Zuniga-Sandino v 611 W. 46, LLC
2020 NY Slip Op 32565(U)
August 5, 2020
Supreme Court, New York County
Docket Number: 157176/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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CARLOS ZUNIGA-SANDINO,

Index No. 157176/2015

Plaintiff

- against -

DECISION AND ORDER

611 WEST 46, LLC, and AUTOHAUS NYC, LLC,

Defendants

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611 WEST 46, LLC,

Third Party Plaintiff

- against -

AUTOHAUS NYC, LLC, and ALBCO, INC.,

Third Party Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, an employee of third party defendant Albco, Inc., sues to recover damages for personal injuries sustained April 23, 2015, when he fell through an opening in the floor while performing demolition on premises owned by defendant-third party plaintiff 611 West 46, LLC, and leased by defendant Autohaus NYC,

LLC, at 609-611 West 46th Street, New York County. Plaintiff moves for summary judgment on defendants' liability under New York Labor Law §§ 240(1) and 241(6). C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court grants plaintiff's motion in part.

II. PLAINTIFF'S MOTION IS NOT PREMATURE.

C.P.L.R. § 3212(f) permits the court to deny summary judgment when "facts essential to justify opposition may exist but cannot then be stated." Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d 666, 667 (1st Dep't 2018); Figueroa v. City of New York, 126 A.D.3d 438, 439 (1st Dep't 2015). See Baghban v. City of New York, 140 A.D.3d 586, 586 (1st Dep't 2016). To withstand summary judgment on this ground, defendants must demonstrate that facts necessary to oppose plaintiff's motion for summary judgment are exclusively within his knowledge and control, and further disclosure may lead to relevant evidence that will defeat the motion. C.P.L.R. § 3212(f); Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d at 667; Stern v. Starwood Hotels & Resorts Worldwide, Inc., 149 A.D.3d 496, 491 (1st Dep't 2017); Solano v. Skanska USA Civ. Northeast Inc., 148 A.D.3d 619, 620 (1st Dep't 2017).

Defendants point out that Albco, plaintiff's employer, and

Marvin Zuniga, plaintiff's brother and an eyewitness, have not been deposed, but fail to show that the witnesses are exclusively in plaintiff's control. Even if plaintiff's brother might be considered within plaintiff's control, defendants further fail to specify what information either of these witnesses' depositions would reveal. Erkan v. McDonald's Corp., 146 A.D.3d 466, 467 (1st Dep't 2017); Debevoise & Plimpton LLP v. Candlewood Timber Group LLC, 102 A.D.3d 571, (1st Dep't 2013); Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006). See Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d at 667; Hoffman v. Wyckoff Hgts. Med. Ctr., 129 A.D.3d 526, 526 (1st Dep't 2015).

611 West 46 contends that a witness from Albco would reveal why plaintiff did not report his injury until two weeks afterward, but relies on a report presented by Autohaus that is unauthenticated and for which no witness lays a foundation for admissibility as a business record or other exception to the rule against hearsay. C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). See Viviane Etienne Med.

Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 508 (2015); People v. Rodriguez, 153 A.D.3d 235, 244 (1st Dep't 2017); Barkley v. Plaza Realty Invs. Inc., 149 A.D.3d 74, 79 (1st Dep't 2017); Weicht v. City of New York, 148 A.D.3d 551, 552 (1st Dep't 2017). In reply, plaintiff also presents an email dated February 6, 2020, from Albco's attorney indicating that Albco is out of business and that the attorney could not locate an Albco witness.

III. AUTOHAUS'S LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6)

As a tenant, Autohaus is liable under Labor Law §§ 240(1) and 241(6) if it hired Albco. Reyes v. Bruckner Plaza Shopping Ctr. LLC, 173 A.D.3d 570, 571 (1st Dep't 2019); Nava-Juarez v. Mosholu Fieldston Realty, LLC, 167 A.D.3d 511, 513 (1st Dep't 2018); Gordon v. City of New York, 164 A.D.3d 1110, 1111 (1st Dep't 2018); Karwowski v. 1407 Broadway Real Estate, LLC, 160 A.D.3d 82, 85 (1st Dep't 2018). While Gary Flom, a member of Autohaus LLC when plaintiff was injured, testified that Albco was the contractor for renovation of the leased premises, the contract between Autohaus and Albco dated April 1, 2015, on which he bases his testimony, is inadmissible. Flom did not authenticate the contract, which is signed on Autohaus's behalf by Ben Lakicevic, who according to Flom was the project manager and an employee of Bicom NY, LLC, which was to occupy space in

the leased premises. This inadmissible evidence leaves a factual issue whether Autohaus hired Albco that precludes summary judgment on plaintiff's Labor Law claims against Autohaus. Reyes v. Bruckner Plaza Shopping Ctr. LLC, 173 A.D.3d at 571. See Karwowski v. 1407 Broadway Real Estate, LLC, 160 A.D.3d at 84-85; Henningham v. Highbridge Community Hous. Dev. Fund Corp., 91 A.D.3d 521, 523 (1st Dep't 2012).

IV. 611 WEST 46'S LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6)

A. 611 West 46's Untimely Opposition

The parties' stipulation dated January 31, 2020, adjouning the return date of plaintiff's motion to February 19, 2020, required defendants to file any opposition by February 12, 2020. C.P.L.R. § 2214(b). 611 West 46's opposition served February 14, 2020, was late. Id. Plaintiff claims prejudice from less time to reply, but served a reply and never requested more time. Therefore the court has considered the late opposition. Narvaez v. Wadsworth, 165 A.D.3d 407, 408 (1st Dep't 2018); JPMorgan Chase Bank, N.A. v. Hayes, 138 A.D.3d 617, 617 (1st Dep't 2016); Serradilla v. Lords Corp., 117 A.D.3d 648, 649 (1st Dep't 2014); Prato v. Arzt, 79 A.D.3d 622, 622-23 (1st Dep't 2010).

B. The Labor Law Claims

611 West 46 contends that factual issues regarding how

plaintiff's injury occurred preclude summary judgment on his Labor Law § 240(1) and 241(6) claims. 611 West 46 points to the conflict between plaintiff's deposition testimony that he was standing on plywood before falling and the affidavit by Marvin Zuniga, as well as the inadmissible incident report that plaintiff was standing on a beam. Both plaintiff and Marvin Zuniga consistently attest that they were not provided any equipment to prevent them from falling and that plaintiff fell through an opening to the floor below. Sanchez v. 404 Park Partners, LP, 168 A.D.3d 491, 492 (1st Dep't 2019); Wiscovitch v. Lend Lease (U.S.) Constr. LMB Inc., 157 A.D.3d 576, 577 (1st Dep't 2018); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 450 (1st Dep't 2013); Figueiredo v. New Palace Painters Supply Co. Inc., 39 A.D.3d 363, 363 (1st Dep't 2007). See Guaman v. City of New York, 158 A.D.3d 492, 492-93 (1st Dep't 2018). Whether plaintiff fell from a beam or plywood, he establishes a violation of Labor Law § 240(1). Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 412-13 (1st Dep't 2019); Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 544 (1st Dep't 2018); Hill v. City of New York, 140 A.D.3d 568, 570 (1st Dep't 2016).

To support his Labor Law § 241(6) claim, plaintiff maintains

that defendants violated 12 N.Y.C.R.R. 23-1.7(b)(1)(i), which provides that: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Plaintiff does not dispute that he created the hazardous opening through which he fell by removing plywood boards covering it specifically to allow him to pry beams under the floor. In these circumstances, where keeping the covering in place was inconsistent with plaintiff's task, 12 N.Y.C.R.R. § 23-1.7(b)(1)(i) does not reasonably apply. Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134, 140 (2011). See Krzyzanowski v. City of New York, 179 A.D.3d 479, 481 (1st Dep't 2020).

Finally, 611 West 46 maintains that plaintiff was the sole proximate cause of his injury because he failed to use a scaffold. This defense requires evidence that plaintiff disobeyed instructions to use the scaffold, which the record nowhere discloses. Kehoe v. 61 Broadway Owner LLC, 180 A.D.3d 618, 619 (1st Dep't 2020); Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568-69 (1st Dep't 2018); Jarzabek v. Schafer Mews Hous. Dev. Fund Corp., 160 A.D.3d 412, 413 (1st Dep't 2018); Gonzalez v. City of New York, 151 A.D.3d 492, 493

(1st Dep't 2017).

V. CONCLUSION

Consequently, the court grants plaintiff's motion for summary judgment on liability under Labor Law § 240(1) against defendant 611 West 46, LLC, but otherwise denies his motion. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment.

DATED: August 5, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C