

Garcia v Waldman Partners LLC
2024 NY Slip Op 35256(U)
July 10, 2024
Supreme Court, Richmond County
Docket Number: Index No. 151248/2021
Judge: Ralph J. Porzio
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

GERARDO F. GARCIA as Administrator of
the Estate of HERIBERTO VIDAL a/k/a
HERIBERTO VIDAL BALBUENA,
Deceased

Index #: 151248/2021

Plaintiff

-against-

DECISION & ORDER
(Motions #3 and #4)

WALDMAN PARTNERS LLC AND
NATIONAL HOMES, LLC

Defendants

WALDMAN PARTNERS LLC AND
NATIONAL HOMES, LLC

Third-Party Plaintiffs

-against-

LEONE CONCRETE INC.

Third-Party
Defendant

Upon the papers filed in support of both applications and the papers filed in opposition to both applications, it is hereby:

ORDERED that Plaintiff's motion (#3) for summary judgment his Labor Law 240(1) claim is hereby denied;

ORDERED that Defendants Waldman Partners LLC and National Homes Inc.'s motion (#4) for summary judgment dismissing Plaintiff's complaint is hereby denied; and it is further

ORDERED that that branch of Defendants Waldman Partners LLC and National Homes Inc.'s motion for summary judgment on Plaintiff's Labor Law 200 claim is hereby granted.

BACKGROUND AND PROCEDURAL HISTORY

This case arises out of the Plaintiff Heriberto Vidal's alleged fall on July 25, 2019, from a tubular pipe scaffold located at 2333 Forest Avenue in Staten Island ("the Premises") while in the course and scope of his employment with Third-Party Defendant Leone Concrete Inc. ("Leone

Concrete”). At that time the Premises was owned by Defendant Waldman Partners, LLC (“Waldman”). National Homes, LLC (“National Homes”) was hired by Waldman as general contractor for the work on the premises. The Plaintiff, via his estate administrator Gerardo F. Garcia (hereinafter collectively referred to as “Plaintiff”) alleges that the Plaintiff was atop scaffolding approximately thirteen to fifteen feet tall which did not contain any safety railings. The Plaintiff alleges that the lack of safety railings caused him to fall from the scaffolding and suffer various injuries, including Plaintiff’s ultimate and unfortunate death.

Summons and Complaint were filed on June 30, 2021. Defendants Waldman and National Homes filed an Answer on August 21, 2021. The Request for Judicial Intervention was filed on September 21, 2021. Third-Party Summons and Complaint were filed by Defendants Waldman and National Homes on February 7, 2023, against Leone Concrete. Leone Concrete did not file an Answer. On June 5, 2023, Waldman and National Homes filed a motion for default judgment, which this Court granted on October 26, 2023. Plaintiff filed the Note of Issue on February 2, 2024, and filed their instant motion on March 29, 2024. Defendants filed their instant motion on April 2, 2024. This Court heard Oral Arguments on both motions on May 7, 2024, and reserved decision.

ARGUMENTS

Plaintiff argues in their motion that they are entitled to summary judgment pursuant to Labor Law 240(1) because the Plaintiff was caused to fall from a height due to the inadequacy of the scaffold he was utilizing while engaged in construction work. Plaintiff asserts that both Waldman and National Homes are statutory defendants under Labor Law 240(1) as the owner of the Premises and the General Contractor respectively. The Plaintiff argues that the deposition testimony and submitted affidavits clearly demonstrates that the Plaintiff was not provided with an adequate safety device while utilizing the subject scaffold on the Premises. In support of their motion the Plaintiff highlights the affidavit of Mr. Morales Torija (“Torija”), an employee of Leone Concrete at the time of the incident. Torija states that he observed the Plaintiff at the top of a thirteen to fifteen-foot scaffold with no safety railings. He further states that as the Plaintiff was about to come down off the scaffold platform, he fell to the ground. Plaintiff further relies on the OSHA investigation file obtained for the incident, where several citations were issued to Leone

Construction, including one for improper scaffolding construction¹ and another for missing guardrails for said scaffolding.² For these reasons, Plaintiff asserts that they have made a prima facie showing of entitlement to summary judgment on their Labor Law 240(1) claim.

