

<b>Castillo v TRM Contr. 626, LLC</b>
2021 NY Slip Op 32015(U)
August 18, 2021
Supreme Court, Bronx County
Docket Number: 23185/2019
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. 2

NOEL CASTILLO,

Index No.: 23185/2019

Plaintiff,

- against -

TRM CONTRACTING 626, LLC and NEPTUNE SOUTH  
COMMERCIAL, LLC,

Defendants.

**DECISION and ORDER**

TRM CONTRACTING 626, LLC and NEPTUNE  
SOUTH COMMERCIAL, LLC,

Third-Party Plaintiffs,

- against -

PARK AVE PAINT AND WALL DÉCOR INC.,

Third-Party Defendants.

**PRESENT:**

The issue in Plaintiff's motion is whether he has established evidentiary facts sufficient to entitle him to judgment as a matter of law on his Labor Law §240(1) claim. This court finds he has.

Plaintiff was injured while working at a construction site when he fell from an unsecured ladder. On the day of his accident Plaintiff was tasked with taping plastic over windows in preparation of painting. To complete his task, he used an A-frame ladder. Plaintiff testified at his deposition that the ladder was old, very unstable and shook a lot. According to Plaintiff, all

ladders at the construction site were being used and there were no other ladders or scaffolds or any other device available to him. In addition, he testified that there was no one available to hold the ladder for him.

According to Plaintiff, the room he was working in was filled with large heavy boxes which, made it difficult for him to position the A-frame ladder in a fully open position. Therefore, he used the ladder in a closed position, leaning it against the wall, perpendicular to the window. While on the ladder, he stretched to tape the plastic to the window, when he avers that the ladder moved to the right and he fell. Plaintiff now argues a violation of Labor Law §240(1) occurred when the unsecured ladder moved causing him to fall.

Defendants argue that: 1) Plaintiff's motion is premature as large amounts of discovery is still outstanding, 2) he has not satisfied his *prima facie* entitlement to summary judgment in that he has not established Defendant NEPTUNE SOUTH COMMERCIAL, LLC ("NEPTUNE") was the owner of the job site and that Defendant TRM CONTRACTING was the construction manager of same and 3) triable issues of fact exist, namely whether Plaintiff was the sole proximate cause in that he used his ladder in a closed position and whether Plaintiff chose not to ask for help from a co-worker. Lastly, Defendants argue there are inconsistencies in the record.

This court finds that Plaintiff's motion is not premature. CPLR §3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion exist but cannot then be stated... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. See, *Wesolowski v. St. Francis Hosp.* 108 A.D.3d 525, 968 N.Y.S.2d 181 (2d Dep't). Here, Plaintiff's deposition

was completed. The opposing party had ample opportunity to question the Plaintiff. Further, Defendants provided an affidavit from one of their witnesses to rebut Plaintiff's assertions made in the instant motion. Defendants argument that third-party defendants have not been deposed is unavailing as the third-party defendants did not oppose the instant motion.

To establish liability under Labor Law §240(1) a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his injury. *Santos v. Condo 124 LLC*, 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dep't 2011). The failure to provide a safety device is a *per se* violation of the statute for which an owner/contractor is strictly liable. *Id.* The burden of providing a safety device is squarely on contractors and owners and their agents. *Id.* Labor Law §240(1) has unequivocally placed the duty on all contractors and owners to furnish or erect or cause to be furnished or erected, safety devices which shall be so constructed, placed and operated as to give workers proper protection. *Id.*

Here, Defendants filed an answer to the complaint wherein they did not deny NEPTUNE's ownership, nor did they deny TRM CONTRACTING's role as the managing contractor. It is well established that facts admitted in a party's pleading constitute formal admissions and are conclusive of the facts admitted in the action in which they are made. See, *GMS Batching, Inc. v. TADCO Constr. Corp.*, 120 A.D.3d 549, 999 N.Y.S.2d 264 (2d Dep't 2014). Further, Defendants did not provide any documentary evidence demonstrating any triable issues of fact exist as to whether Defendants are proper defendants. As such, this court finds that Plaintiff has established Defendants are proper defendants in this matter.

In addition, this court finds that Defendants did not raise any triable issues of fact that

would refute a finding that a violation of Labor Law §240(1) existed. A worker's decision to use an A-frame ladder in the closed position is not a *per se* reason to declare him the sole proximate cause of an accident. See, *Noor v. City of New York*, 130 A.D.3d 536, 15 N.Y.S.3d 13 (1st Dep't 2015). As in *Noor*, here Plaintiff gave a specific reason as to why he used the ladder in the closed position. Here, Plaintiff testified that boxes were in his way from fully opening the ladder and there were no other ladders available for his use to complete his task. Plaintiff's failure to ask his coworkers to hold the ladder while he worked ... did not constitute the sole proximate cause of the accident, since a coworker "is not a safety device contemplated by the statute". *Id.* Thus, the court finds that Plaintiff's fall from a ladder that moved was a direct consequence of gravity and that Defendants violated Labor Law 240(1) by not providing Plaintiff with a secure safety device.

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion seeking liability on his Labor Law §240(1) claim is granted.

This constitutes the decision and order of the court.

Dated: August 18, 2021



Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**