Silva v Hehe Enters., LLC
2018 NY Slip Op 34319(U)
December 11, 2018
Supreme Court, Rockland County
Docket Number: Index No. 034141/2016
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---x
LAERCIO SILVA

Plaintiffs,

-against-

HEHE ENTERPRISES, LLC and ROSE IMPROVEMENT, INC.,

Defendant
---x

DECISION & ORDER
Index No. 034141/2016

Motion #1 - MG and MD
Motion #2 - MD

DC - N
Adj: 1/23/19

Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 4 were considered in connection with Plaintiff's Notice of Motion (Motion #1) for an Order pursuant to *Civil Practice Law and Rules* § 3212 granting Summary Judgment in favor of Plaintiff and against the Defendant Rose Improvement, Inc. on the issue of liability, that the matters be set down for trial as to damages and for such other and further relief as the Court deems just and proper; and also considered in connection with Plaintiff's Notice of Motion (Motion #2) for an Order pursuant to *Civil Practice Law and Rules* § 602(b) consolidating Action 1 (SILVA v. HEHE ENTERPRISES, et ano., Index # 34141/2016) and Action 2(SILVA, et al., v. WAVERLY HOMES, et ano., Index # 511295/2018) on the ground that both Actions have identical questions of law and fact:

PAPERS	**NUMBERED**
Notice of Motion (Motion #1)/Affirmation of Richard Winograd, Esq./ Exhibits (A-E)	1
Affirmation of Kirby J. Smith, Esq. In Opposition/Exhibit A	2
Reply Affirmation of Timothy W. Norton, Esq.	3
Notice of Motion (Motion #1)/Affirmation of Richard M. Winograd, Esq./ Exhibits (A-E)	4

The instant actions are for personal injuries arising out of an accident that occurred on June 28, 2016 when Plaintiff alleges he fell from an unsecured 28 foot aluminum ladder while working on a construction project at "The Waverly Gardens Project," 7 Luttman Place, Monticello, New York 12701, Rockland County.

Plaintiff commenced the Action #1 (Index #34141/2016) with the filing of a Summons and Complaint on September 29, 2016 against Defendant Rose Improvement (hereinafter Rose) the general contractor at the construction project and Hehe Enterprises, LLC. Issue was joined as to Defendant Rose Improvement by service of an Answer on January 17, 2017. Discovery was exchanged and Plaintiff and the owner of Rose, Isaac Rosenberger both appeared for depositions (one on April 3, 2018 and the other on May 16, 2018. Subsequently, Plaintiff filed a Note of Issue along with a Certificate of Readiness in Action #1 on June 27, 2018.

On June1, 2018 Action #2 was commenced in Kings County by filing and serving a Summons and Complaint against Defendants Waverly Homes Development, LLC and Highview Builders Group, Inc. (Index # 511295/2018[1]). On July 27, 2018 issue was joined by Defendant Highview Builders Group, Inc by the filing of an Answer. According to Plaintiff the second action was commenced as it was determined that Waverly Homes Development, LLC and Highview Builders Group, Inc. were "viable" defendants since they "owned, managed, controlled, maintained and/or operated the premises known as The Waverly Gardens Project located at 7 Lutman Place, Monticello, New York 12701.

Plaintiff contends that he was installing framing at a construction project located at 7 Lutman Place, Monticello, New York 12701 in which Defendant Rose Improvement was the general contractor. According to Plaintiff he was installing plywood and was working alone using a 28-foot aluminum ladder provided to him by Defendant. Plaintiff testified that he was not provided with a safety harness or any other safety equipment by Defendant and no safety harness or equipment was available for his use at the construction site. The Plaintiff testified

[1] Plaintiff submits that Action #2 was assigned Index # 24038/2017 in paragraph 8 on the Affirmation annexed to Motion #2. However, the copy of the Summons and Complaint annexed to the Affirmation indicates that the Index # is 511295/2018.

that the aforementioned ladder was place on top of a three (3) to four (4) foot circular mound and he began installing the plywood. Based upon Plaintiff's Examination Before Trial (hereinafter EBT) transcript, the aforementioned ladder slipped backwards, hit a "neighboring" building and came to rest. According to Plaintiff after the ladder fell backwards he tried to grab a window in the building upon which he was working, but he fell at the same time as the ladder fell resulting in hanging by the ladder with one (1) leg. Plaintiff testified that he was hanging from the ladder screaming for about two (2) minutes before another worker came and pulled him from the ladder to a sheet of plywood. The Plaintiff testified that as a result of the fall he was taken to a hospital emergency room via ambulance. As a result of the fall, Plaintiff submits that he suffered a displaced intra-articular lateral tibial plateau fracture, non-displaced fracture of the right fibula, lateral meniscus tear in right knee, right knee joint effusion, baker's cyst and pain in his right knee. Plaintiff underwent an internal fixation surgery

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

a. Summary Judgment on Labor Law § 240(1) Claims

Plaintiff argues that it is undisputed that he was engaged in a protected activity under the Labor Law since at the time of the subject accident he was engaged in work activities that placed him at an elevated height and that the work he was engaged in was related to the construction project. The Plaintiff also contends that there is no dispute that Defendant Rose was the general contractor of the construction project where the accident occurred. As the general contractor, Plaintiff submits that Defendant was required to provide proper safety protection to workers on the project and is liable for not providing the proper safety protection. Further, Plaintiff avers that based on his EBT testimony and that of Defendant's representative the Defendant failed to provide any device to protect Plaintiff during his elevated work and therefore Defendant has absolute liability against them under *Labor Law* § 240.

In opposition Defendant Rose distinguishes the factual scenarios in the cases cited by Plaintiff in support of their argument arguing that those factual differences make the findings in the cases inapplicable. Specifically, Defendant argues that each of the cases cited the accident

was caused by a defective ladder or the "application of force upon the ladder/plaintiffs" which contributed to the fall. Defendant contends that in the instant action there is no set of facts that demonstrates the inadequacy of a primary safety device, but rather the facts demonstrate that the Plaintiff was the sole proximate cause of the accident. In support of their argument Defendants note that the Plaintiff testified that he his boss provided him ladders of various lengths (heights) from sixteen (16) feet to forty-two (42) feet for use at the subject construction project. Defendants argue that Plaintiff testified he was initially using the sixteen (16) foot ladder, switched to the twenty-eight (28) foot aluminum ladder and placed the ladder on top of a three (3) to four (4) foot mound of dirt rather than use a longer ladder. Further, Defendants argue that Plaintiff's fall was solely as a result of Plaintiff's own actions since he testified he had various lengths of ladders, including several taller ladders, and that he had did not testify that he was unable to place the subject ladder on flat and stable land. Additionally, Defendants submit that Plaintiff never testified about a defect in the ladder or the application of force on the ladder or himself which was the cause of his fall.

In Reply Plaintiff argues that he cannot be the sole proximate cause of the subject accident in a circumstance in which he was not provided adequate safely equipment. Rather Plaintiff argues that it is "undisputed" that he was working alone on a 28 foot ladder that had no mechanical security measure to prevent slippage and was not being held in place by a person at the bottom. Further, Plaintiff contends that it is undisputed he was working from a height of approximately thirty (30) feet without a safety harness or any fall protection. Based upon the facts presented the Plaintiff submits that they have established a prima facie entitlement to summary judgment pursuant to *Labor Law* §§ 240(1) and 241(6). As to Defendant's argument that a different ladder could have been used, the Plaintiff argues that any failure on his part to use a "slightly less inadequate unsecured ladder" does not remove the fact that the Defendant violated Labor Law's requirement to provide safety devices and a fall protection system. Further, Plaintiff submits that the proximate cause of Plaintiff's injuries was not the use of a smaller ladder or placement on a dirt mound, but rather the Defendant's failure to supply proper safety equipment.

New York *Labor Law* § 240(1) creates a statutory cause of action for strict liability against landowners who do not provide adequate protection for work being performed at a construction site, and negligence on the part of a worker cannot bar or reduce the worker's recovery. [*Blake v. Neighborhood Housing Services of New York City*, 1 N.Y.3d 280 (2003)]. All contractors, owners, and their agents in the erection of a building or structure must furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, ladders, stays, hangers, slings, blocks, pulleys, braces, irons, ropes and other devices which must be so constructed, placed, and operated as to give proper protection to a person so employed. [*Labor Law* § 240(1)]. This statutory cause of action applies to types of work where an inherent risk emanates from the height at which the work is to be performed, or from the application of the force of gravity to an object or person. [*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Biafora v. City of New York*, 27 AD3d 506 (2d Dept 2006)]. Public policy protecting workers requires that the Labor Law be construed as liberally as possible in order to afford appropriate protections to the worker. [*Kosavick v. Tishman Const. Corp. of New York*, 50 AD3d 287 (1st Dept 2008); *Panek v. County of Albany*, 99 NY2d 452 (2003)]. The purpose of the Labor Law is to place the ultimate responsibility for safety practices on owners and contractors instead of on workers, who as a practical matter lack the means of protecting themselves from accidents. [*Martinez v. City of New York*, 93 NY2d 322 (1999)].

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), *citing* *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), *citing* *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert*

Frank Corp. v. Federal Ins. Co., 70 NY2d 966 (1988); Zuckerman v. City of New York, 49 NY2d 557 (1980)]. Where material issues of fact exist that cannot be resolved on the papers filed in support of and in opposition to summary judgement the motion must be denied. [Matter of Suffolk County Department of Social Services V. Jams M., 83 NY2d 178 (1993)].

Plaintiff has established that the lack of safety equipment provided to him while he was working at the subject construction site was a violation of Labor Law § 240(1) and that the violation was the proximate cause of his injuries. The absence of appropriate safety devices constitutes a violation of the statute as a matter of law. [Andino v. BFC Partners, 303 AD2d 338 (2d Dept 2003)]. Defendants are not afforded either the "sole proximate cause" or "recalcitrant worker" defenses. While a worker cannot recover under sections of the Labor Law other than Section 240(1) if his conduct was the sole proximate cause of his injuries, this defense is unavailable if the worker was not provided with adequate fall protection as required by that section. [Blake v. Neighborhood Housing Services of New York City, 1 NY3d 280 (2003)]. Here, Plaintiff's action cannot be said to be the sole proximate cause of his injuries since another proximate cause of his injuries was the lack of proper safety equipment to complete the framing work on the home at the subject construction site. Nor was Plaintiff a recalcitrant worker, since he did not deliberately refuse direct instructions to use a safety device which was available, visible and in place at the work site. [Baltazar v. Full Circle Construction Corp., 268 AD2d 96 (2d Dept 2000); Arey v. McDunn, 29 AD3d 1137 (3d Dept 2006)]. It is well settled that "a generic statement of the availability of safety devices is insufficient to create an issue of fact that plaintiff was the sole proximate cause of his injury." [Kosavick v. Tishman Const. Corp., 50 AD3d 287 (1st Dept 2008)]. Defendant's have not even made a generic statement of the availability of safety devices. In fact there is no assertion by Defendants that any safety devices were available or provided to Plaintiff as part of his framing work which he was engaged in at the time of the subject accident. As such, Plaintiff's motion for summary judgment as to liability pursuant to Labor Law § 240(1) is granted.

b. Summary Judgment on Labor Law § 241(6) Claims

Plaintiff submits that similar to the absolute liability imposed on Defendant pursuant to Labor Law § 240, Labor Law § 241(6) imposes a non-delegable duty to a general contractor at a construction site to provide reasonable and adequate protection and safety to workers and to comply with specific safety rules and regulations set forth by the Commissioner of the Department of Labor. The Plaintiff contends that since the duties set forth under Labor Law § 241(6) are non-delegable the Plaintiff is not required to show the Defendant exercised supervision or control over the worksite for a right of recovery. Rather, Plaintiff avers that he need show that Defendant violated sections of the Industrial Code and that the violation was the proximate cause of the injury.

The Plaintiff argues that Defendant violated Industrial Code Sections 12NYCRR 23-1.21(b)(4)(iv), 12 NYCRR 23-1.21(b)(4)(ii) and 12 NYCRR 23-1.21(b)(3)(iv). Specifically, the Plaintiff argues that he was on a ladder higher than ten (10) feet above the ladder footing, there was no method to secure the ladder at the top and no person holding the bottom to prevent slippage as required by 12 NYCRR 23-1.21(b)(4)(iv). In regards to the footing of the ladder used by Plaintiff, he testified in his EBT that the ladder was placed on top of a three (3) to four (4) four foot circular mound, leaving the ladder unsecure and placed on an improper and unsafe surface in violation of Industrial Code 12 NYCRR 23-1.21(b)(4)(ii). Finally, Plaintiff argues that the ladder provided by Defendant to Plaintiff was "flawed and defective" in violation of Industrial Code 12 NYCRR 23-1.21(b)(3)(iv) and the flaw and defect caused Plaintiff to fall.

In opposition Defendant argues that the Industrial Code sections are inapplicable to the facts in the instant action and as such there is no liability under Labor Law § 241(6). The Defendant again notes that the cases cited by Plaintiff in support of their arguments are distinguishable since there are "clear factual distinctions." Specifically, Defendants note that the Plaintiff never testified in his EBT and no testimony has been elicited that the ladder the Plaintiff was using when he fell was unsafe, had a material defect or there were insecure objects used as ladder footings. In contrast, Defendant notes that Plaintiff testified in his EBT that the ladder he was using was new. Defendant submits that the Plaintiff has failed to demonstrate a violation of

any of the three Industrial Codes and the "mere fact that the ladder fell is not enough to establish a violation under the statute."

Labor Law § 241(6) imposes a non-delegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. An additional purpose of Labor Law § 241 (6) is that it requires the owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. [Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 (1993)]. Labor Law § 241(6) is considered a hybrid of the common-law principles and Labor Law § 240, in that it includes the general common-law standard of care and also considers the specific detailed rules through the Labor Commissioner's rule making authority. [Ross, 81 NY2d at 503]. In a circumstance in which there is no ongoing construction Section 241(6) Labor Law is not intended to confer liability on a Defendant. [Toro v. Plaza Construction Corp., 82 AD3d 505, 506 (1st Dept 2011)].

A plaintiff must demonstrate a violation of any one of the aforementioned regulations promulgated by the Commissioner of the Department of Labor. [Ross v. Curtis-Palmer Hydro-Elec. Co, 81 NY2d at 502]. The plaintiff must demonstrate that the violation of the regulation was the proximate cause of the injuries suffered. [Rizzuto v. L.A. Wegner Contr. Co., 91 NY2d 343 (1998)].

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 NY2d 72 (2003), *citing* Alvarez v. Prospect Hosp., 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306 AD2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 (2000), *citing* Alvarez, *supra*, and Winegrad v. New York Univ. Med. Center, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated

allegations unsupported by competent evidence are insufficient to raise a triable issue. [(Gilbert Frank Corp. v. Federal Ins. Co., 70 NY2d 966 (1988); Zuckerman v. City of New York, 49 NY2d 557 (1980)]. Where material issues of fact exist that cannot be resolved on the papers filed in support of and in opposition to summary judgement the motion must be denied. [Matter of Suffolk County Department of Social Services V. Jams M., 83 NY2d 178 (1993)].

Plaintiff has established his prima facie claim of a violation of *Labor Law* § 246(1) based upon the violation of Industrial Code 12 NYCRR 23-1.21(b)(4)(iv) shifting the burden to Defendant to raise a issue of material fact as to the whether the Defendant violated that Industrial Code as asserted by Plaintiff. The Court grants summary judgment as to *Labor Law* § 246(1) based solely on the violation of 12 NYCRR 23-1.21(b)(4)(iv). As to the other two Industrial Code violations, 12 NYCRR 23-1.21(b)(4)(ii) and 12 NYCRR 23-1.21(b)(3)(iv), the Court finds that the Plaintiff has not established his claim sufficient to warrant the Court granting summary judgment. Specifically, the Court finds that Plaintiff has failed to demonstrate that the two Industrial Codes are applicable to the instant accident, never shifting the burden to Defendant as to those two code violations. Material questions of fact precluding summary judgment remain. Therefore, the Plaintiff's motion for summary judgment as to the *Labor Law* § 246(1) claims based upon violations of 12 NYCRR 23-1.21(b)(4)(ii) and 12 NYCRR 23-1.21(b)(3)(iv) is denied.

C. Argument Regarding Comparative Fault is Inapplicable to Issue of Defendant's Liability under Labor Law § 241(6)

Plaintiff directs the Court to the recent Court of Appeals ruling, *Rodriguez v. City of New York*, 31 NY3d 312 (2018) in which the Court found that the plaintiff does not bear the "double burden" of establishing the absence of his/her own comparative fault to obtain summary judgment on the issue of a defendant's liability. The Plaintiff argues that based upon the recent Rodriguez ruling their motion should be granted as to the Defendant's liability and the Court cannot consider Plaintiff's comparative fault.

Defendant fails to raise any argument in their opposition as to the applicability of Rodriguez to the instant action.

PLAINTIFF'S NOTICE OF MOTION TO CONSOLIDATE ACTION #1 (SILVA v HEHE ENTERPRISES, et ano, INDEX # 34141/2016) and ACTION #2 (SILVA, et al., v. WAVERLY HOMES, et ano., bearing INDEX # 511295/2018)

Plaintiff submits the instant unopposed motion to consolidate an action before the undersigned and an action filed within the past year in Kings County based on the argument that both actions have identical questions of law and fact. According to Plaintiff the two (2) actions stem from an identical set of facts and involve an accident which occurred on June 28, 2016 during the course of Plaintiff's employment. Plaintiffs further argue that there is no prejudice to Defendants to consolidate the actions and would rather streamline discovery and assist and narrowing the issues. Further, Plaintiff argues that consolidation will "obviate the likelihood of inconsistent verdicts or judgments, which could result in "protracted appellate litigation."

Defendant has failed to file any opposition to the Plaintiff's motion seeking consolidation despite proof of service of same.

Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice of substantial rights. [*Civil Practice Law and Rules* § 602; *American Home Mtge. Servicing, Inc. v. Sharrocks*, 92 AD3d 620, 622; *Chiacchia v. National Westminster Bank*, 124 AD 626, 628 (2d Dept 1986)]. A determination to consolidate actions rests within the sound discretion of the trial court. [*American Home Mtge. Servicing, Inc. v. Sharrocks*, 92 AD3d at 622]. In a situation where after a consolidation the role of an individual as a plaintiff and defendant could be the source of confusion at a jury trial of the consolidated action, consolidation is inappropriate. [*Padilla v. Greyhound Lines*, 29 AD2d 495, 497 (1st Dept 1968); *M & K Computer Corp. v. MBS Industries, Inc*., 271 AD2d 660 (2d Dept 2000)]. Further, where these is insufficient identity of factual or legal issues in an action, then consolidation is not warranted. [*J.T. Mauro Co. v. Genesee Val Group Health Assn*, 184 AD2d 998 (4th Dept 1992); *Dunkin Donuts v. Reyes Corp.*, 166 AD2d 908 (4th Dept 1998)].

The Defendant has failed to demonstrate that Defendant will not suffer prejudice based on the delay in filing the second action. Specifically, Action #1 was commenced in 2016, discovery has been completed and a Note of Issue has been filed. Action #2 was commenced earlier this

year in 2018 in a different county and the status of discovery and motion practice is unclear to the undersigned. The Court in its discretion has determined that a consolidation of the foregoing actions for the purpose of trial would result in a prejudice to Defendants based upon the fact that trial is imminent in Action #1 and Action #2 remains in pre-note status and it is unclear what discovery has been exchanged. Therefore, Defendant's motion for consolidation of Action #1 and Action #2 is denied.

Accordingly it is hereby

ORDERED that Plaintiff's Notice of Motion for Summary Judgment (Motion #1) is granted in part and denied in part consistent with the Court's Decision; and it is further

ORDERED that Plaintiff is granted summary judgment as to liability on the claims pursuant to *Labor Law* §§ 240(1); and it is further

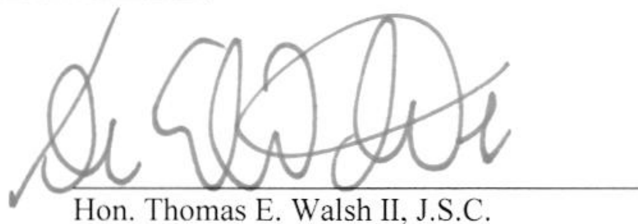
ORDERED that Plaintiff is granted summary judgment as to liability on the claims pursuant to *Labor Law* § 241(6) based upon the violation of Industrial Code 12 NYCRR 23-1.21(b)(4)(iv); and it is further

ORDERED that Plaintiff is denied summary judgment as to liability on the claims pursuant to *Labor Law* § 241(6) based upon the violation of Industrial Codes 12 NYCRR 23-1.21(b)(4)(ii) and 12 NYCRR 23-1.21(b)(3)(iv); and it is further

ORDERED that Defendant's Notice of Motion to Consolidate Action #1 and Action #2 (Motion #2) is denied in its entirety; and it is further

ORDERED that the parties are to appear for a previously scheduled pre-trial conference on **WEDNESDAY JANUARY 23, 2018 at 9:30 a.m. in TAP.**

Dated: New City, New York
December 11, 2018



Hon. Thomas E. Walsh II, J.S.C.

TO:

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