Borjas v Gladden Props. LLC
2021 NY Slip Op 34271(U)
September 28, 2021
Supreme Court, Queens County
Docket Number: Index No. 715845/2020
Judge: Robert J. McDonald
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SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

\- x

ROBERTO BORJAS,

Plaintiff,

\- against -

GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUNDING MANAGEMENT LLC, and REIDY CONTRACTING GROUP LLC,

Defendants.

Index No.: 715845/2020
Motion Date: 9/23/2021
Motion No.: 4
Motion Seq.: 7

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REIDY CONTRACTING GROUP LLC,

Third-Party Plaintiff,

\- against -

TECHNO ACOUSTICS HOLDINGS, LLC d/b/a TECHNO ACOUSTICS,

Third-Party Defendant.

\- - - - - - - - - - - - - - - - - - - x

GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., and SOROS FUNDING MANAGEMENT LLC,

Second Third-Party Plaintiffs,

\- against -

TECHNO ACOUSTICS HOLDINGS, LLC d/b/a TECHNO ACOUSTICS,

Second Third-Party Defendants.

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GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUNDING MANAGEMENT LLC, and REIDY CONTRACTING GROUP LLC,

Third Third-Party Plaintiffs,

\- against -

CHELSEA FLOOR COVERING ACQUISITION CORP.,

Third Third-Party Defendant.

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CHELSEA FLOOR COVERING ACQUISITION CORP.,

Fourth Third-Party Plaintiff,

\- against -

COMMERCIAL FLOORING MANAGEMENT LLC,

Fourth Third-Party Defendant.

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The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR § 3212, awarding plaintiff partial summary judgment on the issue of liability pursuant to Labor Law § 240(1); and on this cross-motion by defendant/third-party plaintiff GLADDEN PROPERTIES LLC, for an Order granting GLADDEN PROPERTIES LLC summary judgment, dismissing plaintiff's complaint against it:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law....EF	4 - 17
CFM's Affirmation in Opposition-Exhibits.............EF	38 - 39
Chelsea's Affirmation in Opposition-Exhibits.........EF	40 - 44
Techno's Affirmation in Opposition-Exhibits..........EF	46 - 50
Notice of Cross-Motion-Affirmation-Exhibits..........EF	20 - 26
Plaintiff's Affirmation in Opposition................EF	75 - 76
Reply Affirmation-Exhibits...........................EF	77 - 81

This personal injury action arises out of an incident that occurred on April 15, 2015 at the construction site located at 250 West 55th Street, in New York County, New York. At the time of the incident, Gladden Properties LLC (Gladden) owned the premises. Boston Properties, Inc. (Boston) was the managing agent on behalf of Gladden. Soros Funding Management LLC (Soros) was the tenant that hired Reidy Contracting Group LLC (Reidy) as the general contractor. At the time of the accident, plaintiff was employed by Techno Acoustics Holding, LLC d/b/a Techno Acoustics (Techno), a drywall contractor hired by Reidy.

Plaintiff commenced this action by filing a summons and complaint on May 8, 2016. All defendants joined issue. Plaintiff and Reidy have been deposed. There are outstanding depositions as to Boston, Soros, Gladden, and the third-party defendants. Plaintiff now moves for summary judgment on his Labor Law § 240(1) claim.

Plaintiff appeared at three examinations before trial and testified that he was a DC-9 union drywall/taper. His supervisor was Aurelio. Aurelio gave him all of his instructions. On the day of the accident, Aurelio directed plaintiff to use the subject Baker scaffold to tape the ten to twelve foot high ceiling on the 38th floor. The scaffold had four wheels with a lock on each wheel. The scaffold platform was eight feet long and four feet wide. The scaffold was five to six feet above the floor below. Many portions of the 38th floor were uneven. The scaffold was owned by Techno. On the day of the accident, he went up and down the subject scaffold approximately two times before the accident. Prior to the day of the accident, he never used the subject scaffold. He would finish taping the ceiling on one location,

come down from the scaffold, and move the scaffold to another location. He always placed the scaffold in an area where the floor was not broken or uneven. He always tested the scaffold. The locks on three out of the four wheels did not lock the wheel completely on the subject scaffold. He locked the wheels of he scaffold before he went up on the scaffold. The scaffold still moved. As he was on the scaffold, the scaffold suddenly moved, which caused the wheels to move onto a portion of uneven flooring, which caused the scaffold to collapse. He fell at an elevation of five to six feet onto the floor below. The scaffold did not have any guardrails or safety railings to prevent him from falling.

Danny Monteiro appeared for an examination before trial on behalf of Reidy and testified that Reidy was the general contractor. Soros hired Reidy. The project involved a renovation of various floors leased by Soros. Boston was the building manager. Reidy hired Techno. Reidy hired various superintendents who conducted walkthroughs and would stop work if they saw an unsafe condition. Reidy conducted weekly job meetings with Boston and Soros. The flooring of the 38th floor was misleveled, uneven, and broken and needed to be repaired by the flooring subcontractor. While remaining on the scaffold platform, plaintiff attempted to roll the scaffold out of the office into the hallway by grabbing onto the door frames and propelling the scaffold out. In doing so, the wheels of the scaffold went into the embedded metal channel in the floor, which would ultimately anchor the glass outer wall of the office.

Boston, Commercial Flooring Management, LLC (CFM), Chelsea and Techno oppose the motion on the grounds that the motion is premature and as questions of fact remain as to whether plaintiff's own actions were the sole proximate cause of the accident. In support of the oppositions, three accident reports are submitted. The Reidy and Techno Accident Reports indicate that plaintiff "self-propelled himself on a Baker scaffold on an uneven surface and lost his balance". The Reports also list David Macagnone of Techno as a witness to the accident. Mr. Macagnone has not yet been deposed. The Boston Accident Report indicates that plaintiff fell off a platform that was about four feet high.

Annexed to Techno's opposition is the affidavit of John Barry, a Supervisor for Techno. Mr. Barry affirms that he inspected the scaffold after the accident and did not observe any defects. The scaffold was never taken out of service and was used by Techno workers for the remainder of the project. He did not receive any complaints from plaintiff or anyone else prior to the accident regarding the subject scaffold. All Techno scaffolds

that were used at the project were inspected prior to being delivered to the work site. If the inspections revealed any issues with any of the component parts, including the wheel locks, the component parts and wheel locks would have been repaired and/or replaced before the scaffolds were delivered to the project. All Techno scaffolds had fully operational railings that were readily available onsite for use if needed. All Techno employees were directed to inspect the scaffolds, including all component parts, prior to use each day. If any Techno employee experienced any issues, the employee was instructed to advise the foreman. All Techno employees were directed never to scaffold surf or self-propel the scaffolds.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240(1) will not stand where the plaintiff’s own conduct was the sole proximate cause of his or her injuries (see Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]; Plass v Solotoff, 5 AD3d 365 [2d Dept. 2004])

Here, plaintiff contends that he is entitled to summary judgment because he was not provided with a proper scaffold because three of the four wheel locks were not working properly and as the scaffold was not equipped with railings. However, viewing the evidence in the light most favorable to the non-moving parties, the opposing parties established that issues of

fact as to whether plaintiff's own actions were the sole proximate cause of the accident and as to credibility preclude summary judgment (see Palmeri v City of New York, 2020 NY Slip Op 34252[U][Sup Ct., New York Cnty. 2020]). Specifically, there are questions of fact, including, but not limited to, whether plaintiff was misusing the scaffold, the height of the scaffold, and whether guardrails were readily available.

Regarding the cross-motion, the Notice of Cross-Motion seeks summary judgment, dismissing the complaint and all cross-claims against Gladden. However, the affirmation in support of the cross-motion and "WHEREFORE" paragraph seeks summary judgment, dismissing the complaint and all cross-claims against Boston. Although the Notice of Cross-Motion is clearly defective, as plaintiff has opposed the motion regarding both defendants, the Court will consider the cross-motion as to Boston.

In support of the cross-motion, Boston submits the affidavit of Janet Kerr, the Vice President of Risk Management for Boston. Boston was not the property owner of the subject premises on or before April 15, 2015. Boston was not a party to any contract for the performance of work for the SFM Interior Build Out Project, including the contract between SFM and Reidy. Boston did not hire, and was not a party to any agreement for the performance of work by any contractor or subcontractor. Boston did not perform, supervise, direct or control any construction work at or for the subject project. Boston did not maintain, repair, operate, manage direct, supervise or control any of the work performed for the project. Boston did not provide any contractor or subcontractor with tools, material, or equipment for the work that was performed for or during the project.

Based on such, Boston contends that it is not an owner under the Labor Law, and thus, all Labor Law claims against it must be dismissed. Additionally, Boston contends that as it did not supervise, direct, or control the injury producing work, the common law negligence claim must also be dismissed.

In opposition to the cross-motion, plaintiff contends that Boston failed to establish its prima facie case as Ms. Kerr failed to state whether Boston had the authority to supervise or direct the work.

A managing agent will be deemed to be a Labor Law agent if it had the authority to supervise or direct the work (see Merino v Continental Towers Condominium, 159 AD3d 471, 472 [1st Dept. 2018]["the test of whether a defendant is a statutory agent subject to liability under [Labor Law 240(1) and 241(6)] is not

whether it actually supervised the work, but whether it had the authority to do so"]; Voultepsis v Gumley-Haft-Klierer,Inc., 60 AD3d 524 [1st Dept. 2009]). Here, no evidence has been submitted to demonstrate that Boston did not have any authority to supervise or direct the work. Moreover, regarding the common negligence claim, no evidence has been submitted to demonstrate whether Boston had actual or constructive notice of the alleged dangerous condition, i.e. the misleveled floor. Therefore, Boston failed to establish its prima facie case.

Accordingly, for the reasons stated above, it is hereby

ORDERED, that both the motion and cross-motion are denied.

Dated: Long Island City, NY
September 28, 2021

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.