

Blacio v Related Constr. LLC

2023 NY Slip Op 32312(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 157518/2022

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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INDEX NO. 157518/2022

JIMMY BLACIO,

MOTION DATE 05/09/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

RELATED CONSTRUCTION LLC, 22ND AND 11TH ASSOCIATES, L.L.C.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff commenced this action on September 2, 2022, based upon a construction site accident, which occurred on June 20, 2022. Before the Court is plaintiff Jimmy Blacio's ("plaintiff") motion for an Order, pursuant to CPLR §3212, granting him partial summary judgment on the issue of liability as against defendants, Related Construction, LLC and 11th Associates, LLC ("defendants") under New York State Labor Law §§240(1) and 241(6). Defendants filed opposition and plaintiff filed a reply.

Plaintiff's Motion for Partial Summary Judgment

In support of motion, plaintiff submits, inter alia, the Pleadings, Verified Bill of Particulars, Affidavit of Jimmy Blacio, Plaintiff's Request for Admissions, Defendants' Response to Request for Admissions, Related Incident Report Form, Related Safety Statement Form, Related Witness Statement Form from Plaintiff's Coworker, Statement of Material Facts, and Memoranda of Law. (See, NYSCEF Doc. Nos. 20-31). Plaintiff argues that defendants did not furnish a device to protect plaintiff from falling into the unguarded stairwell, which resulted in the plaintiff's injuries.

Plaintiff Jimmy Blacio attests that he was employed by Roki Installation Services, and was working on a construction project located at 555 West 22nd Street in New York, New York ("the building"), while being supervised by the Roki foreman, Arturo Acolco. Plaintiff attests that he was carrying large, finished wood panels with his co-worker, Byron Chavez, on the 12th floor of the building. Blacio asserts that he was told by Mr. Acolco to move the panels to the 12th floor, which was where they would be installed. Plaintiff states that when he and Mr. Chavez walked past the stairwell, while carrying the panel, plaintiff fell through the unguarded opening and sustained numerous injuries. Plaintiff submits photographs that were taken immediately after his fall, which demonstrate 1) that the landing he fell through was an unguarded stairwell and 2) the large panel he and his co-worker were carrying before the fall. Plaintiff also attests that he was not provided with any fall protection device that would have prevented his fall. (See, NYSCEF Doc. No. 24).

Defendants' Opposition

In opposition, defendants submit, *inter alia*, the Affidavit of Arturo Acolco, Affidavit of Al Calderon, and Counterstatement of Material Facts. (See, NYSCEF Doc. Nos. 36-39). Defendants argue that plaintiff's motion is premature because discovery is needed to ascertain if the plaintiff and/or his co-worker Byron Chavez removed the protection barrier on the stairwell. Further, defendants contend that a question of fact exists as to whether plaintiff was the sole proximate cause of his accident. Therefore, defendants argue that the plaintiff has failed to make a *prima facie* showing of entitlement to summary judgment as a matter of law. (See, NYSCEF Doc. No. 36).

Arturo Acolco, the foreman of Roki Installation Services LLC ("Roki"), attests he was employed as the foreman on the date of plaintiff's accident, and he was in charge of supervising the plaintiff and Byron Chavez. Mr. Acolco states that plaintiff and Mr. Chavez brought the finished wooden panels from the basement, and were informed to cut and install the panels on the stairway inside the apartment. Mr. Acolco states that prior to the incident, the importance of reporting issues to him or to the Site Manager, Al Calderon, was discussed with plaintiff and Mr. Chavez during regular toolbox talk and pre-task meetings. In addition, they discussed the importance of a barrier, as well as the importance of not removing the barrier. Mr. Acolco attests that he was later notified of the accident and arrived at the premises, where he saw an unguarded stairwell and landing.

Nonetheless, Mr. Acolco does not deny there was not a barrier at the time of the accident, and asserts that the unguarded stairwell was not reported to him prior to plaintiff's accident. Annexed to his affidavit, as Exhibit A, are copies of Roki's Pre-Task Safety Plans/Job Hazard Analysis on the days he was supervising the plaintiff and Mr. Chavez, which show the list of jobs and tools required, identification of all specific hazards found, and how the hazards would be controlled. (See, NYSCEF Doc. No. 37).

Al Calderon, the onsite Site Safety Manager, attests that on March 15, 2021, the plaintiff, Jimmy Blacio, completed his employee orientation, and as part of the orientation, he discussed a variety of jobsite hazards, which includes stairway/fall protection. Further, he states that during the orientation, the use of safety devices, equipment and material were discussed. In addition, Calderon states that on Friday, June 17, 2022, which was three days prior to the accident, that he along with his team of safety workers/carpenters, had installed a plywood barricade/protection, using screws and a drill, where plaintiff claims to have fallen. Mr. Calderon states that based on his review of the Site Safety Log, which is annexed to his affidavit, from June 18, 2022, the plywood barricade/protection remained in place. Mr. Calderon attests that on the date of the accident he was notified by Mr. Acolco and Mr. Chavez that plaintiff had fallen from the 12th floor stairway landing, and when Mr. Calderon arrived he saw plaintiff lying on the middle landing of the interior stairway. Mr. Calderon states that after he arrived, he had noticed that the plywood barricade/protection, which was installed just days before, was no longer secured at the top of the stairway, and was instead leaning up against a wall behind a few pieces of equipment, which was just feet away from where it was previously secured.

Mr. Calderon submitted photos of the plywood barrier at the location of where plaintiff claims to have fallen, and indicates that the barrier covered the entirety of the 12th floor landing and stairway. Mr. Calderon does not dispute that the guardrail was removed at the time of the accident, but he maintains that someone must have removed it prior to the accident between the time that it was installed on Friday, June 17, 2022, and before the accident occurred on Monday, June 20, 2022. Here, the defendants present issues, although, there is no dispute that the guard rail

was removed at the time of the accident, the question of fact is who removed it – either plaintiff, his co-worker, or the employer.

Plaintiff's Reply

In reply, plaintiff argues, *inter alia*, that defendants cannot claim the motion is premature and that an investigation is needed because defendants already interviewed witnesses and documented its findings. Plaintiff states that Mr. Calderon and Mr. Acolcos' affidavits do not state any facts within that are first-hand knowledge that would suggest that plaintiff or his co-worker unscrewed the panel, performed any task that day other than what they were instructed to do, or reference to what transpired on the jobsite on June 18, 2022. Jimmy Blacio attests that neither he nor his coworker unscrewed the protective wooden barrier before the accident. (*See, NYSCEF Doc. No. 42*).

Plaintiff claims that Mr. Acolco's admission to the stairwell being unguarded when plaintiff fell, should be considered as an admission of fault because absolute liability applies, and that plaintiff should prevail regardless of the stage of discovery. Plaintiff maintains that the Site Safety Manager Statement Form does not support the claim in defendants' opposition, that someone must have willfully tampered with the work site.

Discussion

Under *CPLR §3212*, “[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) [internal citations and quotation marks omitted].

Under *New York Labor Law §240(1)*, “All contractors and owners and their agents...in the erection, demolition, repairing, altering,...or pointing of a building 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.” *New York Labor Law §240(1)*.

Under *New York Labor Law §241(6)*, “[a]ll contractors and owners and their agents... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:[a]ll areas in which...demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein...[t]he commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work...shall comply therewith.” *New York Labor Law §241(6)*.

Here, the Court finds that summary judgment is denied because plaintiff has failed to demonstrate there are no material issues of fact. Plaintiff presents the supporting affidavits which indicate that plaintiff was not the proximate cause of his injuries because neither he nor his co-worker were provided with fall protection devices that would have prevented his fall, and they did not remove the barrier. (*See, NYSCEF Doc. No. 240*). In contrast, Mr. Calderon, in his affidavit submitted in support of defendants, attests that during the plaintiff's employee orientation, the use of safety devices, equipment and material were discussed. (*See, NYSCEF Doc. No. 38*). Further, Mr. Calderon contends that the barrier was installed on Friday, June 17, 2022, and that someone,

such as the plaintiff, Mr. Chavez, or their employer, must have removed the barrier before the accident occurred on Monday, June 20, 2022. *Id.* Here, the Court is presented with a discrepancy as to whether the guardrail, on the date of the accident, was removed by the plaintiff, another worker or defendants' representative. In addition, there are issues of fact as to whether plaintiff may have contributed to accident by not using the protective gear, and whether the defendant actually provided the protective gear to the plaintiff and the workers. As there are clear issues of fact presented, the motion for summary judgment on the issue of liability must be denied.

Accordingly, it is hereby

ORDERED that plaintiff, Jimmy Blacio's motion for an Order, pursuant to *CPLR* §3212 for an order granting him partial summary judgment on the issue of liability as against defendants pursuant to *New York State Labor Law* §§240(1) and 241(6) is DENIED, and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

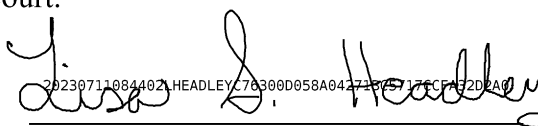
ORDERED that the parties shall proceed with discovery expeditiously and in good faith; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

7/11/2023

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE