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

PRESENT : DONNA M. MILLS PART 58
Justice

RAFAEL A. ABREGO,

Plaintiff,

-v-

THE CITY OF NEW YORK,

Defendant.

INDEX NO. 112476/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2, 3
Replying Affidavits	4

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER

FILED
MAY 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/14/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

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

RAFAEL A. ABREGO,

INDEX NO. 112476/10

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

DECISION/ORDER

Donna M. Mills, J.:

In this labor law action, plaintiff Rafael Abrego moves for an Order for partial summary judgment, pursuant to CPLR § 3212(e), on the issue of defendant City of New York's liability under Labor Law § 240(1).

This is an action to recover damages for injuries sustained by the plaintiff on March 17, 2010. Plaintiff was employed as a laborer/painter for American Chain Link & Construction, Inc. ("American Chain Link") and was painting a fence framework in Saint Nicholas Playground at the Saint Nicholas Park in New York County on the day in question. Plaintiff was performing his painting work at an elevation of approximately eighteen feet off the ground when he was caused to fall to the ground below.

American Chain Link was the contractor on this construction site pursuant to a written contract between the defendant and American Chain Link. Plaintiff testified at his deposition that on the date of the accident, he used a ladder to ascent onto a horizontal rail of the fence framework, approximately eighteen feet high. He stated that he was instructed by his supervisor to climb onto the fence framework, hold onto the rail above and stand on a horizontal rail to paint the fence framework. He further stated that the accident occurred when the top horizontal rail that he was holding onto broke off at the corner, striking him and causing him to fall to the ground below. Plaintiff maintains that he was not provided with any safety devices and was not issued a safety harness or tied to any

lifelines.

Plaintiff submits an affidavit of Mel Abrego, a former co worker who was present on the date of the accident, wherein he states that safety devices or safety harnesses were not provided to plaintiff while working at the worksite. Plaintiff also submits the deposition testimony of Bill Sifounios, a Resident Engineer produced by the City. Mr. Sifounios testified that he was employed by the City of New York managing the construction project and worksite at the Saint Nicholas Playground in March 2010 and that American Chain Link was the contractor hired by the City to paint the fence framework. Mr. Sifounios testified that he did not know if plaintiff was wearing a harness on the day of the accident and did not know if safety harnesses were used at the worksite on the day of the accident. Mr. Sifounios did confirm that Kirk Bellois, a job foreman for American Chain Link, stated that plaintiff fell from a height when the horizontal rail he was standing on when painting gave way, causing him to fall.

In opposition to plaintiff's motion for summary judgment, defendant submits the deposition testimony and affidavit from Mr. Sifounios. In his affidavit, Mr. Sifounios avers that Mr. Bellois told him verbally that plaintiff was wearing a safety harness at the time of the accident and that an extension ladder was present at the jobsite on the date of the accident. According to both the sworn affidavit and sworn testimony of Mr. Sifounios, plaintiff was also supplied with ladders at the time of the accident. Similarly, Mr. Sifounios' affidavit and testimony sets forth that the body harness plaintiff was wearing was tied to the fence framework when the accident occurred. Finally, Mr. Sifounios states in both his affidavit and his deposition that he personally observed workers using safety harnesses and ladders each time he was on the jobsite.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of

action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

Labor Law §240(1) imposes liability on contractors and owners for the existence of certain elevation-related hazards and the failure to provide an adequate safety device of the kind enumerated in the statute (see Berg v Albany Ladder Co., Inc., 10 NY3d 902, 904 [2008]). To establish a claim under this provision, a plaintiff must "show that the statute was violated and that the violation proximately caused his injury" (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004]). Accordingly, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (id.) To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained (Gallagher v New York Post, 14 NY3d 83, 88 [2010]).

The affidavit and deposition testimony of plaintiff revealed that he was not provided with a safety device, that there were no scaffolds, life lines or harnesses provided to him or anyone else at the worksite. Plaintiff stated in his affidavit that his boss instructed him to stand on a rail of the fence framework and hold onto the rail above while he painted the rails of the fence. The affidavit of co-worker, Mel Abrego corroborates the fact that plaintiff was not provided with any safety devices or safety harnesses prior to his fall from the elevated rail of the fence framework.

Plaintiff has thus made a prima facie showing, through his presentation of his own deposition testimony, and that of a co-worker that defendant violated Labor Law § 240(1) and that this violation proximately caused his injury (see, Blake v. Neighborhood Hous. Serv. Of N.Y. City, Inc., 1 NY3d 280 [2003]; see also, Runner v. New York Stock Exchange, Inc., 13 NY3d 599 [2009]).

Defendant attempts to raise a triable issue of fact through their presentation of the affidavit of Mr. Sifounios, City's Resident Engineer. Mr. Sifounios did not witness plaintiff's accident. However, his affidavit raises the question of whether plaintiff refused safety devices. Mr. Sifounios and the City contend that genuine issues of fact exist regarding whether plaintiff was wearing a safety harness and had access to other safety equipment such as ladders at the time of his accident. Defendant argues that plaintiff was a recalcitrant worker because he had access to safety equipment and failed to utilize the available safety equipments which was the sole proximate cause of his injuries. Finally, defendant maintains that the plaintiff's attendance at an OSHA Construction Course over two years before the accident and receipt of an Employee Handbook creates an issue of fact because plaintiff was aware of the safety issues attendant to working at an elevated height.

In the class of cases where a worker has been injured as a result of his refusal to

use available safety devices provided by the employer or owner, the so-called recalcitrant worker doctrine may permit a defendant to escape liability under Labor Law § 240(1) (see, Hagins v. State, 81 N.Y.2d 921 [1993]). A defendant who wishes to invoke the recalcitrant worker defense must show that the injured worker refused to use the safety devices that were provided by the owner or employer (see, Stolt v. General Foods Corp., 81 N.Y.2d 918 [1993] citing Hagins v. State, 81 N.Y.2d 921 [1993]). The recalcitrant worker defense has no application where no adequate safety devices were provided (Stolt v. General Foods Corp. at 918 [1993] citing Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513 [1985]).

The allegation that the plaintiff was provided with and had a safety device on at the time of his accident is based on inadmissible hearsay. While hearsay statements have been held to be sufficient to oppose a summary judgment motion under certain circumstances, no such circumstances are present in this case (see Joseph v. Hemlok Realty Corp., 6 A.D.3d 392, 393, 775 N.Y.S.2d 61; Allstate Ins. Co. v. Keil, 268 A.D.2d 545, 546, 702 N.Y.S.2d 619). Here, aside from Mr. Sifounios's affidavit, the City has failed to submit any additional admissible evidence which raises a question of fact as to whether plaintiff was a recalcitrant worker. Thus, Mr. Sifounios's affidavit may not be used to raise an issue of fact to bar summary judgment. In the absence of any additional, nonhearsay evidence on this point, plaintiff is entitled to judgment as a matter of law (see Briggs v 2244 Morris L.P., 30 AD3d 216 [1st Dept 2006]).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendant's liability under Labor Law § 240(1) is granted.

Dated: 5/14/13

So Ordered

Donna M. Mills, J.S.C.