Aguirre v CDA Yonkers
2020 NY Slip Op 34676(U)
September 18, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52888/2019
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOSE ALBERTO AGUIRRE,

Plaintiff,

-against-

DECISION and ORDER
Index No. 52888/2019
Motion Sequence No. 2

C D A YONKERS C/O YONKERS WATERFRONT PROPERTY, LLC, YONKERS COMMUNITY DEVELOPMENT AGENCY and CITY OF YONKERS INDUSTRIAL DEVELOPMENT AGENCY LLC,

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion for partial summary judgment on the issue of liability against all three[1] named defendants on his cause of action pursuant to Labor Law § 240 (1):

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - C, and Memorandum of Law	1
Affirmation in Opposition, Exhibits 1 - 16, and Memorandum of Law	2
Reply Affirmation	3

In this Labor Law action, plaintiff Jose Alberto Aguirre alleges that he was injured on

[1] Since the action was discontinued as against defendant Yonkers Community Development Agency by stipulation of discontinuance filed March 18, 2019, the Court must treat plaintiff's motion as seeking summary judgment on his Labor Law § 240 (1) claim against only the two remaining defendants, Yonkers Waterfront Properties, LLC (i/s/h/a "CDA Yonkers c/o Yonkers Waterfront Property, LLC") and City of Yonkers Industrial Development Agency.

August 8, 2018, in an accident while he was employed as a painter on a construction project at 63 Wells Avenue in Yonkers, New York, where a new high rise residential building was being built. At the time, plaintiff had been assigned by his employer to paint the building's 6th floor bathrooms, and alleges that he fell from the bathtub edge on which he was standing in order to reach high up on the wall, because he had been refused a ladder.

Plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim relies on his own 50-h hearing testimony and his deposition, as well as the deposition of the general contractor's superintendent on the project. However, as defendants correctly observe, the deposition of defendants' witness may not be relied upon for purposes of this motion, since it was not sent to the witness for review as required by CPLR 3116 (a).

Plaintiff may properly rely on his own deposition transcript, even though it was not signed, since it was sent to plaintiff for review on October 11, 2019, more than sixty days before this motion (*see* CPLR 3116 [a]). That transcript serves as evidence of plaintiff's claim that he was instructed by his supervisor Geremias to paint the bathrooms on the building's sixth floor, and that he made a request to Geremias for a ladder to perform the elevation- related portion of the painting work, which request was denied because the ladders plaintiff's employer had onsite were being used. Plaintiff states that he was directed to do his work without a ladder, and no other safety devices were provided for plaintiff to perform his work. At the time of his accident, plaintiff testified, he was standing on the edge of a bathtub that he was using as an elevated work platform in lieu of a ladder. He estimates the distance of his fall to the floor as one and one-half to two feet

At his 50-h hearing, plaintiff testified that at the moment he slipped and fell, he was

standing on the edge of the tub to paint the upper portion of the bathroom wall; at his deposition, plaintiff testified that at the time of his accident he was standing on the edge of the bathtub, reaching to pull off the tape he had placed around the edge of the ceiling.

In defendants' opposition to the motion, defendant Yonkers Waterfront Properties, LLC (i/s/h/a "CDA Yonkers c/o Yonkers Waterfront Property, LLC") (referred to hereinafter as "Yonkers Waterfront") concedes that it was the owner of the property, such that Labor Law § 240 (1) applies to it. As to defendant City of Yonkers Industrial Development Agency ("Industrial"), defendants' affirmation in opposition includes the bare assertion that it had no "direct ownership interest" in the property at the time of the accident, and suggests in a footnote that plaintiff's motion against Industrial should be denied on the ground that plaintiff has not established his claim against Industrial in the absence of evidence of ownership. Notably, however, when Industrial made a previous motion to dismiss most of the claims against it – and then entered into a stipulation resolving that motion – it did not seek dismissal of the Labor Law § 240 (1) cause of action.

In opposition, defendants dispute plaintiff's description of the events of his fall, relying on evidence that at the time of his accident, he had been standing on a piece of sheetrock placed on top of a bucket. They submit an affidavit by Michael Shahbazi, a Site Safety Professional who was working at the site in question, who states that after the accident, he spoke with plaintiff through an (unidentified) interpreter, who stated that he fell when he was standing with one foot on a bathroom tub and the other foot on a paint bucket with a piece of sheetrock on top. They also point to a hearsay statement in the "patient complaints" section of in the ambulance company's report, reciting that he fell "off a paint bucket." At his deposition, plaintiff denied

making such a statement in the ambulance.

