

<b>Robles v 635 Owner LLC</b>
2020 NY Slip Op 33430(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 162049/2015
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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ANGEL ROBLES,

Index No. 162049/2015

Plaintiff

- against -

DECISION AND ORDER

635 OWNER LLC and W5 GROUP LLC,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant 635 Owner LLC, the owner of the construction site where plaintiff claims he was injured April 16, 2013, has moved to supplement the record in opposition to plaintiff's motion for summary judgment on defendants' liability under New York Labor Law § 240(1). C.P.L.R. §§ 2001, 2004. While this current motion was pending, the court granted plaintiff's motion for partial summary judgment. C.P.L.R. § 3212(b) and (e). Therefore the court treats 635 Owner's current motion as a motion to renew plaintiff's motion for partial summary judgment. C.P.L.R. § 2221(e). The new evidence that 635 Owner presents is plaintiff's supplemental deposition June 6, 2019; the depositions of his former wife, Socorro Chavez Dominguez, and his treating

physician, Mark Gladstein M.D.; and Dr. Gladstein's medical records pertaining to plaintiff.

Although only plaintiff observed his fall from a ladder, as set forth in the decision granting plaintiff's motion for partial summary judgment, James Costello, a construction project manager for co-defendant general contractor W5 Group LLC, testified at his deposition that he heard the ladder and plaintiff fall and observed them fallen on the ground immediately afterward.

Specifically, Costello testified that plaintiff:

was coming down a ladder that, after the accident, I saw had been placed upside down, meaning that the feet were at the top and plastic safety caps were at the bottom. The ladder seems to have slid out when he was coming down and he fell or jumped off and landed on the ground in a kneeling position, which ended up landing on his knee.

Aff. in Supp. of Mot. for Summ. J. of Steven Payne Ex. E, at 17 (July 3, 2018). This testimony, corroborating plaintiff's testimony that, as plaintiff attempted to descend the ladder, its feet slid backwards, the top skidded down the wall against which it was placed, and the ladder fell, causing him to fall to the first floor on top of the ladder, established a violation of Labor Law § 240(1). Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 544 (1st Dep't 2018); Merino v.

Continental Towers Condominium, 159 A.D.3d 471, 472 (1st Dep't 2018); Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583 (1st Dep't 2018).

## II. DOMINGUEZ'S TESTIMONY

Dominguez, plaintiff's former wife, testified that on April 16, 2013, while she and plaintiff still were married, he confirmed that he fell from a ladder that day, but described it as his "lucky day," as "he was waiting for a day when he had an accident at his job because he can make a back lawsuit, because a back lawsuit, it was going to give him a lot of money." *Aff. of Debora Pitman Ex. 1*, at 24. According to Dominguez, he further declared that his fall from a ladder "wasn't a big deal and he was really happy because he said it was his opportunity to put that case that he wanted to do." *Id.* at 16.

Plaintiff's communications to his wife during their marriage are privileged. C.P.L.R. § 4502(b); People v. Fediuk, 66 N.Y.2d 881, 883-84 (1985); Matter of Vanderbilt (Rosner-Hickey), 57 N.Y.2d 66, 73-74 (1982). *See People v. Mills*, 1 N.Y.3d 269, 276 (2003). Whether or not plaintiff still may claim the privilege at trial, however, *see, e.g., People v. Edney*, 39 N.Y.2d 620, 624 (1976); People v. Martinez, 22 A.D.3d 318, 318 (1st Dep't 2005), his failure to object to Dominguez's deposition testimony allows

its use to oppose a motion for summary judgment. C.P.L.R. § 3212(b); Knee v. A.W. Chesterton Co., 52 A.D.3d 355, 356 (1st Dep't 2008); State of New York v. Metz, 241 A.D.2d 192, 198 (1st Dep't 1998). See Rugova v. Davis, 112 A.D.3d 404, 404 (1st Dep't 2013); Matter of New York City Asbestos Litig., 21 A.D.3d 320, 320 (1st Dep't 2005); Matter of New York City Asbestos Litig., 7 A.D.3d 285, 285 (1st Dep't 2004).

