SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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RAMON MORADO a/k/a RAMON MORADO MENDOZA,

Index No. 160833/2018
Motion Seq. No. 001

Plaintiff,

- against -

CITY SAFETY COMPLIANCE CORP., WE PREVAIL MANAGEMENT LLC and SKYLAND DEVELOPMENT CORP.,

Defendants.

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HON. DORIS LING-COHAN:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on May 24, 2017, when he slipped and fell off of a ramp, while working at a construction site located at 346 Broadway (also known as 108 Leonard Street), in New York, New York (the Premises). Defendant Skyland Development Corp. (Skyland) moves, pre-answer, pursuant to CPLR 3211(a)(1) and 3211(a)(7), to dismiss the complaint insofar as asserted against it.

BACKGROUND

On the day of the accident, Civic Center Community Group Broadway, LLC (Civic) owned the Premises where the accident occurred (Complaint at ¶ 5). Civic hired New Line Structures Inc. (New Line) to serve as the construction manager and general contractor for a project at the Premises, which entailed demolition, renovation, and construction of a high-end condominium complex (the Project) (*id.* at ¶¶ 6-7). New Line, in turn, hired Skyland to, among other things, furnish, maintain and repair "all items of temporary protection that are required to maintain the safety of all personnel during the course of the construction job," and to furnish and install "new . . . fall-protection guard railings" at certain locations of the job site (Defendant's Affirmation in Support of Motion, Exhibit B, Scope of Work, at ¶¶ 15, 16).

New Line hired non-party Nova Construction Services, LLC (Nova) to perform facade restoration and cleaning of the exterior of the Premises. Plaintiff was employed by Nova on the day of the accident. As is relevant here, the complaint alleges causes of action against Skyland sounding in common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

Plaintiff's Affidavit

In his affidavit, plaintiff states that at the time of the accident, he was working on the Project as a laborer for Nova (*id.*). He was given a wheelbarrow to use to move bricks from the outside to the inside of the building (*id.* at ¶¶ 3-4). He loaded about 20 to 25 bricks into the wheelbarrow and took one of the elevators to the east tower up to the fifth floor of the building (*id.*). When the elevator reached the fifth floor, plaintiff "exited the hoist tower and entered into the building via the sloped entrance ramp, pushing the wheelbarrow ahead of" him (*id.* at ¶ 5). Plaintiff explained that as he "proceeded down toward the bottom of the ramp," he "slipped on water and fell, along with the wheelbarrow, off of the left side of the ramp and onto the floor below resulting in a serious injury to [his] left ankle" (*id.* at ¶ 6).

Plaintiff maintains that the area of the ramp where he "fell off did not have a safety railing along either side" (*id.* at ¶ 7). He asserts that if "there had been a safety rail there" he believes that he would not have, and could not have, fallen off the ramp (*id.*).

Deposition Testimony of Ryan Przyborowski (Employee of New Line)

Ryan Przyborowski testified that he has been an assistant project superintendent for New Line

since September 2016 (Przyborowski's Tr at 8-9). As is relevant here, Przyborowski testified that a company by the name of Everest built and installed the ramps leading from the hoists to the floors, including the East 5th floor ramp where plaintiff allegedly fell (*id.* at 39; 47). In addition, at the time of the accident, Skyland, an "OSHA protection company" was on site, routinely inspecting these ramps and repairing any damage to the ramps (*id.* at 49-50; 61). Skyland also performed walk-throughs of the Premises at periodic intervals during the day "to make sure everything was safe and secure" (*id.* at 51-52; 61). Przyborowski observed Skyland inspecting the ramps a handful of time (*id.* at 50-52; 61).

The Accident/Incident Report

An "Accident/Incident Report" (the Report), prepared by non-party City Safety Compliance Corp., states that on the date of the accident, plaintiff was employed by Nova (Plaintiff's Affirmation in Support of Motion, Exhibit D). The report includes the following statement, dated and signed by plaintiff:

> "[Plaintiff] was coming down ramp of East hoist on 5th floor. He was pushing a wheel barrow . . . with bricks in it. The wheel barrow was filled with bricks by [plaintiff]. While coming down ramp with the barrow [plaintiff] started to loose [sic] control and the barrow moved side to side and he steped [sic] on side of foot (outside) of foot causing pain and swelling also on outside of foot"

(*id.* at 2).

