Pimentel v De Frgt. LLC
2020 NY Slip Op 33740(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 161075/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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INDEX NO. 161075/2017

FRANCISCO PIMENTEL,

Plaintiff,

MOTION DATE N/A, N/A, N/A, N/A, 11/06/2020

- v -

MOTION SEQ. NO. 003 004 005 006 007

DE FREIGHT LLC,NAMOR REALTY COMPANY L.L.C., ARCHSTONE BUILDERS LLC,

DECISION + ORDER ON MOTION

Defendant.

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NAMOR REALTY COMPANY L.L.C.

Third-Party
Index No. 595883/2018

Plaintiff,

-against-

TRANSEL ELEVATOR, ELECTRIC INC. D/B/A T.E.I. GROUP

Defendant.

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DE FREIGHT LLC

Second Third-Party
Index No. 595289/2020

Plaintiff,

-against-

ED TRUCK SERVICE, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 210, 429, 430, 447, 448

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 205, 209, 244, 245, 246, 247, 250, 253, 256, 296, 297, 298, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 419, 423, 437, 438, 439, 440, 444, 445, 446, 451, 452

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 206, 207, 208, 237, 238, 239, 240, 241, 248, 251, 254, 257, 275, 276, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 420, 424, 441, 442, 443

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 249, 252, 255, 258, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 299, 300, 301, 302, 303, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 421, 425, 431, 432, 433, 434, 435, 436

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 418, 450, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 481

were read on this motion to/for ORDER OF PROTECTION.

Motion sequence numbers 003-007 are consolidated for disposition.

Background

This is a Labor Law case in which plaintiff claims that he fell while he was working at an elevation off-loading materials from a delivery truck on November 15, 2017. Plaintiff says that the lift gate on which he was standing, which also held materials for the construction of a new elevator, collapsed. He claims that defendants violated sections, 200, 240 and 241 of the Labor Law.

The defendants blame each other. Plaintiff's employer (Transel) blames De Freight (the company that provided the truck for the shipment of the elevator materials). De Freight and Namor (the owner) blame plaintiff and Transel and insist they had nothing to do with the accident.

MS003

In this motion, defendant De Freight, LLC ("De Freight") seeks discovery and to strike the note of issue.

In opposition, plaintiff observes that the note of issue was not filed (the Court previously struck it) and that it served expert disclosures on April 22, 2020. He also argues that the supplemental bill of particulars did not allege new injuries to body parts. Plaintiff claims that there is no need for another deposition of plaintiff.

In reply, De Freight points out the ways in which the supplemental bill of particulars identified the need for a future cervical spine discectomy and fusion, lumbar spine discectomy and fusion, a total left knee replacement as well as additional special damages.

The Court finds that there is no need for another deposition of plaintiff. Certainly, defendants can request documents about potential future damages but the fact is that in personal injury cases, sometimes conditions worsen. And De Freight admits that plaintiff agreed to appear for a further IME and a vocational rehab IME. This is the proper way to deal with injuries whose severity has increased. Moreover, De Freight details how "the value of this matter has potentially dramatically increased" (NYSCEF Doc. No. 447) based on the surgeries that plaintiff may now need but does not assert that these are new injuries to new body parts. Simply put, having another deposition is unlikely to shed more light about the accident or the extent of the plaintiff's injuries especially where more IMEs are to take place.

Therefore, the Court grants De Freight's motion only to the extent it seeks to compel the disclosure of authorizations relating to these additional injuries and economic claims (although it appears the discovery order [NYSCEF Doc. No. 428] addresses these issues).

MS004

In this motion, plaintiff moves for partial summary judgment on its Labor Law § 240(1) and 241(6) claims against defendant Namor Realty Company LLC ("Namor"). He asserts that defendant Namor was the owner of the building.

Plaintiff claims that the accident happened because the lift gate on the delivery truck was defective and collapsed. He worked for third-party defendant Transel Elevator and Electric, Inc. ("Transel") who was installing an elevator at the premises. The parts were shipped from non-party EDI and De Freight was the delivery company that provided the truck. He claims that this is a classic falling-worker case and he is entitled to summary judgment under 240(1).

With respect to the 241(6) claim, plaintiff argues that Industrial Code § 23-1.5(c)(3) applies, and the collapse of the lift gate (which plaintiff claims is a safety device) compels summary judgment under this section.

In opposition, De Freight argues that this accident does not fall under the provisions of the Labor Law. It argues that plaintiff only fell from a height of four to five feet, which does not compel judgment under 240(1). De Freight argues in the alternative that plaintiff was the sole proximate cause of his own accident; it claims he should not have ridden the lift gate.

With respect to 241(6), De Freight argues that there is no evidence that the lift gate was intended to act as a safety device and stresses that there was a ladder that plaintiff decided not to use.

For some reason, Transel offers opposition (despite the fact that plaintiff did not move against this defendant) on similar grounds as De Freight. Namor also offers opposition that makes many of the same points as De Freight.

Plaintiff submits three replies, one to each of the oppositions. It claims that the lift gate was a safety device and that the case is clearly a 240(1) violation.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed

on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants this branch of the motion. Plaintiff says that the accident occurred while he and a co-worker were unloading a component of an elevator on the lift gate (NYSCEF Doc. No. 340 at 50). He testified that he was "holding [the part] steady" (*id.*) when the accident occurred. This states an elevation related accident that falls under the ambit of the Labor Law § 240(1).

Defendants are correct that the Court of Appeals has ruled on at least one occasion that a four to five feet fall while unloading a flatbed truck does not state a Labor Law 240(1) violation (*cf. Toefer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 11 [2005]). But the Court of Appeals later distinguished *Toefer* and concluded that "courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and ... the extraordinary elevation risks envisioned by Labor Law § 240(1). A worker may reasonably be expected to protect himself by exercising due care in stepping down from a flatbed truck. However, the present case, with the facts considered in the light most favorable to the non-moving party, is distinguishable from *Toefer*" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335,

339, 937 NYS2d 157 [2011] [declining to dismiss a 240(1) claim where plaintiff was standing on a six-foot high dumpster]).

Similarly, here, plaintiff was holding components steady on the lift gate. In other words, the evidence submitted demonstrates it was necessary for him to be with the materials being unloaded and the equipment used to accomplish this task—the lift gate—collapsed. That is an elevation-related accident; plaintiff fell along with the elevator components while working at a job site. Plaintiff is correct in pointing out that there is no magic or precise height under Labor Law 240(1) for it to apply. And the claims here present circumstances that the Labor Law was intended to protect.

The Court declines to accept defendants' claim that plaintiff should have used a ladder and was not supposed to ride the lift gate. Obviously, plaintiff (along with his coworker) decided to stay with the equipment so it wouldn't fall off and get damaged during the descent. The Court is unable to find that plaintiff should have just left the materials and hoped that these valuable components survived the descent on the lift gate. For similar reasons, the Court rejects any argument that plaintiff was a sole proximate cause of his accident. The undisputed testimony is that the lift gate, which workers would inevitably walk on while unloading materials, collapsed.

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

The Court denies plaintiff's motion to the extent it is based on section 241(6). It does not matter whether plaintiff raised this precise Industrial Code section in his bill of particulars because the section he moves for summary judgment on is inapplicable. A lift gate is not a safety device; it is a tool used to facilitate unloading heavy objects from a truck. Its purpose is to prevent damage to the materials delivered and to help the unloading occur efficiently. While it may have some safety benefits, it is not a safety device such as a harness or a hard hat that would apply to the specific Industrial Code section upon which plaintiff seeks relief.

MS 005

In this motion, Transel seeks summary judgment dismissing the third-party complaint against it. It argues that the accident did not arise out of work performed by Transel necessary for the parties' indemnification provision to be triggered.

In opposition, Namor emphasizes that Transel entered into a written contract prior to the date of the accident in which Transel agreed to indemnify Namor. Namor stresses that the accident happened while plaintiff was working for Transel to unload a new elevator cab to be installed at the building (the very work for which Transel was hired).

Defendant De Freight and plaintiff also offer similar opposition.

In reply, Transel argues that the accident happened because of improper maintenance and repair of De Freight's box truck rather than any work performed by Transel.

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia*, 259 AD2d at 65).

"It is elementary that, absent a clear contractual expression to the contrary, a cause of action for indemnification does not arise until the indemnitee has actually sustained a loss" (*Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 470, 510 NYS2d 67 n 2 [1986]).

