Wozyny v 875 Park Ave. Corp.

2013 NY Slip Op 32429(U)

October 8, 2013

Sup Ct, New York County

Docket Number: 115665/2010

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Index Number : 115665/2010
LUKASZ WOZNY
vs.
875 PARK AVENUE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 115665/10
MOTION DATE
MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for S/J

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/8/13

BJ
BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

LUKASZ WOZNY,

Plaintiff,

- against -

875 PARK AVENUE CORPORATION, and BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendants.

----------x

Index No. 115665/2010

Mot. seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

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Plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment on its Labor Law § 240(1) claim. Defendants oppose.

I. BACKGROUND

On October 18, 2010, plaintiff is alleged to have fallen while climbing onto the platform of a scaffold in order to perform masonry work at 875 Park Avenue in Manhattan, sustaining an injury to his foot. (NYSCEF 44). On or about April 1, 2011, plaintiff commenced this action against the building's owner and operator. (NYSCEF 2).

At an examination before trial (EBT) held on November 3, 2011, plaintiff testified that the scaffold was longer than its supports, which created a see-saw effect, and that when he pulled his leg over a guardrail to access the platform, one side abruptly tipped, causing him to fall onto the platform. (NYSCEF 47).

By affidavit dated February 17, 2012, one of plaintiff's co-workers, Bogdan Antczak, who was on the scaffold with plaintiff, denied that the scaffold had tipped. Rather, he saw plaintiff slip after having climbed over the guardrail and was already standing on the platform. (NYSCEF 59).

A week later, by affidavit dated February 25, 2012, Antczak stated that he did not see plaintiff fall but heard it happen as he stood on the platform waiting for plaintiff to join him, and did not see him until he had already fallen onto the platform. Thus, Antczak did not see whether plaintiff had fallen while climbing over the guardrail, or while standing on the platform. Antczak also acknowledged having told insurance investigators that he did not see plaintiff fall. (NYSCEF 60).

At an EBT held later that day, Antczak disavowed the February 25 affidavit, testifying that plaintiff's brothers had visited him on February 25 bringing beer, and that after drinking eight to ten shots of vodka, he agreed to sign, without reading, the affidavit which the brothers falsely represented to be an insurance document unrelated to plaintiff's personal injury action. He denied ever meeting the notary or plaintiff counsel's interpreter who allegedly translated the affidavit. Anczak also testified that he was approximately six to eight feet away from plaintiff when he saw him fall on the platform, and that he assumed that plaintiff had tripped on a brick, as brick and mortar were the only objects on the platform. He also denied having heard plaintiff fall. (NYSCEF 51).

II. CONTENTIONS

Plaintiff relies on the affidavit of an expert who asserts that the instability of the platform, as well as defendants' failure to provide direct access to it, constitute violations of Labor Law § 240(1). (NYSCEF 41). Plaintiff argues that his testimony that he was injured while

entering the platform entitles him to summary judgment, and that Antczak's conflicting versions render his testimony not credible. (NYSCEF 39, 64).

Defendants reject plaintiff's account of the accident, as such circumstances would have also caused Antczak to fall. They rely on Antczak's testimony and plaintiff's injury as more consistent with a trip than with an elevation-related trauma. These discrepancies, as well as Antczak's allegations of witness tampering and the fraudulent February 25 affidavit, in defendants' view, create triable issues. (NYSCEF 57).

III. ANALYSIS

A party seeking summary judgment must demonstrate *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forrest*, 3 NY3d at 314). Moreover, to sustain its burden, a movant cannot simply reveal gaps in its opponent's case, rather it must "affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." (*Forrest*, 3 NY3d at 315, *quoting Anderson v.*

Liberty Lobby, Inc., 477 US 242, 255 [1986]). Thus, a court does not assess credibility on a motion for summary judgment unless it is clearly apparent that the issue raised is feigned. (*Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

To prevail on a Labor Law § 240(1) claim, a worker must show that he was injured when an elevation-related safety device failed to perform its function to support and secure him or her from injury. (*Ortega v City of New York*, 95 AD3d 125 [1st Dept 2012]). A defendant violates the statute when it fails to provide a worker with adequate protection from a reasonably preventable, gravity-related accident. (*Id.*). However, a defendant's violation of the statute, by itself, is insufficient to establish liability, as the plaintiff must demonstrate that the violation was a contributing cause to his injury. (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003]; *Panek v County of Albany*, 99 NY2d 452, 457 [2003]). Therefore, a plaintiff sets forth, *prima facie*, entitlement to summary judgment by establishing: 1) a violation of the defendant's duty to provide necessary safety devices for workers at an elevation, and 2) that the violation was a proximate cause of plaintiff's injury. (*See Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268 [1st Dept 2007]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]).

Here, plaintiff has satisfied his *prima facie* burden by testifying that he fell while trying to climb over an unstable scaffold, and through his expert's testimony, that these conditions constitute violations of Labor Law § 240(1). (*See Ortega*, 95 AD3d at 130 [plaintiffs entitled to summary judgment upon showing through admissible evidence that defendants failed to protect them from gravity-related hazards]).

While Antczak contradicted his February 25 affidavit at his EBT, he maintains that the

February 25 affidavit was the result of his having been deceived by plaintiff's brothers. As his EBT testimony is not inherently incredible (*cf. Espinal v Trezechahn 1065 Ave. of Americas, LLC*, 94 AD3d 611, 613 [1st Dept 2012] [party's version of events were "physically impossible", "contrary to experience" and "incredible as a matter of law"]; *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472 [1st Dept 2008] [general contractor's testimony attempting to rebut plaintiff's Labor Law § 240(1) claim was "simply incredible" and insufficient to raise triable issue]), and is consistent with his February 17 affidavit (*see Barco v Green Bus Lines, Inc.*, 62 AD3d 923, 924 [2d Dept 2009] [plaintiff's affidavit was sufficiently consistent with her prior deposition testimony; did not create feigned factual issue]), it need not be disregarded (*see Crespo v HRH Const. Corp.*, 2009 NY Slip Op 51893 [Sup Ct NY County 2009] [rejecting contention that non-party eyewitness feigned anything]). Antczak also testified that plaintiff tripped after he was already standing on the platform, evidence that an elevation-related violation was not a proximate cause of plaintiff's injury.

The legal authority cited by plaintiff is distinguishable. For example, in *Hernandez v Argo Corp.*, evidence that the plaintiff had detached himself from a safety rope before he fell was held insufficient to rebut the plaintiff's initial showing that the defendants had violated Labor Law § 240(1), and that therefore, plaintiff's conduct could not be deemed the accident's sole proximate cause. (95 AD3d 782, 783 [1st Dept 2012]). Here, by contrast, Antczak's testimony demonstrates that any defect in the scaffold did not cause plaintiff's injury. In both *Romanczuk v Metropolitan Ins. And Annuity Co.*, 72 AD3d 592 (1st Dept 2010), and *Vergara*, 21 AD3d at 280, summary judgments were granted the plaintiffs despite conflicting eyewitness testimony, because under either account of the accident, the defendants' violation of Labor Law § 240(1) proximately caused the accident. Here, however, Anctzak's testimony, if credited,

entirely rebuts plaintiff's position.

Consequently, defendants have raised an issue of fact as to the cause of plaintiff's injury sufficient to warrant a trial.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting it partial summary judgment on its claim pursuant to Labor Law § 240(1) is denied.

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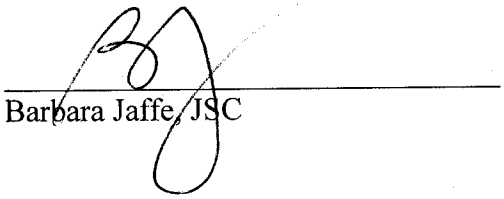

Barbara Jaffe, JSC

DATED: October 8, 2013
New York, New York