

Pena v Jane H. Goldman Residuary Trust No. 1

2016 NY Slip Op 32630(U)

December 2, 2016

Supreme Court, Bronx County

Docket Number: 301044/2015

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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JUAN PENA,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 301044/2015

THE JANE H. GOLDMAN RESIDUARY TRUST
NUMBER 1, THE JANE H. GOLDMAN RESIDUARY
TRUST NUMBER 3, THE JANE H. GOLDMAN 2008
Y-1 TRUST, THE JANE H. GOLDMAN 2008 Y-3
TRUST, THE ALLAN H. GOLDMAN RESIDUARY
TRUST NUMBER 1, THE ALLAN H. GOLDMAN
RESIDUARY TRUST NUMBER 3, THE ALLAN H.
GOLDMAN 2008 Y-1 TRUST, THE ALLAN H.
GOLDMAN 2008 Y-3 TRUST, THE DIANE
GOLDMAN KEMPER RESIDUARY TRUST NUMBER
1, THE DIANE GOLDMAN KEMPER RESIDUARY
TRUST NUMBER 3, THE DIANE GOLDMAN
KEMPER 2008 Y-1 TRUST, THE DIANE GOLDMAN
KEMPER 2008 Y-3 TRUST, THE AMY P. GOLDMAN
RESIDUARY TRUST NUMBER 1, THE AMY P.
GOLDMAN RESIDUARY TRUST NUMBER 3, THE
AMY P. GOLDMAN 2008 Y-1 TRUST, THE AMY P.
GOLDMAN 2008 Y-3 TRUST, SOL GOLDMAN
INVESTMENTS, LLC, CENTURY MANAGEMENT
SERVICES INC., and WALLACK MANAGEMENT
CO., INC.,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated July 29, 2016 and the affirmation and exhibits submitted in support thereof; defendants' notice of cross-motion dated November 7, 2016 and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition and reply dated November 17, 2016 and the affidavits submitted therewith; defendants' reply affirmation and supplemental affirmation in opposition dated November 18, 2016 and the affidavit submitted therewith; and due deliberation; the court finds:

Plaintiff commenced this action seeking to recover damages for injuries sustained on June 12, 2013 when he fell from a ladder while painting a pipe in the basement of a cooperative building at 190 East 72nd Street, New York County. It is alleged that defendants The Jane H. Goldman Residuary Trust Number 1, The Jane H. Goldman Residuary Trust Number 3, The Jane H. Goldman 2008 Y-1 Trust, The Jane H. Goldman 2008 Y-3 Trust, The Allan H. Goldman Residuary Trust Number 1, The Allan H. Goldman Residuary Trust Number 3, The Allan H. Goldman 2008 Y-1 Trust, The Allan H. Goldman 2008 Y-3 Trust, The Diane Goldman Kemper Residuary Trust Number 1, The Diane Goldman Kemper Residuary Trust Number 3, The Diane Goldman Kemper 2008 Y-1 Trust, The Diane Goldman Kemper 2008 Y-3 Trust, The Amy P. Goldman Residuary Trust Number 1, The Amy P. Goldman Residuary Trust Number 3, The Amy P. Goldman 2008 Y-1 Trust, The Amy P. Goldman 2008 Y-3 Trust (“Trust Defendants”) and Sol Goldman Investments, LLC (“SGI”) (collectively “defendants”) owned the premises. Plaintiff now moves pursuant to CPLR 3212 for partial summary judgment in his favor on his Labor Law § 240(1) claim. Defendants oppose the motion and cross-move for summary judgment dismissing the complaint in its entirety. Submitted are the pleadings, deposition transcripts, and affidavits among other exhibits. The action against defendants Century Management Services, Inc. and Wallack Management Co., Inc. has been discontinued.

As a preliminary matter, a so-ordered stipulation dated May 10, 2016 extended the deadline for summary judgment motions to September 18. Plaintiff’s motion is timely but defendants’ cross-motion as to the Labor Law §§ 200, 241(6) and common-law negligence claims is not. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep’t 2006), *appeal dismissed*, 9 N.Y.3d 862, 872 N.E.2d 878, 840 N.Y.S.2d 765 (2007). However, plaintiff in reply does not oppose the dismissal of those causes of action. Accordingly, the cross-motion insofar as it seeks to dismiss the Labor Law §§ 200, 241(6) and common-law negligence claims is granted. The only cause of action that remains is plaintiff’s Labor Law § 240(1) claim.

Plaintiff testified that he was employed by non-party 190 East 72nd Corp. (“East 72nd Corp.”) as a porter in a residential and commercial building. On the day of the accident, building superintendent Adrian Sanchez (“Sanchez”) tasked plaintiff with painting the hot water pipes in the basement. The pipes were located ten or eleven feet above the basement floor. He retrieved a six-foot aluminum A-frame ladder from the shop room. The left stabilizer bar was broken and a rubber foot was missing. The ladder “would move frontwards, backwards, to the side.” Plaintiff last used the ladder one week earlier, and the ladder was in the same condition. Although several ladders were kept in the shop room, the other ladders were all taken by the time plaintiff arrived. He told Sanchez the ladder was broken but Sanchez said “it’s fine.” Plaintiff was standing on the second step from the top with a paint roller in his right hand when he felt the ladder move. He tried to hold on to the ladder with his left hand but he fell to the ground. The ladder toppled onto several storage bins. Angel Alvarado (“Alvarado”), a porter, was eating lunch near the elevators when he heard plaintiff shout. Alvarado called Sanchez.

Claims risk manager Kathleen Weeks (“Weeks”) testified on behalf of defendants. Weeks described SGI as a real estate company whose principals were members of the Goldman family. SGI was in the business of buying and selling real estate and its properties, which included 190 East 72nd Street (the “Property”), were either owned by the family or by trusts created for the family’s benefit. The Property had been let to East 72nd Corp. under a triple net lease prior to the accident, and East 72nd Corp. was responsible for all building operations. Defendants merely owned the ground on which the building stood. They collected rent from East 72nd Corp. and other entities through Goldman Partners I. In 2010, the Trust Defendants divested themselves of their ownership interests in the Property. The owners at the time of the accident were the Estate of Lillian Goldman and the Lillian Goldman Marital Trust, each with a 20% share, and SGI with a 60% share.

In its answer, SGI admitted it “had a partial ownership interest in the property located at 190 East 72nd Street.” The deeds and the lease modification recorded in the Office of the City Register

further described defendants' ownership of the Property.

Labor Law § 240(1) imposes a nondelegable duty upon owners to provide safety devices to protect workers from risks inherent in elevated work sites. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 953 N.E.2d 794, 798, 929 N.Y.S.2d 556, 561 (2011). The Trust Defendants have shown they did not own the Property when the accident occurred, and plaintiff has not raised a triable issue of fact in opposition. Plaintiff objects to the admissibility of defendants' documents because they were not authenticated but he, too, relies on the recorded documents to establish ownership. The court may also take judicial notice of documents recorded in the Office of the City Register. *See 74 Eldert, LLC v. Sharp*, 2014 N.Y. Misc. LEXIS 174 (Sup. Ct. Kings County Jan. 17, 2014). The documents show that the Trust Defendants conveyed their ownership shares to SGI three years before the accident.

To recover under Labor Law §240(1), plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the injury. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 761, 771 N.Y.S.2d 484, 488 (2003). Plaintiff has met his burden on summary judgment. *See Ocana v. Quasar Realty Partners L.P.*, 137 A.D.3d 566, 27 N.Y.S.3d 530 (1st Dep't), *lv dismissed*, 27 N.Y.3d 1078, 54 N.E.3d 1172, 35 N.Y.S.3d 300 (2016). The statute references "painting," and plaintiff fell from a ladder which shifted while he was painting. SGI fails to raise a triable issue of fact in opposition.

SGI argues that as an out-of-possession landlord it lacked a sufficient nexus to plaintiff and seeks judgment in its favor. An out-of-possession owner is liable under the Labor Law even though it lacks notice or control over the work contracted for by its tenant or lessee, *see Sanatass v. Consolidated Inv. Co., Inc.*, 10 N.Y.3d 333, 887 N.E.2d 112, 858 N.Y.S.2d 67 (2008), when there is "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." *Morton v. State of New York*, 15 N.Y.3d 50, 56, 930 N.E.2d 271, 274, 904 N.Y.S.2d 350, 353 (2010) (internal citation omitted). The lease between SGI and East 72nd Corp. created the

sufficient nexus, and SGI may not avoid liability merely because it leased the premises to another entity. *Costa v. State of New York*, 141 A.D.3d 43, 46, 32 N.Y.S.3d 147, 150 (1st Dep't 2016) (internal citation omitted). SGI's attempt to limit its interest to the ground beneath the building also fails. The deed recorded on May 26, 1994 and the lease modification recorded on March 24, 2010 described the Property as the "plot, piece of parcel or land, with the buildings and improvements erected thereon."

SGI next argues that plaintiff was the sole proximate cause of the accident. Generally, plaintiff cannot be solely to blame if a statutory violation is a proximate cause of the injury. *Blake*, 1 N.Y.3d at 290, 803 N.E.2d at 763, 771 N.Y.S.2d at 490. SGI submits an affidavit from Sanchez who averred that there were multiple six-foot A-frame ladders available to plaintiff "had he chosen to retrieve one." Sanchez, though, failed to rebut plaintiff's testimony that the other ladders stored in the shop room were unavailable. *See Golubowski v. City of New York*, 131 A.D.3d 900, 17 N.Y.S.3d 110 (1st Dep't 2015). Plaintiff's knowing use of a broken ladder addresses his comparative negligence, which is not a defense. *See Stankey v. Tishman Constr. Corp. of N.Y.*, 131 A.D.3d 430, 15 N.Y.S.3d 48 (1st Dep't 2015). Nor was he required to prove that the ladder was defective. *See Fletcher v. Brookfield Props.*, 2016 NY Slip Op 08105 (1st Dep't Dec. 1, 2016). The fact that the accident was unwitnessed is no bar to summary judgment. *See Ortiz v. Burke Ave. Realty, Inc.*, 126 A.D.3d 577, 3 N.Y.S.3d 582 (1st Dep't 2015).

Alvarado's affidavits also fail to raise an issue of fact. His statements that he and plaintiff were painting pipes in the basement contradicts plaintiff's testimony that he was working alone. He told an investigator the subject ladder was in "good enough condition for Juan to use." Plaintiff also "took his right foot off the ladder and placed it onto a group of cinder blocks" prior to the accident. However, Alvarado did not rebut plaintiff's testimony that the ladder moved before it tipped over. Alvarado did not witness plaintiff's fall and therefore cannot state whether plaintiff's foot was still on top of the cinder blocks at the moment he fell. This last statement also bears more on plaintiff's comparative negligence, not the issue of whether plaintiff was provided with proper protection.

Accordingly, it is

ORDERED, that plaintiff's motion seeking partial summary judgment on his Labor Law § 240(1) claim is granted to the extent of granting the motion against defendant Sol Goldman Investments, LLC only; and it is further

ORDERED, that the cross-motion of defendants The Jane H. Goldman Residuary Trust Number 1, The Jane H. Goldman Residuary Trust Number 3, The Jane H. Goldman 2008 Y-1 Trust, The Jane H. Goldman 2008 Y-3 Trust, The Allan H. Goldman Residuary Trust Number 1, The Allan H. Goldman Residuary Trust Number 3, The Allan H. Goldman 2008 Y-1 Trust, The Allan H. Goldman 2008 Y-3 Trust, The Diane Goldman Kemper Residuary Trust Number 1, The Diane Goldman Kemper Residuary Trust Number 3, The Diane Goldman Kemper 2008 Y-1 Trust, The Diane Goldman Kemper 2008 Y-3 Trust, The Amy P. Goldman Residuary Trust Number 1, The Amy P. Goldman Residuary Trust Number 3, The Amy P. Goldman 2008 Y-1 Trust, The Amy P. Goldman 2008 Y-3 Trust (the "Trust Defendants") and Sol Goldman Investments, LLC for summary judgment dismissing the complaint is granted to the extent of dismissing plaintiff's complaint in its entirety against the Trust Defendants and dismissing plaintiff's Labor Law §§ 200, 241(6) and common-law negligence claims against defendant Sol Goldman Investments, LLC; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of plaintiff on the issue of defendant Sol Goldman Investments, LLC's liability on his Labor Law § 240(1) claim; and it is further

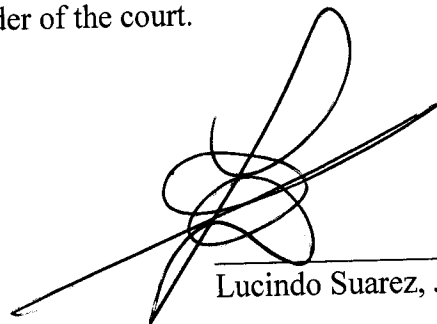
ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants The Jane H. Goldman Residuary Trust Number 1, The Jane H. Goldman Residuary Trust Number 3, The Jane H. Goldman 2008 Y-1 Trust, The Jane H. Goldman 2008 Y-3 Trust, The Allan H. Goldman Residuary Trust Number 1, The Allan H. Goldman Residuary Trust Number 3, The Allan H. Goldman 2008 Y-1 Trust, The Allan H. Goldman 2008 Y-3 Trust, The Diane Goldman Kemper Residuary Trust

Number 1, The Diane Goldman Kemper Residuary Trust Number 3, The Diane Goldman Kemper 2008 Y-1 Trust, The Diane Goldman Kemper 2008 Y-3 Trust, The Amy P. Goldman Residuary Trust Number 1, The Amy P. Goldman Residuary Trust Number 3, The Amy P. Goldman 2008 Y-1 Trust, and The Amy P. Goldman 2008 Y-3 Trust dismissing plaintiff's complaint against them; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant Sol Goldman Investments, LLC dismissing plaintiff's Labor Law §§ 200, 241(6) and common-law negligence claims against it.

This constitutes the decision and order of the court.

Dated: December 2, 2016

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Lucindo Suarez, J.S.C.