SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JAMES GUERIN and MELISA GUERIN,

Plaintiff,

-against-

NEW 56TH AND PARK (NY) OWNER, LLC, et al.,

Defendants.

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NEW 56TH AND PARK (NY) OWNER, LLC, et al.,

Third-Party Plaintiff,

-against-

VERIZON NEW YORK, INC., et al.,

Third-Party Defendants.

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Index No. 157422/15
Motion Sequence 03

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

This Labor Law personal injury action arises from a July 18, 2015 accident at a construction site located at 440 Park Avenue in Manhattan. Plaintiff James Guerin (Plaintiff) alleges that he was in the process of picking up a steel plate that covered a trench when the trench collapsed. He then allegedly fell eight feet to the ground below and was struck by the steel plate. The construction site was owned by defendant 56 & Park (NY) Owner, LLC (Owner), which hired Lend Lease (US) Construction, LMB, Inc. (Lend Lease) (collectively, Defendants) as its general contractor.

After the note of issue was filed Plaintiff moved for summary judgment on his Labor Law 240(1) cause of action. The court heard oral argument on September 16, 2019. By interim order dated September 20, 2019, this court directed the deposition of non-party Brendan Tobin,

Plaintiff's foreman, who submitted an affidavit stating that he witnessed the accident and that the trench collapsed because it was not properly secured. In relevant part my interim order states:

> The court agrees that Mr. Tobin should be deposed before deciding Plaintiff's motion on the merits. The court is therefore directing that Mr. Tobin be deposed within 30 days of the date of entry of this order. The deposition shall last no longer than 3 hours and shall be limited in scope to the content of his affidavit. Within two weeks of Mr. Tobin's deposition the parties may E-file letter briefs no longer than three pages in length to supplement their motion papers.

Mr. Tobin was deposed on October 29, 2019. A week earlier, on October 21, 2019, third-party defendant Verizon New York, Inc. ("Verizon") retained new counsel. On or about November 11, 2019, Verizon filed a notice of cross-motion to dismiss the third-party complaint. Defendants oppose both the motion and cross-motion. Plaintiff has not taken a position on Verizon's motion, and Verizon has not taken a position on Plaintiff's motion.

Mr. Guerin was deposed on February 14, 2018.[1] He testified that when he arrived at the worksite he was told to assist Mr. Tobin cut a trench that was designed to be an extension of another trench that had already been constructed. Mr. Tobin was cutting when he instructed the Plaintiff to move a steel plate. After Plaintiff picked up the plate, the trench around the hole collapsed and Plaintiff fell eight feet to the ground below. The steel plate followed and struck the Plaintiff on the head. Mr. Tobin's affidavit[2] was consistent with Mr. Guerin's testimony:

> As I was cutting, I instructed James to pick up a thin metal sheet that had been covering the trench and immediately upon him doing so, the outer portion of the trench wall collapsed, causing him to fall into the hole below. He fell about 8 feet and there was a water stem pipe in the hole in which he landed in.
>
> The trench and its surrounding area collapsed. The trench was not properly secured. There was no plywood, plank, or any sort of proper shoring system in place. These safety and securing devices are required to properly keep a trench from collapsing and where [sic.] absent where James fell.

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[1] Plaintiff's exhibit 5 (Guerin Dep).

[2] Plaintiff's exhibit 6 (Tobin Affidavit).

And when Mr. Tobin was deposed under oath, his testimony[3] mirrored his affidavit in all respects (Tobin Dep. pp. 27, 29):

> Q. So after you tilted the machine back, you told Mr. Guerin to go move the plate, what happened next?
>
> A. Jimmy was in front of me. He went to lift the plate and picked up the plate, and the ground underneath him collapsed. Jimmy fell down into a hole. The plate came down on top of his head and I thought he was dead.
>
> * * * *
>
> Q. And when the ground gave way, did he fall straight down, forward, or in some other direction?
>
> A. The ground came from underneath him. It collapsed and kind of went straight down. And the plate came down on top of his head.
>
> Q. And you had an unobstructed view of all of this?
>
> A. Unobstructed.

Three additional depositions were held in this case: Mr. James Fallon on behalf of Lend Lease, Ms. Simone Sarcona on behalf of the Owner, and Mr. Harnarine Lochan on behalf of Verizon. None of these individuals witnessed the accident or had any relevant knowledge of same.

Plaintiff's counsel argues that the undisputed testimony regarding the trench collapsed is *prima facie* evidence of a Labor Law 240(1) violation. Defendants' counsel counters that Mr. Tobin's testimony raises several issues of fact which precludes summary judgment. These include whether Plaintiff's injuries were caused by Mr. Tobin's directive that Plaintiff remove the steel plate as opposed to Defendants' alleged failure to brace the trench, and whether Plaintiff caused his own injuries because he knew that the steel plate was covering a hole.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and

[3] NYSCEF Doc. 142 (Tobin Dep).

then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Labor Law 240(1)

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Labor Law 240 provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

The "purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being

struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. To establish a claim under Labor Law 240(1), Plaintiff must show that the statute was violated and that the violation proximately caused his injury. *See Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004).

This is the not the first time the courts have been asked to interpret the Labor Law in the context of collapsing trenches. In *Trillo v City of New York*, 262 AD2d 121 (1st Dept 1999), the plaintiff was part of a team assigned to dig trenches. His specific responsibility was to install 20-foot long wooden beams horizontally along the side of the trench and 4-foot long posts to hold up the horizontal beams. At one point while plaintiff was standing on a horizontal beam to help nail it into place the whole structure collapsed. In reversing the trial court and awarding the plaintiff summary judgment, the court held:

> Whether plaintiff's fall was caused by the collapse of the wooden sheeting structure over the trench, or by the earth giving way on the side of the trench as the sheeting was being installed, the fact remains that plaintiff was caused to fall eight feet to the bottom of the excavation. This trench supported by the wood sheeting constituted a difference in elevation and therefore, a risk within the contemplation of Labor Law §240(1).

The First Department reached a similar conclusion in *Bell v Bengomo Realty, Inc.*, 36 AD3d 479 (1st Dept 2007). In that case plaintiff was hired to erect two billboards. He sustained injuries when the ground under his feet gave way, causing him to fall into an open trench that had been excavated by another contractor. The court held that plaintiff's "fall into the excavated trench, allegedly caused by a failure to shore or brace the trench and an undercutting of the trench . . . is the type of elevation-related risk for which section 240(1) provides protection" *Id.* at 480; *see also LeChase Constr. Servs., LLC v Jag I, LLC*, 167 AD3d 1435, 1436 (4th Dept 2018); *Tooher v Willets Point Contracting Corp.*, 213 AD2d 856, 857 (3d Dept 1995); *Pouso v Columbia Univ. in the City of N.Y.*, 2012 NY Misc. LEXIS 5884, *14 (Sup. Ct. NY Co. Dec. 21, 2012, Hagler,

J.); *McTigue v American Airlines, Inc.*, 2008 NY Misc. LEXIS 10047, *9 (Sup. Ct. Queens Co., July 1, 2008, Kelly, J.).

Defendants do not dispute the applicability of *Trillo* and *Bell* to the case at bar, instead pinning their opposition on what they claim to be triable issues of fact. This is somewhat confusing in that the only two persons with first-hand knowledge of the accident are the Plaintiff and Mr. Tobin, and their accounts of the accident are identical in all material respects. In any event, Defendants contend that Plaintiff was somehow the sole proximate cause of his injuries because he knew the steel plate covered a hole. This is not the case. The Plaintiff testified, and Mr. Tobin confirmed, that he only removed the steel plate at Mr. Tobin's direction. This precludes any possibility that he was the sole proximate cause of his injuries.

As for Defendants' contention that the accident was caused by the removal of a safety device (the steel plate) as opposed to the trench being unsecured, this at most suggests the possibility that there was more than one proximate cause of Plaintiff's injuries. Since it is well-settled that a Labor Law plaintiff need only show that a defendant's violation was a proximate cause (but not the only proximate cause) of his/her an accident, this would not preclude summary judgment. *See Pardo v Bialystoker Ctr.*, 308 AD2d 384, 385 (1st Dept 2003) (There may be more than one proximate cause of a workplace accident and a plaintiff need only show that his/her "injuries were at least partially attributable" to a defendant's Labor Law violation).

Defendants also argue that there is an issue of fact as to Plaintiff's credibility since there is conflicting testimony whether the entire trench collapsed or only the small area surrounding the hole. This too would not preclude summary judgment. What matters for summary judgment purposes is that the trench was not shored or braced, that it collapsed through no fault of the Plaintiff, and that the resulting hole was big enough for the Plaintiff to fall to the ground below.

These facts are enough for Plaintiff to establish his entitlement to summary judgment on his Labor Law 240(1) claim.

The court has considered Defendants' remaining contentions and finds them to be without merit.

Verizon's Cross-Motion

CPLR 3212(a) requires that summary judgment motions "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." This "requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy." *Brill v City of New York*, 2 NY3d 648, 652 (2004). Here the note of issue was filed on April 24, 2019. Verizon's cross-motion was filed on November 11, 2019, well outside the 120-day deadline provided by the CPLR.

Verizon concedes that it's cross-motion is untimely but argues that there is good cause for the court to consider it because it recently retained new counsel and because Mr. Tobin's testimony establishes that Verizon has no liability in this case. The court disagrees. Controlling case law dictates that a change in representation is not "good cause" for purposes of this discussion. *See Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 (1st Dept 2008); *Azcona v Salem*, 49 AD3d 343, 343 (1st Dept 2008). As Defendants correctly argue, were this court to hold otherwise, parties in other cases who miss a summary judgment deadline could simply subvert CPLR 3212(a) by hiring new counsel.

As for Verizon's second argument - that Mr. Tobin's deposition exonerates it from liability - Verizon does not recognize two crucial facts. First, that it was in possession of Mr. Guerin's testimony and Mr. Tobin's affidavit long before Mr. Tobin was deposed. Second, that

Defendants' third-party claims sound not just in common-law indemnity, but also in contractual indemnity. This means that the third-party claims arise from contract provisions having nothing to do with Mr. Tobin. These contract provisions, supported by the then-existing deposition transcripts, could have been submitted before the deadline to move for summary judgment expired. Thus, while the court appreciates Verizon's claim that Mr. Tobin's deposition was a "revelation of evidence," and that its motion may have merit, the CPLR and *Brill* preclude the court from considering same. Verizon's cross-motion is therefore denied.

CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment on his Labor Law 240(1) claim is granted; and it is further

ORDERED that Verizon's cross-motion to dismiss the third-party complaint is denied; and it is further

ORDERED that, pursuant to the January 23, 2020 order of the Hon. Deborah Kaplan, the parties shall appear in Part 40 for trial on April 9, 2020.

The Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

DATED: 2-7-20

SHERRY KLEIN HEITLER, J.S.C.