In opposition to Plaintiff's motion, the Defendants argue first that the deposition testimony of Frank Amato, the site superintendent of the general contractor, who was present at the premises at the time of the Plaintiff's alleged fall, demonstrates that the subject scaffolding was dismantled prior to the fall. Further, Amato's affidavit alleges that there also was no ladder in the area immediately prior to the Plaintiff's fall. The Defendants pair this testimony with the Plaintiff's allegations in his complaint versus those in his Bill of Particulars. Plaintiff's complaint alleges that his fall was from scaffolding. However, the Plaintiff's Bill of Particulars alleges that the Plaintiff fell from a ladder. The Defendants argue that under either version of events, the affidavit of Amato at the very least requires denial of Plaintiff's motion for summary judgment. The Defendants also assert that the affidavit of Torija is inadmissible under CPLR 2101(b), in that there was no accompanying affidavit of translation by a Spanish translator. The Defendants further highlight that the affidavit itself does not articulate that Torija actually witnessed the Plaintiff fall from a scaffold. The Defendants further argue that the OSHA records are inadmissible hearsay in that the recorder and generator of the statements contained therein are unidentified in the records themselves.

LEGAL STANDARD

Pursuant to CPLR § 3212(b) a motion for summary judgment shall be granted if "upon all the 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." The proponent of a summary judgment motion is entitled to judgment as a matter of law when a prima facie showing is made, through the tendering sufficient evidence, that there is an absence of material issues of fact (*see Moore v. 3 Phase Equestrian Center, Inc.*, 83 A.D.3d 677 [2nd Dept 2011]). To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (*see* CPLR § 3212[b]). Thus, where the proponent of the motion makes a

¹ 29 CFR 1926.451(f)(7)

² 29 CFR 1926.451(g)(1)

prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

DISCUSSION

Here, the Court finds there are sufficient issues of fact to deny Plaintiff's motion for summary judgment on their Labor Law 240(1) claim, and to deny Defendants' motion for summary judgment dismissing Plaintiff's complaint. The Court finds that the Plaintiff has failed to make a prima facie showing of entitlement to summary judgment. The affidavit of Torija is inadmissible as there was no accompanying affidavit of translator (*see Monteleone v. Jung Pyo Hong*, 79 A.D.3d 988 [2nd Dept 2010]). Furthermore, the Court finds that the OSHA Records relied upon by the Plaintiff constitute inadmissible hearsay. The records are unverified, and neither the recorder of the statements or the person or persons who made said statements are identified in those OSHA records. As such, this Court cannot consider the statements contained therein (*see Cheul Soo Kang v. Violante*, 60 A.D.3d 991 [2nd Dept. 2009]). For these reasons, the Court finds that the Plaintiffs are not entitled to summary judgment and their motion is hereby denied.

The Court finds further questions of fact to preclude the Defendants' entitlement to summary judgment as well. The Defendants have also failed to make a prima facie showing of entitlement to summary judgment. The deposition and affidavit testimony of the site superintendent Frank Amato, and the alleged discrepancies between the two as highlighted by the Plaintiff, create issues of fact as to whether the Plaintiff was actually atop any scaffolding at the time of the incident, or if the scaffolding was dismantled prior to the incident as argued by the Defendants. This crucial element of this case is a clear question of fact to be answered by a jury, not by this Court as a matter of law (*see Moore v. 3 Phase Equestrian Center, Inc.*, 83 A.D.3d 677 [2nd Dept 2011]). As such, the Court is also denying Defendants' motion for summary judgment on as to the Plaintiff's Labor Law §§ 240(1), 240(6), 240(2), 240(3), 241(6), and Wrongful Death claims.

Regarding the Plaintiff's Labor Law § 200 claim and common law negligence claims, there is no evidence that the Defendants controlled or directed the work of the Plaintiff (*see Ross v.*

Curtis-Palmer Hydro-Elec., Co., 81 N.Y.2d 494 [1993]). Furthermore, the Plaintiff does not specifically oppose that branch of Defendants' motion to dismiss these claims in their opposition. Therefore, this Court finds that Defendant is entitled to summary judgment on Plaintiff's Labor Law § 200 claim and common law negligence claim, and those causes of action is hereby dismissed.

In conclusion, the Plaintiff's motion for summary judgment on their Labor Law § 240(1) claim is hereby denied.

Defendant's motion for summary judgment on Plaintiff's claims of Labor Law 200 and common law Negligence is hereby granted.

Defendant's motion for summary judgment on Plaintiff's Labor Law §§ 240(1), 240(6), 240(2), 240(3), 241(6) claims and on Plaintiff's Wrongful Death claim is hereby denied.

This constitutes the decision and order of the Court.

Date: July 10, 2024

ENTER


HON. RALPH J. PORZIO
J.S.C.