Here, there has not been a finding of negligence against any defendant as to who was responsible for plaintiff's accident. There is no question that Transel was unloading the elevator cab parts when the lift gate collapsed. But there is no definitive evidence that De Freight was negligent (i.e. that it had actual or constructive notice of a defect in the lift gate). To be clear, that is a different analysis from whether Labor Law 240(1) was violated. That Labor Law statute is a strict liability scheme—it does not require a finding of negligence. Simply put, the Court cannot decide on a motion for summary judgment that Transel is free from negligence. It remains to be seen what exactly caused the lift gate to break; it could have been negligent operation or use of the lift gate, or some defect with the lift gate itself. Transel's motion is denied.

MS006

De Freight moves for summary judgment dismissing the complaint and any crossclaims against it.

In opposition, plaintiff claims that he seeks to pursue only its common-law negligence cause of action against De Freight. He agrees to withdraw all Labor Law claims against De Freight.

In reply, De Freight argues that it did not control, direct or supervise the work done.

The Court denies the motion to the extent that it seeks dismissal of a common law negligence claim against it by plaintiff. The fact is that plaintiff and his coworkers were using a box truck from De Freight when the lift gate collapsed. Clearly, there is an issue of fact with respect to whether De Freight provided a faulty lift gate. It may be that Transel did something wrong in operating the lift gate, but the Court cannot make such a factual conclusion on this motion for summary judgment. Plaintiff's account of the accident suggests that the lift gate looked fine prior to the accident and it just collapsed without warning.

For this same reason, the Court denies the remaining branches of the motion that seek to dismiss any crossclaims. De Freight could potentially face liability from the other defendants if a fact finder concludes that De Freight was responsible for plaintiff's accident.

However, the Labor Law claims against De Freight are severed and dismissed based on plaintiff's withdrawal of these causes of action.

MS 007

Transel brings this discovery motion for a protective order striking Namor's notice to admit dated February 5, 2020. Curiously, Transel's notice of motion and portions of the moving

papers seek a protective order against plaintiff's notice to admit, but it appears that this was merely a typo that the Court will overlook.

Transel argues that the notice to admit demands that Transel admit to facts that go to the heart of this case and are therefore improper. It points out that many of the admissions sought are similar to the allegations in the third-party complaint.

In opposition, Namor claims that the instant motion is untimely and that the admissions sought are proper.

In reply, Transel claims that the motion is timely and the Court has discretion to extend a party's time to respond to a notice to admit.

"A notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts, and is only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung America, Inc., v Yugoslav-Korean Consulting & Trading Co., Inc.*, 199 AD2d 48, 49, 604 NYS2d 112 [1st Dept 1993]). A notice to admit may not be used to seek admissions "which go to the very heart of the matters at issue" (*Zohar v Hair Club for Men Ltd.*, 200 AD2d 453, 454, 607 NYS2d 5 [1st Dept 1994]).

A review of the notice to admit (NYSCEF Doc. No. 273) reveals that the requested admissions go directly to the claims between these parties. Namor seeks indemnification from Transel and the notice to admit seeks confirmation that there was a contract between the parties, that it was signed by an authorized signatory from Transel and that the contract was in effect on the date of the accident. It also seeks an admission that plaintiff was a Transel employee on certain dates, was working at the subject premises and that his work on the date of the accident was pursuant to the terms of the parties' contract. That is tantamount to asking Transel to admit it owes indemnification to Namor.

The Court declines to parse or rewrite the subject notice to admit. It will not force Transel to essentially admit liability; that is not the purpose of a notice to admit.

This motion is granted.

Accordingly, it is hereby

ORDERED that the motion (MS003) by De Freight is decided as follows: it is entitled to additional authorizations for the injuries disclosed in the supplemental verified bill of particulars but it is not entitled to another deposition of plaintiff (this is reflected in the discovery order [NYSCEF Doc. No. 428]); and it is further

ORDERED that the motion (MS004) by plaintiff is granted only to the extent that he sought summary judgment on his Labor Law § 240(1) claim and denied to the extent he sought summary judgment on his Labor Law § 241(6) claim; and it is further

ORDERED that the motion (MS005) by defendant Transel for summary judgment is denied; and it is further

ORDERED that the motion (MS006) by defendant De Freight for summary judgment is granted only to the extent that the Labor Law claims against it are severed and dismissed and denied as to the remaining portions of its motion; and it is further

ORDERED that the motion (MS007) by Transel for a protective order with respect to the notice to admit is granted.

Remote Conference already scheduled December 3, 2020 at 12:00 p.m.

11/9/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE