

Alarcon v Thor 840 W. End Ave. LLC

2019 NY Slip Op 31733(U)

June 6, 2019

Supreme Court, New York County

Docket Number: 153242/2017

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. 153242/2017

CARLOS ALARCON,

Plaintiff,

MOT. SEQ. NOS. 001, 002

- v -

THOR 840 WEST END AVENUE LLC,

Defendant.

DECISION AND ORDER

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Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

In this personal injury action, defendant Thor 840 West End Avenue LLC moves (motion sequence 001), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 200 and 241(6). Plaintiff Carlos Alarcon moves (motion sequence 002), pursuant to the same statute, for partial summary judgment as to liability against defendant pursuant to Labor Law § 240(1), as well as for a trial on the issue of damages. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on March 18, 2016 in which plaintiff was injured when he fell from a wobbling, unsecured ladder during the gut renovation of apartment 2B ("apartment 2B") at 840 West End Avenue, New York, New York ("the building"). The building and apartment 2B were owned by defendant Thor 840 West End Avenue LLC. Doc. 40. At the time of the alleged incident, plaintiff was employed by nonparty J&M Industries, Inc. ("J&M"), a

contractor hired to perform construction and renovation of five apartments in the building, including apartment 2B.

Plaintiff commenced the captioned action by filing a summons and verified complaint on April 6, 2017. Doc. 32. In his complaint, plaintiff alleged that defendant was negligent and violated Labor Law §§ 200, 240(1), and 241(6). Defendant joined issue by its answer filed July 5, 2017. Doc. 33.

In his bill of particulars, plaintiff claimed, inter alia, that defendant failed to provide him with proper safety devices, allowed him to use a dangerous and “shaky ladder”, “fail[ed] to secure the ladder”, and “fail[ed] to have a person holding the ladder”. Doc. 34 at par. 4. Plaintiff also alleged numerous violations of the New York State Industrial Code (“the Industrial Code”) which, he claimed, triggered defendant’s liability pursuant to Labor Law § 241(6). Doc. 34 at par. 7; Doc. 35 at par. 1.

Plaintiff testified at his deposition that, on the date of his accident, March 18, 2016, he was employed as a carpenter by J&M, was supervised by Luis Molina of J&M, and was working in apartment 2B with a partner named Claudio. Doc. 36 at 27-28, 34-36, 40. J&M, which was involved in the renovation of 5 apartments in the building, never held safety meetings. Doc. 36 at 31-33, 50.

On the day of the incident, Molina told plaintiff that “double [s]heetrock needed to be put on the walls [of apartment 2B] about the height of the ceiling all the way up” for fireproofing reasons. Doc. 36 at 37. He clarified that the sheetrock was to be installed on the wall from the height of the drop ceiling up. Doc. 36 at 38. The “height of the ceiling from the floor to the part [of the wall] where” sheetrocking needed to be done was between 11 and 12 feet. Doc. 36 at 38. The height from the floor to the drop ceiling was 10 feet. Doc. 36 at 38.

In order to install the sheetrock, plaintiff used a 6-foot A-frame aluminum ladder provided by J&M. Doc. 36 at 52-53. Plaintiff set up the ladder on a hard plywood floor and moved it several times during the course of his work. Doc. 36 at 58, 63. He always opened the ladder and locked it into place before using it. Doc. 36 at 59-60. The ladder was very light and wobbled when he used it. Doc. 36 at 59-62. Although plaintiff said that there was no other ladder available at the site (Doc. 36 at 59), he also testified that other trades at the site had ladders but he did not use them. Doc. 36 at 52. He was aware that the ladder wobbled because he had used it on prior occasions, but he never complained or asked for another ladder. Doc. 36 at 59, 62. He did not recall whether the ladder had rubber feet. Doc. 36 at 59.

