Maldonado v City of New York
2019 NY Slip Op 30959(U)
April 3, 2019
Supreme Court, New York County
Docket Number: 157651/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** ***Justice*** **PART** **IAS MOTION 21EFM**

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IRVIN MALDONADO,

Plaintiff,

- v -

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY (MTA), NEW YORK CITY TRANSIT AUTHORITY, d/b/a MTA NEW YORK CITY TRANSIT (NYCTA), and LIMNES CORP.,

Defendants.

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INDEX NO. 157651/2015

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this Labor Law action, plaintiff Irvin Maldonado ("Maldonado") moves, pursuant to CPLR 3212, for summary judgment on the issue of liability under New York Labor Law § 240(1) against defendants Metropolitan Transportation Authority ("the MTA"), New York City Transit Authority ("NYCTA"), and Limnes Corp. ("Limnes"). Defendants oppose the motion. After oral argument, and upon reviewing the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 20, 2014, plaintiff Maldonado suffered injuries when he fell twenty feet from a platform while working as a bridge painter underneath the elevated subway line running along Nagle Avenue in Manhattan. (Doc. 33 at 2–3.) At the time, Maldonado was employed by NUCO

Painting Corp. ("NUCO"), a subcontractor of Limnes. (*Id.* at 2.) He commenced the instant action on July 24, 2015 by filing a summons and complaint against defendants the City of New York, the MTA, NYCTA, and Limnes, which was hired by the MTA and acted as the general contractor on the site. (Doc. 34 at 4–24.) In his complaint, he asserted causes of action for negligence and violations of New York Labor Law §§ 200, 240(1), and 241(6). (*Id.* at 21–23.)

Maldonado now moves, pursuant to CPLR 3212, for summary judgment against the MTA, NYCTA, and Limnes on the issue of liability under New York Labor Law § 240(1).

In support of the motion, Maldonado claims that defendants failed to provide him with adequate safety devices that would have prevented him from falling off the platform. (Doc. 33 at 7.) At both his 50-hearing and deposition, Maldonado testified that the platform he was working on had been modified by "[o]ne of the workers." (*Id.* at 2–3; Doc. 37 at 31.) Specifically, he said that the rear corner of the platform had been removed so that the platform could be raised "a little higher" than usual. (Docs. 33 at 2–3; 37 at 32.) This modification created a hole in the platform. (Doc. 33 at 2–3.) However, because the platform was covered by tarpaulins, Maldonado did not see the hole and fell through. (*Id.*) Malcolm King ("King"), Limnes' site safety engineer (Doc. 39 at 11), and Victor Ravelo ("Ravelo"), NUCO's health and safety officer (Doc. 40 at 4), confirmed that workers were in the process of setting up tarpaulins around the platform prior to Maldonado's accident (Docs. 39 at 89; 40 at 6). Thus, Maldonado argues that summary judgment must be granted in his favor because: (1) the platform itself was defective due to the modification (Doc. 33 at 16–18); (2) the tarpaulins prevented him from tying himself onto the safety lines on the platform (*id.* at 11–14); and (3) defendants failed to furnish adequate safety devices, such as fences or railings, where he was working (*id.* at 15–16).

In opposition, the MTA, NYCTA, and Limnes argue that the motion should be denied as procedurally defective because plaintiff failed to provide a full copy of the pleadings as required by CPLR 3212(b) (Doc. 45 at 2–3) and because the deposition transcripts of plaintiff and Ravello, which were unsigned by the deponents (*id.*), are hearsay. They also assert that the MTA is not an "owner" or "contractor" because the contract for the overcoat painting states: "The Metropolitan Transportation Authority acting by the New York City Transit Authority." (*Id.* at 4.) Thus, they argue that the MTA is not a proper Labor Law defendant in this action because it is the parent company to defendant NYCTA. (*Id.* at 4–5.)

Further, defendants maintain that there are multiple issues of fact precluding summary judgment. In particular, defendants argue that the deposition testimony of King and Robert Drexel ("Drexel"), plaintiff's foreman (*id.* at 5), raise a question of fact as to whether the safety lines on the platform were actually covered by the tarpaulins (*id.* at 8) and whether there were any workers on the platform at the time that it was being raised (*id.* at 7). Moreover, given Drexel's testimony that he saw Maldonado wearing a harness on the day of the accident (Doc. 47 at 5), they oppose plaintiff's contention that there were inadequate safety devices on the platform (Doc. 45 at 12). Finally, defendants claim that there is a factual issue as to whether Maldonado was a recalcitrant worker because Drexel testified that he did not order any workers to sit on the platform as it was being raised. (Doc. 45 at 7.)

LEGAL CONCLUSIONS:

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].)

As a preliminary matter, this Court finds that that plaintiff's motion is not procedurally defective. Although defendants are correct that plaintiff did not include their answer in his moving papers, such an error may be overlooked. (*See Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2012] (failure to include pleadings with a summary judgment motion was "properly overlooked" as the pleadings were filed electronically and thus were available to the parties and the court); *see also Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008] (rejecting contention that a motion should be denied for failure to include the pleadings "as the . . . pleading was attached to the reply papers.").) Defendants' contention that the deposition transcripts on which plaintiff relies constitute hearsay is also unavailing. (*See Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013] (concluding that unsigned transcripts were admissible); *see also Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001] (same).) The deposition transcripts of plaintiff and Ravello are therefore admissible.[1]

Moreover, the argument that the MTA is not a proper Labor Law defendant is unpersuasive. While the contract for the repainting job states "The Metropolitan Transportation Authority acting by the New York City Transit Authority" (Doc. 35 at 2), Patricia Johnson

[1] This Court notes that Ravello was deposed by defendants. (Doc. 40 at 4.)

("Johnson"), a senior director of capital procurements for MTA New York City Transit Authority (Doc. 36 at 5), stated at her deposition that "MTA New York City Transit Authority" is a single entity (*id.*). (*See Sarata v Metro. Transp. Auth.*, 134 AD3d 1089, 1089 [2d Dept 2015] (treating the "MTA New York City Transit" as a proper Labor Law defendant); *see also Cicillini v New York City Tr. Auth.*, 47 Misc 3d 1209 [Sup Ct, NY County 2015] (finding the MTA as an "owner" of the premises at issue in a Labor Law action even though the contract submitted stated that the MTA was "acting by the New York City Transit Authority").) Indeed, the contract submitted in the parties' papers makes multiple references to the MTA, and, in fact, at the bottom left corner of each page of the contract, the letters "MTA" appear. (*See* Doc. 35.)

This Court finds that plaintiff established his prima facie case of entitlement to judgment as a matter of law under Labor Law § 240(1). That provision was meant to protect workers from the risk of falling when they work at elevated heights by requiring "contractors and owners and their agents" to provide those workers with protective devices, such as "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices . . . ." (Labor Law § 240[1].) (*See also Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005].) Here, plaintiff has alleged that he fell from a height of approximately twenty feet, which would certainly trigger the protections of § 240(1). (*Myiow v City of New York*, 143 AD3d 433, 436 [1st Dept 2016] (plaintiff's fall from a height of thirteen to fourteen feet "constitutes precisely the type of elevation-related risk envisioned by the statute").) In addition, plaintiff has alleged that, although he was given a harness to wear, he was unable to attach his harness to the safety lines on the platform because the tarpaulins were covering the platform's surface. (*Rich v State of New York*, 231 AD2d 942, 942 [4th Dept 1996] (plaintiff established prima facie case for summary judgment where he was unable to attach his safety belt and lanyard on the surface where he was working).)

Nevertheless, this Court concludes that the motion must be denied as defendants raised a triable issue of fact in response to the motion. Importantly, King, Limnes' site safety engineer who was present at the site when plaintiff was injured, testified that he did not see anything on the platform as it was being lifted and moved to a new work location:

> Q: Now, on June 20th, 2014 as the elevated platform was being lifted, did you observe whether or not there were workers on the platform?
> A: I didn't see anyone on the platform going up.
> Q: Would the platform have been opened on the sides or would there have been any form of containment potentially preventing the view?
> A: No, the containment wouldn't have been set up yet.

(Doc. 39 at 129.) Thus, there is a material question of fact regarding whether plaintiff's accident occurred the way he says it did. Moreover, plaintiff's allegation that the tarpaulins were covering the platform's safety lines is contradicted by Drexel's affidavit, in which he states that the tarpaulins used at the worksite extended only about four feet. (Doc. 47 at 4.) At his 50-h hearing, Maldonado testified that the dimensions of the platform were forty feet long and ten feet across. (Doc. 37 at 17.) Drexel's testimony therefore raises another factual issue as to whether plaintiff, if he were actually on the platform, was really prevented from using the safety lines that were provided. Thus, plaintiff's summary judgment motion must be denied.

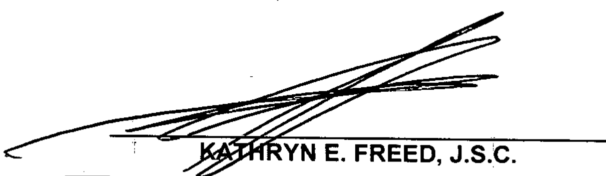
In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Irvin Maldonado's motion for summary judgment against defendants Metropolitan Transportation Authority, New York City Transit Authority, and Limnes Corp. for liability under New York Labor Law § 240(1) is denied; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, plaintiff is to serve a copy of this order with notice of entry on defendants and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

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

4/3/2019
DATE



KATHRYN E. FREED, J.S.C.

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