

Godfrey v Witkoff Group LLC
2017 NY Slip Op 31370(U)
June 26, 2017
Supreme Court, New York County
Docket Number: 159242/13
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
FRANCIS GODFREY and MARILYN GODFREY,

Plaintiffs,

-against-

Index No.: 159242/13

THE WITKOFF GROUP LLC, 150 CHARLES STREET
HOLDINGS, LLC, and PLAZA CONSTRUCTION CORP.,

Defendants.
-----X

COHEN, J.:

Plaintiffs Francis Godfrey and Marilyn Godfrey move, pursuant to CPLR 3212, for an order granting summary judgment as to their claims of violations of Labor Law §§ 240 (1) and 241 (6) as against defendants The Witkoff Group LLC (Witkoff), 150 Charles Street Holdings, LLC (150), and Plaza Construction Corp. (Plaza).

Defendants cross-move, pursuant to CPLR 3212, for an order granting summary judgment as to plaintiffs claim made pursuant to Labor Law § 241 (6). Defendants also move, pursuant to CPLR 3126, to preclude plaintiff from offering the testimony of non-party witness Sanford LeMoine (LeMoine) as to liability and/or damages based upon defendants allegation that plaintiffs failed to disclose this witness prior to the filing of their motion for summary judgment.

Defendants alternatively move to vacate the note of issue based upon plaintiffs' submission of an affidavit from LeMoine, and move, pursuant to CPLR 3108, directing the issuance of an open commission for LeMoine's deposition in New Jersey.

FACTUAL ALLEGATIONS

In this action, plaintiff Francis Godfrey alleges that he suffered personal injuries while working at a construction project of a high rise building located at 150 Charles Street in New

York, New York. Plaintiff alleges that he was employed by non-party Navillus Construction (Navillus), the general contractor, and was standing in the courtyard of the site when he was struck in his left hand by a piece of falling wood.

Plaintiff testified, that at the time of his subject accident, he was a member of Local 46, the ironworkers union. Plaintiff maintains that Navillus held safety meetings once a week, and that the foreman for Navillus was Chris Scully (Scully), however Scully did not direct or supervise his work. Plaintiff testified that no one from Plaza directed his work, and that he was unsure if anyone from 150 directed or supervised his work.

Plaintiff testified that he was located on the courtyard level of the site which was on the first level, and was about four to five feet from the building's perimeter. The building was already built to the sixth floor, and was continuing to rise above plaintiff's work area. Plaintiff did not observe scaffolding being taken apart or cleaning work being performed, and he was aware that workers were on the sixth floor.

On the date of his accident, plaintiff was working with a "bending machine" which bends pieces of steel and which was located in the courtyard of the site. Plaintiff testified that he had three conversations with Plaza's representative "Frank" about moving the machines because there were no safety railings or nets above where he was working. Plaintiff maintains that Frank promised him that the machine would be moved. Although plaintiff spoke to Frank either the week of his accident or the week before, plaintiff did not observe any measures taken in response to his concerns.

Plaintiff maintains that before his accident, he spoke with the safety man for Navillus named "John." Plaintiff spoke to John about how ironworkers were picking up steel with frayed

slings, how faulty equipment was being utilized, and about the moving of the bending machines. Plaintiff testified that prior to his accident, no workers were hit by objects, but that something was coming off of the roof. In the moments before his accident, plaintiff testified that he was bending and holding steel with his hands on the handle of the bending machine. He maintains that he saw a flash in front of him and that his left hand got struck by something which had fallen. After getting struck, plaintiff pushed himself off of the bending machine. Plaintiff proceeded to move backwards to get away from the building because he was worried something else would fall.

Upon removing his gloves, plaintiff noticed bruising and bleeding on his left hand. When he was moving away, plaintiff tripped on bundles of steel which were located at the site. Plaintiff noticed that there were pieces of wood on the ground. Plaintiff proceeded downstairs to a shanty which had about three to four workers. Plaintiff testified that he told the workers that he had previously complained about the need for netting at the site. Plaintiff's partner, Billy McEntire, informed him that he was a witness to the accident. Plaintiff testified that after the accident, the shop steward "Sanford Lamoine," who was employed by Navillus, called him and mentioned that he had taken pictures of the wood and that the wood which struck plaintiff was saved.

Robert Marone (Marone), lead superintendent for Plaza Construction, testified on March 11, 2016. In October of 2013, Marone was assigned to work as the senior superintendent at the project at 150 Charles Street. Marone maintains that Witkoff, the owner and developer of the property, had hired Plaza to work at the subject project as the construction manager. Plaza was in charge of negotiating subcontracts, developing the construction schedule, overseeing

construction, and paying the subcontractors. Marone maintains that Plaza would conduct weekly safety meetings, and that Plaza instructed that all contractors were to hold their own safety meetings called “toolbox talks.”

Marone would walk the subject site about three times a day, would look for unsafe conditions, and had the authority to stop the work if he saw an unsafe condition. Plaza had a site safety plan which was distributed to contractors which Plaza hired. Marone maintains that Navillus was hired to perform “concrete super structure” work, that Pat Cochran was Navillus’ lead person, and that Brendan O’Sullivan was the general labor foreman.

On the date of plaintiff’s accident, Marone went to the area of the incident shortly after it occurred. Marone testified that plaintiff told him how a piece of lumber had fallen from the area near where he was working. Marone maintains that he heard that the piece of lumber which struck plaintiff was about two feet long, and was no smaller than a two by four piece of lumber. He maintains that there was a belief that the wood was of a typical size and shape for form work.

Marone testified that the location of where to set up a bending machine was determined by Navillus, the other contractors at the site, and Plaza. Marone maintains that during the course of the construction, Plaza ensured that Navillus erected a horizontal netting system extending out from the building with an outrigger to catch falling debris and material. He maintains that the workers that were performing the bending should have had overhead protection, specifically horizontal nets which extend from the perimeter of the building. Marone heard conflicting stories whether plaintiff was protected by overhead netting.

Marone testified that he believes that if work was being completed on the sixth or seventh floor, there would probably be horizontal nets set up on the fourth or fifth floor. He maintains

that he also spoke to the lathers shop steward who stated that the nets were pulled in once in a while to drop loads of rebar with the crane, and that the nets would not go back out quickly enough. Marone maintains that the wood could have come from above or it could have been thrown by someone on the first floor.

LeMoine submits an affidavit dated October 6, 2016. LeMoine states that on the date of plaintiff's accident, he was employed by Navillus as a shop steward at a project located at 150 Charles Street. He states that Navillus was hired by Plaza Construction, the general contractor, to build the concrete superstructure. As part of the construction project, rebar had to be bended with a rebar bending machine. He maintains that Plaza and Navillus decided that the rebar machine should be placed in the courtyard near where the building was being constructed and that Plaza had designated the courtyard for Navillus' use during the construction.

LeMoine states that plaintiff was assigned to operate the rebar bending machine with Billy McIntyre on a daily basis. LeMoine maintains that as the building rose in height, Plaza and Navillus talked about installing a horizontal netting system around the perimeter of the building and extending 15-20 feet out from the building in order to protect workers below from falling debris and material. LeMoine maintains that prior to the date of his accident, plaintiff complained to him about the netting system not being in place and that he was exposed to falling debris and material. LeMoine relayed these concerns to Navillus's superintendent and was informed that they would remedy the situation, but to continue working.

LeMoine states that upon hearing of plaintiff's accident, he went to the site. He saw the rebar bending machine situated five feet away from the building and maintains that the horizontal nets, which were supposed to be set up to prevent falling debris, were not present. After

discussing the accident with plaintiff, he saw the wood which struck plaintiff which was a 4x4 used by carpenters to build forms. LeMoine went to the sixth floor and saw the piece of wood that was supposed to be installed above a beam supporting the plywood deck forms above. He states that the wooden forms were to be secured by nails, but that someone shot a nail through the floor down into the deck above and missed the wood.

LeMoine maintains that the wood should have been installed with a nail and a banding wire to brace the wood. He states that on the date of the accident, the carpenters were scheduled to build forms on the sixth floor and that the sixth floor perimeter was open so that debris and material could fall off. It was discovered that while the carpenters were installing the wood to build a temporary form in order to build a column, the wood fell and struck plaintiff.

DISCUSSION

Plaintiffs maintain that defendants, as owners and general contractors, are liable to plaintiff for violating Labor Law §§ 240 (1) and 241 (6). Labor Law § 240 (1) provides, in relevant part:

"[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, 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."

"To establish a claim under this provision, a plaintiff must show that the statute was violated and that the violation proximately caused his injury." *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 (1st Dept 2013) (internal quotation marks and citation omitted). Plaintiff "must have suffered an injury as the direct consequence of a failure to provide adequate

protection against a risk arising from a physically significant elevation differential." *Soto v J. Crew, Inc.*, 21 NY3d 562, 566 (2013) (internal quotation marks and citation omitted).

Plaintiffs argue that the undisputed evidence demonstrates that the carpenters were using 4x4 pieces of wood to build forms, and that the piece of wood which fell on plaintiff was used to support a wooden deck and was installed beneath the deck and on top of a steel beam. Plaintiffs argue that the wood was to be nailed, but that when nails were shot through the decking floor, workers missed the pieces of wood. Plaintiffs argue that additionally, wire bands are supposed to be used along with nails to support the wood and keep it in place. As a result, the wood was not adequately secured by an enumerated safety device or wire, and was caused to fall from the sixth floor and strike plaintiff.

Plaintiffs also contend that Labor Law § 241 (6) was violated. Labor Law § 241 (6) provides, in pertinent part:

"[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places"

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision

containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Plaintiffs contend that section 23-1.7 (a) and section 23-1.19 (c) of the Industrial Code were violated. Section 23-1.7 (a) of the Industrial Code discusses protection from overhead hazards, while section 23-1.19 (c) discusses catch platform enclosures. Plaintiffs argue that these sections of the Industrial Code were violated as plaintiff was working in a known controlled access zone where it was determined by the general contractor with plaintiff's employer that a netting system was required around the perimeter of the building to prevent falling debris or materials.

