Ferreras v Park Premium Enter. Inc.
2020 NY Slip Op 31226(U)
April 17, 2020
Supreme Court, Kings County
Docket Number: 519431/16
Judge: Edgar G. Walker
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At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, on the 17th day of April, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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SIXTO GARRIDO FERRERAS,

Plaintiff,

- against -

Index No. 519431/16

PARK PREMIUM ENTERPRISE INC., PARK DEVELOPERS & BUILDERS, INC., and 1629-1631 ST JOHNS PL LLC,

Defendants.

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PARK PREMIUM ENTERPRISE INC.,

Third-Party Plaintiff,

- against -

COLORADO USA, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed	30-31, 38
Opposing Affidavits (Affirmations)	63, 78, 79, 81, 84,
Reply Affidavits (Affirmations)	

Upon the foregoing papers, plaintiff Sixto Garrido Ferreras moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action as against defendants

Park Premium Enterprise Inc., Park Developers & Builders, Inc., and 1629-1631 St. Johns Place., LLC., with respect to (motion sequence number 2).

Plaintiff's motion is denied.

Plaintiff, as is relevant here, alleges causes of action premised on Labor Law §§ 240 (1) and 241 (6) based on injuries he allegedly suffered on April 19, 2016 when he fell between flooring beams or joists while installing flooring at a building located at 1629 St. Johns Place, Brooklyn, New York (the Premises). The Premises at issue was owned by defendant 1629-1631 St Johns Pl LLC (St Johns). Pursuant to a written contract, St Johns hired defendant/third party plaintiff Park Developers & Builders, Inc. (Park)[1] to act as the general contractor on a project involving the gut renovation of the Premises and the neighboring building. Park, in turn, hired third-party defendant Colorado USA Inc., (Colorado) to perform carpentry work that included framing and the installation of new floors. Plaintiff was employed by Colorado as a carpenter.

According to plaintiff's deposition testimony, on the date of the accident plaintiff and his coworkers were installing plywood pieces over the exposed floor beams or joists on the third floor of the Premises. In doing so, plaintiff would put glue on joists and then, with a coworker, place a piece of plywood over the joists. Other coworkers would then

[1] The contracts attached as exhibits to St John's motion for summary judgment on its contractual indemnification claims as against Park identified the general contractor as Park Developers & Builders, Inc. However, Park's witness, its sole owner, testified at his deposition that he operated Park Premium Enterprise Inc. and Park Developers & Builders, Inc., as a single enterprise. Whether these facts make a difference as to who may be held liable need not be decided now as the court is denying plaintiff's motion.

nail the plywood piece to the joists. The joists were approximately 16 to 18 inches apart and there was nothing between the joists and the second floor below. The accident occurred when plaintiff and a coworker were carrying a plywood piece from a pile of plywood located on the third floor to an area where plaintiff had already placed down glue on the joists. As they were carrying the plywood piece, plaintiff stepped on a piece of plywood that was lying over the joists, but not attached to the joists, and when he did so, this plywood piece moved, causing plaintiff to lose his balance, and fall between two joists. Plaintiff, however, was able to catch himself as he was falling, and he did not fall to the floor below. Defendants did not provide plaintiff with a safety harness and there were no harnesses available at the job site.

Turning to the applicable law, Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with working at an elevation proximately causes injury to a worker (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]). Here there is no dispute that St Johns, as owner, and Park, as general contractor, may be held liable under section 240(1) (*see Gordan v Eastern Ry. Supply,* 82 NY2d 555, 559-560 [1993]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *cf. Guryev v Tomchinsky*, 20 NY3d 194, 199-201 [2012]),[2] or that plaintiff's carpentry work is of the

[2] In this respect, St Johns admitted that it was the owner of the Premises in its answer, and Park's owner testified at his deposition that Park acted as the general contractor for the project.

kind of work covered under section 240 (1) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-883 [2003]; *Panek v County of Albany*, 99 NY2d 452, 457-458 [2003]). In addition, plaintiff, through his deposition testimony that the movement of the plywood piece placed over the floor caused him to lose his balance and fall between the floor joists, has demonstrated, prima facie, that a violation of Labor Law § 240 (1) was a proximate cause of his accident (*see Xieu Park Place Estate, LLC*, 181 AD3d 627, ___ [2d Dept 2020]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475,476 [1st Dept 2014]; *Gomez v 2355 Eighth Ave., LLC*, 45 AD3d 493, 493 [1st Dept 2007]; *Campisi v Epos Contr. Corp.*, 299 AD2d 4, 6, 8 [1st Dept 2002]; *Robertti v Chang*, 227 AD2d 542, 543 [2d Dept 1996], *lv dismissed* 88 NY2d 1064 [1996]). The fact that plaintiff did not fall all the way to the floor below does not remove his accident from coverage under Labor Law § 240 (1) (*see Dos Santos*, 169 AD3d 1328, 1329 [3d Dept 2019]; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 880 [2d Dept 2009]; *Gomez*, 45 AD3d at 493; *Robertti*, 227 AD2d at 543).

In opposition, St Johns makes no contention that the version of the accident to which plaintiff testified at his deposition is insufficient to demonstrate his prima facie entitlement to summary judgment.[3] Rather, St Johns contends that plaintiff made inconsistent statements regarding how the accident happened to his medical providers, and that these inconsistent statements raise credibility issues that require a trial of the action. In this respect, St Johns points to a statement contained in the history section of Interfaith Medical Center's emergency room records that "pt. here reporting stepping on a hard object on the

[3] Park and Colorado adopt St John's arguments in their own opposition papers.

floor at his job, causing him to mis his balance and falling," a statement contained in the records of plaintiff's orthopedic surgeon, Barry Katzman, M.D., that at the time of the accident "while working on fixing a floor, [plaintiff] tripped, twisted his right ankle and landed on both of his knees," and a statement in the records of plaintiff's podiatric surgeon, Steven Yager, D.P., that plaintiff "relates being involved in a work injury on April 19, 2016 when his foot got stuck in a hole at work."

The fact that a plaintiff may have been the sole witness to an accident, in and of itself, is not a ground for denying summary judgment unless the defendant raises a bona fide issue as to how the accident happened or with respect to plaintiff's credibility (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Cardenas v 111-127 Cabrini Apts. Corp.*, 145 AD3d 955, 956-957 [2d Dept 2016]). Denial of summary judgment will be warranted, however, where a plaintiff's inconsistent statements suggest that the accident did not involve a violation of Labor Law § 240 (1) (*see King v Villette*, 155 AD3d 619, 622 [2d Dept 2017]; *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799, 800-801 [1st Dept 2016]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097-1098 [2d Dept 2012]). Here, plaintiff's statements to his medical providers make no mention of his falling between the joists or beams of the third floor. His statement to Dr. Katzman suggests that he simply fell to the surface of the third floor and his statement to Dr. Yager similarly suggests that he did not fall between the floor joists. Since a jury could infer from these statements that plaintiff only fell to the surface of the joists, and since such a fall would not involve an elevation differential for purposes of Labor Law § 240 (1) liability

(*see Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405, 406 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017]; *Scharff v Sachem Cent. School Dist. at Holbrook*, 53 AD3d 538, 538-539 [2d Dept 2008]), these statements are sufficient to raise a bona fide issue of plaintiff's credibility such that his motion must be denied (*see King*, 155 AD3d at 622; *Albino*, 142 AD3d at 800-801).[4]

With respect to the portion of the motion addressed to plaintiff's Labor Law § 241 (6) claim, plaintiff asserts that defendants violated 12 NYCRR 23-1.7 (b) (1) (i), an Industrial Code section that requires that hazardous openings be guarded by covers or safety railings. As the above noted credibility issues present factual issues with respect to whether plaintiff fell through a hazardous opening for purposes of section 23-1.7 (b) (1) (i), plaintiff's motion must also be denied with respect to his Labor Law § 241 (6) cause of action.[5]

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[4] The court notes that plaintiff, who has not submitted a reply affirmation, has failed to raise any objection to the consideration of the statements in the medical records. While defendants' submission of the medical records may present hearsay and foundation issues (*see e.g. Grechko v Maimonides Med. Ctr.*, 175 AD3d 1261, 1262-1263 [2d Dept 2019]; *Mosqueda v Ariston Dev. Group*, 155 AD3d 504, 504-505 [1st Dept 2017]; *Erkan v McDonald's Corp.*, 146 AD3d 466, 467-468 [1st Dept 2017]), plaintiff has waived objections on these grounds by failing to object, and it would be improper for the court to raise these issues on its own initiative (*see Bank of New York*, 171 AD3d 197, 202 [2d Dept 2019]; *Rosenblatt v St. George Health & Racquetball Assoc.*, 119 AD3d 45, 55 [2d Dept 2014]).

[5] It is also not clear that 12 NYCRR 23-1.7 (b) (1) (i) would, in any event, apply to the openings at issue under the circumstances here (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140-141 [2011]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476-477 [1st Dept 2014]).

This constitutes the decision and order of the court.

E N T E R,

J. S. C.