Nevertheless, Dominguez's testimony suggests only that plaintiff's claimed spinal injuries are not due to his fall from the ladder April 16, 2013. In addition to lumbar spinal injuries, plaintiff claims injuries to his right knee and right shoulder and a fractured nose from his fall. Dominguez testified that he underwent prior surgery on his knee, but did not recall which knee, and did not indicate that he still suffered any knee injury in 2013 before his fall. Her testimony does not raise any question about his other injuries nor, most importantly, about whether the ladder and he fell.

Notably, 635 Owner has never claimed that plaintiff feigned the ladder slipping or his fall, but has claimed only that he feigned spinal and knee injuries due to the fall, when in fact those injuries predated the fall. In opposition to plaintiff's motion for partial summary judgment, defendants contended only

that the evidence did not establish a defect in the ladder and instead showed that plaintiff's misuse of the ladder was the sole proximate cause of the ladder slipping and his injury.

### III. DR. GLADSTEIN'S TESTIMONY AND RECORDS

635 Owner demonstrates the fact that plaintiff's spinal and knee injuries predated his fall from the ladder through Dr. Gladstein's deposition testimony and business records, excluding the inadmissible hearsay within his testimony and records. The unsworn reports of magnetic resonant imagings (MRIs) from an outside facility placed in Dr. Gladstein's records, for example, do not qualify as his business records. People v. Cratsley, 86 N.Y.2d 81, 90 (1995); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521-22 (1st Dep't 2016); TriState Loan Acquisitions III, LLC v. Litkowski, 172 A.D.3d 780, 782 (2d Dep't 2019); Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197, 209 (2d Dep't 2019). Dr. Gladstein's testimony and records regarding plaintiff's reports of results from a prior MRI of his spine is multi-layered inadmissible hearsay. State of New York v. Charada T., 23 N.Y.3d 355, 361-62 (2014); Rubin v. Rubin, 134 A.D.3d 572, 572 (1st Dep't 2015); Whisenant v. Farazi, 67 A.D.3d 535, 536 (1st Dep't 2005); Matter of Philip, 50 A.D.3d 81, 86 (1st Dep't 2008). Any patient forms that plaintiff might have completed are also

inadmissible, since Dr. Gladstein could not authenticate them to qualify their contents as admissions.

Dr. Gladstein testified, however, based on his records, that he examined plaintiff during January through March 2012 regarding pain in plaintiff's lumbar spine and legs, found tenderness at the L4-L5 and L5-S1 levels and lumbar radiculopathy, and administered spinal injections. Dr. Gladstein did not describe any independent injury to plaintiff's right knee, but described only pain in his legs associated with his lumbar spinal pain. Dr. Gladstein did recount that plaintiff reported arthroscopic surgery on his right knee in 2001.

Dr. Gladstein's deposition concluded without an opportunity for plaintiff to cross-examine the witness. Again, however, the consequent inadmissibility of this testimony at trial does not render the testimony inadmissible in opposition to summary judgment. See C.P.L.R. § 3117(a)(3); Matter of New York City Asbestos Litig., 7 A.D.3d at 285; State of New York v. Metz, 241 A.D.2d at 199-200; Bigelow v. Acands, Inc., 196 A.D.3d 436, 439 (1st Dep't 1993); Loschiavo v. DeBruyn, 6 A.D.3d 1113, 1114 (4th Dep't 2004). Just as Dr. Gladstein's affidavit, not subject to any cross-examination, ordinarily would not be admissible at trial, neither would his deposition testimony, similarly not

subject to cross-examination, ordinarily be admissible. C.P.L.R. § 3117(a). E.g., People v. Settles, 46 N.Y.2d 154, 166 (1978). Yet, just as the affidavit would be admissible in opposition to summary judgment, so, too, is the deposition testimony. Deonarine v. Montefiore Med. Ctr., 113 A.D.3d 496, 497 (1st Dep't 2014); State of New York v. Metz, 241 A.D.2d at 198.

Again, however, Dr. Gladstein's testimony and records do no more than demonstrate that plaintiff's claimed spinal injuries are not due to his fall from the ladder April 16, 2013. Although Dr. Gladstein also recounts plaintiff's report of arthroscopic surgery on his right knee in 2001, Dr. Gladstein reported no ongoing symptoms of a knee injury 11 years later. Nor did Dr. Gladstein report any injuries to plaintiff's shoulder or nose. Nor could his testimony or records raise any question about whether plaintiff fell from a misplaced, unsecured, unstable ladder April 16, 2013, since Dr. Gladstein never examined plaintiff after 2012.

