

Hobbs v MTA Capital Constr.
2019 NY Slip Op 30683(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 155382/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 155382/2015

JOSEPH HOBBS and LINDA HOBBS,

Plaintiffs,

MOTION SEQ. NO. 003

- v -

MTA CAPITAL CONSTRUCTION, METROPOLITAN
TRANSPORTATION AUTHORITY, CITY OF NEW YORK, NEW
YORK CITY TRANSIT AUTHORITY, and S3 TUNNEL
CONSTRUCTORS, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 79, 80, 81

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **decided as follows**.

In this Labor Law action, defendants MTA Capital Construction (“MTACC”), Metropolitan Transportation Authority (“MTA”), City of New York (“the City”), New York City Transit Authority (“NYCTA”), and S3 Tunnel Constructors, Inc. (“S3 Tunnel Constructors”) move, pursuant to CPLR 3212, for summary judgment dismissing the New York Labor Law §§ 200, 240(1), and 241(6) claims of plaintiffs Joseph Hobbs (“Hobbs”) and Linda Hobbs (collectively “plaintiffs”). Defendants also move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs’ common law negligence cause of action. Further, defendant S3 Tunnel Constructors moves, pursuant to CPLR 3211(a)(1) and (7) and 3212, to dismiss plaintiffs’ complaint in its entirety. Plaintiffs oppose the motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in a prior decision and order of this Court rendered on March 28, 2017. (Doc. 71 at 19–31.) To briefly summarize, Hobbs was a construction worker who was injured on September 19, 2014 while working on the Second Avenue subway extension project. (*Id.* at 20.) Hobbs alleges that he was climbing a 20-foot ladder on the site to follow two workers, who had been recently laid off, from their work area and to “make sure they got their tools out and nothing was stolen.” (Doc. 69 at 94.) Plaintiff claims that, as he neared the top of the ladder, either the fourth or fifth rung from the top broke away, causing him to fall. (Doc. 77 at 8–9.)

Plaintiffs thereafter commenced the instant action against defendants on May 28, 2015 by filing a summons and complaint. (Doc. 68 at 17–31.) In the complaint, they alleged the following causes of action: (1) common law negligence; (2) a violation of New York Labor Law § 200; (3) a violation of Labor Law § 240(1); (4) a violation of Labor Law § 241(6); and (5) loss of consortium. (*Id.*) Defendants filed their answer on June 22, 2015. (*Id.* at 32–36.)

In motion sequence 002, plaintiffs moved, pursuant to CPLR 3212, for partial summary judgment on their Labor Law § 240(1) claim against MTACC and the City. (Doc. 32 at 3.) In denying the motion, this Court found that, although the ladder was a safety device within the purview of § 240(1) (Doc. 71 at 28–29), there was an issue of fact regarding how the accident occurred. Specifically, this Court noted that “this is a case in which the parties offer two distinct versions of the accident.” (*Id.* at 29.) Plaintiff’s version is that the edge of one of the ladder’s rungs broke off. (*Id.*) On the other hand, several employees of defendants indicated that there was nothing defective about the ladder. For example, Robert Begonja (“Begonja”), the site superintendent,

stated in an affidavit in opposition to the motion that, upon learning of plaintiff's accident, he descended the same ladder and did not observe any broken rungs on it. (*Id.* at 26.) Stephen Faustini ("Faustini"), a safety manager at the site, represented that he spoke with Hobbs shortly after the accident, and that Hobbs informed him that he fell because he slipped. (*Id.*) Moreover, another safety manager, Michael Ceglio ("Ceglio"), discussed the accident with Begonja and Faustini and completed a post-accident report in which he indicated that the ladder was functioning properly and was in compliance with Skanska's safety measures.¹ (*Id.* at 23–25.) Because of the stark differences between these accounts, this Court denied plaintiffs' partial summary judgment motion. (*Id.* at 30.)

Plaintiffs subsequently appealed this Court's prior decision. On March 20, 2018, the First Department affirmed, concluding that defendants had raised triable issues of fact because of the "conflicting accounts of how the accident occurred" (*Hobbs v MTA Capital Constr.*, 159 AD3d 544, 545 [1st Dept 2018]) (Doc. 81 at 2–3).

Hobbs' and Ceglio's depositions were taken in 2016. (Docs. 66 at 2; 70 at 130, 210.) Between the time this Court issued its March 28, 2017 order and the time of the First Department's March 20, 2018 decision, the depositions of Begonja and Faustini were conducted. (Docs. 66 at 2–3; 81 at 2–3.)

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' common law negligence claim and their Labor Law causes of action. Defendant S3 Tunnel Constructors further moves, pursuant to CPLR 3211(a)(1) and (7) and 3212, to dismiss the entire complaint. In support of their motion, defendants maintain that the evidence "conclusively" establishes that the ladder did not break. (Doc. 66 at 8.) In particular, they refer to the affidavits

¹ At the time, Hobbs was employed as a carpenter by Skanska USA Civil Northeast, a nonparty entity. (Doc. 71 at 21.)

and deposition testimonies of Ceglio, Begonja, and Faustini, all of whom stated that there was nothing wrong with the ladder. (Doc. 67 at 4–5.) In addition, they argue that entries in plaintiff’s hospital charts, which indicate that plaintiff slipped, are admissible as admissions against interest. (*Id.* at 11.) Thus, they argue that summary judgment dismissing plaintiffs’ Labor Law § 240(1) claim should be granted (Doc. 67 at 2) because, in light of the foregoing evidence, Hobbs failed to prove that defendants violated that statutory provision. With respect to S3 Tunnel Constructors, defendants’ counsel argues that the complaint should be dismissed because S3 Tunnel Constructors is an improper defendant in this action, because it never entered into a contract with the MTA to perform construction work on the project. (Doc. 66 at 3–4.)

In opposition, plaintiffs argue that defendants’ motion should be denied as to Labor Law §§ 200 and 241(6), since defendants did not address those provisions in their affirmation or memorandum of law in support. (Doc. 77 at 3.) Regarding § 240(1), plaintiffs maintain that the ladder constitutes a safety device within the purview of the Labor Law because Hobbs was engaged in construction work while he was using it and because it provided Hobbs with access to different areas of the worksite. (*Id.* at 12–13.) Because Hobbs alleges that the ladder broke, and since defendants had notice that a ladder creates a foreseeable risk of falling, plaintiffs argue that MTACC and the City are liable under § 240(1) and that defendants’ motion should be denied. (*Id.* at 10–20.) With respect to Hobbs’ medical records, plaintiffs contend that the entries are not inconsistent with his account of how his accident occurred. In other words, while the hospital entries contain the words “slipped” and “slid,” they do not contradict Hobbs’ allegation that he slipped down the ladder because a rung broke away. (*Id.* at 20–21.)

LEGAL CONCLUSIONS:

Under CPLR 3212, a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Under a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, dismissal will be granted. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) If the “allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference” (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Further, a motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) “test[s] the facial sufficiency of the pleading in two different ways.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, “the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law.” (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

a. Whether Defendant S3 Tunnel Constructors is Entitled to Dismissal of Plaintiffs’ Complaint.

As a preliminary matter, this Court finds that plaintiffs’ complaint must be dismissed as to defendant S3 Tunnel Constructors. Defendants argue that S3 Tunnel Constructors has been incorrectly named as a defendant, since it never entered into a contract with the MTA for the construction project. (Doc. 66 at 3–4.) Indeed, the contract that defendants submit establishes that the MTA, acting through NYCTA, entered into a contract with Skanska, Hobbs’ employer, for the construction work on the project. (Doc. 72 at 325–29.) In their opposition, plaintiffs failed to address this branch of defendants’ motion. Because the documentary evidence establishes that S3 Tunnel Constructors is an improper defendant, this Court determines that it is entitled to dismissal of the complaint pursuant to CPLR 3211(a)(1).

b. Whether Defendants MTACC, MTA, the City, and NYCTA are Entitled to Summary Judgment Dismissing Plaintiffs’ New York Labor Law and Negligence Claims.

The primary contention between the parties on plaintiffs’ Labor Law claims is with respect to § 240(1). Although both plaintiffs’ and defendants’ papers argued extensively on the issue of

whether the ladder at issue constituted a safety device within the purview of the Labor Law (Docs. 67 at 8–10; 77 at 5–8, 11–16), this Court, in its prior decision, explicitly found that “the Ladder is a safety device for the purposes of Labor Law §240(1)” (Doc. 71 at 28–29). Thus, that finding is the law of the case and the parties’ arguments as to the ladder need not be addressed.

In rendering its prior decision, this Court considered the following: Hobbs’ 50-h hearing testimony (Doc. 71 at 21–23); Ceglio’s deposition and post-accident report (*id.* at 23–25); and the affidavits of Faustini and Begonja (*id.* at 26). Both this Court and the First Department held that summary judgment was inappropriate because of the existence of factual issues regarding how the accident occurred. (*Id.* at 30; Doc. 81 at 2–3.) The First Department specifically held: “The[] conflicting accounts of how the accident occurred raise an issue of fact that precludes the granting of summary judgment.” (Doc. 81 at 3.)

Here, defendants submit the same evidence considered in connection with the prior motion, as well as the depositions of Faustini and Begonja, which were taken after the prior decision was appealed. (Docs. 66 at 2–3; 81 at 2–3.) In addition, they submit the affidavit of Neil Webster (“Webster”) (Doc. 69 at 37–42), a certified safety professional and occupational health and safety technologist, who surmised that there was nothing defective about the ladder (*id.* at 42). This additional evidence, however, does not obviate the material issue of fact that both this Court and the First Department found in denying plaintiffs’ prior summary judgement motion: that there are different accounts of how the accident happened. Viewing the evidence in the light most favorable to the nonmoving party, as this Court must (*see Valente v Lend Lease (US) Constr. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]), summary judgment dismissing plaintiffs’ Labor Law §240(1) claim is

denied, since the same issues of fact still exist² (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] (denying summary judgment in Labor Law action where there were conflicting accounts regarding the cause of plaintiff's accident).)

Both plaintiffs' and defendants' papers further argued whether the entries in Hobbs' hospital charts are admissible evidence, and whether such entries establish a violation of § 240(1). (Docs. 67 at 11–12; 77 at 20–21.) In their motion papers, for example, defendants contended that plaintiff's hospital records contradict his account of what occurred. (Doc. 67 at 11–12.) But even if this Court were to consider those records, summary judgment would still be denied, because those records are not necessarily inconsistent with Hobbs' testimony. While the hospital entries contain the words "slipped" and "slid," they are not inconsistent with Hobbs' allegation that he slipped down the ladder because a rung broke away. (Doc. 77 at 20–21.) In other words, even in light of the hospital records, an issue of fact still remains.

With respect to plaintiffs' Labor Law §§ 200 and 241(6) causes of action, plaintiffs correctly point out that defendants did not address either cause of action in their affirmation or memorandum in support of the motion. (Doc. 77 at 22–23.) However, defendants contend that they addressed §§ 200 and 241(6) through Webster's affidavit, in which he opined that those statutes were not violated. (Doc. 80 at 10–11.) This Court agrees with defendants' position: although it is true that the primary papers on a motion consist of the party's affirmations, affidavits, and memoranda, any relevant documents—such as exhibits, deposition transcripts, etc.—may be considered. (*See Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013] (affirming

² Defendants argue that plaintiffs failed to submit admissible proof in opposition to the motion. (Doc. 80 at 1–3.) This Court need not consider whatever proof plaintiffs may have furnished, since defendants failed to even establish their prima facie case of entitlement to judgment as a matter of law. (*See Mazurek*, 27 AD3d at 228 [1st Dept 2006].)

trial court where the movant's papers, "primarily through the thorough opinions expressed by its expert," established movant's prima facie case for the relief it sought) (brackets omitted.)

Nevertheless, this Court denies defendants' motion with respect to plaintiffs' Labor Law §§ 200, 241(6), and common law negligence claims. "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." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012].) Because, as already explained, there is an issue of material fact, summary judgment must be denied as to § 200 and the common law negligence causes of action. Moreover, with respect to § 241(6), which provides a cause of action when an applicable Industrial Code regulation has been violated (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]), plaintiffs plead the following violations: 23-1.7; 23-1.8; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.22; 23-2.5; 23-2.6; 23-2.7; 23-3.1; 23-3.2; 23-5.1; 23-5.2; 23-5.6; 23-5.7–5.22; and 23-5.15. (Doc. 68 at 45.) While Webster opined in his affidavit that Industrial Code regulations 23-1.15, 23-1.16, and 23-1.17 were not violated because those provisions apply only to safety devices—and, in his opinion, the ladder did not constitute a safety device (Doc. 69 at 41)—such conclusory statements are insufficient to establish entitlement to judgment as a matter of law. (*See 400 E. 77th Owners, Inc. v New York Eng'g Assn., P.C.*, 122 AD3d 474 [1st Dept 2014].)

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants MTA Capital Construction, Metropolitan Transportation Authority, City of New York, New York City Transit Authority, and S3 Tunnel Constructors, Inc. for summary judgment pursuant to CPLR 3212 dismissing plaintiffs Joseph Hobbs and Linda Hobbs' claims pursuant to New York Labor Law §§ 200, 240(1), 241(6), as well as their common law negligence cause of action, is denied; and it is further


ORDERED that the branch of the motion by defendant S3 Tunnel Constructors, Inc. seeking dismissal of the complaint as against it pursuant to CPLR 3211(a)(1), is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption be amended to reflect the dismissal of S3 Tunnel Constructors and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 20 days of the entry of this order, counsel for the moving parties shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

<u>3/13/2019</u> DATE	 KATHRYN E. FREED, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
				OTHER