613 [2016]; ***Vasquez-Roldan v Two Little Red Hens, Ltd.***, 129 AD3d 828,10 NYS3d 603 [2d Dept 2015]; ***Moran v 200 Varick St. Assoc., LLC***, 80 AD3d 581, 914 NYS2d 307 [2d Dept 2011]; ***Madalinski v Structure-Tone, Inc.***, 47 AD3d 687, 850 NYS2d 505 [2d Dept 2008]). Significantly, plaintiff's moving papers includes sworn affidavits by himself and nonparty witness Matthew McGill, which state, among other things, that plaintiff was standing on a mobile scaffold, reaching above his head, when he fell, and that the scaffold was shaky and not equipped with any safety railings. Further, plaintiff's affidavit indicates that he was not provided with any other safety devices, such as ropes or belts, that could have cushioned or prevented his fall. Plaintiff also adduced uncontradicted testimony that Outer Marker leased land at the airport for the purpose of building the subject air hanger, that it hired its affiliate, Park Line, as the general contractor for the project, and that it was in possession of the structure at the time of the alleged accident. Outer Marker and Park Line, therefore, are strictly liable for plaintiff's injuries as defacto owner and general contractor, respectively, whether or not they actually exercised any supervision or control over plaintiff's work (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Glielmi v Toys "R" Us, Inc.***, *supra*; ***Tate v Clancy-Cullen Storage Co.***, *supra*; ***Kwang Ho Kim v D & W Shin Realty Corp.***, *supra*).

In opposition, neither Outer Marker nor Park Line raised any significant triable of issue warranting denial of the motion (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Contrary to Outer Marker's assertion, plaintiff's failure to name the County of Suffolk as a party to the action does not warrant dismissal of the complaint, as plaintiff has brought suit against the parties responsible for the construction of the air hanger in question. Further, the County of Suffolk is not an "indispensable party" where, as here, there was no assertion of any defective condition or improper use of its land and the court will be able to settle the controversy without inequitably affecting its rights (*see* CPLR 1001 (a); ***Strough v Incorporated Vil. of W. Hampton Dunes***, 78 AD3d 1037, 912 NYS2d 82 [2d Dept

2010]; ***Joanne S. v Carey***, 115 AD2d 4, 498 NYS2d 817 [1st Det 1986]; ***Figari v New York Tel. Co.***, 32 AD2d 434, 303 NYS2d 245 [2d Dept 1969]). The court also rejects Outer Marker's assertion that it should not be treated as an owner for the purposes of the Labor Law, as it is undisputed that it had a possessory interest in the property as its lessee, it contracted for the work plaintiff was engaged in at the time of the accident, and it was in possession of the subject premises (*see* ***Glielmi v Toys "R" Us, Inc.***, *supra*; ***Tate v Clancy-Cullen Storage Co.***, *supra*; ***Zaher v Shopwell, Inc.***, *supra*; ***Kwang Ho Kim v D & W Shin Realty Corp.***, *supra*). Therefore, plaintiff is granted partial summary judgment on the issue of liability with respect to his Labor Law §240 (1) claim.

Since plaintiff is entitled to summary judgment on his Labor Law §240 (1) claim, the branch of his motion seeking partial summary judgment on the issue of liability with respect to his Labor Law §241(6) claim is denied as academic, as plaintiff's damages are the same under any of the theories of liability and he can only recover once (*see* ***Kristo v Board of Educ. of the City of N.Y.***, 134 AD3d 550, 23 NYS3d 165 [1st Dept 2015]; ***Jerez v Tishman Constr. Corp. of N.Y.***, 118 AD3d 617, 989 NYS2d 465 [1st Dept 2014]; ***Argueta v Pomona Panorama Estates, Ltd.***, 39 AD3d 785, 835 NYS2d 358 [2d Dept 2007]). Conversely, the motions by Outer Marker and Park Line for summary judgment dismissing plaintiff's complaint against them are denied, as moot. Furthermore, the branch of Park Line's motion seeking summary judgment on its common law indemnification cross claim against Valdas is denied, as Park Line failed to submit any evidence that plaintiff suffered a "grave injury," thereby overcoming the statutory bar to common law indemnification and contribution claims against a plaintiff's employer (*see* ***Fleming v Graham***, 10 NY3d 296, 857 NYS2d 8 [2008]; ***Keita v City of New York***, 129 AD3d 409, 11 NYS3d 20 [1st Dept 2015]).

Dated: July 29, 2016



PETER H. MAYER, J.S.C.