Both Shabazi and Shawn Augustine, a superintendent with the project's general contractor, Plaza Construction LLC, state in their submitted affidavits that plaintiff's employer, JLM, had ladders, rollers, and extension poles available for use by their employees, for reaching the ceiling height within the above-described bathroom. They do not provide an affidavit from any individual representing JLM. Nevertheless, the affirmation of defendants' counsel contends that it is an established fact that JLM had multiple ladders available for plaintiff to use.

The only information defendants submit that comes from JLM consists of documents supplied by JLM as "certified business records" from its employee file for plaintiff. Included with those documents is an unsworn statement, which appears to be on JLM letterhead, by an individual named Noe Argueta, who indicates that he was the JLM foreman at the building on the morning of plaintiff's accident. In that statement Argueta asserts that plaintiff was instructed to "only do the bottom of the bathroom walls since later on we would be working on the top part which we need a latter (sic) for." Defendants demonstrate that they issued subpoenas to Argueta and two other JLM representatives, and counsel asserts that these JLM employees failed to appear for their scheduled depositions.

Defendants argue that in view of evidence indicating that plaintiff stood on a bucket and piece of sheetrock rather than on the edge of a bathtub as he claims, issues of fact are presented as to how plaintiff's accident occurred. In addition, they contend that issues of fact exist as to whether plaintiff was the sole proximate cause of his own accident, based on his failure to follow the instructions purportedly given to him by his foreman Noe Argueta, not to paint the top of the bathroom walls at that time, as well as on evidence that appropriate equipment was available for

plaintiff to perform his task safely.

Analysis

"Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors, and their agents, to provide safety devices necessary to protect workers from the risks inherent in elevated work sites" (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 925 [2d Dept 2017] [citations omitted]; *see also Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 786 [2d Dept 2016]).

Although plaintiff's deposition testimony makes a prima facie showing of a Labor Law § 240(1) violation, based on his assertion that he had been assigned to paint the bathroom walls, but was not provided with equipment to allow him to safely reach the top of the walls, a credibility issue is created by the small difference between his deposition and his 50-h hearing testimony as to what task he was engaged in at the time of his fall. In addition, the uncertainty about the exact task he was engaged in at the time of his accident presents issues of fact, because it relates to what equipment could have allowed plaintiff to safely do the job; if he was painting, an extension pole could have sufficed, whereas if he was pulling tape some other equipment might have been necessary.

Some of the evidentiary materials submitted by defendants also call into question whether the accident occurred in exactly the manner described by plaintiff. The records of the ambulance service are admissible business records, and the hearsay they contain may be admissible as a party admission. The Shabazi affidavit's hearsay statement attributed to plaintiff may similarly be admissible. While it is possible that liability may exist under Labor Law § 240 (1) regardless of the means plaintiff used in order to reach the top of the wall, questions of fact both as to exactly what occurred, and as to plaintiff's credibility, sufficient to preclude determination of

plaintiff's claim as a matter of law.

It is doubtful whether the unsworn statement by Noe Argueta could be admitted as evidence, even if prepared in the ordinary course of business; however, hearsay statements may be offered in opposition to a motion for summary judgment, as long as they are not the only evidence upon which the opposition is predicated (*see I.A. v Majia*, 174 AD3d 770 [2d Dept 2019]). Moreover, summary judgment may be denied where a party opposing a motion for summary judgment is unable to produce evidentiary proof in admissible form, but successfully "demonstrate[s] [an] acceptable excuse for [its] failure to meet the requirement of tender in admissible form" (*Zuckerman v City of New York*, 49 NY 2d 557, 562 [1980]). Here, the affirmation of counsel for defendants establishes that they issued and served a subpoena on Argueta, and two other JLM representatives, months prior to the filing of this motion, and they failed to appear for the designated deposition date. Under the circumstances, defendants' inability to establish, through admissible evidence, its defense that plaintiff is the sole proximate cause of his accident, either because the assigned task did not involve an elevation-related risk, or if it did, that he was provided with devices necessary to safely perform such a task, also precludes the grant of summary judgment on plaintiff's Labor Law § 240 (1) claim.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment against defendants on the issue of liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part, on a

date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 18, 2020

HON. TERRY JANE RUDERMAN, J.S.C.