

Dupree v 510 W. 22nd St. Owner, LLC
2020 NY Slip Op 30790(U)
March 13, 2020
Supreme Court, New York County
Docket Number: 153588/18
Judge: Sherry Klein Heitler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30**

-----X
ROEDELL DUPREE,

Plaintiff,

-against-

510 WEST 22ND STREET OWNER, LLC, et al.,

Defendants.

-----X
510 WEST 22ND STREET OWNER, LLC, et al.,

Third-Party Plaintiffs,

-against-

FEAL GROUP, INC.,

Third-Party Defendant.

-----X
SHERRY KLEIN HEITLER, J.S.C.

Motion Sequence 01 and 02 are consolidated for disposition. In MS 01, plaintiff Roedell Dupree (Plaintiff or Mr. Dupree) moves for summary judgment on his Labor Law 240(1) cause of action. In MS 02, third-party defendant Feal Group, Inc. (Feal) moves pursuant to CPLR 603 and CPLR 1010 for an order severing the third-party action from the main action and extending its time to move for summary judgment. As more fully set forth below, Plaintiff's motion is granted and Feal's motion is granted in part and denied in part.

This Labor Law personal injury action arises out of a December 21, 2017 accident at a construction site located at 510 West 21st Street in Manhattan. The construction site was set up as part of a renovation of an existing five-story building into a thirteen-story building. Defendant 510 West 22nd Street Owner, LLC (Owner), which owned the building, hired defendants Cava Construction Co., Inc. and Cava Construction and Development, Inc. (Cava or Defendants) as its construction managers. At some point Cava was purchased by defendant Omnibuild Construction

Inc. (Omnibuild). In turn, Cava, and then Omnibuild, hired several subcontractors including Plaintiff's employer, non-party Ekon Energy.

Plaintiff was one of Ekon's foreman, and on the date of the accident he was working on a canopy located approximately 15 feet above ground level. To access the canopy he used a 10-12 high A-frame ladder. Plaintiff described¹ his work and his accident as follows (Dupree Dep. pp. 66-67, 72, 80, 102, 103-104, 106-107):

Q. Can you describe the canopy for me?

A. It was like an overhang that had some type of railing -- not railings, but some type of suspension to hold it together. And then there was another wall that needed to have waterproofing paper that needed to be put onto the concrete.

* * * *

Q. Did your accident occur somewhere in the area of the canopy?

A. Yes.

Q. Were you on a ladder at the time of your accident?

A. No. I was on top of -- hold on. Was I on the ladder at the time of the accident?

Q. Yes.

A. I was coming down and that's how I wound up on the ladder and the ladder fell and I fell with the ladder.

* * * *

Q. Was it an A-frame ladder or some other type of ladder?

A. It was an A-frame stepladder.

Q. How tall was that ladder?

A. Ten to 12 feet, maybe.

* * * *

Q. Describe for me how your accident occurred as you were coming down the ladder?

A. As I was coming down the ladder, my left foot had to climb over the barricade, and my left foot -- well, my feet were kind of hanging a little bit, and then I was able to touch the top of the ladder with my left foot, the very top of the ladder. And then as I was coming down, I was able to get my right foot on the step before the very top, and then the ladder kind of gave way and it fell and I just went down with it. I fell to the left, and then I went to try to break my fall with my left wrist, and that's how I had got the injury to my wrist with the pressure.

¹ Plaintiff's exhibit H (Dupree Dep.)

Q. Is there any reason you know of why the ladder wasn't set up in front of the canopy?

A. I have no idea.

Q. Did you ever say to anybody let's set up the ladder in front of the canopy?

A. It was my first time up. I didn't think nothing to - I just went up and tried to do the job.

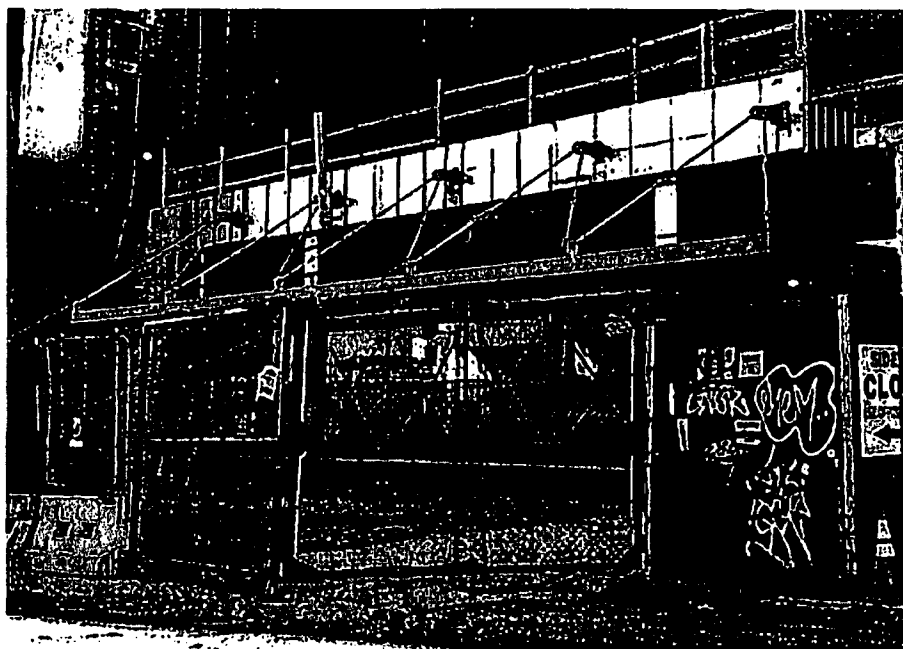
Q. But did you ever say anything to anybody such as let's move the ladder to a different location?

A. No.

Q. And how far from the top of the ladder were your feet hanging at that moment?

A. I was able to touch it with the balls of my feet, like the front of my feet, until I was able to slide down the board, and I tried to get my right foot to the next step. That's when the ladder gave way and I just fell with the ladder.

Annexed to the Plaintiff's moving papers (exhibit I) is a photograph of the canopy at issue. Plaintiff explained that a piece of plywood was set up on the right side and that he would climb up the ladder and over the plywood to get to the canopy (Dupree Deposition p. 85-86).



In addition to describing his accident, Plaintiff testified that his employer, Ekon energy, had some kind of relationship with third-party defendant Feal (Dupree Deposition p. 28):

Q. Did Ekon place any kind of identifying labels on their ladders?

A. Yes. It would say FEAL, F-E-A-L.

Q. And do you know what FEAL is?

A. Feal is the company.

Q. What do you mean by that?

A. Ekon Energy.

Q. Is FEAL a company that has some sort of working relationship with Ekon?

A. Yes.

Plaintiff believed that his supervisors, who he identified as “Alex” and “Beck”, were employed by Omnibuild. However, according to Omnibuild’s assistant project manager, Mr. Damien Harris, Beck was employed by Feal at the time of the accident.² Mr. Harris also testified that Omnibuild did not provide its subcontractors with ladders and that he never saw a piece of plywood set up at the perimeter of the canopy as testified to by Mr. Dupree.

Plaintiff filed a note of issue on May 7, 2019. On June 3, 2019, Defendants filed the third-party summons and complaint. Plaintiff now moves for summary judgment on his Labor Law 240(1) cause of action. Feal separately moves for an order severing the third-party action from the main action.

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 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-

² See Deposition of Damien Harris, Defendants’ exhibit C, pp. 32-22.

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), 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.

“In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason”, the Court of Appeals has “continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. . . .” *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8 (2003); see also *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 883 (1st Dept 2012); *Demaj v Pelham Realty, LLC*, 82 AD3d 531, 532 (1st Dept 2011) (The collapse of the ladder is prima facie evidence of a violation of the statute); *Kosavick v Tishman Construction Corporation of New York*, 50 AD3d 287, 288 (1st Dept 2008) (“once a

plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device,” shifting the burden to the defendant to establish that there was no violation of the statute and plaintiff was the sole proximate cause of his accident).

Here, Plaintiff’s testimony is enough to meet its *prima facie* burden that there was a Labor Law 240(1) violation. At the time of his accident Plaintiff was performing construction work using a ladder that collapsed. The evidence suggests that the ladder was not tall enough for the task at hand and that alternative safety measures should have been installed so that the Plaintiff could ascend to and descend more safely. In their opposition brief, Defendants assert that conflicting deposition testimony between the Plaintiff and Mr. Harris about the existence and location of the plywood is enough to raise an issue of fact. The court disagrees. While this may be a factual dispute, the existence of the plywood (or lack thereof) is immaterial to the issue of whether there was a Labor Law violation. What is important, and undisputed, is Plaintiff’s testimony about how the accident itself occurred and what safety devices were provided to him.

Defendants also oppose Plaintiff’s motion on CPLR 3212(f) grounds, claiming additional discovery is necessary before can decide this issue on the merit. The court addressed this need for additional discovery during court conferences on January 27, 2020 and February 24, 2020 during which counsel for all parties were present. Also during the February 24, 2020 conference, Defendants argued that Plaintiff was the sole proximate cause of his accident because he had other ways to get to the canopy that did not involve using the ladder and climbing over the plywood. To the extent Plaintiff may have used questionable judgment in descending from the canopy, this at most equates to comparative negligence on his part, which is irrelevant to the question of Defendants’ statutory liability. See *Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 (1st Dept 2018); *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 (1st Dept 2013); *Spages v Gary Null Assocs.*, 14 AD3d 425, 426 (1st Dept 2005).

Finally, with respect to Feal, the court declines to grant that part of its motion which seeks to sever the third-party action from the main action.

CPLR 603 provides that, “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.” CPLR 1010, which applies specifically to third-party actions, provides that “[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim... [and] in exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.” In determining whether to sever a third-party action the court must not only consider issues of judicial economy and prejudice to the third-party plaintiff (*see Vasquez v G.A.P.L.W. Realty, Inc.*, 254 AD2d 232, 233 [1st Dept 1998]), but also whether the main action will be delayed because of undue or inexcusable delay in prosecuting the third-party claims (*see Garcia v Geshel Realty Corp.*, 280 AD2d 440, 440-41[1st Dept 2001]). The decision to sever or not sever rests with the sound discretion of the court. *Escourse v City of New York*, 27 AD3d 319, 320 (1st Dept 2006); *Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606, 608.

Here, since the main and third-party actions arise from the same factual circumstances, and there is no allegation that the third-party complaint was untimely, the court prefers that these cases be tried together in the interests of judicial economy. To avoid any prejudice, however, the court will not set a trial date until Feal has completed all necessary discovery. In addition, Feal’s time to move for summary judgment is also extended until 60 days from the date of the completion of all such discovery as determined by the court.

In light 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 the Feal's motion is denied except as set forth herein; and it is further

ORDERED that counsel for all parties appear for a compliance conference in Part 30 (60 Centre, Room 408) on April 13, 2020 at 10:30AM. During this conference the court will set a schedule for all remaining discovery.

This constitutes the decision and order of the court.

DATED: 3-13-20


SHERRY KLEIN HEITLER, J.S.C.