Thaqi v One Bryant Park LLC
2014 NY Slip Op 33425(U)
December 15, 2014
Supreme Court, Bronx County
Docket Number: 310642/2008
Judge: Mary Ann Brigantti
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

DEC 17 2014

PRESENT: Honorable Mary Ann Brigantti-Hughes

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FARUK THAQI and ARDITA THAQI,

Plaintiffs,

-against-

DECISION / ORDER
Index No. 310642/2008

ONE BRYANT PARK LLC., et als.,

Defendants

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The following papers numbered 1 to 6 read on the below motions noticed on August 19, 2014 and duly submitted on the Part IA15 Motion calendar of **October 14, 2014**:

Papers Submitted	Numbered
Pl. Notice of Motion, Exhibits	1,2
Defs.' Aff. in Opp., Exhibits	3,4
Pl. Reply Aff., Exhibits	5,6

Upon the forgoing papers, the plaintiffs Faruk Thaqi (individually, "Plaintiff") and Ardita Thaqi (collectively, "Plaintiffs") move to renew their motion for summary judgment on the issue of liability on their Labor Law §240(1) claim against defendants One Bryant Park LLC ("One Bryant Park) and Tishman Construction Company of New York ("Tishman"), and upon renewal, granting the motion and setting this matter down for trial as to damages, pursuant to CPLR 3212. The motion is opposed by defendants One Bryant Park, Tishman, One Bryant Park Development Partners, LLC., The Durst Organization, Inc., and The Durst Organization, L.P. (collectively "Defendants"). Plaintiff made an earlier motion for summary judgment, seeking the same relief. By Decision and Order dated May 2, 2014, this Court denied the motion without prejudice, with leave to renew following completion of discovery.

I. Background

Plaintiff testified that on December 28, 2005, he was employed as a laborer at a construction project located at One Bryant Park in New York, New York. Defendant Tishman Construction Corporation of New York ("Tishman") was the general contractor for the project. Plaintiff's employer was assigned to perform foundation work at the job site. Plaintiff's job

responsibilities included breaking foundation walls and rocks with various construction equipment. On the date of the accident, Plaintiff was working at the site removing concrete debris from a foundation wall that a co-worker was breaking. Later, Plaintiff was working in an underground area that was open and exposed to the outside. Here, Plaintiff's job was to break a concrete wall with a jackhammer and to clean up resulting debris. Debris from the area was removed with an excavator/backhoe that was positioned two stories above where Plaintiff was working. The bucket of the backhoe would reach down into the area where Plaintiff was working and hoist debris up and out of the area. As he was working, Plaintiff's co-worker Urim Zeqiraj requested that a nearby rock splitter power pack be raised to a higher level of the construction site. Two co-workers placed the power pack, that weighed at least 100 pounds, into the backhoe bucket. Plaintiff testified that after he saw the power pack being loaded into the bucket, he resumed his work. The next thing he remembers is waking up in the hospital. Mr. Zeqiraj states in an affidavit that he saw the power pack fall out of the backhoe bucket as it was being raised, and strike Plaintiff on the head. The impact knocked Plaintiff unconscious.

Plaintiff also submits deposition testimony from Louis Esposito, the Chief Operating Officer of the Durst Corporation and Vice President of Construction on the One Bryant Park project. Mr. Esposito testified that defendant One Bryant Park was the owner of the premises. Plaintiff also provides the deposition transcript of Dean Essen, First Vice President of Tishman. Mr. Essen also confirmed that One Bryant Park owned the premises, and testified that Tishman directed the work at the construction site and had the authority to enforce property safety protocols. Tishman maintained daily reports at the site, including the report for this incident which concluded that the cause of the accident was improper placement of equipment. Mr. Essen testified that the rock splitter power pack should not have been placed unsecured in the backhoe bucket.

Plaintiff has also provided the relevant deed demonstrating that One Bryant Park owned the premises, as well as "work permit data" from the New York City Department of Buildings indicating that Tishman was the general contractor for the construction site. Included in the moving papers is the Construction Management Agreement between Tishman and One Bryant Park.

In opposition to the motion, Defendants argue that the Plaintiff did not comply with the timing requirements set forth in this Court's prior Order, directing the motion to be made after completion of discovery. Defendants contend that discovery is incomplete here since Note of Issue has yet to be filed.

Defendants also argue that the proof submitted in support of the motion is not in admissible form. All of the deposition transcripts are unsigned and not certified by the Court reporter, and Plaintiff did not demonstrate that the transcript was sent to the deponent for review and the deponent failed to return the transcript within 60 days.

Finally, Defendants contend that the documents submitted in support of the motion are unauthenticated and uncertified, and therefore inadmissible. Moreover, Plaintiff failed to lay a proper foundation for their admissibility as business records. Plaintiff argues that these failures cannot be corrected in reply papers. In a footnote, Defendants note that Plaintiff is not seeking relief against co-defendants One Bryant Park Development Partners, LLC., the Durst Organization, Inc., and the Durst Organization, and this court may "search the record" and grant them summary judgment, dismissing the complaint as to those defendants.

In reply, Plaintiff notes that Defendants have not addressed any substantive issues raised in the initial motion with respect to Plaintiff's entitlement to summary judgment. Plaintiff notes that even if the Court does not submit the documentary evidence, there is sufficient evidence to demonstrate that One Bryant Park owned the premises, and Tishman Speyer was the general contractor. Plaintiff argues that the deposition transcripts are admissible, and in any event, Plaintiff provides the certifications for all of the transcripts, as well as evidence that Defendants' were sent transcripts for verification before the instant motion was made. Further still, Plaintiff annexes the signature page and errata sheet from Louis Esposito and Dean Essen. Although Plaintiff did not sign his own deposition transcript, it was submitted in support of his own motion and was thereby adopted as accurate.

II. Standard of Review

To be entitled to the "drastic" 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 University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists in providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The foregoing devices are to be furnished in a manner sufficient to give "proper protection" to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed. (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003], *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 [1985], *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 [1993]). Specifically, the statute imposes liability in situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991]).

"In order to prevail on summary judgment in a section 240(1) 'falling object' case, the

injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 [2001], citing *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501 [1993]). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured' (*Narducci*, 96 N.Y.2d at 268,), or 'required securing for the purposes of the undertaking' (*Outar v. City of New York*, 5 N.Y.3d 731, 732 [2005]; see *Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757, 759 [2008])" (*Fabrizi v. 1095 Ave. of Americas, LLC.*, 22 N.Y.3d 358 [2014]).

Here, the deposition testimony of Plaintiff and the affidavit of an eyewitness demonstrate that this accident fell within the scope of Labor Law §240(1), as Plaintiff was struck by a falling object that it was in the process of being hoisted, and was not adequately secured (*see Fabrizi, supra; see also Greaves v. Obayashi Corp.*, 55 A.D.3d 409 [1st Dept. 2008]). The deposition testimony also establishes that defendant One Bryant Park owned the premises, and defendant Tishman was the general contractor for the project. There is, moreover, no indication that Plaintiff was the sole proximate cause of this accident, thus shifting the burden to Defendants to raise a genuine issue of fact so as to defeat the motion.

In opposition, Defendants initially argue that the motion is premature. This Court's prior order allowed renewal of Plaintiff's summary judgment motion "upon completion of discovery." Defendants contend that discovery remains incomplete since Note of Issue has not been filed. However, a summary judgment motion may not be defeated by a claim of unconducted discovery unless the opponent has made a showing of reasonable attempt at discovery and that discoverable facts would give rise to a triable issue (*Perez v. Brux Cab Corp.*, 251 A.D.2d 157 [1st Dept. 1998]). A self-serving claim, alone, that discovery would lead to relevant evidence is insufficient to withstand a motion for summary judgment (*Jefferies v. N.Y. City Hous. Auth*, 8 A.D.3d 178 [1st Dept. 2004]). Here, Defendants' bald contention that discovery is incomplete does not warrant denial of this motion.

Defendants also argue that the various deposition transcripts are not in admissible form since they are unsigned and uncertified. In reply, however, Plaintiff has provided the signature and certification pages for Defendants' representatives. Under these circumstances, Defendants

were not prejudiced by their omission from the moving papers, and Plaintiff was entitled to correct this technical defect in reply (*see Mazarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008 [2nd Dept. 2008]). Plaintiff's deposition transcript, although unsigned, was submitted by the deponent himself and therefore adopted as accurate (*Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543 [1st Dept. 2013], citing *Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d 935 [2nd Dept. 2012]).

The deposition testimony, elicited from individuals with personal knowledge, established the facts of this accident, and identified One Bryant Park as the owner of the property, and Tishman as the project's general contractor. Accordingly, it is not necessary to decide whether the deed, work permit sheet, and construction management agreement were in admissible form. Accordingly, Defendants have failed to raise a triable issue of fact warranting denial of this motion. Defendants' informal request for dismissal of the complaint as to co-defendants One Bryant Park Development Partners, LLC., the Durst Organization, Inc., and the Durst Organization, not made by way of cross-motion, is denied because the co-defendants have not made a sufficient evidentiary showing as to their entitlement to summary judgment.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion to renew its prior motion for summary judgment is granted, and it is further,

ORDERED, that upon renewal, Plaintiffs' motion for summary judgment on the issue of liability on its Labor Law §240(1) claims against defendants One Bryant Park and Tishman, is granted, with the issue of damages to be determined at trial of this action, and it is further,

ORDERED, that any relief not specifically addressed herein has nonetheless been considered and is expressly denied.

This constitutes the Decision and Order of this Court.

Dated: 12/15, 2014

Hon. Mary Ann Brigantti, J.S.C.