SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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LINCOLN COLEMAN,

Plaintiff,

– against –

NORTHERN STAR TEXTILE,

Defendant.

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Index No.: 521572/2019
Motion Seq.: 02

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion.

The following e-filed documents, listed by NYSCEF document number (Motion 02) 46-56 and 58-63 were read on this motion for summary judgment.

In this action to recover damages for personal injuries, the plaintiff moves for an Order (Motion 03) granting partial summary judgment pursuant to CPLR § 3212 as to the issue of liability against defendant, allowing plaintiff to make the instant motion after the time limit for good cause shown. For the reasons set forth below, Motion 02 is granted.

This action arises out of an accident that the plaintiff alleges occurred on April 24, 2019, in which he was caused to fall on a job site while standing near the apex of an A-frame ladder. The plaintiff alleges that he was installing sheetrock close to the ceiling in a room and painting walls at a significant height above the ground when the unsecured ladder moved beneath him, causing plaintiff to fall. Plaintiff states that, at the time of his accident, he was performing substantial interior renovations to a commercial office space located at 122 West 27th Street, New York, NY 10001, and leased by a non-party from defendant/owner Northern Star Textile.

Pursuant to the compliance conference order of the Hon. Lawrence K. Knipel dated October 27, 2020, the plaintiff was directed to file a Note of Issue in this action on or before May 28, 2021. *See* NYSCEF Doc. No. 61. The plaintiff's Note of Issue is dated May 28, 2021, and the plaintiff notes therein that some discovery remained outstanding at the time, such as the defendant's deposition and the physical examination of the plaintiff. *See* NYSCEF Doc. No. 55. The plaintiff then filed the instant motion on October 26, 2021.

In support of his motion, the plaintiff submits, inter alia, the pleadings, the deposition transcripts of both plaintiff and defendant, and a copy of an order of the Hon. Lawrence Knipel. The plaintiff states that he was the only individual renovating at the job site that day, that the plaintiff's work was at an elevated height off the ground and was related to the performance of his work, and that he was therefore engaging in a protected activity under Labor Law § 240(1). Plaintiff further argues that it is undisputed that the only safety equipment provided to him was an unsecured A-frame ladder, which plaintiff testified was several years old and covered in paint

and putty. *See* NYSCEF Doc. No. 52. The plaintiff argues that the defendant's failure to provide the plaintiff with any safety devices to protect against the risk of falling from a significant height constituted a violation of Labor Law § 240(1) and was the proximate cause of the plaintiff's fall and subsequent injuries. Furthermore, regarding the timeliness of the motion, the plaintiff argues that the completion of outstanding discovery was necessary for the plaintiff's motion and, as such, that there is good cause for the delay in making the motion. Plaintiff contends that the motion should be heard on its merits given the delay in taking the defendant's deposition.

In opposition, the defendant submits the affirmation of its attorney and argues that the motion should on the ground that it is untimely and the plaintiff failed to demonstrate good cause for the late filing. The defendant argues that the plaintiff asserted in its Note of Issue that "Discovery Proceedings now known to be necessary [were] completed." *See* NYSCEF Doc. No. 55, pg. 4. Defendant asserts that the plaintiff now makes the motion more than 90 days after defendant's examination before trial and 151 days after the plaintiff's filing of the Note of Issue. Defendant contends that this motion was filed in violation of Kings County Supreme Court Uniform Civil Term Rules, Part C, which states that motions for summary judgment must be made within 120 days of the filing of the Note of Issue. Defendant also cites to *Tower Ins. Co. of New York v Razy Assocs.*, 37 AD3d 702 (2d Dept 2007) in support of its contention that the plaintiff has not established good cause here and argues that the completion of defendant's deposition was not required for the plaintiff to make the instant motion. The defendant does not address the merits of the plaintiff's motion in its opposition.

In reply, the plaintiff notes that it addressed the issue of the outstanding deposition in its Note of Issue, stating that "Examinations Before Trial of Defendants remain outstanding." *See* NYSCEF Doc. No. 55. Plaintiff also contends that the reason the instant motion was made beyond 120 days was the defendant's failure to return a signed transcript within 60 days pursuant to CPLR § 3116(a). Notably, the defendant's deposition occurred on July 20, 2021, and the plaintiff made the motion as soon as the 60-day period expired.

In *Brill v City of New York*, 2 NY3d 648 (2004), the Court of Appeals determined that "good cause" as set forth in CPLR 3212(a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy." *Id.* at 652. Here, the plaintiff has demonstrated good cause shown for its delay in filing the instant motion, as discovery remained outstanding at the time the note of issue was filed. *See Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740, 741-742 (2d Dept 2012) (movant showed good cause for leave to serve and file a late motion for summary judgment when there was significant discovery outstanding at the time the note of issue was filed); *Alvarez v Eviles*, 56 AD3d 500 (2d Dept 2008). The defendant's argument that its deposition was unnecessary is without merit. Here, in contrast to the situation presented in *Tower*, 37 AD3d 702, 703 (2d Dept 2007), the defendant's completed deposition provided the plaintiff more than mere "minor background details."

The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law and submit sufficient admissible evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (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." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Pursuant to Labor Law § 240(1), all contractors and owners engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, except certain owners of one and two-family dwellings, 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." The statute "was designed to prevent those types of 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." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

To prevail under Labor Law § 240(1), the plaintiff must prove a violation of the statute, i.e. that the owner or general contractor failed to provide adequate safety devices, and that the absence of that protection was the proximate cause of the injuries. *Allan v DHL Express (USA), Inc.*, 99 AD3d 828 (2d Dept 2012); *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003). The statute applies to risks related to elevation, and "are limited to such specific gravity-related accidents as falling from a height." *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 (2d Dept 2000) (holding that whether a device provided proper protection is not a question of fact "when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials").

In the instant matter, the plaintiff has demonstrated his prima facie entitlement to judgment on the issue of liability pursuant to Labor Law § 240(1). According to the plaintiff's deposition testimony, he was standing on an unsecured A-frame ladder when it shifted and he fell to the ground, which proximately caused his injuries. *See Grant v City of New York*, 109 AD3d 961 (2d Dept 2013) (the plaintiff demonstrated entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action by submitting evidence establishing that he fell from an unsecured straight ladder when it shifted to the side, and that the failure to secure the ladder proximately caused his injuries); *see also Vicuna v Vista Woods, LLC*, 168 AD3d 1124, 1125 (2d Dept 2019) ("[P]laintiff made a prima facie showing of entitlement to judgment as a matter of law through his deposition testimony, demonstrating that the ladder on which he was working shifted for no apparent reason, causing him to fall...."); *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685 (2d Dept 2017) (plaintiff established entitlement to summary judgment through his deposition, in which he indicated that the unsecured ladder he was working on moved beneath him, causing him to fall); *Alvarez v Yingsan Ltd. Partnership*, 150 AD3d 1177 (2d Dept 2017) (plaintiff demonstrated entitlement to summary judgment when he testified that he fell from an unsecured ladder, and the defendant failed to raise an issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident). The defendant did not address the merits of the plaintiff's motion in its opposition and has therefore failed to raise a triable issue of fact as to whether there was a statutory violation and/or whether the plaintiff's actions were the sole proximate cause of the accident. *See Melchor v Singh*, 90 AD3d 866 (2d Dept 2011). The affirmation of the defendant's attorney alone is insufficient to raise a

triable issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557 (1980). As such, the plaintiff's motion is granted.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) (Motion 02) is GRANTED.

This constitutes the decision and order of the Court.

DATED: March 31, 2022

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.