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

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MARIA CAMINITI as Administratrix of the Estate of PASQUALE CAMINITI (deceased) and MARIA CAMINITI, Individually,

Plaintiffs,

-against-

EXTELL WEST 57th STREET LLC, EXTELL DEVELOPMENT COMPANY, LEND LEASE (US) CONSTRUCTION HOLDINGS, INC., and LEND LEASE (US) CONSTRUCTION LMB INC. f/k/a DOVIS LEND LEASE LMB, INC.,

Defendants.

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Index No. 150298/2013
Motion Seq: 004 & 005

DECISION & ORDER

HON. ARLENE P. BLUTH

Motion Sequence Numbers 004 and 005 are consolidated for disposition. The motion (Mot Seq 004) by plaintiffs for partial summary judgment on liability pursuant to Labor Law §§ 240(1) and 241(6) is granted in part and denied in part. The motion (Mot Seq 005) by all defendants for summary judgment is denied.

Background

This case concerns an incident that occurred on a construction site involving plaintiff's decedent, Pasquale Caminiti (hereinafter, "Pasquale"). Pasquale was working as electrician for Five Star Electric on January 3, 2012 and was assigned to install BX Cable. Pasquale's job was to stand on a ladder and pull cable being fed by another Five Star employee, Robert Munoz.

At some point, Munoz found Pasquale off the ladder and standing over the gangbox. The ladder remained upright. Munoz claims that Pasquale told him that he had chest pains and

Pasquale collapsed into Munoz's arms. Munoz claims that he helped take Pasquale to the construction site medic, who quickly called an ambulance. The medic concluded that Pasquale was suffering from a torn thoracic aortic artery, a serious life threatening condition. Unfortunately, Pasquale passed away due to his heart issues fifteen days later, on January 18, 2012.

Plaintiff Maria Caminiti (hereinafter, "Maria") brought this case on behalf of Pasquale and claims that Pasquale suffered a work-related accident. Maria stresses that Pasquale told her in the emergency room at the hospital, right before he underwent heart surgery, that he should have known better than to work on an unsteady ladder and that the ladder hit his chest while it was rocking back and forth.

Defendants stress that Pasquale never mentioned anything about a work related accident to Munoz or to the medic who spoke with Pasquale on the day of the incident. Defendants claim that because there was no accident, they are entitled to summary judgment. Defendants theorize that Pasquale happened to suffer a serious heart issue while he was at work but that nothing at work caused his artery to tear.

Admissibility of Statement to Maria

At her deposition, Maria testified that she rushed to the hospital to see Pasquale after being told about the incident (NYSCEF Doc. No. 109 at 25-27 [Maria Caminiti tr]). After speaking with a doctor, Maria went to go see her husband (*id.* at 29). Maria testified that Pasquale said "he was pulling wire, and he had the ladder and he said I knew– I– knew I shouldn't have did that. He said I had the ladder, and he climbed up the ladder to pull the wire,

and he said I should have knew better. Because he was pulling and it was — got stuck. So he was pulling with force trying to, I guess, loosen it, and the ladder wasn't steady, so it started to tip. So he was trying to hold it with his legs because he was by himself. So he was trying to hold it steady with his legs and I guess he lost his footing and it fell back and it hit him in his chest really hard and he said he was just in so much pain" (*id.* at 30-31). Maria claimed that she did not have another conversation with Pasquale about the incident before he passed away (*id.* at 33).

As an initial matter the Court must decide whether Pasquale's purported statement to Maria is admissible. Clearly, the statement is hearsay. It is an out-of-court statement offered for truth of the matter asserted– that Pasquale was in an accident while working at a construction site. The question, then, is whether the statement is admissible pursuant to a hearsay exception.

"An exception to the rule that excludes hearsay is that which relates to declarations against or in conflict with pecuniary or proprietary interest of the declarant . . . It is the well-settled rule that declarations against the interest of a person since deceased, or unavailable as a witness . . . are admissible in evidence irrespective of the question of whether any privity existed between the declarant and the person against whom it is offered provided that the declarant had peculiar means of knowing the matters stated, had no interest to misrepresent it, and it was opposed to his or her pecuniary or proprietary interest" (58 NY Jur 2d Evidence and Witnesses § 347).

"To come within the rule that permits the introduction of declarations against interest, the declaration must, when considered as a whole, be against the interest of the declarant, at the time when it was made, and it must be established that when the declarant made the statement, he or she knew that it was against his or her interest" (58 NY Jur 2d Evidence and Witnesses § 347).

