

Salamone v Hillside Park 168, LLC
2021 NY Slip Op 31474(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 161235/2015
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X
RAYMOND SALAMONE,

Plaintiff,

- v -

HILLSIDE PARK 168, LLC, ZARA REALTY HOLDING
CORP.,

Defendant.

INDEX NO. 161235/2015

MOTION DATE 09/11/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

-----X
HILLSIDE PARK 168, LLC, ZARA REALTY HOLDING CORP.

Plaintiff,

-against-

EAST COAST CONSTRUCTION INC

Defendant.
-----X

Third-Party
Index No. 595370/2016

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 117, 118, 119

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

In this personal injury action, Defendants Hillside Park 168 and Zara Realty Holding Corp., (collectively "Defendants") move for summary judgment pursuant to CPLR §3212 on liability. The instant action arises out of an incident on June 29, 2015 in which the plaintiff Raymond Salamone (herein "Plaintiff") alleges to have sustained injury at 88-15 168th Street, Jamaica, New York when he allegedly fell from a sidewalk shed. Defendants contend that Plaintiff's behavior and actions are the sole proximate cause of his injuries and as such, they are entitled to summary judgment.

Background

Plaintiff's Deposition Testimony

On the date of the accident, June 29, 2015, Plaintiff was employed as "Bricklayer Foreman" for East Coast Construction (NYSCEF Doc. No. 104, p. 13). At the time of the accident he had been working for East Coast for approximately two months at "168th street, Queens" at a "12 story apartment building" (NYSCEF Doc. No. 104, p. 13-14). His job duties for East Coast included "installation of brick, scaffold coordination, production" (NYSCEF Doc. No. 104, p. 13).

On the day in question the plaintiff arrived at the building at approximately 8am (NYSCEF Doc. No. 104, p. 24). After arriving at work, he "went up onto" the platform which he also described as a "protective scaffold" and a "bridge" (NYSCEF Doc. No. 104, p. 25). Plaintiff's accident occurred at approximately 9:30am while he was standing on the platform yelling down to other employees on the sidewalk (NYSCEF Doc. No. 104, p. 30-31). He testified that the "bridge opened up on [him]" while he had "one foot up on the [platform]" ...he "looked over the bridge...the bridge broke apart and [he] hit the concrete" (NYSCEF Doc. No. 104, p. 31). He landed on the sidewalk below hitting his left shoulder first (NYSCEF Doc. No. 104, p. 39). During his deposition, plaintiff identified on a photograph the blue parapet wall as the exact area where the platform opened up (NYSCEF Doc. No. 104, p. 31-32).

The plaintiff testified that he was given a harness by East Coast Construction to wear while working every day (NYSCEF Doc. No. 104, p. 36-37). He denied that he was wearing the harness on the day of the accident because he "was not required to wear a harness on the [platform]" (NYSCEF Doc. No. 104, p. 36-38). The plaintiff testified that he drank "about a six pack" of beer in the 24-hour period immediately prior to his accident (NYSCEF Doc. No. 104, p.

46). He denied being drunk at the time of his accident (NYSCEF Doc. No. 104, p. 46-47). He testified that he would also drink beer at work during his lunch "two-three times a week" (NYSCEF Doc. No. 104, p. 48).

Plaintiff testified that the portion of the wall which "opened" was used every day as a removable doorway to facilitate the transfer of materials onto the platform (NYSCEF Doc. No. 104, p. 77-78). He testified that the section of the wall, which he circled on the photograph, was removed to create an open space on the platform wall through which materials could be passed (NYSCEF Doc. No. 104, p. 83-84). He knew the wall section could be removed prior to the date of accident as he had observed other employees removing it to pass debris through the open space (NYSCEF Doc. No. 104, p. 85-87).

East Coast Construction, Antonio Caristia's Deposition Testimony

On June 9, 2017, Antonio Caristia, senior project manager of East Coast Construction, was deposed (NYSCEF Doc. No. 108). As of the date of the deposition Mr. Caristia had been employed by East Coast, the general contractor for the jobsite, for three years (NYSCEF Doc. No. 108, p. 6). His job duties involved supervising job sites including the construction project located at 88-15 168th Street, which involved "façade restoration and parapet wall restoration" (NYSCEF Doc. No. 108, p.7-8).

When showed the photograph Plaintiff marked at his deposition, Mr. Caristia testified that the portion of the wall was not the section which was removed to bring equipment and debris through (NYSCEF Doc. No. 108, p. 26). He specifically testified that section of the wall identified by plaintiff could not be easily moved because it was "braced in" (NYSCEF Doc. No. 108, p. 26). Mr. Caristia also emphasized that they would never put the removable section of the

wall in the area where plaintiff indicated because of the presence of the utility pole immediately adjacent to the wall (NYSCEF Doc. No. 108, p. 28).

Mr. Caristia stated that he was told by other East Coast employees that the plaintiff "fell off the sidewalk shed" when he "climbed up the 45 plank and fell over the [shed]" (NYSCEF Doc. No. 108, p. 62). He testified that the "45 plank" was a piece of wood which held netting in place on the sidewalk shed (NYSCEF Doc. No. 108, p. 62). According to Mr. Caristia, the "45 plank" cannot hold a human (NYSCEF Doc. No. 108, p. 63).

East Coast Construction, Manmonhan Singh's Deposition Testimony

On August 22, 2017, Manmonhan Singh appeared for a deposition on behalf of East Coast Construction (NYSCEF Doc. No. 109). Mr. Singh was employed by East Coast Construction as a "supervisor" (NYSCEF Doc. No. 109, p. 7). He worked for East Coast for approximately two years on approximately twenty different job sites (NYSCEF Doc. No. 109, p. 10). Mr. Singh testified that East Coast constructed the sidewalk shed at 88-15 168th Street, (NYSCEF Doc. No. 109, p. 12-13). Following the construction of the sidewalk shed, Mr. Singh stated that a building inspector "signed off" on the shed (NYSCEF Doc. No. 109, p. 13-14). He further stated that following the sign off, the City inspector returned "many times" to inspect the sidewalk shed and signed off on it every time (NYSCEF Doc. No. 109, p. 16). Mr. Singh also stated that East Coast Construction was never issued any violations for the sidewalk shed (NYSCEF Doc. No. 109, p. 17).

Mr. Singh testified that he observed that the plaintiff was drunk on the date of his injury, he "saw [plaintiff] was drunk and then [Mr. Singh] didn't allow [plaintiff] at the worksite" (NYSCEF Doc. No. 109, p. 27). He observed that plaintiff was drunk at "approximately 7:30am" on the day in question (NYSCEF Doc. No. 109, p. 28). Mr. Singh testified that the plaintiff was

"stumbling" and "slurring his words" (NYSCEF Doc. No. 109, p. 28). After not allowing plaintiff "in the worksite," Mr. Singh did not see the plaintiff again until he was getting into the ambulance (NYSCEF Doc. No. 109, p. 29) at approximately 9:30-10:00am. Mr. Singh also testified that two building inspectors inspected the sidewalk shed on the day of plaintiff's accident and no violations were issued (NYSCEF Doc. No. 109, p. 38-39).

Mr. Singh was shown the photographs marked at plaintiff's deposition (NYSCEF Doc. No. 109, p. 62-63). Mr. Singh denied that the area circled was the area where anything would be loaded or unloaded from the sidewalk shed (NYSCEF Doc. No. 109, p. 63). He testified it was not possible to remove the section of the wall where plaintiff had circled (NYSCEF Doc. No. 109, p. 64)

East Coast Construction, Rajinder Singh's Deposition Testimony

On November 17, 2017, Rajinder Singh appeared for a non-party deposition (NYSCEF Doc. No. 110). Mr. Rajinder Singh worked for East Coast Construction for approximately two years performing "masonry work" (NYSCEF Doc. No. 110, p. 8). He was present at 88-15 168th Street on the day of plaintiff's accident (NYSCEF Doc. No. 110, p. 10). His immediate supervisors were Antonio Caristia and Manmonhan Singh (NYSCEF Doc. No. 110, p. 12). Mr. Singh testified that he knew and worked with the plaintiff and knew him to drink at work (NYSCEF Doc. No. 110, p. 14-15). Mr. Singh stated that he witnessed the plaintiff buy a six pack of beer every day before work and then drink the beers during work (NYSCEF Doc. No. 110, p. 15-16). He further testified that plaintiff would finish the six pack and then would go to lunch to get another beer (NYSCEF Doc. No. 110, p. 16). Mr. Singh testified that he saw the plaintiff drinking beer at work every day (NYSCEF Doc. No. 110, p. 16).

Mr. Singh stated that he witnessed the plaintiff's accident as he was standing "very near him" on the sidewalk shed (NYSCEF Doc. No. 110, p. 17). Mr. Singh stated that he saw the plaintiff drinking beer on top of the sidewalk shed immediately before his accident (NYSCEF Doc. No. 110, p. 21). Mr. Singh was shown the photographs marked at plaintiff's deposition and identified the area plaintiff circled as being the area where the accident occurred (NYSCEF Doc. No. 110, p. 23-24). Mr. Singh testified that he witnessed the plaintiff walk up the 45 degree plywood planks which then gave way and caused the plaintiff to fall over the side of the parapet wall (NYSCEF Doc. No. 110, p. 24-25). Mr. Singh testified that "nobody would put the weight [on the 45-degree plywood plank] if they were in their right mind (NYSCEF Doc. No. 110, p. 26). Mr. Singh further testified that "both the [plaintiff's] feet were on the plywood, he was climbing the plank, but the moment that he...put both feet there the plywood gave (NYSCEF Doc. No. 110, p. 48).

Mr. Singh denied that there was any work-related reason for anyone to stand on the 45-degree plywood planks and he also denied that anyone told the plaintiff to stand on the planks (NYSCEF Doc. No. 110, p. 27). Mr. Singh denied that any part of the sidewalk shed broke or that the parapet wall where plaintiff said that his accident occurred was ever removed (NYSCEF Doc. No. 110, p. 28).

Toxicology Report

In 2018, Defendants retained an expert forensic toxicologist, Dr. Richard Stripp to evaluate the plaintiff's drug and alcohol use on the date of incident. As indicated in his report, Dr. Stripp reviewed plaintiff's Bill of Particulars, Jamaica Hospital medical records, Plaintiff's deposition testimony and Plaintiff's Blood Alcohol and Drug Test results from the date of incident (NYSCEF Doc. No. 112, p.1). 45. Dr. Stripp reported that "according to the hospital

record, Mr. Raymond Salamone had an ethanol level of 48 mg/dL [or a BAC of .04%] at the time of collection at 10:54 am (NYSCEF Doc. No. 112, p. 1-2). A urine drug abuse screen was also completed, and the plaintiff tested positive for opiates, benzodiazepines, and cannabinoids" (NYSCEF Doc. No. 112, p. 2). Dr. Stripp further reported that "approximately 1 1/2 hours had passed from the time of the accident to the time that the blood was collected (NYSCEF Doc. No. 112, p. 2). Therefore, Dr. Stripp stated that it is toxicologically reasonable to opine that that his BAC would have been higher at the time of the accident (NYSCEF Doc. No. 112, p. 2). Dr. Stripp concluded that using a conservative estimate, a retrograde extrapolation calculation based upon on the average dissipation rates for ethyl alcohol (0.017% per hour) for the average population results in Plaintiff having an estimated BAC of .061 ((NYSCEF Doc. No. 112, p. 3). Dr. Stripp further concluded that "the relevant and expected pharmacological effects of the alcohol alone in this case would have been...impaired critical judgment, impairment of perception, decreased sensory response, increased reaction time, minor impairment of balance, disturbances of vision and reduced visual acuity" (NYSCEF Doc. No. 112, p. 5).

Analysis

Summary Judgment Standard

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also

DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (Udoh v Inwood Gardens, Inc., 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).


Defendants contend that plaintiff's own actions are the sole proximate cause of his accident and accordingly, liability cannot attach to the premises owner. In opposition, Plaintiff argues that Defendants have failed to meet their prima facie burden.

Defendants have not demonstrated entitlement to summary judgment as a matter of law. The evidence presented in Defendants' own papers raise questions of material fact. There is contradictory testimony as to how Plaintiff's accident occurred. Further, there is a significant question as to whether Plaintiff's actions were affected by alcohol he may or may not have consumed. Issues of credibility are not to be resolved on summary judgment (see Alvarez v New York City Hous. Auth., 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]). Accordingly, Defendants' motion for summary judgment is denied.

It is hereby,

ORDERED that Defendants' motion for summary judgment is denied.

4/23/2021
DATE


SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE