Acosta v Shanahan Group, LLC
2022 NY Slip Op 34991(U)
August 31, 2022
Supreme Court, Westchester County
Docket Number: Index No. 55882/2020
Judge: David S. Zuckerman
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DISPO Motions Seq 1 & 2

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

--X

FERMIN GONZALEZ ACOSTA and
EUNICE GONZALEZ

DECISION/ORDER

Plaintiffs,

Index No. 55882/2020

-against-

THE SHANAHAN GROUP, LLC,

Defendant.

--X

THE SHANAHAN GROUP, LLC,

Third-Party Plaintiff,

-against-

GAPO CONSTRUCTION INC., VV WOODWORK
CARPENTRY, and W WOOD CARPENTRY

Third-Party Defendants.

--X

ZUCKERMAN, J.

The papers filed in NYSCEF as Documents 1 through 83 were read in connection with these two motions, pursuant to CPLR 3212, by Defendant/Third Party Plaintiff The Shanahan Group, LLC seeking summary judgment and by Plaintiffs seeking partial summary judgment. Both motions are opposed.

FACTS:

On June 8, 2020, Plaintiffs Fermin Gonzalez Acosta ("Acosta") and Eunice Gonzalez ("Gonzalez") commenced this action by filing a Summons and Complaint. The Complaint contains two causes of action: violation of Labor Law 240(1) [1] to recover for personal injuries Acosta allegedly sustained while engaged in construction work at a residence in Mount Kisco, NY ("the jobsite") and Gonzalez's derivative claim for loss of services.

Plaintiffs allege that, at the time of the alleged accident, Acosta was employed by Third-Party Defendant W Wood Carpentry ("W Wood"). Plaintiffs add that Defendant/Third-Party Plaintiff The Shanahan Group, LLC ("Shanahan") was the general contractor at the jobsite.

Plaintiffs further allege that Acosta was erecting rafters for a new roof on a detached garage when he fell and sustained serious injuries. Plaintiffs assert that, at the time of the accident, Acosta was attempting to cut a tree branch that was interfering with his carpentry work when the beam he was standing on gave way causing him to fall to the ground. At the time that

[1] Plaintiffs have withdrawn their Labor Law § 200, Labor Law § 241 (6) and negligence claims (NYSCEF Doc. No. 74).

he fell, Acosta was not using a safety harness, tether, hardhat or any other safety equipment.

DISCUSSION

A. SUMMARY JUDGMENT IN GENERAL

Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." In *Andre v Pomeroy*, 35 NY2d 361, 364 [1974], the Court of Appeals explained that

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trail Calendar claims which can properly be resolved as a matter of law when there is no genuine issue to be resolved at trial, the case should be summarily decided, and any unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

In a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent. and admissible form, establishing the absence of any material issues of fact (*Viviane Etienne Medical Care v Country-Wide Insurance Company*, 25 NY3d 498 [2015]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2nd

Dept 2017]; *Winegrad v New York university Medical Center*, 64 NY2d 851 [1985]. In the event that the initial- burden is met, the non-moving party must come forward with proof, also in admissible form, that there are material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 58 NY2d 320 [1986].

In *Celardo v. Bell*, 222 P.D2d 547 [2d Dept 1995], the court stated:

> It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.* 3 NY2d 395 [1957].) If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied (Museums at Stony Brook v Village of Patchogue Fire Dept., 146 AD2d 572 [1989]).

In analyzing the contrasting factual allegations, the court may not engage in weighing the evidence. Rather, the court must draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp*. 215 AD2d 545 [2nd Dept 2000]). Then, the court must determine whether "by no rational process could the trier of facts find for the non-moving party (*Jastrzebski v. N Shore Sch Dist*, 232 AD2d 677 678 [2nd Dept 1996]). Where facts are in dispute, there are issues of credibility, or conflicting

inferences may be drawn from the evidence, summary judgment will not lie (*id.* at 678).

B. LABOR LAW 240 (1)

Pursuant to Labor Law § 240 (1),

> All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for this performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, block, 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 legislative purpose of the statute is to protect workers by placing the ultimate and absolute responsibility for safety practices on the owner and general contractor and is to be construed as liberally as possible to accomplish that purpose. The duty is nondelegable and a violation imposes absolute liability upon owners and general contractors irrespective of whether they exercised supervision or control over the work and without regard for the negligence, if any, of the injured worker so long as the breach was the proximate cause of the injury" (*Buckley v*

Radovich, 211 AD2d 652, 654 [2d Dept 1995]).

C. SHANAHAN'S MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

Contentions of the Parties

In motion sequence #1, Shanahan moves for summary judgment and dismissal of the Complaint on the grounds that, at the time of the alleged accident, Acosta was not engaged in an activity that is protected under Labor Law 240 § (1). Shanahan specifically asserts that Acosta was cutting a tree branch, an activity not covered by the statute.

Acosta argues that, to perform his work on the roof, he was required to trim the tree limb that impeded his ability to work. Thus, the activity is subject to Labor Law 240 § (1) protection.

