Penaloza v Adeia Assoc.
2019 NY Slip Op 33572(U)
December 5, 2019
Supreme Court, New York County
Docket Number: 151861/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, *Justice* — PART IAS MOTION 32

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RAFAEL PENALOZA,

Plaintiff,

- v -

ADEIA ASSOCIATES,

Defendant.

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INDEX NO. 151861/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 79
were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for partial summary judgment on its Labor Law §§ 240(1) and 241(6) claims is granted.

Background

This Labor Law case arises out of plaintiff's work as a painter at a property located at 5 West 102nd Street in Manhattan. Plaintiff was assigned to paint the exterior of the building above the sidewalk shed. Plaintiff claims he was given a single extension ladder with which to perform his work. Plaintiff argues that he resisted working with this ladder because a coworker had previously used this ladder and broken his nose after falling off of it. He claims his requests were rejected and he used the ladder. Plaintiff fell when the ladder suddenly moved and slipped; he maintains that ladder was unsafe because it did not have cleats or footings. He also insists he was not given anything with which he could tie off the ladder.

In opposition, defendant argues that plaintiff was the sole proximate cause of his accident because he did not tie off the ladder. Defendant explains that plaintiff was provided with a ladder

and that it was plaintiff who placed the ladder in order to complete his assigned painting task. Defendant also argues that plaintiff failed to establish that the ladder lacked cleats and improperly relies on uncorroborated deposition testimony. It urges the Court to ignore the photographs submitted by plaintiff in support of his motion. Defendant emphasizes that plaintiff never asked for a rope with which he could tie off the ladder.

Discussion

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]).

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the 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 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Here, the Court grants the motion because plaintiff was working on a ladder when it slipped and caused plaintiff to fall. That account is undisputed and defendant's claim that plaintiff was the sole proximate cause of his accident is insufficient to raise an issue of fact (*see Nieto v CLDN NY LLC*, 170, AD3d 431, 93 NYS3d 553 (Mem), [1st Dept 2019] [granting plaintiff summary judgment and rejecting argument that plaintiff was the sole proximate cause of his accident where plaintiff fell off a ladder after trying to maneuver himself while installing a light]). Just as in *Nieto*, it does not matter that plaintiff was the one who placed the ladder in a particular location. Moreover, defendant provided no evidence that it offered a rope to plaintiff; in other words, this is not a case where plaintiff was offered a safety device and rejected it. Rather, defendant attempts to shift its burden to provide safe equipment to workers by asserting

that plaintiff should have asked for rope to tie off the ladder. That does not create an issue of fact with respect to whether plaintiff was the sole proximate cause of his accident.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff also moves for summary judgment on its Labor Law § 241(6) claim. Plaintiff cites to Section 23-1.21(b)(3)(iv) of the Industrial Code which provides that "All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: . . . If it has any flaw or defect of material that may cause ladder failure."

Plaintiff maintains that the ladder slipped because it lacked cleats and defendant offers nothing substantive to contradict this assertion. Defendant does not cite evidence demonstrating that the ladder had cleats or was free from defects. Nor does defendant assert that the lack of cleats was not a proximate cause of the injury. Instead, defendant claims plaintiff has not met his burden to show a violation of this Industrial Code section. Setting aside the photographs, plaintiff claims he did not want to use the ladder because it lacked the footings and that he told a supervisor about it (NYSCEF Doc. No. 68 at 60-61). Plaintiff need not have an expert examine the ladder to observe that it was missing footings, especially where that claim is undisputed.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment on its Labor Law §§ 240(1) and 241(6) claims against defendant is granted.

Next Conference: February 11, 2020 at 2:15 p.m. The Court observes that plaintiff's Labor Law § 200 claim remains.

12.5.19
DATE

ARLENE P. BLUTH, J.S.C.

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