#### IV. PLAINTIFF'S DEPOSITION TESTIMONY

Most importantly, nothing in Dominguez's testimony, Dr. Gladstein's testimony, or his records contradicts plaintiff's prior deposition testimony or any testimony or other evidence on which the court relied in granting plaintiff partial summary

judgment. Dominguez's privileged account that plaintiff considered his fall from the ladder an opportunity to recover for his prior back injury is relevant only to whether his fall caused or aggravated a prior back injury, an issue that remains for trial. Neither her privileged testimony nor Dr. Gladstein's testimony or records are relevant to whether defendants provided an adequate safety device for plaintiff to descend from the mezzanine level where he was conducting an inspection to the first floor of their construction site.

Nor does 635 Owner show how plaintiff's June 2019 supplemental deposition contradicts his prior deposition testimony in any respect. First, 635 Owner fails to present his prior deposition or even summarize its relevant points in support of this motion. Even when the court looks back to the record of plaintiff's prior motion for partial summary judgment, 635 Owner identifies no discrepancy. Plaintiff's prior deposition does not address any spinal or knee injuries before his April 2013 injury at all.

Plaintiff's bill of particulars has claimed consistently that his April 2013 fall aggravated or exacerbated a prior spinal injury and "further soft tissue injuries." Aff. in Opp'n of Timothy Norton Ex. A ¶¶ 15-16. Plaintiff's June 2019

supplemental deposition focused mainly on the extent of his current impairment. Plaintiff acknowledged, however, that before April 16, 2013, he visited a physician for lower back pain, took medication for that pain, and received injections for it, but denied pain radiating down his legs. He also denied a prior diagnosis of radiculopathy, but Dr. Gladstein did not disclose whether he conveyed that diagnosis to plaintiff. Plaintiff's testimony about the results of prior x-rays or MRIs is, like Dr. Gladstein's testimony on the subject, multi-layered inadmissible hearsay. State of New York v. Charada T., 23 N.Y.3d at 361-62; Rubin v. Rubin, 134 A.D.3d at 572; Whisenant v. Farazi, 67 A.D.3d at 536; Matter of Philip, 50 A.D.3d at 86.

Finally, plaintiff denied any treatment for his right knee before his fall April 16, 2013. To the extent that this testimony conflicts with Dr. Gladstein's testimony and records, plaintiff may have been referring to the period preceding his fall, not 12 years before, consistent with Dr. Gladstein finding no right knee injury 11 years later.

Whatever discrepancies appear between plaintiff's June 2019 deposition and Dr. Gladstein's testimony and evidence, none is relevant to whether the ladder that plaintiff used was misplaced, unsecured, and unstable and hence slipped out from under him, the

issue that the court determined via plaintiff's motion for partial summary judgment. None contradicts his claim that his April 2013 fall aggravated or exacerbated a prior back injury and further soft tissue injuries, but the extent of that aggravation or exacerbation remains an issue to be tried, when a jury will weigh the credibility of plaintiff and, if offered, his former wife, Dr. Gladstein, and Dr. Gladstein's records.

V. CONCLUSION

Consequently, none of the new evidence that 635 Owner presents on whether plaintiff suffered spinal and knee injuries April 16, 2013, would change the prior determination granting plaintiff's motion for summary judgment on defendants' liability for a violation of New York Labor Law § 240(1), to provide a basis for renewal of plaintiff's motion. C.P.L.R. § 2221(e)(2); Omansky v. 160 Chambers St. Owners, Inc., 155 A.D.3d 460, 462 (1st Dep't 2017); Jones v. City of New York, 146 A.D.3d 690, 691 (1st Dep't 2017); Sarfati v. Palazzolo, 142 A.D.3d 877, 877-78 (1st Dep't 2016); South Bronx Unite! v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462-63 (1st Dep't 2016). Plaintiff's motion for partial summary judgment did not implicate the extent of his injuries from his fall on that day. That issue is to resolved at the trial.

In sum, even if the court supplemented the record with all 635 Owner's new evidence, the court still would grant plaintiff's motion. Therefore the court denies defendant 635 Owner LLC's motion to supplement the record of plaintiff's motion for partial summary judgment or to renew that motion. C.P.L.R. §§ 2001, 2004, 2221(e).

DATED: October 15, 2020



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C