

Giordano v A.W.& S. Constr. Co.
2019 NY Slip Op 30786(U)
March 26, 2019
Supreme Court, New York County
Docket Number: 158165/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 158165/2016

GARY GIORDANO,

MOTION DATE 03/12/2019

Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

A.W.& S. CONSTRUCTION CO., INC., PLAZA TOWER,
LLC, TOWER PLAZA ASSOCIATES, LP

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 90, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Motion sequence 001 and 002 in this action are consolidated for disposition. The motion by plaintiff to compel discovery (Motion Sequence Number 001) is granted to the extent stated in this decision. Defendants' cross-motion to compel the plaintiff to appear for a deposition is granted.

The motion by plaintiff for summary judgment (Motion Sequence Number 002) is denied with leave to bring the motion again after the deposition of the plaintiff.

Background

Plaintiff was hired by nonparty Sanjon, Inc. ("Sanjon") to perform construction work for the building of a safe room for the United Kingdom Mission to the United Nations. Defendant A.W. &S. Construction Co., Inc. ("AWS") is the general contractor for the construction project.

Defendants Plaza Tower LLC and Tower Plaza Associates, LP own the premises where the construction occurred.

While performing construction work on the premises, plaintiff alleges he was using a six foot A-frame ladder to install drywall. On the date of the incident, plaintiff claims that he sustained injuries when he was standing on the fourth or fifth rung of the fully opened ladder when it collapsed, causing plaintiff to fall to the ground. Plaintiff claims that his right arm landed on a screw gun he had been using to install the drywall, causing him injuries.

Plaintiff alleges that the ladder provided was dangerous because no worker was stationed at the foot of the ladder to hold it in place nor was it secured in place to avoid side slip or movement. Plaintiff also alleges that defendants failed to inspect the ladder and that defendants should have provided proper protection to the plaintiff while he was using the ladder.

In motion sequence 001 plaintiff moves to compel defendants to correct deficiencies to the defendants' responses to plaintiff's "Notice for Discovery and Inspection" (NYSCEF No. 24) and Combined Demands (NYSCEF Doc. No. 25). In response, defendants make a cross-motion to strike plaintiff's complaint for failure to appear for a deposition, or, in the alternative, compel plaintiff to appear for a deposition.

In motion sequence 002 plaintiff moves for partial summary judgment with respect to liability under Labor Law § 240 (1) because the owner of the premises and the general contractor each have a nondelegable duty to provide the plaintiff with adequate safety equipment to protect the plaintiff from elevation-related risks. Plaintiff claims that an unsecured ladder constitutes inadequate equipment and is a per se violation of § 240 (1). In response, defendants claim that there is no way to determine whether the ladder was unsecured because the plaintiff has continuously refused to appear for a deposition. A deposition is necessary, defendants argue,

because statements made in plaintiff's affidavit suggest that there is evidence that the plaintiff is the sole proximate cause of the accident.

Discussion

CPLR 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The words material and necessary are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). “Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition” (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015] [internal quotations and citation omitted]).

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response” (CPLR § 3124).

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]).

Discovery Responses

Contract Demands (Notice for Discovery and Inspection 2-5)

In its second demand, plaintiff seeks a copy of any type of contract between defendant Plaza Tower and defendant AWS. In its third demand, plaintiff requests a copy of any contract between AWS and Sanjon. In the fourth demand, plaintiff seeks a copy of any contract between Plaza Tower and others regarding construction work, and in the fifth, a copy of any contract between AWS and others regarding construction work. In response, defendants state that there is no contract between Plaza Tower and AWS, they provide a contract between AWS and Sanjon and object to demands four and five as being overly broad.

Plaintiff's demands four and five are overbroad. Plaintiff fell off a ladder and has not shown why every construction contract is relevant. As for the third demand, defendants must produce the entirety of contracts, including addendums, between AWS and Sanjon within the time frame set forth in this decision.

Identification of Witnesses (Notice for Discovery and Inspection 6-9, 50)

Plaintiff requests information regarding all witnesses employed by independent contractors, defendants and Sanjon, who were in a supervisory or nonsupervisory capacity, and who were on the job site on the date of the accident, for one week prior to the date, and for one week thereafter. Plaintiff is only entitled to the names and addresses of witnesses who were on the job site on the date of the accident and (1) who were made aware of the accident (2) who observed the accident or (3) were in the area of the safe room where the accident happened. Defendants must produce this information within the time frame set forth in this decision.

Insurance Demands (Notice for Discovery and Inspection 10-14)

Plaintiff requests information regarding the liability insurance policy held by defendants that was in effect on the date of the incident. Defendants must provide a copy of the two policies mentioned in its Response to the NDI within the time frame set forth in this decision.

Request for Documents (Notice for Discovery and Inspection 15, 17, 18)

Plaintiff's request for blue prints, architectural plans, shop drawings, job plans, and work logs is denied as they are not reasonably related to him falling off an allegedly unsecured ladder.

Identity of General Contractor (Notice for Discovery and Inspection 16)

Plaintiff's request for the name and address of the general contractor is granted. Defendants must produce this information within the time frame set forth in this decision.

Request for Photographs (Notice for Discovery and Inspection 1, 49)

Plaintiff requests all photographs of the accident site, including the screw gun and the subject A-frame ladder and progress photographs. Although defendants provide photographs of the ladder itself, they object to the remaining demands regarding the photographs, claiming that they are overly broad and seek information regarding subsequent remedial measures. Defendants must provide plaintiff with color photographs of the site of the accident from two weeks before the accident and up to and including the date of the accident by the time frame set forth in this decision.

Summary Judgment

Because the motion is premature, plaintiff's motion for summary judgment is denied with leave to bring the motion again after the deposition of the plaintiff. In plaintiff's own affidavit, he states he was not holding the ladder with either hand because he was carrying drywall with both hands (NYSCEF Doc. No. 45 at ¶ 18). Also, in the affidavit of plaintiff's employer, the employer states that he had a conversation with plaintiff in which plaintiff admitted that "the accident was caused by his own 'stupidity'" (NYSCEF Doc. No. 100). Defendants are entitled to question plaintiff about how the accident happened and why he stated to his employer that he was the cause of his accident. The motion is premature.

Summary

Defendants must provide the above documents by May 15, 2019. The deposition of plaintiff shall occur on or before April 30, 2019. One is not contingent upon the other.

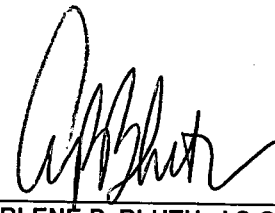
Accordingly, it is hereby

ORDERED that the plaintiff's discovery motion is granted only to the extent as indicated in this decision; defendant's cross motion is granted.

ORDERED that the plaintiff's motion for summary judgment is denied with leave to bring it again after the deposition of the plaintiff.

The parties are directed to appear for a further status conference on June ⁴ 4, 2019 @ 2:15 P.M.

3/26/19
DATE


ARLENE P. BLUTH, J.S.C.
~~NON~~ ARLENE P. BLUTH

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE