Loretta v Split Dev. Corp.
2014 NY Slip Op 33557(U)
December 1, 2014
Supreme Court, Westchester County
Docket Number: 62670/2013
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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VINCENT LORETTA and JOHNNA LORETTA
Plaintiff(s),

-against-

Index No. 62670/2013
DECISION & ORDER
Seq. 2, 3, 4

SPLIT DEVELOPMENT CORP.,

Defendant(s).

---x

The following papers were read on plaintiff's order to show cause for a pre-judgment order of attachment pursuant to CPLR § 6201(3); on plaintiffs' motion for summary judgment against the defendant on the issue of liability on his causes of action under section 240 (1) of the Labor Law; and on defendant's cross-motion for summary judgment against plaintiffs, seeking dismissal of the complaint:

PAPERS	**NUMBERED**
Order to Show Cause/Affirmation/Affidavit/Exhibit A-I	1-12
Plaintiff's Notice of Motion/Affirmation/Affidavits(2)/Exhibits A-E	13-21
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This action is to recover for personal injuries Vincent Loretta ("Vincent") allegedly sustained when he fell from a ladder while working on a construction site on May 22, 2012. Vincent was employed by Armstrong Plumbing & Heating, Inc. ("Armstrong") and was performing construction work on a single family home located at 5 Hugh Hill Lane, Irvington, New York owned by Mark and Tara Steinberg. The Steinbergs had purchased the property from Split Development Corp. ("Split") and entered into a contract with Split to construct the home. Split in turn hired Armstrong to perform the plumbing work on the home.

Plaintiffs allege that Vincent had been installing the plumbing system for three to four weeks prior to the accident and on the day of the accident, he was installing waste pipes in the wall and the twelve foot ceiling of the garage. Plaintiffs allege that to accommodate the installation of the waste pipes, Vincent was required to stand on a ten foot A-framed ladder, which was provided by Armstrong, and placed on the concrete floor in the garage. Plaintiffs further allege that Armstrong did not provide any safety equipment for Vincent to access the ceiling to perform the plumbing work and that the ladder was not secured to prevent it from moving or toppling over. Plaintiffs contend that while Vincent was inserting one waste pipe into another by pushing upward, the ladder toppled over causing Vincent to fall approximately six feet to the concrete floor of the garage, resulting in injuries.

Plaintiffs commenced this action by filing a summons and complaint alleging negligence and violations of Labor Law § 200, 240, and 241. Pursuant to stipulations, the plaintiffs amended the complaint several times, dismissing their action against Rachelle

I. Shapiro, Ross B. Shapiro, Denardo Development Corp. and Joseph Denardo Development, Corp. and adding Split Development Corp. as a defendant.

Defendant opposes the order to show cause seeking a pre-judgment order and the summary judgment motion. The defendant argues that the plaintiffs have failed to meet their burden on the order to show cause and on the motion that there is no violation of Labor Law § 240(1) as the defendant provided proper protection to plaintiff in the form of the ladder, that the plaintiff can only speculate on what caused him to fall and that the plaintiff refused to use the scaffold which was available and which his employer had instructed him to use.

DISCUSSION

Order of attachment pursuant to CPLR § 6201

CPLR § 6201 states in pertinent part that:

> An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
>
> 3. The defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts....

Further, the plaintiff has to show that there is a cause of action, probability of success on the merits, that one or more grounds for attachment in CPLR § 6201 exist and that the amount demanded exceeds all counterclaims known to the plaintiff *see* CPLR § 6212.

The plaintiffs contend that it is more than probable that they will succeed on the merits, since the facts supporting the plaintiffs' claims have been admitted by the defendant or are undisputed and the defendant has not made any counterclaims. The plaintiffs further contend that the defendant lacks insurance coverage and is intentionally transferring its assets for the purpose of frustrating the judgment to be entered against it, by liquidating its assets.

The defendant opposes the motion and argues that the plaintiffs have not met their burden of showing that the defendant acted with the intent to defraud or frustrate enforcement of an anticipated judgment and the plaintiffs have submitted no proof in admissible form, of their likelihood to succeed on the merits.

This Court finds that the plaintiffs have not met the requirements for a pre-judgment order of attachment. The plaintiffs have not presented evidence of intent to defraud or frustrate an anticipated judgment and "the mere removal, assignment or other disposition of property is not grounds for attachment. *Computer Strategies v. Commodore Bus. Machs.*, 105 A.D.2d 167, 173, 483 N.Y.S.2d 716 (2d Dept. 1984) *see also Corsi v. Vroman*, 37 A.D.3d 397, 829 N.Y.S.2d 234. "It must appear that [the] fraudulent intent really existed in the defendant's mind." *Id.* Liquidation or disposal of business assets is not a presumption of fraud. *Mitchell v. Fidelity Borrowing LLC*, 34 A.D.3d 366, 827 N.Y.S.2d 107 (1st Dept. 2006).

Here, the plaintiffs have failed to demonstrate any fraudulent intent on the part of the defendant. The plaintiffs' attorney contends that he informed the defendant's attorney that any transfer of property would be deemed fraudulent pursuant to Article 10 of the Debtor Creditor Law and that the defendant subsequently transferred property. However,

the letter states that any transfer of property "without fair and valuable consideration" will be deemed to be a fraudulent transaction. The plaintiff has not shown that the defendant transferred the properties without fair and valuable consideration and therefore has not shown that the defendant had/has an intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in the plaintiff's favor.

Motions for summary judgment

This summary judgment motion by plaintiffs seeks to establish liability as a matter of law against the defendant due to the alleged unsafe working conditions at the premises where plaintiff was employed on the date of his accident. Plaintiff seeks a determination that pursuant to Labor Law §240 the defendant failed to provide a safe work site and that failure was a substantial factor in causing the accident. The summary judgment cross motion by the defendant seeks dismissal of the plaintiffs' action, since the plaintiff is unaware of what caused him to fall and is speculating and the plaintiff refused to use the scaffold available to him, which his employer had instructed him to use.

A party moving for summary judgment must assemble affirmative proof to establish its entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, (1980). "As general rule, a party does not meet its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense". *Doe v. Orange-Ulster Bd. of Co-op. Educational Services,* 4 A.D.3d 387, 388 (2d Dept., 2004), quoting, *Larkin Trucking Co. v. Lisbon Tire Mart,*185 A.D.2d 614, 615 (4th Dept.1992). It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. The proponent of a motion for summary judgment carries the

initial burden of production of evidence as well as the burden of persuasion. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." *Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) see also, *300 East 34th Street Co. v. Habeeb,* 248 A.D.2d 50 [1st Dept.1997].

Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees", states in pertinent part that:

> "All contractors and owners and their agents, ..., in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" [*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 85, 601 N.Y.S.2d 49, 52 (1993)]; the duty imposed under Section 240(1) is nondelegable and owners,

contractors, and their agents are liable even when they exercise no control or supervision over the work of the injured employee. *Id.*

The legislative purpose behind this enactment is to protect "workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 NY Legis Ann, at 407), instead of on workers, who 'are scarcely in a position to protect themselves from accident' (*Koenig v. Patrick Constr. Co.*, 298 NY 313, 318 [1984])" (*Zimmer v. Chemung County Performing Arts,* 65 N.Y.2d 513, 520(1985). Section 240(1) " 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'. (*See Quigley v. Thatcher*, 207 N.Y. 66, 68 [1912]"; *Koenig v. Patrick Constr. Corp.*, 298 NY 313, 318 [1984]). The section imposes a duty that is nondelegable, so that contractors and owners are liable whether or not they supervise or control the work and if the accident occurs due to the violation of the statute, the plaintiff's own negligence is not a defense. *Cahill v. Triborough Bridge & Tunnel Authority*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74, 76, 823 N.E.2d 439, 441 (2004). Additionally, "the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devises or measures". *Riffo-Velozo v. Village of Scarsdale*, 68 A.D. 3d 839, 840, 891 N.Y.S.2d 418 (2d Dept. 2009). "It is still necessary, however, for the plaintiff to show that the statute was violated and that the violation proximately caused his injury." *Cahill,* 4 N.Y.3d @ 39. "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability." *Id.*

While the plaintiffs have established that the defendants owe a duty of care to maintain a safe workplace, the issue of whether the duty has been breached in violation of Labor Law §240, is a disputed question of fact. "In this case, plaintiff was working on a ladder and thus subject to an 'elevation-related risk'" *Riffo-Velozo v. Village of Scarsdale*, 68 A.D. 3d @ 840 *quoting Gordon v. Eastern Ry. Supply*, 82 N.Y2d 555, 561 [1993]. "The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240(1) was not met" *Id.* However, the determination to use an extension ladder when the plaintiff must balance himself without use of either hand when installing the pipe and with only one hand when ascending and descending the ladder requires a further and factual assessment in order to determine whether there has been a violation of the Labor Law. The determination of the type of protective safety device required for a particular job depends on the foreseeable risks of harm presented by the nature of the work. The statute requires that the device provided must allow the plaintiff to work at an elevation without falling and allow him to safely ascend and descend from the necessary height. *Potter v. NYC Partnership Housing Development Fund Co., Inc.*, 13 A.D.3d 83, 786 N.Y.S.2d 438.

There is also a dispute as to whether the defendant made available to the plaintiff, the proper scaffolding equipment or adequate safety devices to prevent the ladder from slipping and the plaintiff failed to avail himself of such. The plaintiff claims that no other device was made available to him and the defendant claims that a scaffolding device was available for use when needed and that the plaintiff was made aware of this. Credibility issues, of course, are not properly resolved on a summary judgment motion. See, *S& A Realty Management Corp. v. Prestigiacomo*, 306 A.D.2d 339 (2d Dept. 2003).

There are issues of fact and both the plaintiffs' motion and the defendant's motion for summary judgment are DENIED. The parties are directed to appear in Courtroom 1600 on January 6, 2015 at 9:15 AM on for a settlement conference.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
December 1, 2014

HON. SAM D. WALKER, J.S.C.