

Ventura v Sutton 58 Holding Co. LLC

2025 NY Slip Op 33258(U)

September 2, 2025

Supreme Court, New York County

Docket Number: Index No. 155912/2022

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

the project through a man named “Brian,” with whom he had performed previous construction work. According to plaintiff, Brian worked for Maragos Painters, acted as his supervisor, and would let him into the work site each day, as plaintiff was never provided a badge to enter. (NYSCEF doc. no. 57 at pp. 36-37.)

To facilitate painting the unit, plaintiff was provided the A-frame ladder. (NYSCEF doc. no. 57 at pp. 45-50.) Plaintiff testified that, the day prior to the accident, he informed Brian that the ladder’s side hinge was broken. This notwithstanding, plaintiff was allegedly instructed to use this broken A-frame ladder on the day of the accident because no other ladders were available. (*Id.*) As plaintiff attempted to descend from the ladder, the screw attached to the loose hinge broke, causing the ladder to shake. (*Id.* at pp. 52-55.) The ladder tipped over as a result, and plaintiff fell from the ladder. (*Id.*)

In plaintiff’s view, he is entitled to summary judgment on his 240 (1) claim because (1) defendants owed a statutory duty to provide adequate, non-defective safety equipment to prevent the type of fall he suffered, and (2) they breach said duty by instructing him to use the defective ladder. He further argues that any comparative negligence defense that defendants might raise only establishes issues for the trier of fact and is insufficient to deny summary judgment. The Court notes that plaintiff’s motion exclusively relies on his own testimony; there is no corroborating evidence—certainly not from “Brian,” who remains unidentified—that he was instructed to use the broken ladder by an employee of Maragos Painter. Defendants oppose, arguing that material issues of fact remain as to whether plaintiff was even present at the work site on the day of the accident, as site access logs do not reflect his entry or egress.

DISCUSSION

Under CPLR 3212 (b), a proponent moving for a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to eliminate any material issues of fact from the case. (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Kesselman v. Lever House Rest.*, 29 A.D.3d 302 [1st Dept 2006].) Once a defendant establishes their entitlement, the burden shifts to the plaintiff to raise a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) Where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence, summary judgment should be denied. (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010].)

While § 240 (1) requires that “[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . devices which shall be so constructed, placed and operated as to give proper protection [against gravity related risks] to a person so employed,” there needs to be some sort of indication that defendants may be liable under this section. (Labor Law § 240 [1]; see *Soriano v St. Mary’s Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524 [1st Dept 2014]). As defendants’ opposition makes clear, there are issues of fact as to whether plaintiff was employed by Maragos Painter and was, in fact, on the premises on the day in question. Even ignoring the absence of evidence that plaintiff suffered the injury as described—whether in the form of hospital records, witness testimony, or complaints made to

plaintiff's supervisors—defendants' have proffered sufficient evidence that calls into question whether plaintiff was on the premises on the day he allegedly suffered the fall.

For example, in support of their contention that plaintiff has not demonstrated that he was “both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent” (*See Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]), defendants point to the lack of evidence establishing the requisite employment relationship with defendants or their subcontractor Maragos Painters. Defendants submit the deposition of Steven Vincent Caputo, general superintendent for Lendlease, wherein he testified that all project workers gained access to the work site through a single, turnstile-equipped entrance on 58th Street, which required using a company issued electronic badge. (NYSCEF doc. no. 55 pp. 13, 31-32, Stevent Vincent Caputo deposition transcript.) Further, he explained that badges were only given to employees after completing an initial orientation and demonstrating that they had completed a forty-hour SST course. (*Id.* at pp. 22, 24, 25, 27.)

Plaintiff's own deposition raises doubts as to whether he would have met Lendlease's requirements and been granted access to the site: he testified that he had no prior OSHA training of any kind, did not attend any orientation, was not aware of badge entry requirements for Maragos Painters employees, and was never given such a badge himself. (NYSCEF doc. no. 57 pp. 29, 40.) Additionally, defendants submit site access logs and Maragos Painters payroll logs, neither of which contain plaintiff's name. (NYSCEF docs. no. 59-62, site access logs for entry and egress, payroll statement, and access control system logs.) That plaintiff is absent from both sets of records only further raises issues of fact as to whether plaintiff had access to the site. Lastly, Spiros Maragos, as owner and principal of Margos Painters, submitted an affidavit, in which he averred that he did not know of, much less hire, plaintiff to perform work on the project. (*See* NYSCEF doc. no. 63, notarized Spiros Maragos statement.)

Plaintiff, in reply, argues that the Court cannot consider either the affidavit of Spiros Maragos or the proffered documents, as the site access logs and payroll ledgers are inadmissible and otherwise unauthenticated. With respect to Spiros Maragos' affidavit, plaintiff contends that he is non-party witness who was not disclosed by defendants in response to plaintiff's combined demands. (NYSCEF doc. no. 68, plaintiff's combined demands.) However, as an owner/member of Maragos Painters LLC, Spiros is not a “non-party” witness under CPLR 3106; further, in attaching his entire combined demands without specific reference to a demand that would have required defendants to disclose his identity, plaintiff has not established that his affidavit is inadmissible. (*C.f. Alamo v New York City Hous. Auth.*, 118 AD3d 484, 484-85 [1st Dept 2014] [a non-party affidavit from the *mother* of plaintiff properly not considered in opposition to a summary judgment motion as she was not disclosed as a witness in responses to discovery]; *Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009] [affidavit of daughter not considered because she was not disclosed until defendants' motion for summary judgment even as defendants' made specific demands for the names and address of such witnesses].) Even without considering his affidavit, however, defendants have submitted an abundance of evidence that the Court may consider, which, as shown below, sufficiently demonstrates issues of fact that warrant denying the motion.

Among this other evidence, defendants attach the site access logs for all workers, which Caputo identified in his EBT as a record of access and egress to the site that was kept in the

ordinary course of business. (NYSCEF doc. no. 55 at pp. 47-50.) Caputo explained that he was able to authenticate the documents based on personal knowledge and described the process by which Lendlease could harvest said documentary evidence from the site security company for the project. (*Id.*) Plaintiff objects citing *Ging v F.J Sciame Constr. Co., Inc.* (193 AD3d 415 [1st Dept 2021]), *Pena v KST Trucking, Inc.* (206 Ad3d 1007 [2d Dept 2022]), and *Sherrod v Mount Siani St. Luke's* (204 Ad3d 1053, 1057 [2d Dept 2022]). Unlike these cases, where the inadmissible documents were either uncertified and irrelevant (the emergency records in *Ging*; the police report and photos in *Pena*) or lacked foundation to be admissible under the business records exception (the hospital records in *Sherrod*), the site access logs were authenticated and Caputo laid a foundation that they were kept in the ordinary course of business under CPLR 4518.

But even if these records were not authenticated in the manner specified above, the Court may consider hearsay evidence in opposition to a motion for summary judgment as long as it is not the sole basis for opposition. (*See Arnold v New York City Hous. Auth.*, 296 AD2d 355, 356 [1st Dept 2002].) Here, these site access logs and payroll records—and plaintiff's absence from them—are considered in conjunction with (1) Caputo's testimony, specifically the procedures under which employees are granted access to the site, and (2) ironically enough, plaintiff's corroborating testimony that he did not have the experience necessary to receive a badge and gain access to the site. Thus, the site access logs and payroll records are considered to the extent that they undermine plaintiff's own testimony that he was on the site and suffered a fall as alleged. Accordingly, even assuming the documents are considered hearsay, the logs are properly before the Court in its determination of plaintiff's motion because they do not constitute the sole basis for opposition.

In sum, plaintiff has failed to proffer affirmative evidence to eliminate issues of fact as to whether he was at site of the accident, or much less "employed" by Maragos Painters. Plaintiff testified that he was never given an access badge nor obtained the requisites for one, was let into the work site by someone else, never filled out an employment application, merely assumed his supervisor worked for Maragos Painters, and he was paid in cash. In turn, Mr. Caputo's testimony lays the requirements for access to the Property and to be granted permission to work on the project—none of which, according to plaintiff's testimony, were met by plaintiff. This is further supported by the site access and payroll logs, a cursory review of which reflects that plaintiff's name does not appear in either. Further, the Court observes that Brian's name is absent as well, whom, again, was allegedly plaintiff's supervisor and his only way of accessing the work site. Thus, the Court finds that the conflicting testimony and documentary evidence operates to create material issues of fact as to whether plaintiff was permitted to be and perform work at the site on the date of the accident so as to confer § 240 (1) worker protection.

Accordingly, it is hereby,

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 as to liability on his § 240 (1) cause of action is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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9/2/2025

DATE

DAKOTA D. RAMSEUR, 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