The New Line/Skyland Agreement

A trade contract agreement between New Line and Skyland (the Agreement) states that Skyland was hired by New Line

> "to perform the work and furnish all of the labor, materials, supplies, supervision, equipment, scaffolding, layouts, engineering, shop drawings, temporary utilities, accessories, tools, overtime, testing, transportation, unloading, handling, hoisting, applicable insurances, bonds, managements and all other items required or reasonably

> implied by this Agreement in connection with the satisfactory performance, execution and completion of the **J1020.01 TEMPORARY PROTECTION** for the project described in components of the Contract Documents together with all other work reasonably implied or required by the Contract Documents that is necessary to complete such trade work in a first-class manner"

(Defendant's Affirmation in Support of Motion, Exhibit A, Agreement at § 1.1).

Exhibit B.2 to the Agreement, entitled "Scope of Work," states that the scope of Skyland's work included:

> "15. *This Contractor shall furnish all labor, materials, equipment, etc., required to perform temporary and safety protection. In general, this Contractor shall be responsible for the furnishing, erecting, maintaining, repairing, replacing and removing, unless noted otherwise herein, of all items of temporary protection that are required to maintain the safety of all personnel during the course of the construction job*. Such safety items shall be the basic items required by the operations generally encountered in a construction job of this type, and as required by Federal Government Regulations and other State and City Safety Regulations, and the regulations of the Federal Occupational Safety and Health ACT (OSHA) and Local Law 61 effective November 1, 1987. All protection shall be placed and maintained so that adjacent work can be installed. Relocation, removal and replacement of protection if damaged or not in place (when directed by CM) shall be included.
>
> 16. *This Contractor shall furnish and install new OSHA complied fall protection guard railings at marked up locations on the Contract Documents. See Exhibit M.4 to reference the marked up locations where OSHA complied fall protection guard railings are required*"

(Defendant's Affirmation in Support of Motion, Exhibit A, Scope of Work [emphasis added]).

Exhibit M.4 to the Agreement (referenced in paragraph 16 of Exhibit B.2 to the Agreement), entitled "Marked up Plan with Temporary Protection Locations," consists of diagrams pertaining to each floor of the Premises (Plaintiff's Affirmation in Reply, Exhibit C, Exhibit M.4 at 1, 13). However, it should be noted that, the text printed on the diagrams is, for the most part, so small that it is illegible.

DISCUSSION

Dismissal is warranted pursuant to CPLR 3211(a)(1) on the ground that the action is barred by documentary evidence "only if the documentary evidence 'establishes a defense to the asserted claims as a matter of law'" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). Therefore, the defendant bears the burden of demonstrating that the proffered evidence "conclusively refutes plaintiff's factual allegations" (*Kolchins, Inc.*, 31 NY3d at 106). "For evidence to be considered documentary, it must be unambiguous and of undisputed authenticity" (*Graphic Arts Mut. Ins. Co. v Pine Bush Cent. Sch. Dist.*, 159 AD3d 769, 771 [2d Dept 2018][internal quotation marks and citation omitted]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action,

> "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference. Whether a . . . plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence"

(*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005][internal quotation marks and citations omitted]). "In this procedural posture, the allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). Unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal

should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]).

The Labor Law §§ 240(1) and 241(6) Claims

Skyland moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the Labor Law §§ 240(1) and 241(6) claims insofar as asserted against it. Labor Law § 240 (1), commonly referred to as the Scaffold Law, provides, in part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"[T]he statute places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed" (*Hill v Stahl*, 49 AD3d 438, 441 [1st Dept 2008]). The protections of the statute, however,

> "'do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity . . . . [It] was designed to prevent those types of accidents in which scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'"

(*id. at* 442 [emphasis in original], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

In order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Barreto v Metropolitan*

Transp. Auth., 25 NY3d 426, 433 [2015]; *Felker v Corning, Inc.*, 90 NY2d 219, 224-225 [1997]; *Santos v Condo 124 LLC*, 161 AD3d 650, 654 [2018]).

Labor Law § 241(6) requires "[a]ll contractors and owners and their agents" to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240 (1), the Labor Law § 241 (6) duty to comply with the Commissioner's regulations is nondelegable" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241[6]).

Skyland seeks dismissal of the Labor Law §§ 240(1) and 241(6) claims on the sole ground that it is not a proper defendant under the Labor Law. Specifically, Skyland seeks dismissal of these claims, pursuant to CPLR 3211(a)(7), on the ground that the complaint fails to allege that Skyland was an owner or general contractor, or that Skyland acted as an agent, as required by the statute. Skyland also contends that these claims should be dismissed, pursuant to CPLR 3211(a)(1), because the documentary evidence establishes that it was not an owner, general contractor, or statutory agent, and therefore not a proper defendant, such that it may be liable for plaintiff's injuries under the statute.

Here, however, plaintiff does not allege that Skyland was an owner of the Premises or a general contractor. At issue is whether Skyland may be liable for plaintiff's injuries as an agent of the owner or general contractor.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Accordingly, "[t]o be treated as a statutory agent, [a] subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011], quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]; *Oliveri v City of New York*, 146 AD3d 522, 522 [1st Dept 2017]). Where "the subcontractor's area of authority is over a different portion of the work or a different area than the one in which the plaintiff was injured, there can be no liability under this theory" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d at 193).

The complaint alleges that Skyland was hired by the owner and/or general contractor to perform "certain work" at the Premises and to act as "the OSHA compliance manager", and does not allege that Skyland was delegated the supervision and control either over the specific work area involved or the work which gave rise to plaintiff's injury. However, as noted above, "any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d at 591), which are also to "be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d at 442). The court must "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98

NY2d 144, 152 [2002]). The complaint at issue here, as supplemented by the additional evidence submitted by plaintiff, is sufficient to withstand this branch of Skyland's motion. Specifically, plaintiff stated in his affidavit that he slipped and fell off a ramp leading from the hoist tower elevator to the fifth floor of the building, and that the area of the ramp where he fell did not have a safety railing on either side. Importantly, the Agreement states that Skyland was retained to, among other things, furnish, maintain and repair "all items of temporary protection that are required to maintain the safety of all personnel during the course of the construction job," and charged with furnishing and installing new fall-protection guard railing at certain locations of the job site. In addition, the deposition testimony of Przyborowski indicates that Skyland was responsible for inspecting the ramps on the Premises and repairing any damage.

Contrary to Skyland's assertion, the Agreement does not conclusively establish that Skyland had no control or authority over the ramp and/or railing at the location where the plaintiff was injured. In so arguing, Skyland contends that certain diagrams annexed as exhibits to the Agreement indicate that the accident occurred outside of the scope of Skyland's work area. However, the text upon which Skyland relies is completely illegible, therefore, rendering dismissal based upon the Agreement is not appropriate.

Furthermore, to the extent Skyland may be arguing that it is not a statutory agent because the Agreement establishes that it was not hired to control plaintiff's work, this contention is without merit. Whether Skyland had the ability to control plaintiff's work is not dispositive. The inquiry here is whether Skyland had the "ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d at 863-864), i.e., the activity of furnishing and installing new fall-protection guard railing, and/or inspecting and repairing the ramp, at the location of the job site where plaintiff fell (*see generally Fraser v Pace Plumbing Corp.*, 93 AD3d 616 [1st Dept 2012]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60 [1st Dept 1999]). Accordingly, at this juncture, Skyland is not entitled to dismissal of the Labor Law §§ 240(1) and 241(6) claims, pursuant to CPLR 3211(a)(7).

Skyland is also not entitled to dismissal of these claims pursuant to CPLR 3211(a)(1) based on documentary evidence. The evidence annexed by Skyland to its motion does not resolve all factual issues or conclusively dispose of these claims as a matter of law. As noted above, the Agreement, alone, is not sufficient to establish that the scope of Skyland's work did not include the area where plaintiff was injured. Moreover, the affidavit of Skyland's project manager does not qualify as documentary evidence, under CPLR 3211(a)(1) (*see Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748, 752 [2d Dept 2011]["In order to be documentary, the evidence must be unambiguous, authentic, and undeniable; thus, affidavits are not considered documentary evidence"]; *see also Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]). As such, Skyland is not entitled to dismissal of these claims under CPLR 3211(a)(1).

The Common-Law Negligence and Labor Law § 200 Claims

Similarly, Skyland is not entitled to dismissal of the common-law negligence or Labor Law § 200

claims insofar as asserted against it under CPLR 3211(a)(1) or (7) on the ground that it is not a proper defendant. "Labor Law § 200 essentially 'codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d at 317).

Here, the facts alleged in the complaint and the factual submissions made in opposition to the motion, which must be accepted as true, sufficiently allege that Skyland was charged with the authority to control the activity which brought about plaintiff's injuries, i.e., the activity of furnishing and installing new fall-protection guard railing and/or inspecting and repairing the ramp at the location of the job site where plaintiff's injuries occurred. The documentary evidence submitted by Skyland in support of its motion does not conclusively refute these factual allegations. Therefore, this branch of Skyland's motion is also denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Skyland Development Corp.'s motion is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: July 3, 2019

Doris Ling-Cohan, J.S.C.

J:\Judge_Ling-Cohan\Dismiss\MORADO V CITY SAFETY COMPLIANCE CORP.b DeRico.pre answer denied.wpd