

O'Brien v Hines 1045 Ave. of the Ams. Invs. LLC
2021 NY Slip Op 31705(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 158565/2015
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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JOHN O'BRIEN, KELLY O'BRIEN,

Plaintiff,

- v -

HINES 1045 AVENUE OF THE AMERICAS INVESTORS
LLC, TURNER CONSTRUCTION COMPANY,

Defendant.

INDEX NO. 158565/2015

MOTION DATE 10/23/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

-----X
HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiffs John and Kelly O'Brien¹ move pursuant to CPLR §3212 for partial summary judgment determining that the defendants are liable for violating Section 240(1) of the Labor Law and that such violation was a proximate cause of the injuries that Plaintiff John O'Brien (herein referred to as "Plaintiff") sustained on October 14, 2014, with the issue of damages to be deferred to trial.

Background

On October 14, 2014, Plaintiff John O'Brien, a union electrician employed by Pomalee Electric Co., was working on the construction of the building known as 7 Bryant Park in Manhattan. Defendant Hines 1045 Avenue of the Americas Investors LLC (hereinafter "Hines") was either the owner or the agent of the owner with respect to the construction of that building.

¹ Plaintiff Kelly O'Brien is the spouse of Plaintiff John O'Brien.
158565/2015 O'BRIEN, JOHN vs. HINES 1045 AVENUE OF THE
Motion No. 003

The defendant Turner Construction Company (hereinafter "Turner") was the General Contractor for the construction project. The defendant Turner had a subcontract for electrical work with Schneider Electric Buildings Americas, Inc., which in turn subcontracted some of that work to Pomalee Electric Co., the plaintiff's employer.

Plaintiff's Deposition Testimony

Plaintiff testified that the accident occurred in the subbasement of 7 Bryant Park around noon time when he was running $\frac{3}{4}$ " conduit and he "had to get to a hole to penetrate through a wall." (NYSCEF Doc. No. 80, p. 16:19-22). He stated that there was a "bunch of debris" on the floor against the wall that prevented him from setting his ladder up next to the wall. (NYSCEF Doc. No. 80, p. 22-23). Plaintiff testified that he had to go up to measure the pipe to be cut to the appropriate length. (NYSCEF Doc. No. 80, p. 16:24-25). He stated that as he could not set his ladder up next to the wall, he set his ladder up parallel to the wall, "but further away from the wall where I had to go up the ladder and onto a pipe rack." (NYSCEF Doc. No. 80, p. 17:1-5).

Plaintiff testified that he drilled a hole for his lanyard to "hook onto" then "got onto an existing pipe rack that was not electrical conduit" and sat on the pipe rack. (NYSCEF Doc. No. 80, p. 17: 9-11). He stated that he had the pipe that he had to measure in his left hand and when he went to reach for his marker with his right hand, the pipe slid up the wall causing him to fall forward and downward while holding onto the pipe (NYSCEF Doc. No. 80, p. 17: 12-13, 15-16). Plaintiff stated that the lanyard "kicked in" so that he did not fall all the way to the floor. (NYSCEF Doc. No. 80, p. 17: 16-18). He testified that his left upper body made contact with the wall with hard impact, and he felt a sharp pain in his left shoulder (NYSCEF Doc. No. 80, p. 25: 2-12, p. 28:6-10).

Plaintiff testified that the debris that was on the floor was conduit for pipe and fittings to those pipes, "like elbows and things like that" and a small pallet (NYSCEF Doc. No. 80, p. 17: 22-25; 18: 1-2). He stated that he did not believe that anyone witnessed his accident (NYSCEF Doc. No. 80, p. 43: 3-5). Plaintiff stated that he did not prepare an incident report and that he didn't know who filled out the "C-2 Accident Report" and the "supervisor's 24-hour accident report." (NYSCEF Doc. No. 80, p. 25-26). He testified that as a result of the accident, he had arthroscopic surgery on his left shoulder in January 2015 and September 2016. (NYSCEF Doc. No. 80, p. 32: 2-9).

Plaintiff's Affidavit

Plaintiff contends that his deposition was brief and not detailed. Accordingly, he submits an affidavit in support of his motion. Plaintiff's affidavit states that on the date of his accident his job was to run electrical conduit along and through a cinder block wall. He further states that his work was to be performed at an elevation and he was provided with a 6' A-frame ladder and an 8' A-frame ladder.

Plaintiff further states that his accident occurred while he was positioning electrical conduit horizontally across the wall so that he could measure it and mark it. He states that he was going to use the 8 foot A-frame ladder to stand on and mark the conduit while he held it in place to prevent it from falling, but when it was time to do the work described above, he saw that there was debris on the floor. He described the debris as in an irregularly shaped rectangular pile which was about three to five feet across and about six to twelve inches high. Because of the presence of this debris, Plaintiff states that he could not place the ladder next to the wall so that it would be stable. He states that there was a pre-existing pipe rack in the subbasement which someone else had installed that was suspended about 4 feet from the ceiling. Plaintiff further

states that he elevated himself using the 8 foot A-frame ladder and that while standing on the ladder, he drilled a hole in the ceiling so that he could hook up the lanyard that was attached to the safety harness that he was wearing. He states that the presence of debris on the floor did not affect his ability to drill a hole in the ceiling while standing on the ladder. However, Plaintiff states that because of the presence of the debris on the floor, the only place where he could position himself close enough to hold the conduit against the wall while he marked it was on top of the pipe rack. He further states that he could not stand on the pipe rack because it was too unstable to stand on and because he would not be able to fit his head below the existing ceiling if he stood. Plaintiff states that he moved off the ladder and positioned himself seated on the pipe rack facing the wall against which he was going to position and mark the electrical conduit.

Plaintiff states that just before the accident occurred, he was holding the conduit against the wall with his left hand, and he reached with his right hand to get a marker that was in the right-hand pocket of his pants. As he did so, his buttocks moved backward on top of the pipe rack and the pipe under his buttocks shifted, and the conduit that he was pressing against the wall with his left hand slid upward, his lower body jerked downward, and his body above his waist pitched forward and downward. Plaintiff states that after a very short time, the lanyard to his harness "kicked in," but before it did, his body struck the wall. He states that in the period of time before the lanyard kicked in, he felt a sharp pain in the left shoulder as his body pitched forward and downward.

Radoslaw Brzezinski Deposition Testimony

Radoslaw Brzezinski stated that he was employed by Turner as a job superintendent on the date of the accident and had been so employed for 12 years (NYSCEF Doc. No. 84, p. 8:14-25; 9:1-2). He testified that the entry on the Daily Construction Report stated, "Note. John

O'Brien injured his left shoulder while leveling it and reached it for his marker to mark the cut mark on the pipe," (NYSCEF Doc. No. 84, p. 27:15-21). He further stated that the report was prepared and signed by Dan Kressler of Turner on the day after the accident (NYSCEF Doc. No. 84, p. 43: 8-10).

Mr. Brzezinski stated that each subcontractor working on LL2 was required to "center pile" the debris created by them into one location and then Turner laborers would put the debris into containers and remove it (NYSCEF Doc. No. 84, p. 50: 7-13).

He testified that if an electrician was sitting on a pipe rack to attempt to install vertical pipe, it would be a safety violation because [pipe racks] are not meant as a work platform for electricians (NYSCEF Doc. No. 84, p. 58: 17-25).

The Turner Incident Investigation Report

Plaintiff also submits a "Turner Construction Company- Incident Investigation Report," dated 10/15/14 (NYSCEF Doc. No. 83), which states:

Late Reporting of Injury Worker allegedly strained right shoulder in LL2 yesterday at 1250pm. Worker alleges that he was holding an 8' length of ¾" EMT conduit to the wall with his right arm when he reached for his tape measure with his left arm to take a measurement and he felt a strain in right shoulder. Worker admitted to having pre-existing right shoulder issues approximately 8 years ago. Worker was instructed by foreman to report the event to medic yesterday but did not, went home, is not in today. After speaking with him on the phone, I ascertained that he has an orthopedic consult today.

Affidavit of William Marletta, PhD, CSP

Plaintiff submits the affidavit of its liability expert, William Marletta, PhD, CSP. Dr. Marletta opines that with a reasonable degree of certainty as a certified safety professional that Plaintiff's accident and injuries could have been prevented had there been compliance with Labor Law § 240(1). He further states that the failure to provide plaintiff with a proper safety device, in

violation of § 240(1), was a proximate cause of his accident and injuries. Dr. Marletta states that a scaffold or other elevated work platform with a level stable base or work platform with guardrails and room to work safely and avoid hazards should have been provided instead of a ladder. Dr. Marletta concludes that in any event, it was impossible for plaintiff to have safely used the ladder because of debris on the floor and thus he was left without a safety device. He states that there was a failure to remove dirt and debris in the work area which caused dangerous and hazardous working conditions and which represented a departure from New York State Industrial Code Rule 23 for "PROTECTION IN CONSTRUCTION AND EXCAVATION OPERATIONS"; OSHA, and all good and accepted safe practice. Further, Dr. Marletta opines that the application of the force of gravity to Plaintiff's body was a direct cause of his injuries.

Analysis

“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]).

Further, 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]).

Timeliness

In opposition, Defendants contend that Plaintiff's motion should be denied as premature as discovery has not been completed. However, Defendants fail to accurately depict the discovery status of this case. Discovery is complete absent a few specific requests. Those requests shall be addressed directly at the next conference with this court and in no way preclude Plaintiff's motion.

New York State Labor Law Section 240(1)

New York Labor Law § 240(1) states as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed.

In opposition, Defendants allege that Labor Law § 240(1) does not apply to the facts of this case as Plaintiff's injury was not caused by an object that "was in the process of being hoisted or secured, and did not require securing for the purpose of being affixed to the ceiling, the accident did not result from the special hazards associated with gravity-related accidents" (*see Novak v Del Savio*, 64 AD3d 636, 883 NYS2d 558 [2d Dept. 2009]).

Plaintiff has not met his burden on summary judgment and has failed to demonstrate that no material issues of fact remain regarding liability. There is not only contrary evidence as to how to Plaintiff's accident occurred, but also significant issues as to credibility which cannot be resolved on summary judgment.


Accordingly, it is hereby;

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a remote conference via Microsoft Teams, link to be provided by the Park Clerk, scheduled on July 1, 2021, at 11:00 am.

4/28/2021

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