

Acevedo v PSM Long Is. Corp.
2020 NY Slip Op 35000(U)
May 14, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 609117/17
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

ORIGINAL

_____ X

JOSE ACEVEDO,

**Index No.
609117/17**

Plaintiff,

**Motion Seq:
002**

-against-

Decision/Order

**PSM LONG ISLAND CORPORATION, MORRIS
CONSTRUCTION, and PETER MORRIS,**

Defendants.

_____ X

The following electronically-filed papers were read upon this motion:

Notice of Motion with Exhibits	40-49
Affirmation in Opposition with Exhibits	54-58

This lawsuit alleges that the plaintiff sustained injuries on June 20, 2016 at the defendants' construction site at 90 Fairmont Street, Huntington, New York when he fell from a ladder. In this action, the plaintiff seeks summary judgment pursuant to CPLR Section 3212, New York Labor Law Sections 2401(1) and 241(6), and 12 NYCRR 23-1.21(b)(4)(IV) against the defendants on the issue of liability because, *inter alia*, he was allegedly not provided with appropriate safety equipment. The plaintiff also seeks leave to serve a third supplemental verified bill of particulars pursuant to CPLR 3045. In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, copies of the deposition transcripts of the plaintiff (Plaintiff's Exhibit D) and Edward Stainback (Plaintiff's Exhibit E), an employee of the defendant Morris Construction.

In opposition thereto, the defendants proffered, *inter alia*, copies of the ambulance report (Defendant's Exhibit B) and the plaintiff's emergency room records (Defendant's Exhibit C).

On June 20, 2016, the plaintiff, an employee of non-party Finbar McGrath Carpentry, was working at a construction site at 90 Fairmount Street. The site was owned, managed, and operated by the defendants. The plaintiff was performing siding work to the front of the house. A few days before, Mr. Finbar McGrath (non-party and owner of Finbar McGrath Carpentry) set up a plank

which was approximately twelve to fifteen feet high on the front of the house using two roofing brackets. The plank was approximately twenty inches wide and ten feet long.

On the morning of the accident, Mr. McGrath set up a twenty-eight-foot metal extension ladder on the front of the house. The ladder was fully extended. Finbar McGrath Carpentry owned the ladder. McGrath leaned the ladder against the house and nailed a two-by-four piece of wood into the fascia on each side of the ladder to keep it from slipping. The plaintiff then stood on the fifteenth rung of the ladder and hammered nails into J-channel. While doing that, the ladder tilted to the right, causing the plaintiff to lose his balance, jump onto the elevated plank, slide across the plank, and fracture his right ankle when it became lodged between the plank and the roof. According to the plaintiff, he would have fallen to the ground if not for his foot becoming stuck between the plank and the roof.

Emergency crews responded to the scene, and the plaintiff remained on the elevated plank until he was removed by the fire department with the use of a fire truck boom. When firemen arrived, the ladder was still tilted at an angle, and the firemen re-set the ladder before they climbed up to the plaintiff. At that time, the plaintiff saw that the nail which had been securing the two-by-four piece of wood on the right side of the ladder was missing.

The plaintiff was not provided with a harness or rope at this job site. He never used a rope or harness at this job site.

CPLR 3212 governs motions for summary judgment, and it provides that

[t]he motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party . . . [but] the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact (CPLR 3212 [b] [emphasis added]; see also *Zuckerman v. City of New York*, 49 N.Y. 2d 557, 562 [NY 1980]; *Dix v. Pines Hotel, Inc.*, 188 A.D. 2d 1007 [4th Dept. 1992]).

The initial burden rests upon the proponent of the motion. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case” (*Friends of Animals v Associated Fur Mfrs.*, 46 N.Y.2d 1065 [NY 1979]). If the proponent meets that burden, then “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v. Prospect Hosp.*, 68 N.Y. 2d 320, 324 [NY 1986]; see also *Mortillaro v. Rochester Gen. Hosp.*, 94 A.D. 3d 1497, 1499 [4th Dept. 2012]).

When deciding a motion for summary judgment, the Court must view the facts “in the light most favorable to the non-moving party” (*Vega v. Restani Const. Corp.*, 18 N.Y. 3d 499, 503 [NY 2012]; *Giraldo v Twins Ambulette Service, Inc.*, 96 A.D. 3d 903 [2nd Dept. 2012]). Because “[s]ummary judgment is a drastic remedy,” it may only be “granted . . . where the moving party has ‘tendered sufficient evidence to demonstrate the absence of any material issues of fact’” (*Vega*,

18 N.Y. 3d at 503; *see also Esteve v. Abad*, 271 A.D. 725 [1st Dept. 1947] [existence of “genuine and substantial issue of fact” requires denial of motion]; *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y. 2d 395 [NY 1957]).

In the case at bar, there exist questions of fact that preclude this Court from granting summary judgment. While the plaintiff met the initial burden of establish prima facie proof of a lack of a material fact, the defendant proffered sufficient evidence in rebuttal. For example, there are omissions and inconsistencies between from the plaintiff’s account of this accident in his medical records as compared to his deposition testimony. Notably, the plaintiff’s medical records do not mention the main claimed mechanism of his injury: falling from a ladder. Additionally, there are questions of fact regarding whether the plaintiff’s accident was a violation of Labor Law Sections 240(1) or 241(6) and whether the plaintiff was the sole proximate cause of his accident.

In addition to seeking summary judgment, the plaintiff also seeks leave to file a third supplemental bill of particulars. The plaintiff commenced this action on May 12, 2017 and filed his first bill of particulars on August 29, 2017. The plaintiff filed a supplemental bill of particulars on November 16, 2017. On October 15, 2018, the plaintiff filed a second supplemental bill of particulars. On August 12, 2019, the note of issue in this matter was filed. On September 12, 2019, the plaintiff filed a third supplemental bill of particulars, which the defendants rejected on September 17, 2019 as untimely.

The plaintiff now seeks leave of the court to file the third supplemental bill of particulars – bringing the plaintiff’s total number of bill of particular filings in this case to four. The plaintiff seeks to supplement his bill of particulars as follows: “In addition to all of the previously alleged statutory violations set forth in the plaintiff’s verified bills of particulars dated August 29, 2017, the plaintiff . . . alleges the following violation of the Industrial Code of the State of New York: Section 23-1.21” (Plaintiff’s Third Supplemental Bill of Particulars, NYSCEF Doc. # 36).

CPLR R 3043 governs bills of particular in personal injury actions, and it states that [a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed” (CPLR R 3043[b]).

The proposed fourth filing does not relate to “claims of continuing special damages and disabilities” (CPLR R 3043[b]). Rather, the plaintiff seeks to “add a theory of liability not previously alleged in the complaint or original [three] bill[s] of particular” (*Jurado v. Kalache*, 93 A.D. 3d 759, 760 [2nd Dept. 2012]; *Bartkus v. New York Methodist Hospital*, 294 A.D. 2d 455 [2nd Dept. 2002]; *Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 A.D. 3d 1199 [4th Dept. 2012]; *Alami v. 215 E. 68th St., L.P.*, 88 A.D. 3d 924, 926 [2nd Dept. 2011] [“a bill of particulars may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint”]).

The present lawsuit is straightforward with readily accessible, simple evidence in the form of, medical records, medical experts, and firsthand witnesses. The plaintiff litigated this case for more than two years before attempting to file a third supplemental bill of particulars asserting a new theory of liability, but “[t]he plaintiff came forward with no reasonable excuse for his

extensive delay in seeking leave” to supplement (*Dahroug v. Trifon*, 242 A.D. 2d 520 [2nd Dept. 1997]; *see also Afreca v. Caledonian Hospital of City of New York*, 29 A.D. 2d 544 [2nd Dept. 1967]; *Stidham v. Clerk*, 57 A.D. 3d 1369 [4th Dept. 2008]). Therefore, the Court declines to the plaintiff’s request for leave.

Accordingly, the plaintiff’s motion for summary judgment and for leave to to file a third supplemental bill of particulars is respectfully DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 14, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE *EH S.C.C.*
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]