

Clemens v Landing Hill, LLC.
2019 NY Slip Op 33181(U)
October 22, 2019
Supreme Court, Suffolk County
Docket Number: 16-954
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 16-954CAL. No. 18-01685OT

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY**

PRESENT:

Hon. WILLIAM G. FORD
Justice Supreme Court

MOTION DATE 10-25-18 (001)MOTION DATE 2-14-19 (002)ADJ. DATE 3-7-19

Mot. Seq. # 001 - MD

002 - MotD

-----X
ROBERT CLEMENS,

Plaintiff,

- against -

LANDING HILL, LLC.,

Defendant.
-----X

Attorney for Plaintiff:**SIBEN & SIBEN, LLP**

90 East Main Street

Bay Shore, New York 11706

Attorney for Defendant:**BAXTER SMITH & SHAPIRO, P.C.**

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Hicksville, New York 11801

Upon the following papers numbered 1 to 68 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 16, 17 - 35 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 36 - 50, 51 - 60 ; Replying Affidavits and supporting papers 61 - 62, 63 - 68 ; Other Memoranda of Law : (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (001) by plaintiff Robert Clemens and the motion (002) by defendant Landing Hill, LLC, are consolidated for the purposes of this determination; and it is

ORDERED that plaintiff's motion for summary judgment in his favor on the issue of liability as to his Labor Law § 240 (1) is denied; and it is

ORDERED that the motion by defendant Landing Hill, LLC, for, inter alia, summary judgment dismissing the complaint is granted to the extent indicated herein and is otherwise denied; and it is further

Plaintiff Robert Clemens commenced this action to recover damages for personal injuries allegedly sustained on January 22, 2015, when he fell from a ladder while performing HVAC work inside the drop ceiling of an unfinished condominium unit under construction at a new housing development in Glen Cove, New York, known as Cove Landing. The accident allegedly occurred when the A-frame ladder on which

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plaintiff was standing shifted from beneath him as he was attempting to install a ceiling box into the ceiling. Defendant Landing Hill, LLC, is the owner of the construction site. At the time of the accident, plaintiff was employed by All Seasons Heating and Air-Conditioning. By his complaint, plaintiff alleges causes of action against Landing Hill based on common law negligence and violations of Labor Law §§ 240 (1), 200, and 241 (6). Thereafter, plaintiff commenced a separate action asserting identical claims against the general contractor for the project, Landing Cove, LLC. Landing Cove and Landing Hill both joined issue denying plaintiff's claims and asserting affirmative defenses. By order dated October 3, 2016, this court granted a motion by Landing Cove for an order joining the actions, determining that the actions would be joined for the purpose of a trial only and would proceed separately under their respective index numbers. After a protracted period of discovery, a note of issue was filed for each action on September 17, 2018.

Plaintiff now moves for summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim against Landing Hill. Plaintiff asserts that regardless of whether the unsecured ladder fell to the floor or not, it failed to fulfill its safety function when it jerked and twisted on the frozen, warped, and debris-strewn wooden subflooring on which he was required to place it, thereby causing him to fall and injure himself. Plaintiff's submissions in support of the motion include, inter alia, copies of the pleadings, the transcript of the parties' deposition testimony, as well as affidavits by plaintiff and his expert, Joseph Schmidt, P.E. Landing Hill opposes the motion and moves for summary judgment dismissing the complaint against it, arguing that the ladder that plaintiff fell from – which remained standing after the alleged accident – was free of any defects, and that plaintiff merely lost his balance and fell as he was performing his work. Additionally, Landing Hill asserts that it did not have the authority to control or supervise plaintiff's work, that it lacked notice of any alleged defective premises condition, and that plaintiff failed to allege the violation of any specific applicable sections of the Industrial Code in support of his Labor Law § 241 (6) claim against it. Landing Hill further requests that the court not consider the affidavit of plaintiff's expert, as plaintiff failed to disclose the expert prior to the filing of the note of issue. Plaintiff only opposes the branch of Landing Hill's motion which seek dismissal of his Labor Law §§ 240 and 241 (6) claims. Plaintiff contends that summary judgment should be granted in his favor on his Labor Law § 240 (1) claim, as the ladder from which he fell was neither properly placed nor secured, and that triable issues exist as to whether Landing Hill violated 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-1.21 (b) (4) (ii) and 12 NYCRR 23-1.21 (e) (3). Plaintiff further asserts that CPLR 3212 (b) mandates that the affidavit of his expert be considered with his motion for summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Thus, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue

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of fact exists or if there is even arguably such an issue” (see *Bulger v Tri-Town Agency*, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

At the outset, the Court notes that it considered the expert affidavit submitted by plaintiff in support of his motion. Although plaintiff failed to disclose this expert to defendants prior to the filing of the note of issue, CPLR 3212 (b) specifically states that “[w]here an expert affidavit is submitted in support of . . . a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to CPLR 3101 (d) (1) (i) was not furnished prior to the submission of the affidavit.” In any event, Landing Hill failed to submit evidence that plaintiff’s failure to disclose this expert was intentional or willful, or that they were prejudiced thereby (see CPLR 3101 [d] [1] [i]; *Romano v Persky*, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]).

It is further noted that, as plaintiff failed to oppose the branches of Landing Hill’s motion seeking dismissal of his common law negligence and Labor Law § 200 claims, plaintiff is deemed to have abandoned those causes of action (see *Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). Similarly, having failed to oppose the branch of Landing Hill’s motion seeking dismissal his Labor Law § 241 (6) claim based on the alleged violation of 12 NYCRR 23-1.5, the court also deems such claim abandoned. The purported violation of 12 NYCRR 23-1.5 is, in any event, inactionable, as the regulation merely sets forth a general safety standard (see *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]). Moreover, the court finds plaintiff’s Labor Law § 241(6) claim, predicated upon alleged violations of 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (2), and 12 NYCRR 23-1.21 (e) (3), to be inapplicable under the circumstances of this case. 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2), which pertain, respectively, to slipping and tripping hazards, are inapplicable where, as in this case, plaintiff allegedly fell from the rung of a ladder (see *Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 966 NYS2d 387 [1st Dept 2013]). 12 NYCRR 23-1.21 (e) (3), which requires that a step ladder be manually or mechanically steadied when such ladder is 10 feet or more above its footing, is likewise inapplicable, as it undisputed that the subject ladder was less than 10 feet in height (see *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 962 NYS2d 200 [2d Dept 2013]). Therefore, the branch of Landing Hill’s motion seeking summary judgment dismissing plaintiff’s common law negligence and Labor Law § 200 claim against it is granted. The branch of the Landing Hill’s motion seeking dismissal of plaintiff’s Labor Law § 241 (6) claim against it predicated upon alleged violations of 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (2), and 12 NYCRR 23-1.21 (e) (3), is likewise granted.

Turning to plaintiff’s motion for summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim against Landing Hill, the statute “imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure” (*Bland v Manocherian*, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; see *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). Specifically, Labor Law § 240 (1) requires that safety devices, such as ladders, be so “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Thus, a statutory violation is established where a ladder collapses, slips or otherwise fails to perform its safety function of supporting a worker (see *O’Connor v Enright Marble & Tile Corp.*, 22 AD3d 548, 802 NYS2d 506 [2d Dept 2005]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 688 NYS2d

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547 [1st Dept 1999]). However, if a plaintiff is injured in a fall from a ladder which is not otherwise shown to be defective, the issue of whether the ladder provided the plaintiff with the proper protection required under Labor Law § 240 (1) is usually a question of fact (*see Moreta v State of New York*, 272 AD2d 593, 709 NYS2d 829 [2d Dept 2000]; *Benefield v Halmar Corp.*, 264 AD2d 794, 695 NYS2d 394 [2d Dept 1999]). Indeed, “[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1)” (*Xidias v Morris Park Contr. Corp.*, 35 AD3d 850, 851, 828 NYS2d 432 [2d Dept 2006]; *see Hugo v Sarantakos*, 108 AD3d 744, 970 NYS2d 245 [2d Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]). Rather, there must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff’s injuries (*see Xidias v Morris Park Contr. Corp.*, *supra* at 851; *see Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461, 869 NYS2d 172 [2d Dept 2008]).

