

Rahim v Kaba Realty, LLC
2020 NY Slip Op 30850(U)
March 2, 2020
Supreme Court, Kings County
Docket Number: 514031/2015
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of March, 2020.

PRESENT:
HON. CARL J. LANDICINO,

Justice.

-----X

ABDUR RAHIM,

Index No.: 514031/2015

Plaintiff,

DECISION AND ORDER.

- against -

KABA REALTY, LLC, and KAFKA CONSTRUCTION, INC., and SHAH GROUP ENTERPRISES, INC.,

Motion Sequence, #6

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2.</u>
Opposing Affidavits (Affirmations).....	<u>3, 4.</u>
Reply Affidavits (Affirmations).....	<u>5.</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff Abdur Rahim (hereinafter the "Plaintiff") alleges causes of action pursuant to New York State Labor Law §§200, 240(1), 241(6) and common law negligence, as against Defendant Kaba Realty, LLC (hereinafter "Defendants Kaba") and Defendant Kafka Construction, Inc. (hereinafter "Defendant Kafka"). Plaintiff alleges in his Complaint that on November 9, 2015 he was injured after falling off a ladder while working as a laborer at the premises known as 164 West 123rd Street, New York, New York (hereinafter "the Premises").

The Plaintiff now moves (motion sequence #6) for an order pursuant to CPLR 3212 granting the Plaintiff partial summary judgment against both Defendant Kaba and Defendant Kafka with respect to the issue of liability under §240(1) of the Labor Law of the State of New York. The Plaintiff contends that Defendant Kafka, the purported general contractor, and

Defendant Kaba, the purported owner of the Premises, are both liable for his injuries given that the scaffold was purportedly unsafe and they did not provide him with the appropriate protection. The Plaintiff argues that these facts establish a *prima facie* violation of Labor Law §240(1), since the scaffold was a safety device that failed to afford Plaintiff proper protection from a gravity related risk and caused subsequent injury. Both Defendant Kaba and Defendant Kafka oppose the motion and argue that it should be denied. Specifically, both Defendant Kaba and Defendant Kafka contend that it was the Plaintiff's failure to use an available safety harness and safety line that was the sole proximate cause of the Plaintiff's injuries.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558-559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 240(1)

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

“All contractors and owners and their agents ... 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.”

“Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted.” *Walker v. City of New York*, 72 A.D.3d 936, 937, 899 N.Y.S.2d 322, 323 [2nd Dept, 2010]. In order to prevail on a Labor Law § 240 (1) cause of action, “[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries” *Delahaye v. Saint Anns School*, 40 AD3d 679, 682 [2007]; see *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Robinson v East Med. Ctr., L.P.*, 6 NY3d 550 [2006].

“Liability may, therefore, be imposed under the statute only where the “plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

Turning to the merits of the Plaintiff’s motion, the Court finds that the Plaintiff has met his *prima facie* burden in relation to his Labor Law §240(1) claim. The Plaintiff contends in his deposition (Plaintiff’s Motion, Exhibit 4, Page 98) that “I was working, all of a sudden the stone from the wall came out all of a sudden, hit me and part of it hit the wood plank and then it cracked and I fell with it.” In his affidavit the Plaintiff states (Plaintiff’s Motion, Exhibit 2, Paragraph 3) that “[t]here was no safety line nor safety belt present for my use on the scaffold at the front of the

building where I worked, nor did I see any safety belts at the site.” In support of his application, the Plaintiff also provides an affidavit from Stuart Sokoloff, P.E. who opines (Plaintiff’s Motion, Exhibit 10) that the Defendants are liable because they did not 1) properly inspect the exterior masonry, 2) provide the Plaintiff with a proper fall arrest system, and 3) provide a safety railing. Additionally, Plaintiff contends that the scaffold was not as strong as required for the activity at issue. The Plaintiff’s expert also states that upon his review of testimony the owner did not state that a safety belt was available. (Plaintiff’s Exhibit 9, Page 3). However, Mr. Sokoloff never indicates that he visited the site and acknowledges that he never saw the actual scaffold. “The collapse of the makeshift scaffold when it was struck by the facade establishes that the makeshift scaffold failed to afford the injured plaintiff proper protection for the work being performed, and that this failure was a proximate cause of his injuries.” *Saldivar v. Lawrence Dev. Realty, LLC*, 95 A.D.3d 1101, 1102, 945 N.Y.S.2d 324, 326 [2nd Dept, 2012]; *see also Chabla v. 72 Greenpoint, LLC*, 101 A.D.3d 928, 928, 957 N.Y.S.2d 226, 227 [2nd Dept, 2012].

In opposition, the opponents have raised a material issue of fact that is sufficient to deny the Plaintiff’s motion for summary judgment. In support of their Affirmation in Opposition, Defendant Kafka points to the deposition testimony of Kalliopi Giannatos (“Giannatos”), a member of Kaba Realty. Giannatos testified that there was a safety harness and safety tie available to the Plaintiff but that the Plaintiff did not use it. When asked (Affirmation in Opposition of Defendant Kaba, Exhibit 1, Page 62) whether the Plaintiff was tied off on the morning prior to the accident Giannatos stated “[n]ot at all.” When Giannatos was asked what Giannatos told the Plaintiff when she observed this, Giannatos stated that she had previously “gave him a big warning to tie himself up.” (Affirmation in Opposition of Defendant Kaba, Exhibit 2, Pages 49-72) Ms. Giannatos stated that the Plaintiff was wearing a harness but had not tied off. (Affirmation in Opposition of Defendant Kaba, Exhibit 2, Pages 69) Giannatos repeats this in her

affidavit when she states that “I personally observed him wearing his safety harness, hat and goggles but his harness was not tied to the safety line (rope).” (Affirmation in Opposition of Defendant Kaba, Exhibit E, Paragraph 2). Plaintiff’s position is that there was no safety line or belt.

In situations where Defendants present evidence that there was a safety device available but that the Plaintiff had chosen not to use it, that evidence “was found to be sufficient to raise a triable issue of fact as to whether the Plaintiff’s actions were the sole proximate cause of his accident.” *Bascombe v. W. 44th St. Hotel, LLC*, 124 A.D.3d 812, 813, 2 N.Y.S.3d 569 [2nd Dept, 2015]; *see also Probst v. 11 W. 42 Realty Inv’rs, LLC*, 106 A.D.3d 711, 712, 965 N.Y.S.2d 513, 515 [2nd Dept, 2013]. In *Bascombe*, the Court found that the Defendant’s evidentiary submission was sufficient to raise an issue of fact. In *Bascombe* the Court relied on the affidavit of the Plaintiff’s supervisor who stated that there was available safety equipment and that Plaintiff was aware of it. The trial Court, as affirmed by the appellate division, found that the affidavit was sufficient to raise an issue of fact. As in *Bascombe*, in the instant proceeding, Defendants have presented sufficient evidence, by the testimony of Ms. Giannatos, to raise an issue of fact as to whether Plaintiff’s actions were the sole proximate cause of his injuries. As a result, the Plaintiff’s motion is denied.

Based upon the foregoing, it is hereby Ordered that:

The Plaintiff’s motion (motion sequence #6) is denied.

This constitutes the Decision and Order of the Court.

ENTER:


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FILED
KINGS COUNTY CLERK
Carl J. Landicino
J.S.C.