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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 105397/2008

CERVERA,ROBERTO

vs

QUEENS BALLPARK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 105397/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-H	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits Exhibit 9	5, 6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

FILED

AUG 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 8, 2011

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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ROBERTO CERVERA and CRYSTAL CERVERA,

Plaintiffs,

-against-

QUEENS BALLPARK COMPANY, LLC, HUNT-BOVIS, a joint venture, BOVIS LEND LEASE LMB, INC. and HUNT CONSTRUCTION GROUP INC.,

Defendants.

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Index No.: 105397/08

DECISION

MARTIN SHULMAN, J.:

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on their Labor Law § 240 (1) cause of action. Defendants Queens Ballpark Company, LLC ("Queens Ballpark") and Hunt/Bovis Lend Lease Alliance II, a joint venture, i/s/h/a Hunt-Bovis, a joint venture ("Hunt/Bovis") oppose the motion.

Plaintiff Roberto Cervera ("Cervera") was a bridge painter employed by nonparty Capco Steel working on a project at premises located at the subway and commuter rail enhancements to CitiField Stadium in Queens, New York. Queens Ballpark owns the project, co-defendant Hunt/Bovis was the general contractor/construction manager and Capco Steel was a subcontractor Hunt/Bovis hired. This action arises from an accident that occurred at the project on April 6, 2008. Motion, Exs. 1 & 2.

On the morning of the accident, Cervera and his partner proceeded to the staircase that connected the CitiField parking lot with the MTA subway, the location where they had left off work the day before. Cervera was working at the bottom of the staircase applying a primer coat of paint on the structural frame that supports the steps

while his partner was working at the top of the staircase. Steelworkers were installing the stair treads above Cervera. Cervera EBT, at 79-81, 84, 102-104.

One of the steelworkers who was installing the stair treads was Mark Kelly ("Kelly"), a Capco Steel employee, who submits an affidavit regarding the occurrence. Kelly averred that the normal procedure when installing stair treads is to use pins to hold the tread in place temporarily until the connection is made. However, according to Kelly, at the time of the accident, no pins were available to secure the tread and, as a result, the tread that he was installing fell approximately four or five feet, striking Cervera. Kelly Aff.

Cervera testified that he did not see what hit him or know what hit him, but that it felt as though a sledgehammer had hit him on the side of his head. He immediately lost consciousness and did not regain consciousness until he was in the hospital. Cervera EBT, at 106.

William T. Ferraro ("Ferraro"), a job steward working for Capco Steel at the time of the accident, was deposed in this matter and testified that he arrived at the scene of the accident shortly after Cervera was struck and saw Cervera lying underneath the stairway. Ferraro EBT, at 45-48. Ferraro stated that the tread that struck Cervera weighed approximately 60-80 pounds. *Id.* at 37. According to Ferraro, the process used to install stair treads involves lowering the riser into place by hand, using a bolt pin to fit it into a hole in the riser while guiding the riser into place, and that two workers would work in tandem to place each riser, one worker on top to guide the riser into place with the pin, and one worker below to secure the bolt with a nut. *Id.* at 35-39, 41-42, 61-62.

Leonard Kelleher ("Kelleher"), a senior superintendent working for defendant Bovis Lend Lease LMB, Inc. ("Bovis"), was also deposed in this matter, and authenticated the contract between Queens Ballpark and Hunt/Bovis, identifying Hunt/Bovis as the general contractor for the project. Motion, Ex. 5; Kelleher EBT, at 69-70. Kelleher stated that he received a telephone call reporting the accident the morning of its occurrence and that he then drove over to the project site from his off-site location. By the time he arrived at the scene of the accident, Cervera had already been removed by ambulance. *Id.* at 50-52. Kelleher did not speak to anyone who could give a first-hand account of the accident and has no personal knowledge as to what actually occurred. *Id.* at 67.

Plaintiffs contend it is undisputed that the tread was unsecured, which caused it to fall, injuring plaintiff. In opposition, defendants urge the court not to consider Kelly's affidavit since he was not properly disclosed to defendants and plaintiffs submit no other evidence supporting their claim that they are entitled to summary judgment on their Labor Law § 240 (1) cause of action.

Defendants insist that, despite plaintiffs knowing Kelly's proper address and defendants' repeated demands for same, plaintiffs never disclosed Kelly's address to them. In support of this assertion, defendants provide: (1) a copy of their discovery demands (Opp., Ex. B); (2) plaintiffs' response, in which Kelly is identified but with an incorrect address (Opp., Ex. C); (3) the parties' preliminary conference order requiring each side to provide the names and addresses of all witnesses (Opp., Ex. D); (4) the affidavit of defendants' investigator attesting to the fact that he tried on several occasions to contact Kelly at the address plaintiffs gave defendants but was unable to

locate Kelly (Opp., Ex. E); (5) a letter from defendants' counsel to plaintiffs' counsel, dated November 30, 2009, requesting an updated address for Kelly (Opp., Ex. F); and (6) plaintiffs' further response to defendants' demands, dated March 4, 2010, again giving an incorrect address for Kelly (Opp., Ex. G).

Defendants assert that, since a different address appears on Kelly's affidavit submitted in support of plaintiffs' motion, plaintiffs were aware of Kelly's correct address and failed in their continuing obligation to provide them with updated information. It is defendants' position that, absent Kelly's affidavit, plaintiffs have provided no evidence that proper protection was not provided to plaintiff at the job site. Moreover, according to Cervera's MRI report, Cervera indicated that a ladder fell on him, not a stair tread. Hence, argue defendants, a question of fact remains as to the cause of Cervera's injuries.

In reply, plaintiffs submit a supplemental affidavit from Kelly, in which he states that he resided at the address appearing in his affidavit in January of 2009, when the affidavit was taken, but that, previously, he resided at the address that plaintiffs provided to defendants. Further, plaintiffs contend that defendants have provided no evidence that the address that they gave for Kelly was incorrect at the time that it was provided, except for the affidavit of an investigator who attempted to serve Kelly, unsuccessfully, with a subpoena, which is not evidence that Kelly did not reside at that address on the dates indicated. In addition, plaintiffs point to the fact that many of the cases defendants cite to support the position that Kelly's affidavit should be disregarded involve situations in which the affiant was not disclosed until after the note of issue was filed. Conversely, in the instant matter, Kelly's name and address, correct as of the

time that the address was provided, were correct and turned over well before the note of issue was filed. Finally, plaintiffs aver that the MRI report included with the opposition papers is not authenticated, is hearsay and should not be considered.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Section 240 (1) of the New York Labor Law states, in pertinent part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

As stated in *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991):

> It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a

> breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted].

Labor Law § 240 (1) was designed to protect workers against elevation-related risks. "In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries." *Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 (2d Dept 1998).

For section 240 (1) of the Labor Law to apply:

> a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute.

Narducci v Manhasset Bay Assocs., 96 NY2d 259, 268 (2001).

Plaintiffs' motion is denied. The evidence defendants submit clearly establishes that they requested Kelly's address on numerous occasions. Even though plaintiffs have provided the supplemental affidavit from Kelly stating that the address for him given to defendants prior to January, 2009 was correct, it is undisputed that, in January of 2009, when Kelly provided the affidavit, that address was no longer accurate. In November of 2009, defendants specifically requested a correct address for Kelly, 10 months after the affidavit was prepared, but plaintiffs never divulged the new address for the two intervening years, right up to the time that the instant motion was filed. Under these circumstances, in the exercise of judicial discretion, the court declines to consider Kelly's affidavit in support of plaintiffs' motion. *Perez v New York City Housing*

Auth., 75 AD3d 629 (2d Dept 2010); *Rodriguez v New York City Housing Auth.*, 304 AD2d 468 (1st Dept 2003); *Andujar v Benenson Inv. Co.*, 299 AD2d 503 (2d Dept 2002).

Without Kelly's affidavit, plaintiffs fail to meet their burden of establishing their right to summary judgment. The only other individual with personal knowledge of the occurrence whose testimony plaintiffs provided is Cervera, who affirmatively states that he does not know what caused his accident, that he did not see what happened and that he only felt something hit his head that knocked him out. Under these circumstances, a triable issue of fact remains as to whether the object that hit Cervera fell under circumstances giving rise to the protections afforded pursuant to Labor Law § 240 (1). Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability on their cause of action based on a violation of Labor Law § 240 (1) is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
August 8, 2011

Martin Shulman, J.S.C.