

Ming Kwun Lo v Five & Five, Inc.
2017 NY Slip Op 31279(U)
June 8, 2017
Supreme Court, New York County
Docket Number: 151977/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MING KWUN LO,

Plaintiff,

-against-

FIVE & FIVE, INC. and SCK TEAM WORK,
CORP.,

Defendants,

Index No. 151977/2016

DECISION/ORDER

Motion Seq. 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memos of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.:

Plaintiff Ming Kwun Lo ("Plaintiff") brought this action against Defendants Five & Five, Inc. ("Five & Five") and SCK Team Work, Corp. ("SCK") for personal injuries he sustained when he fell from a scaffolding approximately three feet to the ground when a piece of metal broke and the scaffolding collapsed underneath him. At the time of the accident, Plaintiff alleges that he was plastering a ceiling at a construction site owned by Five & Five while he was working for SCK. Plaintiff discontinued his claims against SCK, but Five & Five's cross-claims against SCK remain.

Plaintiff's claims against Five & Five are for common-law negligence and for violations of Labor Law §§ 200, 240 and 241. Plaintiff now moves for partial summary judgment in his favor on liability as to his Third Cause of Action under Labor Law § 240 against Five & Five as

the owner of the premises. Based on the admissible evidence presented, the court grants Plaintiff's motion and orders a trial on damages regarding Plaintiff's Labor Law § 240 cause of action.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011],

citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

Labor Law § 240(1) states that all contractors, owners and their agents “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected 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” (Labor Law § 240[1]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a

difference between the elevation level of the required work and a lower level or the difference between the elevation level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Rocovich*, 78 NY2d at 514).

In the instant matter, among other things, Plaintiff alleges that he was injured when he fell from a height, that Defendants failed to provide him with adequate safety protective equipment and that, as the owner of the premises, Five and Five has absolute liability for Plaintiff's injuries. Five & Five opposes the motion and argues in substance that the motion is premature as discovery has not been conducted, there is a question of fact as to whether SCK is Plaintiff's employer and whether Plaintiff was working at the site when he was injured. SCK took no position on the motion, but objected to certain facts as being unsupported and incorrect.

When applying the applicable law to the facts in this case, the court determines that Plaintiff demonstrated that he is entitled to partial summary judgment as a matter of law for liability on his Labor Law § 240(1) claim against Five & Five and that Five & Five failed to raise any material issues of fact to dispute Plaintiff's claims through any admissible evidence.

It is not disputed that Five & Five was the owner of the site, however, whether questions of fact remain as to whether Plaintiff was employed by SCK at the time of the accident are irrelevant to Five & Five's absolute liability as the owner of the site. Therefore, the court does not need to determine whether SCK was Plaintiff's employer to decide the owner's motion. However, the court will address Five & Five's arguments on this issue. Plaintiff alleged that he was employed by SCK at the time of the accident. Plaintiff provided his sworn affidavit, copies of SCK's permits to conduct work on the premises and the Workers' Compensation Board's Notice of Decision which awarded Plaintiff benefits for this work-related injury suffered while he was working for SCK. The worker's compensation decision was based on Plaintiff's

testimony and a photograph of SCK's sign posted on the wooden fence outside of the work site and SCK was found to be incredible.

Here, Plaintiff demonstrated that Five & Five was the owner of the site, that it violated the statute by failing to provide Plaintiff with an adequate protective device, that such device would have prevented Plaintiff from falling and that such lack of protection was the proximate cause of Plaintiff's injuries. Additionally, Plaintiff demonstrated that he was injured while performing work that was a type of elevation-related hazard to which the statute applies and that he was required to work at the height to complete the task. Furthermore, Plaintiff established his prima facie case that Five & Five breached its non-delegable duty under the statute to furnish Plaintiff with adequate safety devices, which could have included a safety belt, harness, rope or other equipment and that such protections would have protected Plaintiff from this elevation-related risk.

The court finds Five & Five's remaining arguments to be unpersuasive. Therefore, the court grants partial summary judgment in favor of Plaintiff on the issue of liability under Labor Law § 240(1) against Five & Five and orders a trial on damages regarding this cause of action.

Accordingly, it is hereby

ORDERED that the court grants Plaintiff Ming Kwun Lo's motion for partial summary judgment in his favor for liability on his Third Cause of Action under Labor Law § 240(1) as against Defendant Five & Five, Inc. and orders a trial on damages regarding this cause of action; and it is further

ORDERED that the parties must appear for a status conference on October 5, 2017, at 9:30 a.m., in Part 47, located in room 320, at 80 Centre Street, New York, New York.

Date: June 8, 2017

A handwritten signature in black ink, appearing to read 'Erika M. Edwards', is written over a horizontal line.

HON. ERIKA M. EDWARDS