Arias v Extell 4110 LLC
2018 NY Slip Op 32547(U)
October 5, 2018
Supreme Court, New York County
Docket Number: 162047/2014
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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YASSER ARIAS and SHARESE ARIAS

Plaintiff,

- v -

EXTELL 4110 LLC and GOTHAM CONSTRUCTION COMPANY, LLC,

Defendant.

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INDEX NO. 162047/2014

MOTION DATE 05/02/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

In this action to recover damages for alleged personal injuries arising from the collapse of horse scaffolding at a construction site on 40th Street and Tenth Avenue in Manhattan, the plaintiffs move pursuant to CPLR 3212 and Labor Law § 240(1) for summary judgment on the issue liability as against the defendants, Extell 4110, LLC (Extell), and Gotham Construction Company, LLC (Gotham). The defendants oppose the motion and cross-move for summary judgment dismissing the complaint. The plaintiffs' motion is granted, and the defendants' cross-motion is denied.

The plaintiff Yasser Arias (Arias) alleges that, on November 10, 2014, he sustained injuries when horse scaffolding at a construction site where he was working collapsed, causing the scaffolding and a pile of reinforced steel it was supporting to strike the plaintiff. Arias was working as an employee of Rebar Steel, Inc., at the time of the incident. Arias and his wife commenced this action against the defendants, asserting that they violated Labor Law § 240(1) in failing to supply Arias with safety devices necessary to provide proper protection to workers from gravity-related injuries, and that his injuries were proximately caused by a lack of such protections. The plaintiffs also assert violations of Labor Law §§ 200 and 241(6). Named as defendants are Extell, the owner of the building where the accident occurred, and Gotham, the general contractor for the construction site at the building. Gotham subcontracted with Pinnacle Industries, which subcontracted with Rebar Steel, Inc., for the performance of rebar work.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see

Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra.

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . 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]." The duty created by Labor Law § 240(1) is nondelegable, and an owner or contractor who breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 500 (1993); see Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004). Moreover, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense." Cahill v Triborough Bridge and Tunnel Authority, supra at 39. However, there can be no liability under Labor Law § 240(1) where there is no violation and the worker's actions are the sole proximate cause of the accident. Id.; see Barreto v Metropolitan Transp. Authority, 25 NY3d 426 (2015); Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 (2003).

In order to prevail on his motion for summary judgment on his Labor Law § 240(1) claim, Arias must demonstrate that there is no genuine issue of material fact that (i) there was a violation of the statute because the scaffolding that the plaintiff was provided with lacked appropriate safety devices, or (ii) that any violation which occurred proximately caused the plaintiff's injury. The plaintiff establishes through his deposition testimony that the scaffolding horses involved in his accident had nothing at their edges, such as a brace or piece of metal protruding up, to secure materials placed on top of them from falling off, nor was there anything on the top surface of the horses to hold the materials in place. Although Arias had his back to them when the accident occurred, he testified that after he was struck he turned and observed the horses on their sides. Arias further testified that he was never provided with any instructions as to the horses' weight capacity or how to safely place rebar on the horses. Arias' testimony shows, prima facie, that the scaffolding horses' lack of safety devices sufficient to prevent the rebar from falling off or the scaffolding from tipping over, led to his injuries. Importantly, and contrary to the defendants' assertions, Arias is not required to demonstrate that the horse scaffolding was defective in a particular way in order to satisfy his burden under Labor Law § 240(1). See Hill v City of New York, 140 AD3d 568, 570 (1st Dept. 2016). Rather, it is sufficient for the purposes of Labor Law § 240(1) that adequate safety devices to prevent the scaffolding from tipping over or to prevent the rebar from falling were absent. See Fanning v Rockefeller University, 106 AD3d 484 (1st Dept. 2013); Schron v New York University, 14 AD3d 468 (1st Dept. 2005); Thompson v St. Charles Condominiums, 303 AD2d 152 (1st Dept. 2003); Orellano v 29 E 37th St. Realty Corp., 292 AD2d 289 (1st Dept. 2002); Aragon v 233 West 21st Street, Inc., 201 AD2d 353 (1st Dept. 1994). Furthermore, it is undisputed that the defendants, as owner and

general contractor at the subject premises at the time of the incident, respectively, are each subject to liability pursuant to the statute.

Arias having shown, prima facie, that he is entitled to judgment as a matter of law upon his cause of action arising from Labor Law § 240(1), the burden shifts to the defendants to raise a triable issue of fact. The defendants submit in support of their cross-motion and in opposition to the plaintiffs' motion the unsworn written statements of two co-workers of Arias, alleging that upon arrival at the work site, there was already rebar on the horses, loaded on one side. "Records without proper certification may be considered in opposition to a motion for summary judgment, but only when they are not the sole basis for the court's determination." Erkan v McDonald's Corp., 146 AD3d 466, 468 (1st Dept. 2017). Here, the unsworn statements of Arias' co-workers are the only evidence the defendants put forth to challenge the details of Arias' version of the accident, and they may not be considered. Id. Even if the unsworn statements were considered, they do not show that Arias was the sole proximate cause of his accident. It is undisputed that the horse scaffolding lacked braces or anything to secure the rebar placed on top of it, that there were no other safety devices in place to prevent the scaffolding from tipping over or to prevent the rebar from falling off, and that Arias never received any instruction on how to safely use the scaffolding horses. A lack of certainty as to exactly what preceded the collapse of the scaffolding does not create a material issue of fact here as to proximate cause. See Vergara v SS 133 West 21, LLC, 21 AD3d 279 (1st Dept. 2005); Torres v Monroe College, 12 AD3d 261 (1st Dept. 2004); Crespo v Triad, Inc., 294 AD2d 145 (1st Dept. 2002); Moran v 200 Varick Street Associates, LLC, 80 AD3d 581 (2nd Dept. 2011).

Since Arias has established, prima facie, that his injuries were the direct consequence of using horse scaffolding that did not provide adequate protection from the class of injuries contemplated by Labor Law § 240(1), and the defendants have not come forward with evidence sufficient to raise a triable issue of fact, the plaintiffs are entitled to summary judgment on the issue of liability. In light of the foregoing, the plaintiffs' Labor Law §§ 240 and 241(6) claims, which are raised in the defendants' cross-motion, are academic and need not be addressed. See Berisha v 209-219 Sullivan Street L.L.C., 156 AD3d 457 (1st Dept. 2017); Howard v Turner Const. Co., 134 AD3d 523 (1st Dept. 2015); Kristo v Board of Educ. Of City of New York, 134 AD3d 550 (1st Dept. 2015); Jerez v Tishman Const. Corp. Of New York, 118 AD3d 617 (1st Dept. 2014).

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is granted with regard to liability on the plaintiffs' cause of action arising from Labor Law § 240(1), as against the defendants, Extell 4110, LLC, and Gotham Construction Company, LLC; and it is further,

ORDERED that the defendants' cross-motion for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the court.

10/5/2018
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
SEQ 001	X	GRANTED		DENIED		GRANTED IN PART		OTHER
SEQ 001 X-MOT		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

162047/2014 ARIAS, YASSER vs. EXTELL 4110 LLC
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