

De Los Santos v Carlyle House Inc.

2023 NY Slip Op 34892(U)

March 2, 2023

Supreme Court, Bronx County

Docket Number: Index No. 28573/2017E

Judge: Lucindo Suarez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 3

JOEL DE LOS SANTOS,

Index No.: 28573/2017E

Plaintiff,

- against -

DECISION and ORDER

CARLYLE HOUSE INC., HOTEL CARLYLE OWNERS
CORPORATION and THE CARLYLE LLC,

Defendants.

	<u>PAPERS NUMBERED</u>
Plaintiff's Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits	NYSCEF Doc. No. 110-126
Defendant Carlyle House Inc.'s Affirmation in Opposition, Memorandum of Law in Opposition, Counter Statement to Statement of Material Facts, Exhibits	NYSCEF Doc. No. 128-136
Plaintiff's Reply Affirmation, Memorandum of Law in Reply ¹	NYSCEF Doc. No. 141-143

Upon the enumerated papers, and due deliberation, this Court finds:

According to the record, Plaintiff, on the day of the accident, was working as a laborer for non-party Scnellbacher-Sendon Group LLC ("SSG") removing debris from the twelfth floor of the subject building while demolition work was being performed. SSG was hired by Defendant Carlyle House Inc. to perform façade repair. To access the twelfth floor, Plaintiff and another worker used a motorized scaffold to travel up and down the exterior of the building. The motorized scaffold was approximately 42 feet long and 5 feet wide and suspended by two cables connected to the roof of the building and the sides of the scaffold. Plaintiff alleged there was no railing along the side of the scaffold facing the building. Plaintiff testified that he worked on this type of scaffold on a daily basis in the six months prior to his accident. He testified that during those six months, he

¹ Plaintiff's counsel electronically filed similar or duplicate reply papers on separate occasions. There being no opposition to the subsequent filing of reply papers, this Court will consider the reply papers most recently filed.

experienced occasions where the motor attached to the scaffold leaked oil, got overheated, and/or became stuck. Plaintiff indicated that he previously notified his foreman regarding these issues with the scaffold.

Upon reaching the twelfth floor of the building using the motorized scaffold, Plaintiff and another worker loaded the scaffold with garbage bags of debris removed from the subject floor. Once the scaffold was filled, Plaintiff and the worker began their descent to bring the removed debris to the sidewalk bridge. Plaintiff testified that he observed oil that leaked from the motor onto the scaffold platform during its descent. The motor on Plaintiff's side of the scaffold became stuck and caused a sudden stop while the motor on the opposite cable continued to operate causing the scaffold to become unlevelled. According to Plaintiff, the scaffold began to swing away from the exterior of the building due to an increase in wind, when it suddenly stopped. Plaintiff then slipped on the oil accumulated on the scaffold and fell through the open space between the scaffold and the building. Plaintiff testified that he fell one and a half stories from the scaffold to the sidewalk bridge while wearing a harness causing him to sustain injury. Plaintiff alleges that the motorized scaffold became stuck for ten to fifteen minutes around the fifth floor of the building while he and his coworker were ascending up the building exterior to the twelfth floor. He also testified that while he wore a harness, he contends that the harness "did not catch" to break his fall from the scaffold to the sidewalk bridge below.

It is undisputed that Defendant Carlyle House Inc. is the owner of the subject premises. Pursuant to a contract for the subject project, Carlyle House Inc., as owner, hired Plaintiff's employer, SSG, to perform façade repair.

This Court finds Plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as he demonstrated that Defendant Carlyle House Inc. failed to supply Plaintiff with an

adequate scaffold equipped with railing on the side he fell from or other safety equipment to protect said Plaintiff from falling, a failure of which proximately caused the accident. *See Ordonez v One City Block, LLC*, 191 AD3d 412 [1st Dept. 2021]; *see also Deschaine v Tricon Constr., LLC*, 187 AD3d 599 [1st Dept. 2020]; *Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478 [1st Dept. 2019]. Plaintiff was not required to demonstrate that the scaffold or the harness as equipped were defective but that they proved to be inadequate to shield him from the fall resulting in harm. *See Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524 [1st Dept. 2014]; *see also Williams v 520 Madison Partnership*, 38 AD3d 464 [1st Dept. 2007]. Nevertheless, Defendant Carlyle House Inc.'s statutory violation of a defective scaffold was a proximate cause of Plaintiff's accident. *See Frances v 3475 Third Ave. Owner Realty, LLC*, 2023 NY Slip Op 00951 [1st Dept., Feb. 21, 2023].

In opposition, Defendant Carlyle House Inc. failed to raise triable issues of fact where Plaintiff was not provided adequate safety devices to protect him from a gravity-related fall. *See See Kind v 1177 Ave. of the Ams. Acquisitions, LLC*, 168 AD3d 408 [1st Dept. 2019]. To the extent that Defendant Carlyle House Inc. disputes that Plaintiff's accident ever happened where Plaintiff's coworker previously testified, in an unrelated action, that he never observed Plaintiff fall from the scaffold, Plaintiff's accident need not be witnessed and does not bar judgment in Plaintiff's favor. *See Dyszkiewicz v City of New York*, 194 AD3d 444 [1st Dept. 2021]. Moreover, the Court will not consider the affidavit of Plaintiff's foreman, Abraham Diaz, as it was notarized without the state and not accompanied by the requisite certificate of conformity. *See CPLR 2309 [c]*; *see also Attilio v Torres*, 181 AD3d 460 [1st Dept. 2020].

In addition, Plaintiff cites Industrial Codes 12 NYCRR §23-1.7(d) and §23-1.16(b) to support the Labor Law 241(6) claim, therefore, abandoning all other predicates not raised in his

legal arguments, and as such, those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept. 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept. 2014].

Since Plaintiff is entitled to summary judgment as to liability on his Labor Law 240(1) claim, the Court need not address the Labor Law 241(6) claim. However, were the Court to reach this claim, the Court finds insofar as the Labor Law 241(6) claim is predicated on a violation of 12 NYCRR §23-1.7(d), this provision is sufficiently specific to warrant imposition of liability against Carlyle House Inc. §23-1.7(d) states that workers be provided a non-slippery surface to work on. Here, the record demonstrated that this Industrial Code was violated, as Plaintiff unambiguously testified that the motorized scaffold he used previously leaked oil from the motor while operating it, and at the time of the accident, while descending on the scaffold, oil from the motor leaked onto the scaffold and accumulated under his boot. Plaintiff further testified that after the scaffold became unlevelled due to its sudden stop, he slipped on the oil causing him to fall in the space between the scaffold and the building. Further, Plaintiff's complaints to his foreman regarding problems with the scaffold, including the motor leak, in the months prior to the accident is sufficient evidence that "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard." *Booth v Seven World Trade Co., L.P.*, 82 AD3d 499 [1st Dept. 2011]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 131 AD3d 823 [1st Dept. 2015].

While Industrial Code §23-1.16(b), which applies to the proper use, instruction, maintenance and measurements for safety belts, harnesses, tail lines and life lines, is sufficiently specific to maintain a claim under Labor Law 241(6), the Court finds there is a triable issue of fact

as to whether the subject harness was longer than the 5 feet permitted by the regulation. *See Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617 [1st Dept. 2014].

Finally, as to the Labor Law 240(2) claim, liability is premised on the failure to provide safety rails on scaffolding staged more than twenty (20) feet off the ground. *See Peitrowski v Are-East Riv. Science Park, LLC*, 86 AD3d 467 [1st Dept. 2011]. Here, the record presents triable issues of fact including but not limited to whether the scaffold in question was staged more than twenty feet off the ground and whether the absence of a safety rail on the side of the scaffold facing the building façade was the proximate cause of Plaintiff's fall. *See id.*

Accordingly, it is

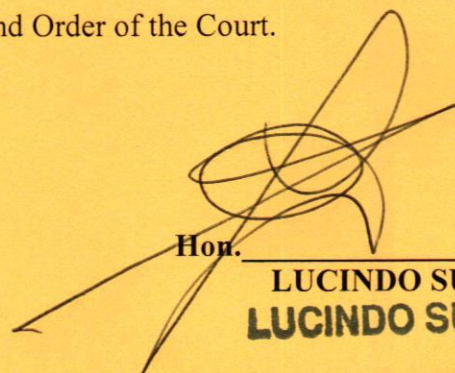
ORDERED, that Plaintiff's summary judgment motion seeking judgment against Defendant Carlyle House Inc. as to liability on the Labor Law 240(1) claim, is granted; and it is further

ORDERED, that Plaintiff's summary judgment motion on his Labor Law 241(6) claim premised on Industrial Code §23-1.7(d), is granted; and it is further

ORDERED, that Plaintiff's summary judgment motion on the Labor Law 240(2) claim, is denied.

This constitutes the Decision and Order of the Court.

Dated: March 2, 2023


Hon. _____
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.