Defendants insist that Pasquale was not aware that his statements were against his interest at the time they were made. Defendants contend that where a declarant feels apprehensive– here, Pasquale was nervous about impending heart surgery– there is no reason to believe he was aware that his statements could be against his interest.

The Court finds that Pasquale's statements to his wife constitute a declaration against interest and are admissible as an exception to the hearsay rule. This exception exists to allow out-of-court statements into evidence because "a person ordinarily does not reveal facts that are contrary to his or her own interest" (58 NY Jur 2d Evidence and Witnesses § 348). Pasquale was about to be wheeled in for emergency surgery on his heart. When his wife asked him what happened, he took responsibility for what occurred. Pasquale did not blame his employer for having an unsecured ladder - he blamed himself for using it. He insisted that he should have known better than to be pulling cables by himself while on top of an unsecured ladder.

At that moment, a time of great stress and anxiety, the Court finds no reason to think that the statements to his wife were unreliable. There is no basis to think that Pasquale would lie about what happened to his wife right before he was to undergo major and emergency heart surgery. He was blaming himself for using an unsecured ladder. What interest would be served by lying about his responsibility in the accident?

While Pasquale may not have fully comprehended that his statements would harm his ability to seek damages in a subsequent lawsuit, that is not fatal to the statement's admissibility. A full comprehension of the legal implications of a statement is not required– here, the declarant blamed himself for the incident. That is a declaration against his interest.

Labor Law § 240

Plaintiffs move for partial summary judgment on their Labor Law § 240(1) claim and defendants move for summary judgment (under Mot Seq 005) dismissing this claim.

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 a 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]).

"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" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

As an initial matter, because no one else witnessed the accident, the version of the accident offered by Pasquale to his wife can support plaintiffs' claim for summary judgment.[1] "The fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment in his favor" (*Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676, 29 NYS3d 272, 272 [1st Dept 2016]).

Under Pasquale's account, he did not fall off the ladder– he only admitted to his wife that the ladder hit him in the chest. Maria claimed that she did not know whether or not Pasquale actually fell off the ladder (NYSCEF Doc. No. 109 at 32, 121). Because the only undisputed claim is that ladder merely shifted and hit Pasquale, the question, then, is whether a Labor Law § 240(1) claim is viable where a plaintiff does not actually fall off the ladder.

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[1]The fact that Munoz claims he found Pasquale standing over the gangbox, that the ladder was upright and that Pasquale did not mention anything about a fall does not compel a different outcome. It is undisputed that Munoz did not witness the rocking of the ladder.

In *Hernandez v Bethel United Methodist Church of N.Y.* (49 AD3d 251, 253, 853 NYS2d 305 [1st Dept 2008]), the First Department found that "Plaintiff satisfied his prima facie burden by establishing that he was using the ladder to install fireproofing in the course of his employment, that the ladder was shaking and wobbling, that the feet of the ladder came off the ground and that defendant failed to provide plaintiff with adequate safety devices or to properly secure the ladder." In *Hernandez*, the plaintiff was injured when he tried to steady a wobbly ladder and a nail from the nail gun he was holding entered his right eye (*id.* at 251-52). Although plaintiff fell down the ladder, he landed on the first step of the ladder and his injuries came from the nail gun rather than from falling off the ladder. The instant matter involves similar circumstances– both the plaintiff in *Hernandez* and Pasquale were injured when they tried to steady a wobbly ladder– and therefore, plaintiffs are entitled to summary judgment on the Labor Law § 240(1) claim.

The Court observes that the vast majority of defendants' submissions for both motion sequences 004 and 005 are focused on the admissibility of Pasquale's statement to Maria. The only other argument offered by defendants is the claim that no accident actually occurred– defendants point to Dr. Decter's review of Pasquale's medical records to support this contention (NYSCEF Doc. No. 131). But this report does not create an issue of fact with respect to liability under Labor Law § 240(1). Dr. Decter did not witness the accident and his conclusions do not change the fact that Pasquale was not provided with adequate safety devices or a properly secured ladder. Dr. Decter's conclusions may affect the amount of damages awarded as they relate to the connection between the ladder hitting Pasquale and his heart complications.

In other words, just because plaintiffs are entitled to summary judgment on this claim

does not mean that they are entitled to all damages flowing from Pasquale's aortic tear. The plaintiffs have not at all proven that the ladder hitting Pasquale in the chest caused or otherwise contributed to his heart issue. Plaintiffs have only shown that there was an unsecured ladder which wobbled and hit Pasquale in the chest.

Labor Law § 241(6)

Plaintiffs also move for summary judgment on its Labor Law § 241(6) claim and defendants move for summary judgment dismissing this claim.

"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]).

Plaintiffs claim that the following Industrial Codes were violated: 12 NYCRR § 23-1.21(b) and 12 NYCRR §23-1.21(e).

The Court finds that plaintiffs have not met their prima facie burden with respect to 23-1.21(b). As an initial matter, plaintiffs state that they have "alleged a violation of Industrial Code (12 NYCRR) § 23-1.21 (b), which reads 'all ladder footings shall be firm'" (NYSCEF Doc. No. 117 at 27). However, section b has 10 subsections and plaintiffs do not identify which subsection applies here. The Court observes that Section 23-1.21(b)(4)(ii) states that "All ladder

footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

However, a few lines down in the memorandum of law (NYSCEF Doc. No. 117 at 27), plaintiffs include a quote from a First Department case referencing 23-1.21(b)(4)(iv), which lists actions that must be taken when work is being performed on ladder rungs between six and 10 feet above the ladder footing. Plaintiffs also submit an affidavit from its expert, Stanley Fein, who claims that 23-1.21(b) was violated but no specific subsection is identified. From plaintiffs' moving papers, the Court cannot discern which subsections of 23-1.21(b) plaintiffs seek summary judgment on. It is not this Court's role to *guess* which sections plaintiffs are referencing and citing to a code section with 10 subsections is not specific enough for this Court to grant plaintiffs summary judgment.

Similarly, plaintiffs state that 23-1.21(e) was violated. That section has 5 subsections, but plaintiffs do not specifically identify which subsections apply or identify the facts applicable to this argument (*see* NYSCEF Doc. No. 117 at 27-28). Plaintiffs' expert refers to subsections 2 and 3 but does not make specific arguments about how those subsections apply here. While plaintiffs devote ample ink to claim that this Industrial Code section can support liability under the Labor Law, plaintiffs failed to meet their prima facie burden to establish summary judgment.

With respect to plaintiffs' Labor Law § 241(6) claim, plaintiffs simply did not identify the specific subsections applicable or explain why the facts merit summary judgment on those purported code violations. Neither plaintiffs' memo of law (NYSCEF Doc. No. 117) nor the affirmation in support (NYSCEF Doc. No. 105) contain particularized arguments sufficient to meet a movant's prima facie burden on a motion for summary judgment. The Court declines to

search the entirety of plaintiffs' submissions for evidence about which subsections were violated and what facts support those claims.

Defendants move for summary judgment dismissing plaintiffs' Labor Law § 241(6) claims on the ground that Pasquale's statements to Maria are inadmissible. Because the Court has found that those statements are admissible, defendants' motion is denied.

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, defendants' arguments in support of dismissing this claim are based on the theory that the statements Pasquale made to Maria are inadmissible. Because the Court has found the statements to be admissible, this branch of defendants' motion is denied.

Summary

Defendants' reliance on the testimonies of Mr. Munoz (the co-worker), Mr. Cannamela (the on-site medic) and Pasquale's medical records all relate to damages and do not raise issues of fact with respect to plaintiffs' Labor Law § 240(1) claim.

On these papers, plaintiffs have only established that, while doing work covered by the Labor Law, Pasquale used an unsecured ladder which wobbled and hit him in the chest.

It may be that the jury credits the testimony of Munoz and Cannamela that Pasquale never mentioned the ladder hitting his chest and the jury may conclude from that omission- and the fact that the ladder did not topple - that the ladder did not hit him with any force, and that, at the scene, even Pasquale didn't think the ladder caused his pain (for example, there was no claim that Pasquale thought he might have broken ribs). The jury might conclude that the accident - the wobbly ladder hitting Pasquale – caused little or no damage to him.

The jury may conclude, as defendants claim, that it was just a coincidence that Pasquale's aortic tear happened while he was at work, and that the ladder had nothing to do with it. It will be plaintiffs' burden at trial to show that the ladder tipping and hitting Pasquale caused or contributed to his severe heart condition that day.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted only to the extent that plaintiffs are entitled to summary judgment on their Labor Law § 240(1) claim and denied as to the remaining branches of the motion; and it is further

ORDERED that defendants' motion for summary judgment is denied.

This is the Decision and Order of the Court.

Dated: March 5, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH