SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

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DOUGLAS PETERKIN,

Plaintiff

-against-

WESTCHESTER PARKS FOUNDATION,

Defendant.

---x

DECISION AND ORDER
Index No. 2019-51137
Motion Sequence Nos. 1 & 2

The following NYSCEF documents were reviewed and considered by the Court in rendering this Decision and Order: 1, 2, 28-39, 41-57, 58-69, 71-77

This is an action seeking relief pursuant to Labor Law 240 (1) and Labor Law 241 (6) commenced by plaintiff Douglas Peterkin (PETERKIN) against defendant Westchester Parks Foundation (WPF). The action was commenced by the filing of a Summons and Complaint on March 19, 2019. It was alleged that on October 22, 2019 Peterkin was injured while an employee of Westchester County, as he was trimming and cutting down a tree at the Kensico Dam Plaza in Westchester County. WPF was the sponsor of a holiday event at the Plaza. WPF wanted a large star installed on a scaffold as part of the event.

At the time of the alleged incident, Peterkin was at all times an employee of Westchester County, Peterkin was driving a Westchester County owned truck at the time of the incident. Which was a 65-foot bucket truck to give him access to trim and cut down the subject Norwegian pine tree. He was in the bucket and had cut a portion of the top of the tree under instructions from his supervisor who was also a Westchester County employee. Plaintiff was utilizing Westchester County owned equipment at the time he cut a portion of the subject tree. As he cut the branch, he attempted to reach it to remove it from the adjacent tree and it fell and hit him in the head and neck causing him an injury In March 2021 defendant WPF filed the instant Motion for Summary Judgment to dismiss the complaint.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (see *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 (1978)

Di Menna & Sons v. City of New York, 301 N. Y. 118 (1950); *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 (1968); *Barrett v. Jacobs*, 255 N. Y. 520 (1931);

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Esteve v. Abad*, 271 A.D. 725. (1st Dept, 1947).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." *Pullman v. Silverman*, 28 N.Y.3d 1060 (2016), quoting *Alvarez v. Prospect Hosp.*. 68 N.Y.2d 320 (1986). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue .See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25, (1933); If the opposition can show there are questionable issues of fact that require a trial of the action, than summary judgment must be denied. In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :....even arguably any doubt as to the existence of a triable issue'. *Baker v. Briarcliff School Dist.*, 205 A.D.2d 652 (2d Dept., 1994).

DEFENDANT WPF CLAIMS THERE ARE NO TRIABLE ISSUES

WPF alleges that Peterkin was at all times an employee of Westchester County, that Peterkin was performing his job that day under the direction of a Westchester County supervisor, that he utilized a Westchester County owned bucket truck to perform the task of removing the branch and at no time was Peterkin an employee of WPF, that at no time was Peterkin performing the subject task at the request or direction of WPF, that at no time did Peterkin utilize any equipment, vehicles or material owned, operated or managed by WPF. Further, there is no factual issue that Peterkin was performing his job that day solely under the direction of Westchester County. Moreover, the star to be affixed to the scaffolding was not on site at the time of the accident. Additionally, WPF never provided Peterkin with any guidance or supervision as to the task at hand. WPF was not an employer supervisor or manager or property owner at the time of the incident. WTF, as a not for profit merely had an agreement with Westchester County to subsidize and support a holiday event at the Kensico Dam Plaza. At no time was the property upon which the event was to occur owned, managed, supervised or otherwise under the care and control or custody of WPF.

There is no issue that at all times the subject real property upon which the event was to be conducted was managed, supervised or otherwise under the care and control or custody of Westchester County. The actions undertaken by Peterkin was an individual action to trim and remove the subject Norwegian pine tree. I is alleged that if the subject tree was left standing it could block the view of those in the audience to observe and participate in the holiday event that

was sponsored by WPF. The property owner of the Kensico Dam Plaza, Westchester County directed its employee, Peterkin to trim and remove the subject tree from Westchester County property. Peterkin was employed solely by Westchester County and was directed by his Westchester County supervisor to utilize equipment materials and a vehicle owned and operated by Westchester County to perform the requested work.

WPF had nothing to do with the erection of any scaffolding upon which a star was to be installed. Nothing about the trimming or removal of the subject Norwegian pine tree was directed or controlled by WPF, everything was done at the direction of Westchester County. As a consequence, it is WPF's position that summary judgment should be granted, as there are no material issues of fact that would warrant a trial. Therefore, it is Defendant WPF's position that the complaint against WPF should be dismissed as there is no cause of action under labor law 240 or labor law 241 against WPF.

Defendant asserts that WPF is neither an owner, contractor or agent withing the statutory meaning of Labor Law 240 (1) or Labor Law 241 (6). Westchester county owns Kensico Dam Plaza, WPF does not. WPF is engaged in fundraising to support the subject event, it does not act as a contractor in any way. Finally, WPF does not supervise, manage o control any of the Westchester County employees that work to set up, operate and take down the subject event. Thus, WPF is not an agent within the relevant statutory definitions. Accordingly, it is Defendant's position that by operation of law, summary judgment should be granted and Plaintiff's complaint dismissed.

Next, WPF proffers that the complaint must be dismissed as the work being performed was not one of the enumerated activities under the relevant statutes. Defendant's Memorandum of Law at page states:

It is black letter law that "[t]o successfully assert a cause of action under Labor Law § 240(1), a plaintiff must establish that he or she was injured during 'the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure.'" Enos v. Werlatone, Inc., 68 A.D.2d 713, 714 (2d Dep't 2009), quoting Labor Law § 240(1). Moreover, "[t]he statute provides 'no protection to a plaintiff injured before any activity listed in the statute was under way.'" Id., quoting Panek v. County.of Albany, 99 N.Y.2d 452, 457 (2003). "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury.'" Panek v. County of Albany, supra, 99 N.Y.2d at 457, quoting Joblon v. Solow, 91 N.Y.2d 457, 465 (1998).

The work being performed does not meet the necessary criteria for the subject injury to be protected under Labor Law 240(1) or Labor Law 241(6).

PLAINTIFF'S OPPOSITION

Rather than file opposition, Plaintiff filed a Cross Motion on February 26, 2021 seeking a declaration that Defendant has violated Labor Law 240 (1). Plaintiff puts forth the position that the subject tree is a "structure" and the work performed was ancillary to setting up a scaffold, therefore Defendant is strictly liable. A variety of cases are cited by Plaintiff in support of its

position wherein the issue of what is considered a "structure" is determined and the related issue of who is an "owner" under the statute is also discussed.

The seminal 1909 Court of Appeals case, *Caddy v Interborough R.T.Co.*, 195 N.Y.415 sought to define what a structure is and also discussed what may be considered a scaffolding. The plaintiff was injured when he fell from "staging" set up around a subway car from where he was working. The trial court dismissed the action and the Appellate Division Second Department reversed and sent the matter back for a new trial. The relevant statute at that time was known as Labor Law (L/1897. Ch.415 section 18) and was the precursor to Labor Law 240(1). The definition created by the *Caddy* court for the word "structure" includes: *"any production or piece or work artificially built up or composed of parts joined together in some definite manner.* The subway car where the Plaintiff had been working was deemed to be a "structure". Next the Court in *Caddy* concerned itself with what would be deemed "scaffolding". "Previously, the scaffolding or staging on a job was not treated as a place upon which a workman worked but had been treated as an "appliance or instrumentality by means of which the work was to be done.". The prior result was that when the "master" had used reasonable care in selecting the proper workmen and suitable materials to construct the appliance (scaffolding), the "master" was not liable for injuries to one of the workmen on the scaffolding. However, *Caddy* was decided after 1897 and held that: *"Whenever a scaffold is furnished or caused to be furnished by an employer to be used in erecting, repairing, altering or painting a house, building or structure, it must be safe, suitable and proper, or the employer is liable.".* (emphasis added) Thus, liability could now be found against an employer and in *Caddy* the Court of Appeals held that work being done on a subway car was work on a "structure", further that the staging from which the plaintiff fell and injured himself was deemed to be "scaffolding". Accordingly, the order of the Appellate Division was affirmed in favor of the plaintiff. But a tree is not a subway car and the definition of "structure" as set forth above does not include a tree in the circumstances presented herein.

The Court is inclined to the view that the following cases, cited by Plaintiff, also do not apply to the case at hand. In *Gordon c Eastern Ry. Supply*, 181 A.D.2d 990 (4th Dept, 1992) the structure was a railway car; in *Dedario v New York Tel. Co.*, 162 A.D.2d 1001 (4th Dept, 1990) the structure was a telephone pole; in *McCoy v Kirsch*, 99 A.D.3 13 (2nd Dept, 2012) the structure was a *chuppah* or wedding canopy. Additionally, *McCoy* lists almost a dozen other cases where diverse items have been deemed "structures" by the Court. However, none cited in *McCoy* claim a tree is a "structure".

There have been situations where work performed on a tree has been found to be protected under Labor Law 240(1). *Lombardi v Stout*, 80 N.Y.2d 290 (1992) concerned a plaintiff who fell from a ladder while working on a tree. Both courts below dismissed by finding a tree was not a structure. The Court of Appeals modified and allowed the action to proceed under Labor Law 240(1). The reasoning was that the tree work was part of the plan for the house renovation and driveway, which was found to be "activities involving a building or structure". This Court does not find *Lombardi* to be persuasive. Note that defendant was the contract vendee of the subject property and was treated as an owner.

In *Moreira v Ponzo*, 131 A.D.2d 1025 (2nd Dept, 2015) a worker fell from a roof while removing a tree that fell on the roof. The workman was engaged in renovations to the roof of the house but first had to engage in removing the tree from the roof. The Second Department found that, "...the protections of Labor Law 240 (1) are to be afforded to tree removal when undertaken during the repair of a structure...". This matter also is not persuasive. Note that herein the defendant was the owner of the subject property.

Tree removal alone has been found not to be protected under Labor Law 240 (1) as set forth in *Enos v Werlatone*68 A.D.3d 713 ((2nd Dept, 2009). A tree was found not be be either a structure or a building in *Morales v Westchester Stone Co., Inc.* 63 A.D.3d 805 (2nd Dept, 2009) where the plaintiff was doing tree work that was considered to be maintenance.

Another issue to be considered is whether the Defendant herein WPS could be held to be an "owner". In *Celestine v City of New York*, 59 N.Y.2d 938 (1983) the Court of Appeals held that the LIRR who was the grantor of an easement wherein the injury claimed by plaintiff took place during subway construction, would be deemed the "owner". This is not relevant to the case herein, however Plaintiff has asserted that WPF was the "owner" of the scaffolding and the Star, and the tree work was ancillary to the installation of the Star. In *Kerr v Rochester Gas & Elec. Corp* 113 A.D.2d 412 (4th Dept, 1985) similarly, the lessor of a construction site wherein the plaintiff was injured was found to be the "owner". In the instant matter, WPS is certainly not the owner of the property where PETERKIN was injured and was neither a grantor of an easement, nor a lessor of property.

Lastly, Plaintiff's Memorandum of Law in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment proposes that the Star/Scaffold is a structure within the *Caddy, Supra* definition as follows:

> *The plaintiff respondent submits that these parts were obviously put together to serve an intended purpose and served no effective purpose as separate parts. The plaintiff does not claim, as the defendant contends that "his tree cutting activity was ancillary to the 'erection' of a 'structure' (the scaffold) ... "*

Thus, Plaintiff characterizes his work as part of the same team setting up Winter Wonderland 2018. Further, it is claimed that since WPS owned the Star and the scaffolding it could be claimed that WPF is an "owner" under the relevant statute.

CONCLUSION

Although both parties claim they each should be granted summary judgment, it appears that there are triable issues of fact that preclude the Court from granting that relief. Who owned the Star? The scaffolding? Was the construct of the star/scaffolding a "structure"? Who devised the plan to create this exhibition? Who determined the extent of the tree cutting? Why was it done on that date? There are other corelated issues that come to bear when answering the above.

By reason of all the foregoing it is

ORDERED that Defendant WPF's Motion for Summary Judgment pursuant to CPLR 3212 to dismiss the Complaint is **denied**; and it is further

ORDERED that Plaintiff PETERKIN's Motion for Summary Judgment pursuant to CPLR 3212 to grant Plaintiff relief under Labor Law 240(1) is **denied**; and it is further

ORDERED that the parties and their respective counsel shall appear for virtual conference on January 19, 2022 at 11:00a.m., for status. A link for the conference will be sent to those listed in NYSCEF. To the extent the parties or their respective counsel are not receiving notifications from NYSCEF, counsel must submit their email address to the Court on or before December 17, 2021.

Any relief not specifically granted herein is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: Poughkeepsie, New York
October 12, 2021

ENTER

Hal B Greenwald

Hon Hal B. Greenwald, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Justice Greenwald's Chambers, please do not submit any copies. Submit only the original papers.