Vivar v Citigroup Tech., Inc.
2024 NY Slip Op 30090(U)
January 9, 2024
Supreme Court, New York County
Docket Number: Index No. 157288/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MANUEL J VIVAR,

Plaintiff,

- v -

CITIGROUP TECHNOLOGY, INC.,

Defendant.

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INDEX NO. 157288/2018

MOTION DATE 01/05/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

CITIGROUP TECHNOLOGY, INC.

Plaintiff,

-against-

TITAN INDUSTRIAL SERVICES CORP.

Defendant.

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Third-Party
Index No. 595462/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is granted. Defendant's cross-motion for summary judgment on plaintiff's Labor Law §§ 240(1), 200, 241(6), 240(2) and 240(3) claims is denied.

Background

This Labor Law action concerns an accident involving plaintiff on May 16, 2018. Plaintiff was working for third-party Titan Industrial Services Corp. ("Titan") at a demolition job in Manhattan. Defendant owned the building where plaintiff was assigned to work. On the day of the accident, plaintiff testified that he was working on cutting ducts in the ceiling, "Those ones

that circulate air or the hot air during cold weather" (NYSCEF Doc. No. 77 at 42). Plaintiff insisted that "The foreman said we were going to take out and cut that duct to bring it down from the ceiling" (*id*. at 44).

He explained that "two [coworkers] were cutting and the foreman put me [in] the other room to hold the duct so it wouldn't come like, inside and it would go down towards the elevator" (*id*. at 48). Plaintiff explained that the ductwork they were cutting was in the ceiling and there was a wall separating him from his two coworkers (*id*. at 49-50). The foreman and the other two workers were in the next room cutting the ductwork when the accident happened (*id*. at 63). Plaintiff insisted that "I had to go up the ladder, like the boss had told me. I had to go up the ladder and get the pipe and press it against the duct so it would not fall towards my side but towards the elevator side" (*id*. at 65). While standing on the ladder and holding up the pipe, "when they finished cutting [the duct] that came and got me and threw me all the way backwards against the wall with the tube and I fell to the ground" (*id*. at 76).

Defendant argues that the accident did not happen the way that plaintiff insists it did. It attaches the affidavit of one of plaintiff's coworkers at Titan, Mr. Valverde, who claims he heard the sound of plaintiff falling to the ground (NYSCEF Doc. No. 87, ¶ 12). Mr. Valverde adds that he immediately went to check on plaintiff, who told him he was "descending the ladder and jumped the last few rungs of the ladder instead of descending normally, one step at a time" (*id*. ¶ 15). Plaintiff allegedly told Mr. Valverde that he was fine and had simply fallen when he jumped down from the ladder (*id*. ¶¶ 13, 16). Mr. Valverde insisted that plaintiff returned to work after a forty-minute break and did not complain for the rest of his shift (*id*. ¶¶ 14, 17). Only at the end of his shift did plaintiff complain of a pain in his feet and then he requested that an ambulance be called (*id*. ¶¶ 18-19).

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 a 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 [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]).

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed

on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Both plaintiff and defendant move for summary judgment on this claim. Plaintiff argues that the ductwork was not properly secured and so it struck a metal pipe that plaintiff was holding, which caused him to fall off the ladder. He insists this entitles him to summary judgment on his Labor Law § 240(1) claim. Plaintiff insists that it is customary for items in a ceiling which are being removed to be secured.

Defendant claims that this accident, even assuming plaintiff's account is correct, is not subject to Labor Law § 240(1) because there was no falling object. It also argues that Mr. Valverde's affidavit raises an issue of fact and points out that this co-worker's name was included on accident reports (meaning that plaintiff was aware of this witness).

Plaintiff argues that his alleged statements to Mr. Valverde do not constitute a statement against interest and are therefore inadmissible hearsay statements.

The central question on this branch of the motion is whether plaintiff's statements, as recounted in Mr. Valverde's affidavit, are admissible. The Court observes that, as an initial finding, these statements are clearly hearsay. They are out-of-court statements by plaintiff and

defendant seeks to use these purported statements for their truth. Therefore, the issue is whether there is an exception to the rule against hearsay.

The Court finds that, contrary to defendant's arguments, the statement is not admissible under the statement against interest exception because "plaintiff was available to, and did, testify as a witness; there is no evidence that plaintiff knew the statement was adverse to his interests when it was made; and the supporting circumstances do not attest to its trustworthiness or reliability" (*Gomes v Pearson Capital Partners LLC*, 159 AD3d 480, 481, 71 NYS3d 484 [1st Dept 2018] [finding that an injured worker's statement to his foreman was not admissible and granting plaintiff summary judgment on his Labor Law § 240(1) claim]). Defendant did not adequately show that plaintiff knew the statements were "adverse to his interest" *when they were made*; plaintiff purportedly made these statements right after the accident and only later asserted that the accident happened in a different way. In other words, it was not against his interest to say he jumped off the ladder when he had not yet insisted that he fell because of the construction work that day. In the immediate aftermath of the accident, plaintiff's purported statements that he jumped off the ladder would not cause him obvious pecuniary consequences.

However, the Court finds that plaintiff's purported statements to his coworker are admissible as excited utterances (*Heer v N. Moore St. Developers, L.L.C.*, 61 AD3d 617, 618, 878 NYS2d 310 [1st Dept 2009] [finding that an injured worker's statement to his coworker immediately after his accident were admissible in a Labor Law action]). "An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication" (*People v Johnson*, 1 NY3d 302, 306, 772 NYS2d 238 [2003]). The Court finds that the instant circumstances satisfy this exception. Mr. Valverde affirmed that after

hearing plaintiff fall, he went "immediately" to check on plaintiff and plaintiff responded that he was "fine, had no pain and wanted to return to work" (NYSCEF Doc. No. 87, ¶ 13). Plaintiff allegedly also said that he fell after jumping off the ladder (*id*. ¶ 16) and did not mention that he fell because of the construction work ongoing at the time (the duct cutting). An explanation provided in the immediate aftermath of an accident, before plaintiff had time to devise a story, constitutes an excited utterance.

Having found that plaintiff's purported statements are admissible, the Court denies plaintiff's motion and defendant's cross-motion with respect to the Labor Law § 240(1) claim. Defendant raised an issue of fact that plaintiff was the sole cause of his accident and that the accident falls outside of the Labor Law altogether on the ground that plaintiff simply decided to jump off the ladder on his own. A fact finder is required to assess whether or not they believe Mr. Valverde's recollection about what plaintiff said or whether they credit plaintiff's version recounted in his deposition. The Court cannot make such a credibility determination in favor of either plaintiff or Mr. Valverde on a motion for summary judgment. Although the Court finds that Mr. Valverde's account of plaintiff's statements is admissible, that is not a finding that plaintiff actually made these statements. The factfinder will have to decide who, and how much, to believe.

The Court denies defendant's cross-motion for summary judgment to dismiss this claim. Contrary to defendant's arguments, plaintiff's accident (as alleged by plaintiff) clearly falls under the ambit of Labor Law § 240(1). "[F]alling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758-59, 866 NYS2d 592 [2008]). The purpose of this statute, as noted above, is that it covers gravity-related accidents where no

protective device was provided. Plaintiff claims he was not provided with any protective devices and that he fell off of a ladder while holding up the duct work with a pipe. Plaintiff met his burden to be considered under this statute.

Remaining Claims

Defendant also moves for summary judgment dismissing the remaining portions of plaintiff's claims: these are claims under Labor Law §§ 200, 241(6), 240(2) and 240(3). Plaintiff does not contest these claims on the merits; rather, he insists that defendant's cross-motion with respect to these causes of action is untimely because they were filed more than 120 days after the note of issue was filed. Plaintiff insists that these branches of defendant's motion do not "relate back" because plaintiff only moved on his Labor Law § 240(1) claim.

Defendant insists that the cross-motion was made on "nearly identical" grounds as the ones raised in the Labor Law § 240(1) claim, the Court should consider it. It argues that the same issue of whether plaintiff was the sole proximate cause of his accident pervades all of these claims.

"A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion. The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion" (*Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281, 824 NYS2d 244 [1st Dept 2006]).

In *Filannino*, the Appellate Division observed that the defendant's motion (the original movant) concerned Labor Law claims under §§ 200 and 241(6) while the cross-motion (by the plaintiff in that case) concerned plaintiff's 240(1) claim, rendering the cross-motion as untimely (*id*.). Similarly, here, plaintiff made a timely motion as to his Labor Law § 240(1) claim. Therefore, to the extent that defendant's motion concerns causes of action other than the 240(1) claim, these branches of the cross-motion are denied as untimely.

Defendant's arguments that the claims are nearly identical is not supported in the aforementioned case. The standards and required analysis for a Labor Law § 240(1) claim (the scaffold law's strict liability scheme) compared with the other causes of action alleged here are inherently different. Plus, as discussed above, Mr. Valverde's affidavit is not conclusive proof that plaintiff's complaint should be dismissed. It merely raised an issue of fact about how the accident happened.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied and defendant's cross-motion is denied in its entirety.

1/9/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**