At the time of the accident, plaintiff, who was 5'9" and weighed 208 pounds, was standing on the first rung below the top of the ladder preparing to install the double sheetrock. Doc. 36 at 9, 60-61, 64-65. His feet were approximately 5 ½ feet above the ground. Doc. 36 at 69. There were tools and pieces of wood on the floor about three feet away from the ladder. Doc. 36 at 62-63. In order to install the sheetrock, plaintiff had to remove a piece of metal, fastened by a screw, which was in his way. Doc. 36 at 65. The screw was approximately 11-12 feet above the ground. Doc. 36 at 69. While he was removing the screw, plaintiff's weight and movement caused the ladder to move to one side and he fell in the opposite direction, causing both he and the ladder to fall to the ground. Doc. 36 at 65-67, 71. Claudio was approximately 10 feet away from plaintiff when he fell. Doc. 36 at 66. Plaintiff did not know whether anyone saw him fall. Doc. 36 at 71.

At his deposition, Steven Stewart of Thor Management Company, LLC testified, inter alia, that the building was owned by defendant and managed by Thor Management Company, RN, LLC. Doc. 38 at 13, 25, 41.

Plaintiff filed a note of issue on July 31, 2018. Doc. 14.

Defendant now moves (motion sequence 001), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's causes of action pursuant to Labor Law §§ 200 and 241(6) submitting, inter alia, the summons and complaint, the answer, the bills of particular and the deposition transcripts. Docs. 19-29.

In an attorney affirmation and memorandum of law in support of the motion, defendant argues that plaintiff's claim pursuant to Labor Law § 241(6) must be dismissed because it is premised upon general or inapplicable provisions of the Industrial Code. Docs. 17, 18. Defendant also argues that plaintiff's claim pursuant to Labor Law § 200 must be dismissed on the ground that it neither supervised plaintiff's work nor controlled the means and methods of the same. Docs. 17, 18.

Plaintiff moves separately (motion sequence 002) for summary judgment against defendant as to liability pursuant to Labor Law § 240(1) and for a trial solely on the issue of damages. Doc. 30. In support of the motion, plaintiff submits, inter alia, the pleadings, the bills of particular, the deposition transcripts of plaintiff and defendant, as well as a notice to admit and response thereto establishing that defendant owned the building and apartment 2B. Docs. 32-41.

In an attorney affirmation in support of plaintiff's motion, counsel argues that plaintiff is entitled to summary judgment pursuant to Labor Law § 240(1) as a matter of law since he was engaged in activity covered by the statute and defendant, the owner of both the building and apartment 2B, failed to provide him with safety devices adequate for his work. Doc. 31.

In an affirmation in opposition to plaintiff's motion (Doc. 42), defendant argues that plaintiff is not entitled to summary judgment because issues of fact exist regarding whether plaintiff misused the ladder by standing on the next to top rung thereof. Doc. 42. Defendant argues that a jury could find that such misuse was the sole proximate cause of the accident. Defendant

also argues that plaintiff violated OSHA regulations, specifically 29 CFR 1926.1053(b)(13), which prohibits one from standing on “[t]he top or top step of a stepladder.” Additionally, defendant asserts that, since he could have had Claudio hold the ladder for him, there is at least a question of fact regarding whether plaintiff had the ability to secure the ladder but failed to do so.

In opposition to defendant’s motion, plaintiff asserts that defendant violated several sections of the Industrial Code pertaining to the use of ladders. Doc. 47.¹

In a reply affirmation in further support of plaintiff’s motion for partial summary judgment (Doc. 50), plaintiff’s counsel argues that, at most, plaintiff’s own actions raised an issue of fact regarding his comparative negligence, which is not a defense to a claim pursuant to Labor Law § 240(1).

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). Only 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,

¹ This Court notes that plaintiff’s counsel inadvertently refers to its opposition to defendant’s motion as an “affirmation in opposition to cross-motion” despite the fact that defendant moved, but did not cross-move, for summary judgment.

will summary judgment be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

“The purpose of Labor Law § 240(1) is to protect the worker from worksite injuries attributable to gravity-related risks. ‘It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent [a] ladder from slipping or to protect plaintiff from falling were absent.’ *Orellano v 29 East 37th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002).” *Cutaia v Board of Managers of the Varick St. Condominium*, ___ AD3d ___, 2019 NY Slip Op 03458 (1st Dept May 2, 2019). The “failure to properly secure a ladder to insure that it remains steady and erect while being used constitutes a violation of Labor Law § 240(1).” *Plywacz v 85 Broad St. LLC*, 159 AD3d 543 (1st Dept 2018) quoting *Schultze v 585 West 214th St. Owners Corp.*, 228 AD2d 381, 381 (1st Dept 1996).

Here, plaintiff established his prima facie entitlement to summary judgment on his claim pursuant to Labor Law § 240(1) by demonstrating that he was caused to fall when the unsecured ladder on which he had been standing fell out from under him. *See Tuzzolino v Consolidated Edison Co. of N.Y.*, 160 AD3d 568 (1st Dept 2018); *see also Rom v Eurostruct, Inc.*, 158 AD3d 570 (1st Dept 2018) (summary judgment granted on Labor Law § 240[1] claim where ladder suddenly shifted and kicked out from under plaintiff); *Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453 (1st Dept 2017) (Labor Law § 240[1] violated where plaintiff testified that he fell when ladder he was standing on wobbled).

In opposition, defendant failed to raise an issue of fact regarding whether plaintiff’s actions were the sole proximate cause of the accident. *See Tuzzolino*, 160 AD3d at 568. Specifically, “[t]here is no evidence in the record that there were other readily available safety devices that would have been adequate for plaintiff’s work.” *Tuzzolino*, 160 AD3d at 568, citing *Messina v*

City of New York, 148 AD3d 493 (1st Dept 2017). Although plaintiff testified that other contractors at the site had ladders, he was never questioned about them at his deposition. Thus, this Court cannot ascertain whether any of those ladders would have been adequate for the task plaintiff was performing. Further, contrary to defendant's contention, plaintiff may still obtain summary judgment on liability pursuant to Labor Law § 240(1) despite the fact that his accident occurred while he stood on the next to top step of the ladder. See *Perrone v Tishman Speyer Properties, L.P.*, 13 AD3d 146, 147 (1st Dept 2004).

Although defendant relies on *Meade v Rock-McGraw, Inc.*, 307 AD2d 156 (1st Dept 2003) in opposing the motion, that case is inapposite herein. The plaintiff in that matter was provided with a 6-foot ladder to replace missing tiles in a closet approximately 8 feet high. He determined that the ladder was too big to use inside the closet and instead used a 5-foot A-frame ladder which he said was in good working order. When he realized that the 5-foot ladder was too big to use in the open position, he leaned it against the wall of the closet in the closed position at a slight angle. As he ascended the ladder, it slipped out from under him. This Court denied plaintiff's motion for partial summary judgment on liability pursuant to § 240(1) and the Appellate Division, First Department affirmed, holding that "defendants have made a showing, sufficient to defeat summary judgment, that plaintiff's own conduct was the sole proximate cause of his injury." *Meade*, 307 AD2d at 160. The Appellate Division reasoned that, since "[i]t was [plaintiff] who chose to place the ladder against the wall in a closed position, an improper use of the device", it followed that "the strict liability benefit of Labor Law § 240(1) [was] not available" to him. *Meade*, 307 AD2d at 160. *Meade* clearly does not apply herein since plaintiff did not use the ladder improperly.

Given that plaintiff has been awarded partial summary judgment on his Labor Law § 240 (1) claim (motion sequence 002), this Court need not address the parties' contentions regarding

plaintiff's claims pursuant to Labor Law § 200 and Labor Law § 241 (6) (*see Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018] [citations omitted]), and defendant's motion to dismiss those claims (motion sequence 001) is therefore denied as academic.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Carlos Alarcon seeking partial summary judgment as to liability on his claim pursuant to Labor Law § 240(1) against defendant Thor 840 West End Avenue LLC (motion sequence 002) is granted; and it is further

ORDERED that motion by defendant Thor 840 West End Avenue LLC seeking summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 200 and 241(6) (motion sequence 001) is denied as academic; and it is further

ORDERED that plaintiff's damages shall be determined at the time of trial; and it is further

ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 30 days after the entry of this order onto NYSCEF, and that the Clerk is directed to enter judgment accordingly and cause this matter to be placed on the calendar for trial; and it is further

ORDERED that such service upon 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.

6/6/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE