

Sheehan v 30 Park Place Residential LLC
2019 NY Slip Op 30687(U)
March 8, 2019
Supreme Court, New York County
Docket Number: 157153/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----x

KEVIN SHEEHAN and ERIN SHEEHAN,
Plaintiffs

Index No. 157153/2015

- against -

DECISION AND ORDER

30 PARK PLACE RESIDENTIAL LLC,
TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK, TISHMAN CONSTRUCTION
CORPORATION, 99 CHURCH STREET
INVESTORS, LLC, SILVERSTEIN
PROPERTIES, INC., and SILVERSTEIN
PROPERTIES, NEW YORK,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and lost services sustained July 31, 2014, when plaintiff Kevin Sheehan's head struck a sprinkler pipe coupling, causing a subdural hematoma, after the front legs of the fiberglass ladder on which Sheehan was standing flexed and sprung back suddenly. He was working on a construction project where defendant Tishman Construction Corporation of New York was the general contractor on premises owned by defendant 30 Park Place Residential LLC.

All defendants move for summary judgment dismissing all of plaintiffs' claims, C.P.L.R. § 3212(b), on the ground that Sheehan's account of his injury is incredible as a matter of law. Plaintiffs separately move for summary judgment on the liability of defendant owner 30 Park Place Residential LLC and defendant

general contractor Tishman Construction Corporation of New York for their violation of New York Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court denies both motions.

II. DEFENDANTS' MOTION

A. Deposition Testimony

Defendants contend that Sheehan's account of his injury is incredible as a matter of law because Sheehan did not report his injury to a superior or mention it to his co-worker when it occurred, to other co-workers with whom he commuted, or to his wife when he arrived at home. Nor does any objective evidence support his description of the ladder's frequent sudden movements when bearing excessive weight and his resulting injury. Although it is undisputed that Sheehan was working on the pipes in the space above where the ceiling was to be installed, his injury was unwitnessed other than by Sheehan himself.

Yet defendants fail to demonstrate that the ladder on which Sheehan was standing did not spring or otherwise move, catapulting him backward, or that his head did not strike a sprinkler pipe coupling, causing him injury. The fact that Sheehan was the sole witness of his injury only precludes summary judgment in plaintiffs' favor and does so only if evidence other than his account controverts that account or otherwise undermines his credibility. Rroku v. West Rac Contr. Corp., 164 A.D.3d 1176, 1177 (1st Dep't 2018); Concepcion v. 333 Seventh LLC, 162 A.D.3d 493, 494 (1st Dep't 2018); Serrano v. TED Gen. Contr., 157

A.D.3d 474, 474 (1st Dep't 2018); Goreczny v. 16 Ct. St. Owner LLC, 110 A.D.3d 465, 466 (1st Dep't 2013). See Smigielski v. Teachers Ins. & Annuity Assn. of Am., 137 A.D.3d 676, 676 (1st Dep't 2016).

Although defendants point to Sheehan's failure to report his injury to his co-workers, which may undermine his credibility, Guerrero v. 115 Central Park West Corp., ___ A.D.3d ___, 88 N.Y.S.3d 880, 880 (1st Dep't Jan. 3, 2019); Espinal v. Trezechahn 1065 Ave. of the Ams., LLC, 94 A.D.3d 611, 612 (1st Dep't 2012), his deposition testimony provides a reasonable explanation. See Capuano v. Tishman Constr. Corp., 98 A.D.3d 848, 850 (1st Dep't 2012). Sheehan testified that, immediately after he struck his head, he experienced no impairment and was able to continue working until lunch. After lunch he developed a headache in his forehead, but still was able to work until his shift ended. He commuted home with two co-workers, Danny Radigan and Tommy O'Shea, who inquired what was wrong because he was subdued and held his head in his hands. Sheehan answered that he was suffering a headache, and O'Shea testified at his deposition that Sheehan did mention he had suffered an injury at work that day, but Sheehan testified that did not mention his head hitting the pipe "because he hadn't put that together yet." Aff. of Alisa Dultz Ex. E, at 130.

He also testified that he did not mention his injury at work to his wife, plaintiff Erin Sheehan, because he became unconscious when he arrived at home and did not wake up until he

was in the hospital. Defendants present Erin Sheehan's deposition testimony in opposition to plaintiffs' motion, when defendants asked her whether she engaged in any conversation with her husband before he reached the hospital, but she responded by merely asking what subject defendants were referring to and never actually answered affirmatively. When defendants then asked her whether he mentioned an injury at work, she denied any such conversation. Nevertheless, even if her testimony suggests, contrary to her husband, that he did mention his headache to her when she arrived at home, she added that he did not know the cause of his headache. Given his condition when he reached the hospital, moreover, it is certainly plausible that Kevin Sheehan simply did not remember a conversation immediately before losing consciousness.

B. Medical and Other Expert Evidence

Defendants further contend that the medical evidence does not support Sheehan's account of his injury. Defendants' medical examiners, however, fail to establish that his subdural hematoma did not result from trauma, which is necessary to meet their initial burden. Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d 404, 407 (1st Dep't 2017); Soho v. Konate, 85 A.D.3d 522, 522 (1st Dep't 2011). In a report dated February 21, 2018, Brian Greenwald M.D. recounted simply that: "Subdural hematomas (bleeding) can occur with or without trauma to the head." Aff. of Alisa Dultz Ex. Q, at 22. Dr. Greenwald added that Sheehan's alcoholism and use of blood thinners increased his risk of a

hematoma with or without trauma. While Dr. Greenwald ultimately concluded that Sheehan had not suffered trauma, Dr. Greenwald based his conclusion on the inadmissible hospital emergency department report that examination of Sheehan's head indicated his injury was atraumatic, rather than on any diagnostic testing or Dr. Greenwald's own examination. See Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d at 405-406; Holmes v. Brini Tr. Inc., 123 A.D.3d 628, 628-29 (1st Dep't 2014); Kone v. Rodriguez, 107 A.D.3d 537, 538 (1st Dep't 2013); Malupa v. Oppong, 106 A.D.3d 538, 539 (1st Dep't 2013).

Douglas Cohen M.D. examined plaintiff and in a report dated March 5, 2018, also recounted that a subdural hematoma may occur from trauma or without trauma. Dr. Cohen's conclusion that it is possible Sheehan's subdural hematoma occurred spontaneously with anticoagulation and without trauma is not based on any objective findings whatsoever regarding Sheehan's condition and therefore is pure speculation. Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d at 407; DeFilippo v. New York Downtown Hosp., 10 A.D.3d 521, 523 (1st Dep't 2004). Moreover, insofar as the physicians rely on the inadmissible hospital records recounting that Sheehan lacked any history of head trauma, this information may be based on the report by Erin Sheehan whose knowledge, as discussed above, was limited and not firsthand.

Similarly, defendants' expert Stanley Kiska merely describes the design, construction, and reliability of the models of fiberglass ladders at the work site. Because he never examined

the specific ladder that Sheehan used and offers no opinion regarding that ladder's condition, Kiska fails to show the absence of defendants' violation of the Labor Law or absence of their negligence. Rroku v. West Rac Contr. Corp., 164 A.D.3d at 1177; Serrano v. TED Gen. Contr., 157 A.D.3d at 474. Moreover, while Kiska specifies the 300-375 pounds that the ladder models are capable of bearing, he never assesses whether Sheehan's body weight, hard hat, and tool belt and the duct Sheehan was carrying exceeded that weight limit. Thus neither the deposition testimony nor any of the expert opinions on which defendants rely demonstrates the impossibility of Sheehan's injury having occurred as he described. See Espinal v. Trezechahn 1065 Ave. of the Ams., LLC, 94 A.D.3d at 613; Williams v. Port Auth. of N.Y. & N.J., 247 A.D.2d 296, 297 (1st Dep't 1998).

III. PLAINTIFFS' MOTION

Sheehan's testimony that the springing of the ladder on which Sheehan was standing caused him to strike his head meets his initial burden to show that the ladder failed to provide adequate protection. Rroku v. West Rac Contr. Corp., 164 A.D.3d at 1177; Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583 (1st Dep't 2018); Goreczny v. 16 Ct. St. Owner LLC, 110 A.D.3d at 465. The fact that he did not fall from the ladder does not negate defendants' liability under Labor Law § 240(1). Messina v. City of New York, 148 A.D.3d 493, 494 (1st Dep't 2017); Reavely v. Yonkers Raceway Programs, Inc., 88

A.D.3d 561, 563-64 (1st Dep't 2011); Peralta v. American Tel. & Tel. Co., 29 A.D.3d 493, 493-94 (1st Dep't 2006).


Although defendants' evidence addressed above fails to raise a factual issue regarding plaintiffs' Labor Law § 240(1) claim, defendants also rely on the deposition testimony by Sheehan's co-worker Keith Forsyth. Sheehan testified that Forsyth was present when Sheehan was injured, but Forsyth denies that he observed Sheehan falling backward or striking his head or even on a ladder at all. While it is possible that Forsyth was present yet did not observe Sheehan's injury, it is difficult to reconcile how Forsyth would have been completely unaware of any such occurrences involving his co-worker. The contradictions and inconsistencies between his testimony and Sheehan's account of the two workers' performance of their work when Sheehan claims he was injured raises credibility and other factual issues precluding summary judgment on plaintiffs' Labor Law 240(1) claim. Albino v. 221-223 W. 82 Owners Corp., 142 A.D.3d 799, 800-801 (1st Dep't 2016); Smigielski v. Teachers Ins. & Annuity Assn. of Am., 137 A.D.3d at 676; Perez v. Folio House, Inc., 123 A.D.3d 519, 519 (1st Dep't 2014); Noble v. 260-261 Madison Ave., LLC, 100 A.D.3d 543, 545 (1st Dep't 2012).

IV. CONCLUSION

In sum, the court denies all defendants' motion for summary judgment because the evidence fails to demonstrate that plaintiff Kevin Sheehan's account of his injury was incredible as a matter of law. C.P.L.R. § 3212(b). Given the credibility and other

factual issues raised by the contradictory accounts of Sheehan's injury, however, the court also denies plaintiffs' motion for summary judgment on the liability of defendants 30 Park Place Residential LLC and Tishman Construction Corporation of New York for a violation of Labor Law § 240(1). C.P.L.R. § 3212(b) and (e).

DATED: March 8, 2019



LUCY BILLINGS, J.S.C.

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