SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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FRANK MERENDINO,

Plaintiff,

-against-

COSTCO WHOLESALE CORP., E.W. HOWELL CO., LLC, AND MERENDINO CORP.,

Defendants.

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Index No. 154010/12
Motion Seq. 003

DECISION & ORDER
ARLENE P. BLUTH, JSC

E.W. HOWELL CO., LLC,

Third Party Plaintiff,

-against-

MERENDINO CORP.,

Third Party Defendant.

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COSTCO WHOLESALE CORPORATION

Fourth Party Plaintiff

-against-

E.W. HOWELL CO., LLC and MERENDINO CORP.,

Fourth Party Defendants.

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COSTCO WHOLESALE CORPORATION

Fifth Party Plaintiff,,

-against-

STARR INDEMNITY AND LIABILITY COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Fifth Party Defendants.

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The motion by defendants E.W. Howell (Howell) and Costco Wholesale Corporation

(Costco) for summary judgment dismissing the verified complaint and any and all cross-claims asserted against them is granted.

The cross-motion by Merendino Corp. for summary judgment dismissing Howell's third-party complaint is granted, and the third party action is severed and dismissed.

Background

This action arises out of alleged injuries suffered by plaintiff while he was working on a renovation job at a Costco facility located in Staten Island, NY on December 1, 2011. Plaintiff claims that he was working on a scaffold when he fell and suffered serious injuries. Plaintiff insists that he was not provided with a harness or safety equipment and that he erected a scaffold despite not knowing its owner.

Costco is the property owner where the alleged injury occurred and contracted with Howell (the general contractor) to oversee the renovation. Howell then entered into a contract with sub-contractor Merendino Corp., who then purportedly entered into an oral contract with Merendino Industries (a company run by plaintiff) to handle certain tasks, including demolition.

Howell claims that plaintiff's three claims against it and Costco should be dismissed.[1] Howell contends that plaintiff's Labor Law § 240(1) cause of action should be dismissed because plaintiff was the sole proximate cause of his injuries and because plaintiff refused to use an available harness, thereby making him a recalcitrant worker. Howell argues that plaintiff's Labor Law § 241(6) claim should be dismissed because no specific Industrial Code section is cited. Howell further claims that plaintiff's Labor Law § 200 and common law negligence claim should

[1] Although the Notice of Motion only refers to Howell, the supporting papers incorporate both Howell and Costco. The opposition also addressed both Costco and Howell.

be dismissed because neither Howell nor Costco supervised plaintiff's work.

In opposition, plaintiff claims that granting summary judgment would be premature because two non-party witnesses (who were allegedly with plaintiff at the job site on the date of the accident) have yet to be deposed. Plaintiff claims that his Labor Law § 240(1) claim should not be dismissed because there is no evidence regarding the ownership of the scaffold. Plaintiff insists that his Labor Law § 241(6) claim cites specific Industrial Code violations and that Howell's claims are based on the erroneous theory that the sections cited by plaintiff only apply to fully-assembled scaffolding. Plaintiff argues that these sections apply in the instant matter. Plaintiff further argues that his Labor Law § 200 claim should remain because there are issues of fact regarding the supervision and direction of the job site by Costco and Howell.

In reply, Howell claims that this action has dragged on for four years and that discovery must come to an end. Howell also insists plaintiff admitted in his deposition that neither of these witnesses saw the accident. Howell also points out that there is no expert affidavit in this matter despite plaintiff's reference to one in the affirmation in opposition. Howell claims that there was a harness available in plaintiff's truck and that, while constructing the scaffolding, plaintiff walked right off the edge of the scaffold. Howell claims that none of the Industrial Code sections apply to the construction of a scaffold; they only apply to an already-constructed scaffold. Howell also claims that it had no notice of plaintiff's activity at the job site.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Key Testimony

In his deposition, plaintiff claims that he was the boss at the job and that he did not report to a foreman (affirmation of Howell's counsel, exh V at 22). Plaintiff also testified that no one from Howell or Costco supervised his work (*id.* at 28). Plaintiff claims that he was at the job site that day to finish up some work and to take left-over equipment (*id.* at 31). Plaintiff insists that he got a phone call from 'Nick' (an employee of Howell) who asked when he would create an opening for a door (*id.* at 25, 32). Plaintiff then started constructing the scaffolding himself (*id.* at 32-33). Plaintiff asserted that he thought the scaffold belonged to Charlie – the owner of Merendino Corp. (*id.* at 32). Plaintiff claims that he fell while installing planks on the scaffold

(*id.* at 35). He claims that a harness was available in the truck (*id.* at 39) and that he fell 12 feet off the scaffold while pulling on a plank (*id.* at 40).

Plaintiff further testified that he did not wear a safety harness because he thought it was not necessary (affirmation of Howell's counsel, exh W at 357). Plaintiff swore that no one was supposed to give him a safety harness, that no one was supposed to be supervising him on the day of the accident, and that he had everything required to complete his task (*id.* at 360-61). Plaintiff also testified that the scaffolding was not defective (*id.* at 361).

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough; plaintiff is obligated to show that the violation was a contributing cause of his fall" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Plaintiff's testimony fails to demonstrate an issue of fact and the Court finds that plaintiff

was the proximate cause of his injuries because he chose not to wear an available harness. Plaintiff was the foreman on this project and fell while erecting the scaffold. Plaintiff did not build the scaffold under the direction of anyone else, including Howell or Costco, and there is no evidence that the scaffold was defective.

Further, this ruling is not premature because plaintiff testified that no one else witnessed the accident. Therefore, plaintiff's workers would only be able to testify about the aftermath of the accident rather than the accident itself. As stated above, liability under Labor Law § 240(1) must be predicated upon statutory liability and on proximate cause. The Court finds that there is no statutory liability and, if there were, plaintiff's refusal to use a harness precludes a finding of liability against Howell and Costco.

Plaintiff's Labor Law § 240(1) claim against Costco and Howell is severed and dismissed.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff claims that the following Industrial Codes were violated: 12 NYCRR 23-5.1(a), (b), (f), and (h), 23-5.3 (f), (g)(1) & (2) and 5.18 c, (e) and (g).

Although plaintiff failed to include his supplemental bill of particulars in this motion, the Court will consider these sections because Howell has had an opportunity to, and did in fact, respond to the specific Industrial Code sections.

Plaintiff does not have a claim under 23-5.1(a) since this section merely sets out the scope of the subpart on scaffolds rather than describe specific, concrete principles that could support liability. Even if liability could flow from this subpart, there has been no evidence submitted to show that this section was violated.

23-5.1(b) states that the "footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface, shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction." There is no testimony that the scaffold's footing or anchorage failed and caused plaintiff to fall. Even if there were such evidence, this code section is not specific enough to support a cause of action (*Kosovrasti v Epic (217) LLC*, 96 AD3d 695, 696, 948 NYS2d 260 [1st Dept 2012]).

23-5.1(f) provides that "Every scaffold shall be maintained in good repair and every defect, unsafe condition or noncompliance with this Part (rule) shall be immediately corrected before further use of such scaffold." Here, plaintiff testified that the scaffold was not defective and that he simply fell off the scaffold. In any event, this section does not contain the specificity required to sustain a cause of action (*see Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 83, 952 NYS2d 275 [2d Dept 2012]).

23-5.1(h) provides that "Every scaffold shall be erected and removed under the supervision of a designated person." Neither Howell nor plaintiff explored this specific code.

However, plaintiff's testimony confirmed that he was in charge of this project and there was no foreman overseeing this task. This testimony suggests that plaintiff was the designated person responsible for supervising the construction of the scaffold. Further, plaintiff was the president of Merendino Industries and had an employee assist him while erecting the scaffold. Plaintiff failed to identify another person who should have been the 'designated person' or why plaintiff should not be considered a 'designated person.'

Section 23-5.3 (f) provides that "Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level." As an initial matter, the Court finds that this Industrial Code section does not apply to the factual scenario at issue in this matter. This section implies that the scaffold has been constructed and, therefore, does not apply to workers in the process of erecting a scaffold. Even if it did apply in this case, plaintiff offered no evidence that his accident was caused by the lack of ladders, stairs, or ramps.

Section 23-5.3(g)(1)&(2) address footings. As stated above, there is no evidence that footings had any role in the accident.

Sections 23-5.18 c, e & g reference platform access on a scaffold, casters, and scaffold footing. There is no evidence before this Court to suggest that these violations occurred or, if they did occur, to suggest that they were the proximate cause of plaintiff's accident.

Labor Law § 200

"Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for

personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.* at 144).

Here, plaintiff's cause of action fails under either category. If plaintiff's injuries were caused by a dangerous condition, then neither Howell nor Costco had actual or constructive notice of a defect arising from a scaffold that plaintiff constructed on the day of the accident. Further, it is not clear that a dangerous condition existed. Plaintiff claimed that the scaffold was not defective in any way.

Plaintiff also failed to state a cause of action with respect to the manner in which the work was performed. Plaintiff claimed that he controlled the means and methods of the work and that Howell and Costco did not exercise supervisory control over the construction of the scaffold. Plaintiff also chose not to wear an available harness that may have prevented his purported injuries. Therefore, plaintiff's Labor Law § 200 claim against Howell and Costco is severed and dismissed.

Summary

Despite plaintiff's claims that further discovery is needed or that issues of fact exist, plaintiff's deposition failed to raise any issues of fact. His testimony is clear that he fell while

erecting a scaffold under his own direction and that nobody witnessed the fall. Plaintiff purportedly served as his own foreman for this project and was the president (and one of two shareholders) of sub-contractor Merendino Industries. Although plaintiff claims that the dispute regarding the ownership of the scaffold is critical to his claims, plaintiff testified that he thought the scaffold belonged to the owner of Merendino Corp. and that he had previously used this scaffold on this job site. The exact ownership does not matter for this motion as plaintiff testified that the scaffold was not defective and offered no evidence that his alleged fall was caused by the scaffold itself.

Plaintiff's testimony indicates that he fell off the scaffold and he chose not to use a harness although one was available. Plaintiff's failure to utilize available safety devices was the proximate cause of his fall. Plaintiff knew or should have known of this danger and decided, as his own boss, not to take safety precautions. These circumstances foreclose liability as against Howell and Costco on plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims.

Merendino Corp's Cross-Motion for Summary Judgment

Merendino Corp.'s cross-motion for summary judgment dismissing Howell's third party complaint against it is granted. Howell only opposed the cross-motion if its own motion for summary judgment was denied (requesting summary judgment against plaintiff "or, in the alternative" summary judgment in the third party action ["Wherefore" clause of Polin affirmation dated September 20, 2016]). As the Court has found that Howell has no liability, the third-party action between Howell and Merendino Corp. is severed and dismissed.

Accordingly, it is hereby

ORDERED that Howell's motion for summary judgment dismissing the complaint against Howell and Costco is granted and all claims and cross- claims against them are severed and dismissed; and it is further

ORDERED that Merendino Corp.'s motion for summary judgment is granted and the third party action is severed and dismissed; and it is further

ORDERED that the clerk is directed to enter judgment in accordance with this Decision and Order of the Court.

Dated: January 25, 2017
New York, New York

ARLENE P. BLUTH
J.S.C.

HON. ARLENE P. BLUTH, JSC