Defendants argue that before the court even discusses the alleged violations of the sections of the Labor Law, the court must preclude plaintiffs from offering any evidence from LeMoine. Defendants contend that LeMoine's affidavit, which was submitted with plaintiff's motion, discusses many elements of the case, including the lack of netting and that the wood which struck plaintiff required securing. Defendants argue that had plaintiff disclosed that LeMoine was a witness prior to the filing of the note of issue, defendants would have conducted a non-party deposition.

Defendants contend that at the preliminary conference held on February 14, 2014, plaintiff was ordered to exchange the names of all eye witnesses, notice witnesses, and photographs of the site by March 31, 2014. Defendants contend that plaintiff did not respond to such request. Defendants argue that LeMoine was never disclosed as a fact witness in the discovery process, but is now being offered as a fact witness who claims to have investigated the accident site immediately afterwards and determined the cause of the accident. *See Dunson v Riverbay Corp.*,

103 AD3d 578, 578-579 (1st Dept 2013) (“given that plaintiff had represented to defendant that he had no witness information before filing his summary judgment motion, less than two weeks before he filed his note of issue and certificate of readiness for trial affirming that all discovery was complete, the motion court properly refused to consider a letter and affidavit from a previously undisclosed notice witness”).

Defendants contend that, in the alternative, the note of issue must be stricken and an open commission should be ordered to allow the deposition of LeMoine, a resident of New Jersey. Defendants argue that if the court allows such deposition to take place, defendants request leave to submit a further brief in opposition to plaintiffs motion and in support of the cross motion.

In reply and opposition to the cross motion, plaintiffs contend that at the deposition of plaintiff, plaintiff testified that LeMoine had taken photographs of the wood which struck plaintiff. Plaintiffs argue that it was logical that plaintiffs would follow up with LeMoine and inquire about the details of his knowledge of the wood, where it came from, the accident, and its surrounding circumstances. Plaintiffs argue that because LeMoine was mentioned in plaintiff’s deposition over 20 months ago, that defendants had adequate time to investigate and subpoena LeMoine for a nonparty deposition.

The court notes that LeMoine’s affidavit discusses complaints about the netting system not being in place, that horizontal nets were not present to prevent falling debris, that LeMoine saw the wood which struck plaintiff, that he visited the sixth floor and maintains that the wood should have been installed with a nail as well as a banding wire to brace the wood, that the sixth floor perimeter was open and debris and material could fall off of the floor, and that it was discovered that while the carpenters were installing the wood to build a temporary form in order to build a

column, the wood fell and stuck plaintiff.

Based upon the information recently disclosed in the affidavit of LeMoine, and because plaintiffs fail to demonstrate what prejudice they will suffer if a deposition of LeMoine occurs, the court will allow the non-party deposition of LeMoine to take place post note of issue. *See Spitzer v 2166 Bronx Park E. Corps.*, 726 NYS2d 639, 640 (1st Dept 2001) (holding that it was proper for the motion court to consider plaintiff's evidence and allow defendants an opportunity to depose the witness"). While plaintiffs contend that defendants had many months to conduct the deposition of LeMoine as plaintiff mentioned LeMoine at his deposition, the information which LeMoine discusses in his affidavit, specifically his examination of the cause of the accident, protective measures not taken, and conclusions as to why the accident occurred, was allegedly unknown to defendants until the affidavit was submitted.

Since the affidavit of LeMoine states that he resides in New Jersey, an out of state commission is needed. *See* CPLR 3108. Finally, as LeMoine's deposition will be permitted, the part of plaintiffs' motion for summary judgment and defendants' cross motion for summary judgment regarding the alleged violations of the Labor Law will be denied, with leave to renew.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that plaintiffs Francis Godfrey and Marilyn Godfrey motion for summary judgment as against defendants The Witkoff Group LLC, 150 Charles Street Holdings, LLC, and Plaza Construction Corp. is denied, with leave to renew; and it is further

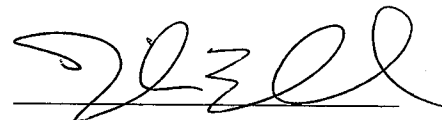
ORDERED that defendants cross motion for summary judgment as to plaintiffs claim

pursuant to Labor Law § 241 (6) is denied with leave to renew, with the exception of the part of the motion which seeks the non-party deposition of Sanford LeMoine which the court will allow to take place post note of issue; and it is further

ORDERED that the open commission is to be filed within 30 days and the non-party deposition of Sanford LeMoine is to take place by September 30, 2017, subject to be extended, in the court's discretion, upon application and a showing of good cause.

Dated: 6-26-2017

ENTER:



HON. DAVID B. COHEN
J.S.C. J.S.C.