

Zhunio v One Maspeth LLC
2021 NY Slip Op 31019(U)
March 24, 2021
Supreme Court, Kings County
Docket Number: 501332/2018
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day March, 2021.

P R E S E N T:

HON. INGRID JOSEPH

Justice.

-----X

DARWIN ZHUNIO,

Plaintiff,

- against -

Index No. 501332/2018

ONE MASPETH LLC and AG CONTRACTING SERVICES INC.,

Defendants.

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The following e-filed papers considered herein:

	<u>E-Filed Papers Numbered</u>
Notice of Motion/Affidavits (Affirmations) Annexed	<u>53-68</u>
Cross Motion/Opposition/Affidavits (Affirmations) Annexed	<u>69-87</u>
Opposing Affidavits (Affirmations)	<u>94-95</u>
Reply Affidavits(Affirmations)	<u>100</u>

Upon the foregoing e-filed papers, plaintiff Darwin Zhunio (“plaintiff”) moves (Motion Sequence 4) pursuant to CPLR § 3212 for an order granting summary judgment on the issue of liability against defendant One Maspeth LLC (“One Maspeth”) on his Labor Law §§ 240(1) and 241(6) claims. One Maspeth opposes the motion and cross moves (Motion Sequence 5) for an order granting summary judgment dismissing this matter in its entirety, or, alternatively, granting one Maspeth summary judgment on its cross claims of contractual indemnity against defendant AG Contracting Services Inc. (“AG Contracting”).

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff on January 11, 2018, when a cylindrical tank of compressed oxygen fell and struck plaintiff during the structural renovation of a residential building located at 211 Warren Street, Brooklyn, New York. The premises was owned by One Maspeth, which entered into a contract with plaintiff’s employer (AG Contracting) to complete the project.

At his deposition on May 6, 2019, plaintiff testified that he and his co-worker were carrying a 20 - 25 foot beam weighing approximately 150 - 175 pounds up a ladder to the second floor of the subject premises when the beam came into contact with a cylindrical tank of compressed oxygen. Plaintiff averred that the beam caused the tank to fall such that the valve part of the tank struck his upper, left leg. Plaintiff indicated that the oxygen tank was free standing and situated next to another tank when it fell. Plaintiff stated that he waited approximately twenty (20) minutes, before resuming the task of taking beams to the second floor. Plaintiff averred that he commuted home via the subway after his work day but went to the hospital that same evening. Plaintiff averred that the injured leg swelled significantly and required drainage. In his affidavit, plaintiff stated that he underwent a fasciotomy, debridement, skin grafting, and back surgery due to the accident. Plaintiff further stated that he incurred permanent scarring and a cosmetic deformity to his leg. Plaintiff indicated that he also has difficulty with standing and mobility.

Plaintiff commenced the within action on or about January 22, 2018, naming One Maspeth and AG Contracting as defendants, alleging violations of Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence. One Maspeth and AG Contracting interposed Answers on April 9, 2018 and April 30, 2018, respectively, wherein both asserted defenses to this action and cross claims against each other for contribution, common-law and contractual indemnification. On August 20, 2018, plaintiff discontinued all claims against his employer, AG Consulting. As a result, the remaining claims concern plaintiff's causes of action against One Maspeth and the cross claims between both defendants, One Maspeth and AG Contracting.

In support of the instant motion, plaintiff contends it is indisputable that the defendants violated New York Industrial Code 12 NYCRR § 23-1.25(a)(1), because there were no straps, ropes, chains, or similar devices securing the tank. Additionally, plaintiff argues it is uncontroverted that the valve assembly of the cylinder tank was not guarded, protected, or covered, which violates 12 NYCRR §§ 23-1.7(e)(1), 23-1.7(e)(2). Plaintiff contends that the defendants also violated Section 23-1.25(a)(2)(i) and 23-2.1(a)(1), by failing to properly store the tanks. Plaintiff claims that the accident resulted from the force of gravity on the unsecured cylindrical gas tank, which implicates Section 240(1) of the Labor Law.

In opposition to plaintiff's motion and in support of its cross motion, One Maspeth contends that plaintiff was the sole, proximate cause of his own injuries and further, that AG Contracting,

rather than One Maspeth, directed plaintiff's work at the site. One Maspeth maintains that it did not provide the gas tank, materials, or any of the equipment for the renovation project and thus, had no responsibility to maintain or inspect the gas tank. Additionally, One Maspeth argues that Labor Law § 240(1) does not apply, because the tank in issue was on the same level of plaintiff when it fell. One Maspeth contends that the tank was placed at the subject premises in compliance with Industrial Code 12 NYCRR 21-1.25(a)(1). One Maspeth also argues that the plaintiff's injuries are not serious, because plaintiff, during his deposition testimony, indicated that the tank "scratched" his leg, and plaintiff also acknowledged completing the work day after the incident occurred. Further, One Maspeth points out that the plaintiff's co-worker, Arash Gilardi, who was moving the beam with plaintiff when the tank fell, testified that he observed the tank "gently" brushing plaintiff's leg. One Maspeth contends that the plaintiff's inconsistent characterizations of the occurrence, together with Mr. Gilardi's testimony, raises issues of fact that preclude an award of summary judgment on the issue of liability in plaintiff's favor.

It is well settled that "the proponent of a summary judgment motion 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In this case, the court finds that neither, the plaintiff nor One Maspeth, established prima facie entitlement to summary judgment as a matter of law in support of their respective motions. The location, storage, and positioning of the tank in issue when the alleged accident occurred is unclear. The court is also without sufficient information to ascertain whether the tank was elevated and which Industrial Codes, if any, were violated at the work site, because plaintiff proffered no expert opinion. One Maspeth's conclusory assertions regarding the inapplicability of the Labor Law and Industrial Code sections is insufficient. There are also different versions of how the alleged accident occurred


and whether such accident was the proximate cause of plaintiff's injuries as described by him, including the injury to his back. Further, it is unclear whether plaintiff's leg was scratched, as plaintiff stated during his deposition, or punctured, as indicated in plaintiff's affidavit, or whether the tank gently brushed up against plaintiff's leg, as described by plaintiff's co-worker.

That branch of One Maspeth's cross motion for summary judgment on its cross claim for indemnification against AG Contracting, a non-moving party herein, is procedurally improper. The motion would be denied even if it were properly before the court, because the contract between AG Contracting and One Maspeth provides that AG Contracting's obligation to indemnify One Maspeth is triggered when certain claims, damages, losses, or expenses incurred by One Maspeth are attributable to *bodily injury and caused by the negligent acts or omissions of AG Contracting*. As previously stated, it is unclear what, if any, negligent act or omission occurred in this case.

Based upon the foregoing, the parties' respective motions (Motion Sequences 4 and 5) are denied in their entirety.

This constitutes the decision and order of the Court.

E N T E R



HON. INGRID JOSEPH, J. S. C.
Hon. Ingrid Joseph
Supreme Court Justice