Ramnath v Brooklyn Inst. of Arts & Sciences
2016 NY Slip Op 32773(U)
November 23, 2016
Supreme Court, Queens County
Docket Number: 702884/14
Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

ANROD RAMNATH,

Plaintiff,

-against-

THE BROOKLYN INSTITUTE OF ARTS AND SCIENCES d/b/a BROOKLYN MUSEUM and WEST INDIAN AMERICAN DAY CARNIVAL ASSOCIATION, INC.,

Defendants.

Index No: 702884/14

Motion Date: 6/5/15

Motion Seq. No.: 4

The following numbered papers read on this motion by defendants' for an Order vacating the court's June 20, 2016 order granting plaintiff's unopposed motion for summary judgment as to liability on his Labor Law § 240(1)claim; deeming the defendants' opposition to plaintiff's motion timely interposed, and determining the motion on the merits.

	PAPERS EF NUMBERED
Order to Show Cause-Affidavits-Exhibits	61-69, 71,72,74
Answering Affidavits-Exhibits.....	75 - 83
Replying Affidavits[1].....	
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Upon the foregoing papers it is ordered that this motion is determined as follows.

[1]Duplicative of Exhibit B in the Order to Show Cause.

[2]Defendants submitted the "Affirmation in Opposition" which they intended to submit in response to the plaintiff's summary judgment motion, but neither plaintiff nor defendants submitted a copy of the plaintiff's motion. Thus, to avoid any further delay, the court will rely on the motion papers plaintiff previously e-filed (see CPLR 2214).

The branch of the motion seeking to vacate the court's order dated June 20, 2016 is granted.

After the motion was submitted without opposition in the Central Motion Part, the court agreed to accept the adjournment of the motion in accordance with the parties stipulation dated May 20, 2016 based upon defense counsel's representation that the need for the adjournment was a scheduled mediation on July 14, 2016. Contrary to plaintiff's counsel's claim the defense counsel was directed to, and did, confirm the adjournment by letter date May 25, 2016 sent to the court and a copy to plaintiff's counsel. However, the motion was decided unopposed, by Order dated June 20, 2016, as the stipulation was overlooked when the motion papers were received in chambers several days after submission in the Central Motion Part.

Under the circumstances, the Order of the court dated June 20, 2016 and entered on June 22, 2016 is vacated and the court will address the plaintiff's summary judgment motion on its merits.

The plaintiff commenced this action to recover for personal injuries he allegedly sustained on August 28, 2013 in the course of his employment with The Williamsburg Company (Williamsburg) when he allegedly fell from an unsecured ladder during the construction of a stage in the parking lot of the property owned by the defendant, the Brooklyn Institute of Arts and Sciences d/b/a Brooklyn Museum (the Museum) and leased to the defendant, West Indian American Day Carnival Association, Inc.(West Indian Assoc.) to be used in conjunction with the West Indian American Day Parade. The West Indian Assoc. hired Williamsburg to construct the stage.

Plaintiff commenced this action against the defendants asserting causes of action based upon the alleged violations of Labor Law §§ 240(1), 241(6) and 200 and common law negligence.

After completion of discovery plaintiff filed the Note of Issue on December 11, 2015 and by Notice of Motion dated March 7, 2016 moved for summary judgement in his favor on his Labor Law § 240(1) claim.

To prevail on a cause of action based upon the violation of Labor Law § 240(1), the plaintiff must establish that he was injured during one of the enumerated activities (Labor Law § 240[1]; see Wein v Amato Props., LLC, 30 AD3d 506, 507 [2006]; Kretzschmar v New York State Urban Development Corp., 13 AD3d 270 [2004]), that a violation of Labor Law §240(1) occurred, and that

the violation was a proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452 [1985]; Zimmer v Chemung County Performing Arts, 65 NY2d 513, 524 [1985]; Nimirovski v Vornado Realty Trust Co., 29 AD3d 762, 763 [2006]).

In support of his motion, the plaintiff submitted, inter alia, his affidavit and deposition testimony, the deposition testimonies of West Indian Assoc. by Thomas Bailey, the Brooklyn Museum by James Kelly, schematic drawings of the stage, which demonstrated, prima facie, his entitlement to summary judgment by demonstrating that he was engaged construction work covered by Labor Law § 240(1), and that he fell from an unsecured A frame ladder that shook, wobbled, moved, and fell over (see Esposito v N.Y. City Indus. Dev. Agency, 1 NY3d 526 [2003]; Bland v Manocherian, 66 NY2d 452, 461 [1985]; McCaffery v Wright & Co. Constr., Inc., 71 AD3d 842 [2010]; Salon v Millinery Syndicate, Inc., 47 AD3d 914 [2008]; Granillo v Donna Karen Co., 17 AD3d 531 [2005]) and that no other safety devices were provided which might have prevented his fall (see Ortiz v 164 Atlantic Avenue, LLC, 77 AD3d 807, 809 [2010]; Cunningham v Alexander's King Plaza, LLC, 22 AD3d 703, 706 [2005].

The stage to be constructed was made of plywood over a steel skeleton frame and elevated between 3 1/2' to 5 1/2' above the ground due to the grade of the parking lot. Plaintiff testified that at the time of his accident he was working alone moving 4' X 8' sheets of plywood from a pile where they had been delivered and stacked to the steel platform of the stage. He explained that to accomplish the task he took one sheet of plywood from the pile with both hands, leaned it on his pouch, tool belt, hip and right hand, then held the ladder, an A-frame aluminum ladder, with his left hand, walked up the ladder and then toppled it on to the stage (Plaintiff's EBT, p.67-73). The plaintiff testified that the accident occurred when he was going up the ladder with a sheet of plywood and the ladder wobbled, shook and tipped over to the left causing him to fall.

In opposition, the defendants, relying on the deposition testimony of Keith Williams, the owner of Williamsburg and plaintiff's boss, contend that summary judgment should be denied as issues of fact exist as to how, when and where this accident occurred. Defendants assert that this was an unwitnessed accident which plaintiff did not report and Keith Williams testified that no ladders were used at the job site by his crew.

The defendants' assertion that summary judgment must be denied as this was an unwitnessed accident is without merit.

The fact that the plaintiff may have been the sole witness to the accident, even if true, does not preclude summary judgment in his favor (see McCaffery v Wright & Co. Constr., Inc., supra; Yin Min Zhu v Triple L. Group, LLC, 64 AD3d 590 [2009]; Perrone v Tishman Speyer Props., L.P., 13 AD3d 146 [2004]) where his testimony concerning how the accident occurred is neither inconsistent with his own account nor contradicted by other evidence (see Klein v City of New York, 222 AD2d 351 [1995] aff'd 89 NY2d 833 [1996]).

Defendants' opposition merely criticizes plaintiff's account as unwitnessed and unsubstantiated (see Evans v Syracuse Model Neighborhood Corp., 53 AD3d 1135, 1137 [2008], quoting Niles v Shue Roofing Co., 219 AD2d 785, 785 [1995]), without submitting any admissible evidence to defeat plaintiff's motion. The only evidence defendants submitted is the deposition testimony of Keith Williams, which was not considered as it was taken after the note of issue was filed and without leave of court.

Plaintiff filed his Note of Issue on December 11, 2016 after completion of the depositions of all parties. The plaintiff moved for summary judgment on March 7, 2016 and the defendants served Keith Williams on May 9, 2016 with a subpoena to take his deposition on June 9, 2016.

The CPLR affords parties a right to "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101. The opportunity for disclosure, however, is not without limits. Once the note of issue is filed additional discovery may be had only as provided in 22 NYCRR 202.21 of the Uniform Rules for the Trial Courts (see Audiovox Corp. v Benyamini, 265 AD2d 135, 139-140 [2000]).

Pursuant to 22 NYCRR 202.21(e), a party may move within 20 days after service of a note of issue and certificate of readiness to vacate a note of issue upon the ground that the case is not ready for trial. Pursuant to 22 NYCRR 202.21(d) the court may, in its discretion, permit additional discovery after the filing of a note of issue and certificate of readiness upon motion where the moving party demonstrates that "unusual or unanticipated circumstances" developed subsequent to the filing, requiring additional pretrial proceedings to prevent substantial prejudice (see Gianacopoulos v Corona, 133 AD3d 565, 565 [2015]; Blinds To Go (US), Inc. v Times Plaza Dev., L.P., 111 AD3d 775 [2012]; Tirado v Miller, 75 AD3d 153, 157 [2010]). An unusual and unanticipated circumstance is some occurrence after the filing of a note of issue that is not in the control of the party seeking further discovery and which causes actual rather than potential

prejudice (see Audiovox Corp. v Benyamini, supra at 138-139 [2000]).

The defendant West Indian Assoc. hired Williamsburg for the work, therefore, defendants cannot claim that they were unaware of the identity of plaintiff's employer. However, defendants did not seek to depose the non-party Keith Williams within 45 days after completion of party depositions on December 7, 2016 as provided in the Preliminary Conference Order. Nor did their motion to vacate the note of issue include as outstanding discovery Wiliams' deposition, nor indicate that it was even sought. The defendants never moved for additional discovery pursuant to 22 NYCRR 202.21(d). Defendants did not serve their subpoena for Williams' deposition until two months after plaintiff moved for summary judgment and failed to offer an unusual or unanticipated circumstance which develop subsequent to the filing of the note of issue to justify further discovery.

In any event, even if the court considered Keith Williams' deposition, it is insufficient to raise a triable issue of fact. Williams testified that he was at the site every day, but not the whole day. With respect to the ladder, he admitted that a ladder was at the site. He did not testify that he saw the plaintiff while he was working. Williams' testimony that it is impossible for a 5'6" man like plaintiff to hold a 4' X 8' piece of plywood in his hand does not contradict the plaintiff's testimony. Plaintiff did not testify that he held the plywood in his hand as he climbed up the ladder. Finally, Williams' opinion that the manner in which plaintiff testified he performed his work is impossible is contradicted by Williams' own testimony that while he has never seen anyone carry a piece of plywood up a ladder he has heard of people doing that in OSHA training classes (Williams EBT p. 30).

The defendants offered only speculation as to whether plaintiff's accident actually occurred without any evidence which specifically contradicts the facts as alleged by plaintiff or which raises an issue of fact regarding the plaintiff's credibility as to a material fact (see Fox v H&M Hennes & Mauritz, L.P., 83 AD3d 889, 891 [2011]). However, speculation is insufficient to raise a triable issue of fact (see generally Morgan v New York Telephone, 220 AD2d 728 [1995]).

Accordingly, the plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim is granted.

Dated: November 23, 2016
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J.S.C.

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