Here, plaintiff failed to meet his prima facie burden on the motion, as his own submissions raise significant triable issues as to whether the ladder on which he was working twisted and fell because the subflooring was uneven and strewn with frozen debris, or whether he merely lost his balance and fell from a ladder which, otherwise, provided him adequate protection (*see Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 103 NYS3d 496 [2d Dept 2019]; *Vivar v 441 Realty, LLC*, 128 AD3d 810, 9 NYS3d 159 [2d Dept 2015]; *Degen v Uniondale Union Free Sch. Dist.*, 114 AD3d 822, 980 NYS2d 790 [2d Dept 2014]; *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 988 NYS2d 1 [1st Dept 2014]; *Chan v Bed Bath & Beyond, Inc.*, 284 AD2d 290, 726 NYS2d 127 [2d Dept 2001]; *compare Ross v 1510 Assoc. LLC*, 106 AD3d 471, 964 NYS2d 514 [1st Dept 2013]). Significantly, plaintiff’s submissions include deposition testimony by his co-worker, Daniel Johnson, that he came to plaintiff’s aid immediately after hearing him fall and found him laying on the floor next to the foot of the ladder, which remained standing after the accident. Such testimony contradicted plaintiff’s assertion that both he and the ladder fell to the ground as a result of the accident. Johnson’s testimony further contradicted plaintiff’s account of the condition of the wooden subflooring on which the ladder was placed, as Johnson testified that the floor was level and free of warps, and that it had been cleared of debris by the subcontractors who previously worked in that unit. Plaintiff’s submissions also include deposition testimony by Landing Hill’s principal, Stephen Sameroff, that he never received any complaints that the unit’s sub-flooring was uneven, and that he did not recall observing any bubbles, debris, or other hazardous conditions on the sub-flooring when he visited the worksite.

Inasmuch as plaintiff contends that he fell because the ladder twisted due to the unevenness and littered condition of the subflooring, rather than because he simply lost his balance while attempting to screw the HVAC box into the ceiling, the deposition testimony by Johnson and Sameroff raises material issues of fact and credibility which preclude a grant of summary judgment in plaintiff’s favor (*see Alvarez v Prospect Hosp.*, *supra*; *Vivar v 441 Realty, LLC*, *supra*; *Degen v Uniondale Union Free Sch. Dist.*, *supra*; *Campos v 68 E. 86th St. Owners Corp.*, *supra*). The affidavit by plaintiff’s expert is likewise insufficient for the purpose of establishing plaintiff’s entitlement to summary judgment as a matter of law, as the opinions and conclusions set forth therein rests on the very same underlying contention that the subflooring was warped and littered with frozen debris (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726, 480 NYS2d 195 [1984]; *Abrams v Bute*, 138 AD3d 179, 196 27 NYS3d 58 [2d Dept 2016]). Accordingly, the branch

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of plaintiff's motion seeking summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim against Landing Hill is denied.

Having determined the existence of significant triable issues of fact and credibility as to whether the ladder on which plaintiff was working twisted and fell because the subflooring was uneven and strewn with frozen debris, or whether plaintiff merely lost his balance and fell, a grant of summary in Landing Hill's favor dismissing plaintiff's Labor Law § 240 (1) claim would be inappropriate (*see Alvarez v Prospect Hospital, supra; Vivar v 441 Realty, LLC, supra; Degen v Uniondale Union Free Sch. Dist., supra; Campos v 68 E. 86th St. Owners Corp., supra*). Given the existence of these triable issues, Landing Hill also is unable to demonstrate, as a matter of law, that plaintiff's alleged decision to place the ladder on a frozen uneven surface, and to utilize it without the aid of his nearby co-worker, was the sole proximate cause of his injuries (*see Graziano v Source Bldrs. & Consultants, LLC, __ AD3d __, 2019 NY Slip Op 06477 [2d Dept 2019]; Orellana v 7 W. 34th St., LLC, supra; Yao Zong Wu v Zhen Jia Yang, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; Lacasse v Sorbello, 121 AD3d 1241, 995 NYS2d 245 [2d Dept 2014]*). Moreover, to the extent triable issues exist as to whether, among other things, the subflooring was uneven and strewn with frozen debris, Landing Hill also failed to demonstrate its entitlement to dismissal of plaintiff's Labor Law § 241 (6) claim predicated upon the alleged violation of 12 NYCRR 23-2.21 (b) (4) (ii), which requires that all ladder footings shall be placed on firm, non-slip surfaces (*see Fladd v Installed Bldg. Prods., LLC, 134 AD3d 1480, 24 NYS3d 459 [4th Dept 2015]; Estrella v GIT Indus., Inc., 105 AD3d 555, 963 NYS2d 110 [1st Dept 2013]*). Therefore, Landing Hill's motion for summary judgment dismissing the complaint against it is granted to the extent that plaintiff's claims under the common law and Labor Law § 200, and his claim under Labor Law § 241 (6) predicated upon the alleged violations of 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (2), and 12 NYCRR 23-1.21 (e) (3) are dismissed, and is otherwise denied.

Dated: October 22, 2019
Riverhead, New York



WILLIAM G. FORD J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION