Severini v HHC TS REIT LLC
2017 NY Slip Op 31970(U)
September 15, 2017
Supreme Court, New York County
Docket Number: 152007/2013
Judge: Arlene P. Bluth

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

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LOUIS SEVERINI,

Plaintiff,

Index No. 152007/2013
Motion Seq: 004

-against-

HHC TS REIT LLC, EXTELL WEST 45th LLC and LEND LEASE (US) CONSTRUCTION LMB INC. f/k/a BOVIS LEND LEASE, LMB, INC.,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion by plaintiff for summary judgment on the issue of liability is denied.

Background

This matter concerns a construction accident that occurred at 135 West 45th Street, New York, New York on April 23, 2012. Plaintiff, a carpenter with over 30 years experience working in construction, was working on a hotel development. It was raining on the day of plaintiff's accident and plaintiff was on the top floor of the job site (plaintiff's and defendants' accounts differ as to the exact floor).

Plaintiff claims that after a coffee break was called for workers at the site, he attempted to climb down scaffolding when he slipped and fell. In his deposition, Plaintiff claims that when he fell, he fell off the scaffold and landed on a concrete floor with his back and right hip.

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]).

Plaintiff moves for summary judgment pursuant to Labor Law §§ 240(1) and 241(6) based on his fall from the scaffolding. Plaintiff insists that there are no material questions of fact and that he is entitled to summary judgment on the issue of liability.

In opposition, defendants stress that plaintiff was the only witness to the accident and that there are factual disputes as to how the accident occurred. Defendants stress that the deposition of non-party David Schlosser (a medical administrator working at the project) demonstrates that, on the day of the accident, plaintiff offered a different account of the accident to Mr. Schlosser than he did at his deposition. Schlosser testified that plaintiff came to him on the job site for treatment after the accident and plaintiff claimed he twisted his right leg after slipping on a wet scaffold deck. Schlosser claims that plaintiff never told him about a fall off the scaffold.

In reply, plaintiff contends that Schlosser's deposition does not create a material issue of fact and that the report Schlosser produced about plaintiff's accident is, in fact, consistent with plaintiff's account of how the accident occurred.

"The fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment in his favor. However, where a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident, his or her account of the accident is contradicted by other evidence, or his or her credibility is otherwise called into question with regard to the accident (*Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676, 29 NYS3d 272, 272-73 [1st Dept 2016] [internal quotations and citations omitted]).

The question for this Court is whether the accounts offered by plaintiff in his deposition and to Schlosser differ enough to constitute *inconsistent* versions sufficient to deny the motion for summary judgment.

At his deposition, plaintiff claimed that he was climbing down the scaffolding to take a coffee break when his leg slipped (plaintiff's tr at 137). Plaintiff testified that his left foot was

above his right foot on the scaffold when he fell and that his right foot was about 19 or 20 inches above the floor (*id.* at 143-44). Plaintiff further testified that "I just fell right on my back and I was laying there and I couldn't move. I couldn't get up, really" (*id.* at 149). Plaintiff insisted he "fell on my lower back and the right side of my hip was hurting, my right leg, the side of my hip and my back" (*id.* at 154).

Schlosser testified that he had no independent recollection of plaintiff's accident (Schlosser tr at 13). Instead, Schlosser relied upon an incident report he prepared while treating plaintiff (*id.* at 13-14). In the incident report, plaintiff's accident was described as "While plaintiff was working on a scaffold, he somehow twisted his right leg" (*id.* at 23). Schlosser testified that although this entry was not typically a verbatim account of an injured worker's description, it was derived from the injured worker's statements (*id.*). Schlosser insisted that if a patient informed him that an injury was caused by falling from a scaffold, Schlosser would have included that description in his report (*id.* at 23-24).

The report itself contains a *Narrative Notes* section which observes that "Pt states that while working on scaffolding he slipped on the wet deck and twisted his right leg" (NYSCEF Doc. No. 78).

This case presents a close question because Schlosser's report does not directly contradict plaintiff's account. However, what is *not* included in the report compels this Court to deny plaintiff's motion. Plaintiff's account of his accident at his deposition gives the impression that he experienced a serious fall on his back where he couldn't get up. If that were true, why is there no mention of a fall or pain in his back in the report?

There is an obvious distinction between slipping on a wet deck and landing in the scaffold deck and falling off a scaffold to the concrete floor below. Both can cause injury, but the acts themselves are very different. There is no way to describe both incidents with the same words or phrases– slipping is not a synonym for falling. And the incident report, according to Schlosser, is merely a recitation of statements provided by an injured worker.

It could be that plaintiff simply omitted these details when meeting with Schlosser or maybe Schlosser did not include all of plaintiff's statements in his report.[1] This Court, on a motion for summary judgment, cannot reconcile these differing accounts of the accident or make credibility determinations.

Summary

Schlosser's report and plaintiff's deposition testimony could be interpreted to be consistent only if it is assumed that plaintiff simply forgot to tell Schlosser every detail of his accident. This Court cannot make such an assumption on a motion for summary judgment. Plaintiff's version of a fall off the scaffold and Schlosser's report of a slip on a scaffold are inconsistent. Even if plaintiff might be entitled to summary judgment pursuant to Labor Law § 241(6) under both of versions of plaintiff's accident offered here, the jury is entitled to hear both versions and credit all, some, or none of a witness' testimony.

Accordingly, it is hereby

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[1]Plaintiff testified that he told the person in charge of medical, who would appear to be Schlosser although Schlosser is not referenced by name, that he fell off the scaffold and hurt his lower back (plaintiff's tr at 186). These details were not included in Schlosser's report.

ORDERED that the motion for summary judgment on liability is denied.

This is the Decision and Order of the Court.

Dated: September 15, 2017
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH