Ambrosio v 1619 Broadway Realty LLC
2022 NY Slip Op 30913(U)
March 21, 2022
Supreme Court, New York County
Docket Number: Index No. 159433-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

FERMIN AMBROSIO

INDEX NO. 159433-2018

MOT. DATE

- v -

MOT. SEQ. NO. 3&4

1619 BROADWAY REALTY LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

In this labor law action arising from personal injuries sustained on a construction site, there are two motions for summary judgment which are hereby consolidated for consideration and disposition. In motion sequence 3, plaintiff Fermin Ambrosio moves for partial summary judgment on liability on his Labor Law § 240(1) cause of action against the defendants 1619 Broadway Realty LLC ("1619 Broadway"), Schimenti Construction Company LLC ("Schimenti") and DNA Contracting LLC ("DNA"). 1619 Broadway, Schimenti, and DNA Contracting jointly oppose the motion, as does defendant/Second Third-Party Defendant/Third Third-Party Plaintiff One Team Restoration Inc. (hereinafter "One Team")

In motion sequence 4, One Team moves for summary judgment in its favor dismissing plaintiff's complaint and the second third-party complaint against it as well as any and all cross-claims, counterclaims or other claims against it. There is no opposition to One Team's motion.

Issue has been joined and the motions were timely brought (see order dated 12/9/21). Therefore, summary judgment relief is available. The court will first consider plaintiff's motion.

Standard of review

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Dated: 3.21.22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Relevant facts

The relevant facts are as follows. On August 11, 2018, plaintiff was injured while setting up scaffolding at the "Brill Building" located at 1619 Broadway, New York, New York (the "premises"). On the date of the accident, 1619 Broadway owned the premises. Schimenti served as general contractor with respect to Local Law 11 work involving the repair of the façade and replacement of the roof at the premises (the "project"). In turn, Schimenti hired DNA pursuant to a written contract to perform the actual work in connection with the project. One Team was hired by DNA to provide labor, materials, equipment and services in connection with the project. One Team also hired Oli Enterprises ("Oli"), plaintiff's employer, to provide labor, materials and/or equipment/services.

The following facts are based upon plaintiff's deposition testimony. On the date of the accident, plaintiff was working with others to assemble scaffolding on the roof of the premises. Right before his accident, plaintiff's coworker named Oscar told him to set up the net. In order to do that, plaintiff climbed to the second level of the scaffold. While standing at that level, a wood plank under plaintiff's left food slid out, causing him to lose his balance and fall backwards to the roof, sixteen feet below. Plaintiff was not wearing a safety harness at the time of his accident and was not provided one on the date of his accident.

Plaintiff's employer had provided him a safety harness before the accident, but plaintiff testified that it was at a jobsite in Queens which was closed. Plaintiff's brother called him the day before the accident and asked him to work at the premises the next day. Plaintiff's brother allegedly told plaintiff that he would be provided tools and equipment and did not need the safety harness in Queens. Plaintiff testified that no one directed him to wear a safety harness and that he wasn't aware of any at the premises.

Defendants argue that issues of fact preclude summary judgment "concerning the availability of alternative and proper safety devices; the administration of scaffolding safety instructions; and Plaintiff's failure to both utilize the necessary protective equipment and heed the instructive guidance as to scaffolding-related work." They point to the testimony of John Buoncore, Schimenti superintendent, who was at the premises on the date of the accident and investigated it shortly after it occurred. Buoncore also generated an accident report which has been provided to the court. According to the report, Miguel Ambrosio observed the accident and stated to Buoncore the following:

> Fermin was putting planks on top of scaffold on north roof top, and fell. Was on the way down off the planks and took a step on the pipe scaffold and fell. Fermin felon his back almost like he was sitting down, at an angle.

Buoncore testified at his deposition that plaintiff was wearing a harness when he observed him on the ground after the accident:

> Q. Was the issue of safety harnesses something you discussed?
> A. Discussed when?
> Q. Oh, after the incident?
> A. Yes.
> Q. Why was that?
> A. Because I observed the person who was injured was not tied off while on the scaffold.
> Q. What do you mean by tied off?

A. There's usually a lanyard and a claps on one side that's attached to a body harness, and it needs to be put on to the attachment point of the scaffold when working on it.
Q. Did you observe that he was not wearing such a safety harness?
A. No, he was wearing a harness, correct.
Q. He was?
A. He was wearing a harness and he was not tied off. His harness was not tied off to the scaffolding system.
Q. How did you conclude he was not tied off?
A. When I was informed he fell of the scaffolding section, the second section, his harness was not, I guess you could say – I'm sorry, I can't find the words. He was on the ground, and his lanyard was still intact. Lt was not expanded out like it was used as a fall protection.

...
Q. And he (plaintiff) had that safety vest on with the lanyard?
A. Yes, he did.

Otherwise, Buoncore claimed that he was told by Juan Paz, Oli's foreman, that harnesses were available to workers at the premises: "From what I remember, that was the interview we had with Tom Madden and I believe now the name was Juan Paz, mentioned that their company supplies each employee with their own harness, and requires them to wear them."

DNA produced Jonathan Leiton for a deposition, who stated that he went to the premises after the accident and interviewed Pazm who told him that the workers were installing pipe scaffolding and "one of the guys fell off from the scaffold." Mr. Leiton was informed that plaintiff was setting up the pipe scaffolding, not netting, when he lost his balance and fell.

A sworn affidavit by Juan Martinez, Oli's Chief Executive Officer, has also been provided to the court by the defendants (1619 Broadway, Schimenti and DNA). In short, Martinez asserts that plaintiff was required to use a harness and attend a stie safety meeting, that Oli supplied safety harnesses and other safety tools in a gang box at the premises, and that "[t]he pipe scaffolding where [plaintiff] was working on August 12, 2018, tie-off/anchorage points were available to prevent height-related falls."

Discussion

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective

devices enumerated in Labor Law § 240 (1)must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

The court agrees with defendants that issues of fact preclude summary judgment: specifically, as to how plaintiff's accident occurred and whether he was provided adequate safety devices. Plaintiff's counsel's arguments to the contrary are unavailing. As for the hearsay from Paz, Martinez's sworn affidavit is sufficient to establish a dispute as to whether harnesses were provided at the premises. In any event, Buoncore himself testified that he observed plaintiff wearing a harness while he was on the ground after he fell. A reasonable factfinder could credit defendants' witnesses' testimony and find that plaintiff is incredible and that Section 240[1] was not violated as a matter of law. Plaintiff's counsel's reliance upon Court Rule 202.8-g and the defendants' failure to submit a counter-statement of facts is of no moment, since the record before the court reveals the aforementioned triable issues of material fact. Accordingly, plaintiff's motion is denied.

One Team's motion

The court now turns to One Team's unopposed motion. In short, One Team has established that it did not supply or set up pipe scaffolding at the project and that the work it was contracted to perform was subcontracted to Oli. Thus, One Team has established that it did not have any involvement in or responsibility for the happening of plaintiff's accident. Accordingly, One Team's motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment (sequence 3) is denied; and it is further

ORDERED that One Team's motion for summary judgment (sequence 4) is granted in its entirety, plaintiff's complaint, the second third-party compliant and all claims/crossclaims against One Team are severed and dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3.21.22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.