SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ADOLF RADELJIC and DONNA ANN SPADAFINO-RADELJIC,

Plaintiffs,

-against-

CERTIFIED OF N.Y., INC., a/k/a CERTIFIED OF NEW YORK, INC., a/k/a CERTIFIED CONSTRUCTION INC., a/k/a CERTIFIED OF NEW YORK CONSTRUCTION, and 326 WEST 80TH ASSOCIATES, LLC,

Defendants.

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CERTIFIED CONSTRUCTION INC.,

Third-Party Plaintiff,

-against-

PROKRAFT C.S., INC.,

Third-Party Defendant.

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326 WEST 80TH ASSOCIATES LLC

Second Third-Party Plaintiff,

-against-

PROKRAFT C.S., INC.,

Second Third-Party Defendant.

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Index No. 158995/2012
Motion Seq: 3, 4, 5

DECISION & ORDER
ARLENE P. BLUTH, JSC

Motion Sequence Numbers 003, 004 and 005 are consolidated for disposition. The motion (Mot Seq 003) by Certified of New York, Inc. ("Certified") for *inter alia* summary judgment dismissing plaintiff's complaint and for summary judgment against third-party defendant Prokraft C.S., Inc. ("Prokraft") is denied and the cross-motion by plaintiff for partial

summary judgment on its Labor Law §§ 240(1) and 241(6) claims is denied. The motion (Mot Seq 004) by defendant 326 West 80th Associates, LLC ("326") for summary judgment dismissing plaintiff's complaint and for summary judgment on its third-party complaint is granted. The motion (Mot Seq 005) by third-party defendant Prokraft for *inter alia* summary judgment dismissing plaintiff's complaint is denied.

Background

This action arises out of injuries suffered by plaintiff Adolf Radeljic ("plaintiff") on October 17, 2012 when he fell approximately 10 feet down an elevator shaft at a construction site located at 326 West 80th Street, New York, New York. At the time of the accident, plaintiff was raising the height of the first floor. Plaintiff fell near the end of the work day, around 4:00 p.m., while he was surveying the first floor to determine what materials would be needed for the following day. The subject elevator shaft began in the basement and ended on the sixth floor.

326 was the owner of the property and contracted with Certified (the general contractor) to turn the structure into a single-family home. Prokraft (plaintiff's employer) was hired by Certified to do carpentry work.

Certified moves for summary judgment on the ground that it was Prokraft's responsibility to provide tools and safety equipment to plaintiff and that plaintiff was not wearing a body harness at the time of the accident. Certified also claims that a barricade, which was used to protect workers from the open elevator shaft, was moved at the direction of Prokraft so that Prokraft could complete its work. Certified argues that plaintiff was the sole proximate cause of his accident because he refused to wear a readily-available safety harness.

Prokraft also claims that plaintiff was the sole proximate cause of his accident because he chose to work near an open elevator shaft and that plaintiff failed to utilize safety devices available on the job site.

In opposition, plaintiff claims that there is no evidence that he moved the elevator shaft barricade which was installed by Certified. Plaintiff also claims that even if there were safety harnesses available to him, there was no place for him to tie off the harness to allow him to do his work. Plaintiff also cross-moves, seeking partial summary judgment on the ground that the presence of the unguarded shaftway violates the Industrial Code.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to

delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee.* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Here, the Court finds that there are multiple issues of fact which compel this Court to deny the motions for summary judgment by Certified and Prokraft and the cross-motion for partial summary judgment by plaintiff. As an initial matter, it is unclear what caused plaintiff to fall into the shaftway. Plaintiff testified that before his accident, he was checking to see what materials he would need to complete his work the following day (NSYCEF Doc. No. 91 at 195). Plaintiff, who was serving as Prokraft's foreman,[1] walked near the shaftway for at least the 15 minutes prior to his accident (*id.* at 194-95). Plaintiff asserted that he did not recall seeing any rope on the ground near the shaftway prior to his fall (*id.* at 218). And plaintiff did not remember coming into contact with the rope prior to his fall (*id.* at 224-25). Plaintiff only speculated that he tripped over the rope because the rope was "all over" him after he fell (*id.* at 224).

And Raymond Betancourt, one of Prokraft's carpenters, testified that he *did not* see plaintiff trip over a rope and fall into the shaftway (NYSCEF Doc. No. 98 at 17). Betancourt

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[1]Plaintiff testified that he served as the foreman for Prokraft on the job site when Donald (plaintiff's brother and boss) was not there (NYSCEF Doc. No. 91 at 38-39). Plaintiff acknowledged that he was authorized to stop work if he thought there was an unsafe working condition (*id.* at 144). The parties dispute the distribution of safety responsibilities between Prokraft and Certified. Although Certified , as the general contractor, has non-delegable duties under the Labor Law, the fact that a subcontractor's foreman worked near an open shaftway for fifteen minutes must factor into the sole proximate cause analysis.

claims that the rope that plaintiff says was all over him was used by Certified to bring trash and construction materials up and down the shaftway (*id.* at 18).

The fact that plaintiff cannot identify what caused him to fall creates an issue of fact. If plaintiff did not trip over a rope and he simply fell into the elevator shaft because he was not watching where he was going, and that he failed to wear an available harness and failed to tie that harness off, then a jury might find that plaintiff was the sole proximate cause of his accident. Plaintiff admitted that he was working right next to an open shaftway for at least fifteen minutes prior to his fall and, as will be explored below, there may have been safety devices available at the site.

Certified and Prokraft are not entitled to summary judgment dismissing plaintiff's complaint because if plaintiff tripped over a rope, which was purportedly used by Certified to haul garbage through the shaftway, then a jury could find Certified liable for violations of the Labor Law.

Barricade

The parties agree that a barricade was used, at times, during the project to protect workers from falling into the elevator shaft.

Betancourt testified that he took off the barricade on the morning of the accident so that he could complete his work and that he told plaintiff that he was taking off the barricade (*id.* at 104). Betancourt also testified that he took down the barricade with a Certified employee named Dorjee (*id.* at 25-26).

Plaintiff testified that he did not remember the presence of any barricade protecting the elevator shaft on the day of his accident (NYSCEF Doc. No. 91 at 269-71). Plaintiff testified

that Betancourt did not inform him that Betancourt was going to take down the barricade on the day of the accident (*id.* at 157-58). Wendel Felix, a Prokraft employee, claimed that on the day of the accident he saw a barricade protecting the shaftway on the first floor just before 8:00 a.m. (NYSCEF Doc. No. 90 at 23).

Joseph O'Leary, a Certified employee, testified that he noticed that the barricade was not in place while he was going out to lunch on the day of the accident and that he put it back (NYSCEF Doc. No. 95 at 77-78). Betancourt claims that no one put the barricade back during lunch and that no one could have put it back (NYSCEF Doc. No. 98 at 114).

Certified also offers the affidavit of Dorjee Sherpa, one of its laborers, who claims that the barricade was there every day, that he did not remove the barricade (contradicting Betancourt's testimony), but that he noticed on the day of plaintiff's accident (around 3 p.m.) that the barricade had been removed (NYSCEF Doc. No. 87). Sherpa guesses that Betancourt moved the barricade so he could do his work (*id.*).[2]

The presence, removal and knowledge about the removal of the barricade present issues of fact. The fact is that if O'Leary's testimony about putting the barricade back in place during lunch is credited, then there is no evidence about who removed the barricade in the afternoon before plaintiff fell.

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[2]Although plaintiff objects to this affidavit, plaintiff failed to raise a sufficient ground for this Court to ignore the affidavit. Plaintiff may not like its contents, but that is not enough to disregard it. And the case law relied on by plaintiff to reject the affidavit is inapposite because the cited cases deal with affidavits that contradict prior deposition testimony (*see Celaj v Cornell*, 144 AD3d 590, 42 NYS3d 25 [1st Dept 2016]; *Saavedra v 89 Park Ave. LLC*, 143 AD3d 615, 39 NYS3d 462 [1st Dept 2016]). Sherpa was never deposed.

A jury might not credit O'Leary's testimony and decide that they believe Betancourt's account– that plaintiff was specifically told that the barricade was being taken down. The jury could subsequently conclude that plaintiff was the sole proximate cause of his accident because he knew that the safety device intended to prevent a fall into the elevator shaft was taken down by one of his own workers and plaintiff decided to work right near an open shaftway in spite of the clear danger presented. Alternatively, the jury could credit plaintiff's theory that Certified had responsibility for the barricade and took it down to get rid of garbage at the site. This Court cannot make a credibility determination on a motion for summary judgment.

Harness

The parties also dispute whether plaintiff could have used a harness to prevent his fall. Jason Allen, another Prokraft employee, testified that he used a harness while building the elevator shaft and that he was able to tie off while doing this work (NYSCEF Doc. No. 99 at 14-15). Allen added that there were always harnesses available on the site (*id.* at 50). Allen further testified that it was plaintiff who instructed him how to use the harness and tie it off (*id.* at 64).

Plaintiff testified that he did not know whether there were harnesses inside a gang box at the site and that he did not look in the box to see if any were in there on the day of the accident (NYSCEF Doc. No. 91 at 143, 145). Plaintiff also contended that one of Prokraft's employees (Wendel) used a harness and a tie line while he was building the elevator shaft (*id.* at 275-276). Plaintiff testified that the closest tie line to the front of the shaftway was 15 feet away (*id.* at 274). Plaintiff acknowledged that he never wore a personal protection vest (another safety device) on the job site despite the fact that Betancourt had used it (*id.* at 252).

Plaintiff's brother, Donald Radeljic (who ran Prokraft), testified that it was the responsibility of Prokraft to provide the safety harnesses and that it was the foreman's job to complain when there was no place to tie off a harness (NYSCEF Doc. No. 86 at 27, 29-30). Donald testified that "there was probably nowhere to tie off if you were working on the first floor" (*id.* at 102). Betancourt testified that he saw harnesses in the gang box on the day of the accident (NYSCEF Doc. No. 98 at 112).

And Wendel Felix, when asked about whether there were places to tie off on the first floor, testified that "There were certain parts that you can tie off. I don't know if it was close enough to where you are, but there are certain spots that you can– it could be further than we are, but not all the times you can be where you can tie off" (NYSCEF Doc. No. 90 at 17). Felix acknowledged that he did not work on the flooring on the first floor but insisted that you could tie off while working on the first floor but not in every position (*id.* at 17-18).

This Court cannot conclude as a matter of law that Certified, Prokraft or plaintiff are entitled to summary judgment on the harness issue. It is undisputed that there were harnesses used on the site and that plaintiff did not make an effort to use or locate a harness on the day of the accident. However, it is unclear whether plaintiff had a place to tie off the harness to complete his work on the first floor. Felix's testimony indicates that some work could be done on the first floor while using a harness, but that a worker could not use a harness in every position. And Donald's testimony is not dispositive either– he only stated there was "probably" nowhere to tie off. That is not enough to decide this issue as a matter of law.

As there are issues of fact with respect to liability, the branches of the motions by Prokraft and Certified relating to the third-party complaint are denied.

326's Motion– the Homeowner's Exemption

326, the owner of the property, claims that it is entitled to summary judgment because it is entitled to the homeowner's exemption under the Labor Law. 326 argues that it is a holding company for Mason and Geri Haupt, who set up 326 solely for holding ownership of the property. 326 insists that neither Mason nor Geri have any construction experience and that they did not direct or control the work. 326 contends that regular visits by the Haupts to the job site does not mean that they supervised, directed or controlled the work. 326 concludes that it had no notice of any dangerous condition.

In opposition, plaintiff urges this Court to look at the "site" under construction and conclude that because the scale of the project was large, the Court should consider it a commercial real estate development rather than a residential renovation. Plaintiff claims that because Mr. Haupt directed Certified to construct a temporary staircase from the first floor down to the basement, plaintiff had to raise the level of the first floor thus providing a direct connection to the work plaintiff was doing when he fell. Plaintiff also claims that 326 is not entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim because there are issues of fact relating to whether 326 had actual or constructive notice of hazardous conditions.

Labor Law § 240(1) provides that "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 . . . 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 . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 241(6) requires that "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places" (Labor Law § 241[6]). These requirements do not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work" (*id.*).

"Labor Law § 241(6) contains language identical to that contained in § 240(1) exempting from its application "'owners of one and two-family dwellings who contract for but do not direct or control the work'" (*Ortega v Puccia*, 57 AD3d 54, 60, 866 NYS2d 323 [2d Dept 2008] [internal quotations and citations omitted]).

These exemptions for homeowners were "intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law, reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection" (*Bartoo v Buell*, 87 NY2d 362, 367, 639 NYS2d 778 [1996]). "[W]hether the exemption is available to an owner in a particular case turns on the site and purpose of the work"(*Cannon v Putnam*, 76 NY2d 644, 650, 563 NYS2d 16 [1990]).

Here, plaintiff failed to raise an issue of fact sufficient to deny the application of the homeowner's exemption in this case. The fact that the Haupts purchased a large home (for a considerable amount of money) does not change the fact that the property was being turned into a single-family home and that the Haupts did not direct or control the work. Expressing desires for

what the project would look like does not mean that the Haupts told workers for Certified or Prokraft how to do their jobs. And that the Haupts frequently visited the job site does not change the Court's conclusion. This project converted a property into a single-family home and there is no evidence that the owners (who have no construction experience) told workers on the site how to complete their tasks.

The Court also grants the branch of 326's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 claims.

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295, 590 NYS2d 55 [1992]).

Here, there is no evidence that the Haupts exercised any supervisory control over the work site. Mason and Geri Haupt submit affidavits claiming that they always saw a barrier near the elevator shaft when they visited the property (NYSCEF Doc. No. 103, ¶ 16; NYSCEF Doc.

No. 104, ¶ 11). And the deposition testimony from employees for Certified and Prokraft, described above, establishes that the barricade (designed to protect against an unguarded shaftway) was present on the morning of the accident and later removed. Accordingly, there is no basis to find that the Haupts created or had constructive notice of a dangerous condition at the site.

326 is also entitled to summary judgment on its cross-claim for contractual indemnification against Certified.

Summary

There are clearly divergent stories about the accident and plaintiff's role at the job site. Under plaintiff's version, Certified was responsible for safety, removing the barricade and for the rope over which plaintiff thinks he must have tripped. Plaintiff insists he was simply a worker on a job site where the general contractor, Certified, did not listen to his complaints about potential dangers. Certified characterizes plaintiff as Prokraft's foreman at the site and points to the fact that plaintiff made no attempt to use a readily-available safety device (such as a harness) despite the fact that he was working near an open elevator shaftway for at least 15 minutes. A jury could credit plaintiff's account and blame Certified or the jury could find that plaintiff was the sole proximate cause of his accident because he refused to use safety devices and knew that the barricade was taken down on the day of his accident.

Accordingly, it is hereby

ORDERED that the motion by Certified (Mot Seq 003), the cross-motion by plaintiff and the motion by Prokraft (Mot Seq 005) are denied; and it is further

ORDERED that the motion by 326 (Mot Seq 004) for summary judgment dismissing plaintiff's claims against it and for summary judgment on its contractual cross-claim against Certified is granted. All claims against 326 by plaintiff are hereby severed and dismissed.

This is the Decision and Order of the Court.

Dated: December 20, 2017
New York, New York

ARLENE P. BLUTH, JSC