Supreme Court of the State of New York
County of Kings

Part LL1M

OSCAR CANO,

Plaintiff,

against

57-51 57TH ROAD LLC, 57-55 57TH ROAD LLC AND PHANTOM CARTING INC.,

Defendants.

57-51 57TH ROAD LLC AND 57-55 57TH ROAD LLC,

Third-Party Plaintiffs,

against

MAVERICK ENTERPRISES SERVICES INC. AND PHANTOM CARTING INC.,

Third-Party Defendants.

Index Number 515307/2016
Seqs. 009

DECISION/ORDER

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	2–3
Replying Affidavits	4
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgement (Seq. 009) is decided as follows:

Introduction & Factual Background

Plaintiff commenced this action for injuries he alleged were caused by a fall on January 22, 2016 from the top of a car port at a property located at 57-51 57th Road, Queens, New York. Plaintiff was an employee of Maverick Enterprises Services, Inc. ("Maverick"), which was owned by Anthony Trupia. The property was owned by 57-51 57th Road LLC ("51 Road") and the adjoining lot by 57-55 57th Road LLC ("55 Road"). Anthony Trupia was the sole

shareholder of both companies. Phantom Carting Inc. ("Phantom"), a trucking company, brought trucks onto the property as needed for maintenance and repair by Maverick.

Plaintiff testified that he was erecting a car port on the premises at the time of his alleged accident (Cano EBT at 15). Plaintiff further testified that Mr. Trupia instructed him to climb to the top of the frame to stretch the canvas across and that Mr. Trupia himself handed plaintiff the canvas (*id.* at 35). Mr. Trupia denies that this occurred but also testified that he did not recall how the plaintiff climbed to the top of the car port (Trupia EBT at 28).

Mr. Trupia testified that Phantom requested the construction of the car port and that Phantom had a written lease to use the yard (Trupia EBT at 10, 33). Carlos Bautista, owner of Phantom, denied that Phantom requested construction of the car port and further denied that Phantom was a lessee of the premises (Bautista EBT at 10, 26–27). There is neither a contract nor a lease in the record.

Plaintiff now seeks partial summary judgment on his Labor Law § 240 (1) claim against all defendants.

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]).

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute (*e.g.* a ladder) is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes*

v. New York Tel. Co., 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

In the instant action, plaintiff testified that he was instructed to climb the exterior frame of the car port and was not provided with a ladder, harness, or any other safety device. Plaintiff then fell from a height and claims he was injured. The car port qualifies as a structure under Labor Law § 240 (1) (*Joblon v Solow*, 91 NY2d 457 [1998]; *see also McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13 [2d Dept 2012] [a wedding chupah is a "structure" under the Labor Law]). Moreover, although the accident took place on the property at 57-51 57th Road and not the adjoining lot at 57-55 57th Road, owners of adjoining properties may be statutorily liable where they benefit from and have the capacity to control the work (*Larosae v American Pumping, Inc.*, 73 AD3d 1270 [3d Dept. 2010] [no contradictory precedent in the Second Department]). Here, where two adjoining properties are owned by the same individual and used for the same purpose (*see* Trupia EBT at 9), both entities can be treated as owners. Plaintiff also relies on Mr. Trupia's testimony to demonstrate that Phantom was a lessee and that plaintiff believed the tent belonged to Phantom, which would render Phantom a proper Labor Law statutory defendant (*see Copertino v Ward*, 100 AD2d 565 [2d Dept 1984]). Plaintiff has therefore established his prima facie entitlement to summary judgment under Labor Law § 240 (1).

In opposition, the property owners contend that the plaintiff was engaged in routine maintenance, and therefore was not performing covered work at the time of his fall. This argument fails because maintenance requires the repair or restoration of some previously existing structure or object (*see Saint v Syracuse Supply Co.*, 8 NYS3d 229 [2015]). Here, plaintiff's testimony that the canvas was being placed on the car port for the first time is unrebutted, and a

car port that is being constructed for the purpose of providing overhead covering cannot reasonably be said to be complete prior to the installation of the overhead covering itself (*i.e.* the canvas roof).

The owners also argue that a material question of fact exists due to the conflicting testimony of plaintiff and Mr. Trupia about whether Mr. Trupia directed plaintiff's work and whether Mr. Trupia himself was on site at the time of the plaintiff's fall. However, the existence of a Labor Law § 240 (1) violation is not contingent on whether Mr. Trupia was or was not present at the site. A plaintiff can prevail even in the face of different versions of an accident where "the plaintiff would be entitled to summary judgment under either set of facts" (*Leconte v 80 E. End Owners Corp.*, 80 AD3d 669 [2d Dept 2011]). Defendant owners have not provided evidence that supports a version of events where plaintiff was provided with proper safety equipment, where the plaintiff was not performing covered work, or where the plaintiff did not fall. Therefore, plaintiff's request for summary judgment on his Labor Law § 240 (1) claim against the property owner defendants is granted.

Defendant Phantom contends that there is a question of fact as to whether it is a proper statutory defendant under the Labor Law. Mr. Bautista's testimony that Phantom did not request the car port, did not contract for the car port, and was not a lessee of the premises directly contradicts the testimony of Mr. Trupia. Additionally, there is no documentary evidence in the record that resolves the conflict. The function of the court is not to make credibility determinations between two parties on a motion for summary judgment (*see Schultheis v Arcate*, 216 AD3d 1018 [2d Dept 2023]). Plaintiff's motion is, therefore, denied as to Phantom.

Conclusion

Plaintiff's motion for summary judgment (Seq. 009) is granted as to 57-51 57th Road LLC and 57-55th Road LLC the owner defendants; the motion is denied as to Phantom.

This constitutes the decision and order of the court.

July 2, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court