Supreme Court of the State of New York
County of Kings

Part LL1M

Index Number 513707/2018
Seq. 004

DECISION/ORDER

ADRIANO NOBREGA,

Plaintiff,

against

T.G. NICKEL & ASSOCIATES, LLC, CASINO DEVELOPMENT GROUP, INC., BOP GREENPOINT F LLC,

Defendants,

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

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for partial summary judgment (Seq. 004) is determined as follows:

Factual Background

Plaintiff was employed as a helper by non-party construction sub-contractor Monolithic Contracting Inc. (Monolithic) on June 2, 2018, the date of his accident (Nobrega EBT at 18). In this role, plaintiff was tasked with attaching and removing the wooden forms that are adjoined to concrete columns during construction, and otherwise assisting at the site (*id.* at 19). Plaintiff's foreman at the worksite was named "Adriano" (*id.* at 23). At the time of the accident, plaintiff was stripping, or removing, wooden forms from concrete columns on the second floor of the new construction at 41 Blue Slip in Greenpoint, Brooklyn (*id.* at 51, 72). It is undisputed that BOP Greenpoint F LLC (Greenpoint) is the owner of this property (Answer at ¶ 5). T.G. Nickel & Associates, LLC (Nickel) was retained as the general contractor for this construction project (*see* Greenpoint-Nickel Construction Agreement). Casino Development Group, Inc. (Casino) was retained as a sub-contractor at the site to perform concrete superstructure work (William Charon, Casino's owner, EBT at 10). Casino in turn sub-contracted that work to Monolithic (*id.* at 38).

[* 1]

The plaintiff testified as to the following: To perform his task, plaintiff was using an approximately seven-foot-tall aluminum A-frame ladder, provided by Adriano, to reach the forms affixed to columns that ran to the top of the nine-foot ceiling (Nobrega EBT at 58–60, 85). The ladder was missing two rubber feet and the ladder "was shaking" (*id.* at 60, 62). The ladder that Adriano brought plaintiff to use was the only one available at the time; all of the ladders and scaffolding on the site were in use (*id.* at 63, 66). Plaintiff claimed that he never talked to Adriano about the missing feet because "[Adriano] brought the ladder and the job was late. I didn't question him since he is the one in charge" (*id.* at 63–64). When asked whether he raised the issue of the ladder shaking to Adriano, plaintiff responded, "That ladder had already been used and then him [sic] telling us to hurry up since the job was delayed. I was afraid to question anything. I was afraid of losing the job" (*id.* at 78). The plaintiff was working alone on the column to which he was assigned (*id.* at 70). Plaintiff was standing on the fourth or fifth step of the ladder and pulling on the wooden form when he fell "to the side because the ladder moved" (*id.* at 90).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The fact that the accident was unwitnessed does not [alone] preclude granting summary judgment to the plaintiff" (*Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]).

Labor Law § 240 (1)

"Liability under Labor Law § 240 (1) [is] 'absolute' in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 NY2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993)]). That "liability is contingent on a statutory violation and proximate cause" (*id.* at 287). The statutorily enumerated safety devices include scaffolding and ladders, and other devices which shall be constructed, placed and operated as to give proper protection to a person employed in covered work (NY Labor Law § 240 [1]).

Plaintiff testified that he was given a defective ladder by his employer and directed to remove forms. It is undisputed that the defendants are proper labor law defendants and that the plaintiff was performing covered work at the time of his accident. Upon the plaintiff's testimony, he has made a prima facie showing of entitlement to summary judgment on his Labor Law 240 (1) claim (*see Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 289 n. 8 [2003]).[1]

In opposition, defendants argue that the plaintiff has provided inconsistent accounts of the accident, is therefore not credible, and that his motion should be denied due to a question of fact about how he was injured. Defendants offer, in support of this argument, a hospital record from the date of the accident. The record, bearing the heading of University Hospital in Newark,

[1] This determination is reached without considering the affidavit of Victor Araujo Miranda, which defendants argue was not disclosed during discovery. The court need not reach this issue, as plaintiff's testimony is sufficient to support his motion for summary judgment.

NJ, contains an entry that reads, "Chief Complaint: Fall [40674]—[Comment]: Fell down the stairs (8 steps) while at work earlier today."

The medical records that the defendants provide lack testimonial foundation and authentication. "An entry in a medical record that is not germane to diagnosis or treatment but is inconsistent with a position taken by a party at trial is admissible as an admission by that party only when there is evidence connecting the party to the entry. . . . Where the source of the information on the hospital or doctor's record is unknown, the record is inadmissible" (*Fraser v 147 Rockaway Pkw, LLC*, 203 AD3d 894 [2d Dept 2022]). Here, plaintiff testified that he does not speak, read, or write any English (Nobrega EBT at 8). However, the medical record upon which the defendants rely is written in English. There is no explanation provided as to how Mr. Nobrega's statements, presumably made in Portuguese, were rendered into English at the hospital. It is therefore impossible to connect the plaintiff with the source of the statement in the medical record. Additionally, "although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted" (*King v N. Shore Long Is. Jewish Hosp. at Plainview*, 127 AD3d 928, 928 [2d Dept 2015]).

As there is no admissible basis for the note in the hospital record, and it is the only evidence tendered by the defendants to challenge the plaintiff's credibility, plaintiff's unrebutted testimony is sufficient to resolve all questions of fact (*see Cardenas v 111-127 Cabrini Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]). Plaintiff's is therefore awarded summary judgment on his Labor Law § 240 (1) claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff pled violations of the following Industrial Code provisions (12 NYCRR 23):

> **23-1.21 (b) (3): Maintenance and replacement**. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
> **(i)** If it has a broken member or part.
> ...
> **(iv)** If it has any flaw or defect of material that may cause ladder failure.
>
> **23-1.21 (b) (4)**: Installation and use.
> ...
> **(ii)** All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
>
> **23-1.21 (e) (3): Stepladder footing**. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means.

"Footing" is a wholistic analysis that involves both the structural quality of the feet *and* the location or placement of the ladder; for example, "taken together, the old and worn feet, the use of blocks, and the concrete surface upon which the ladder was placed, constituted a violation of this Industrial Code provision" (*Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]).

Plaintiff testified that the ladder with which he was provided was missing two rubber feet. Even discounting the affidavit of plaintiff's co-worker and the plaintiff's expert about the state of the ladder, the defendants have not rebutted the plaintiff's testimony about the state of the feet of the ladder he was provided. Therefore, the plaintiff's testimony is sufficient to demonstrate that the ladder was not properly maintained and that the ladder's footing was unsafe,

which are both violations of the Industrial Code. There is no evidence to undermine plaintiff's contentions that these violations caused the of plaintiff's fall from the ladder. Therefore, plaintiff is granted summary judgment on his Labor Law § 241 (6) claim.

Conclusion

Plaintiff's motion for summary judgment on the issue of liability on both his Labor Law § 240 (1) and § 241 (6) claims (Seq. 004) is granted.

This constitutes the decision and order of the court.

July 13, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court