Discussion

"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*, 99 NY2d 452, 457 [2003][internal citation and punctuation marks omitted]). "[T]he intent of [Labor Law § 240 (1)] was to protect workers employed in

the enumerated acts, even while performing duties ancillary to those acts. Since the plaintiff was working on the roof of the building, he was subjected to the sort of risk that Labor Law § 240 (1) was intended to obviate. Accordingly, the protections of Labor Law § 240 (1) are to be afforded to tree removal when undertaken during the repair of a structure" (*Moreira v Ponzo*, 131 AD3d 1025, 1027 [2d Dept 2015] [internal citations and punctuation marks omitted]).

Notwithstanding the clear holding of *Moreira*, Shanahan submits numerous cases to support its argument that tree removal and trimming work is not subject to the protections of the Labor Law. They include *Olarte v Morgan*, 148 AD3d 918, 919 [2d Dept 2017]["The plaintiff's tree branch cutting work was outside the ambit of Labor Law § 240 (1), because a tree is not a 'building or structure' within the meaning of the statute"]; *Enos v Werlatone, Inc.*, 68 AD3d 713, 714 [2d Dept 2009]["The tree removal activity did not constitute an enumerated activity under the statute, and the plaintiff was not entitled to coverage under the statute"] and *Radoncic v Indep. Garden Owners Corp.*, 67 AD3d 981, 982 [2d Dept 2009]["tree cutting is not one of the activities covered by [Labor Law 240 (1)]."

These cases, as well as others cited by Shanahan, however,

are distinguishable. In these cases, the plaintiffs were primarily engaged in tree work. In contrast, here, Acosta was repairing a roof; trimming the tree was incidental to that endeavor. More specifically, Shanahan subcontracted with W Wood to build a roof for the detached garage, not to trim trees. Acosta, while employed by W Wood, attempted to cut the tree limb in furtherance of erecting rafters for the new roof. He was not engaged in unauthorized arborist work nor was he hired to engage in tree work.

Thus, pursuant to *Moreira,* Shanahan has not met its burden to establish, *prima facie,* the absence of any material issues of fact regarding Acosta's activities being outside the protection of Labor Law 240 § (1). Therefore, Defendant The Shanahan Group, LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing the Complaint must be denied.

D. ACOSTA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Contentions of the Parties

In motion sequence #2, Acosta moves for partial summary judgment on his cause of action for violation of Labor Law 240 § (1). He asserts that, pursuant to the statute, Shanahan, as the general contractor, is strictly liable for injuries suffered

during an unprotected fall.

Shanahan first argues that Acosta's motion must be summarily denied as untimely. In the alternative, on the merits, Shanahan asserts that Acosta was trimming the tree on his own accord. Thus, he was engaged in an activity which is not subject to the protections of Labor Law 240 § (1).

Discussion

In an Order dated January 26, 2022, the court (Walker, J.) directed that "any motion(s) for summary judgment … shall be filed on or before April 11, 2022." Notwithstanding, on June 13, 2022, 63 days after the court's deadline, Plaintiffs filed the instant motion for partial summary judgment.

Shanahan seeks summary denial of the motion because it was not timely filed. Acosta counters that, since the subject matter of motion sequence #2 is identical to that of motion sequence #1, it should be deemed a cross-motion and considered by the court.

As per § IV (F) of the Westchester Supreme Court Civil Case

Management Rules Effective December 6, 2021[2]

> Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 60-day time period pursuant to these Rules and the Trial Readiness Order ***shall*** [emphasis added] result in the denial of the untimely motion or cross-motion.

(emphasis added).

Pursuant to the Rule, Plaintiffs' untimely motion cannot be deemed a cross-motion. Thus, Plaintiffs' untimely motion cannot be considered. Therefore, Plaintiffs' motion, pursuant to CPLR 3212, for partial summary judgment must be denied.

Accordingly, it is hereby

ORDERED that the motion (seq. #1) by Defendant The Shanahan Group, LLC for summary judgment dismissing the complaint is denied; it is further;

ORDERED, that the motion (Seq. #2) by Plaintiffs Fermin Gonzalez Acosta and Eunice Gonzalez for partial summary judgment is denied.

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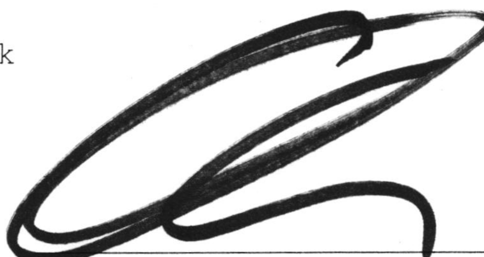
[2] https://www.nycourts.gov/LegacyPDFS/courts/9jd/civilCaseMgmt/rules/WestchesterCivilRules.pdf at 9

Dated: White Plains, New York
August 31, 2022



HON. DAVID S. ZUCKERMAN, A.J.S.C.

TO: All parties via NYSCEF