SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JOSE ANTONIO GOMES

INDEX NO. 158154/15

MOT. DATE

- v -

MOT. SEQ. NO. 002

CWC, INC. and FLINTLOCK CONSTRUCTION SERVICES LLC

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s). 61-72

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s). 77-89

Replying Affidavits ECFS Doc. No(s). 90-92

This action is brought pursuant to the Labor Law for personal injuries sustained on a construction site. Plaintiff now moves for summary judgment on his Labor Law § 240[1] claim on the issue of liability. Defendants oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The following facts are based upon plaintiff's deposition testimony, which was given through a Portuguese interpreter and was taken over the course of two days. On June 19, 2015, the date of the accident, plaintiff was employed by a company called Kenry. Plaintiff had worked for Kenry for one year and eight months prior to his accident. The construction site where plaintiff's accident occurred was located at 219 East 44th Street, New York, New York (the "Premises"). A 32-story building was being construction on the Premises "from the ground up". Plaintiff had worked at the site for approximately four to five months before the accident. Plaintiff described the work he performed as follows: he "[s]et up forms, cement[ed], dismantle[d] the forms" and also performed "finishing" and "cleaning" work. The forms were approximately six feet, and he would fill them up with cement to set, then take out the forms. Plaintiff also stated that he did other general work at the site.

Plaintiff testified that he received paychecks from Kenry. When he first arrived on the job, he would get his assignment from a sign-up book. There were other contractors on the site with approximately 40 workers performing/installing "[p]iping, lights," "sheetrock", etc.. Plaintiff admitted that there was a "work safety contractor" at the site who wore a "vest and cap" but didn't know who they were or how often they were on the site. Kenry held "toolbox or safety meetings" a "few times", but only when "you would, like, hurt your finger or something, then they would call you over there."

Dated: 8/16/17

HON. LYNN R. KOTLER, 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

DISCUSSION

Plaintiff recalled a man named William who was his immediate supervisor on the date of the accident. William was "second foreman" and spoke in Spanish which plaintiff understood "a little bit." On the date of the accident, plaintiff's job was to "take out the forms" by taking pegs out with a twenty-four inch hammer. Before the pegs were inserted, they were treated with oil so the cement wouldn't stick. The oil came in a 200-liter bucket and the oil was brushed onto the pegs.

Plaintiff's accident occurred at about 10am, when he was on the 32nd floor of the building outside the elevator shaft removing cement forms. Plaintiff was performing this work on a platform above the cement floor which was approximately three feet wide and the sides were covered with netting to prevent things from falling to below. As plaintiff was loosening one of the forms, he slipped on oil. About the accident, plaintiff stated:

Q. Tell us what happened.

A. I took out some forms. I put it on the floor and then I stepped on top of it so I could take another one, and when I'm pulling it, the one on top came into me and then I fell and I twisted my knee and my backbone, my spine.

...

Q. What was it that you were standing on immediately before?

A. I was standing on top of a form.

Q. How many forms?

A. Four forms. I don't remember very well.

Q. Why were you standing on top of the forms instead of on top of the platform?

A. Because I couldn't reach it.

...

Q. As the forms started to come off of the wall, what was it that slipped? Was it your foot or was it the forms that you were standing on or something else?

...

A. Both things.

Q. Which foot or did both feet slip?

A. Both.

Q. Do you know why the forms slipped?

A. Because there was oil.

...

Q. Did the hammer hit any part of your body before it hit the ground?

...

A. My knee.

...

Q. What part of your body came into contact with the platform first?

A. The knee.

Q. Which knee?

A. Right.

Q. After your right knee went to the platform, what part of your body, if any, hit the platform next?

A. My back.

Q. Did you land on the platform or did you land on anything on top of the platform?

A. I fell on top of the forms over there.

...

Q. You mentioned that the form fell on top of you, correct?

A. Yes.

Q. Which form or did both forms fall on top of you?

A. Both.

Q. What parts of your body did the top form fall on top of?

A. On my knee.

Q. Which parts of your body did the bottom form fall on top of?

A. My back.

...

Plaintiff testified that he had been provided with a safety harness which was attached to a safety line. Plaintiff also testified that there was a "long" safety lanyard attached to the harness towards the middle of his shoulder which was secured to the safety line. Plaintiff testified that there was slack in the safety line, that the safety line was set up by "[t]he security guys that put it there", and that he didn't know there was slack in the line prior to his accident. Plaintiff explained that he fell "[b]ecause the line of [his] safety belt is long, there is no time, so, when you're falling, for it to hold." About other safety devices, plaintiff testified as follows.

Q. Before June 19, 2015, did you ever ask anyone to provide you with a ladder or a stepladder in order to do any of the work on the platform?

A. I asked for a "scaffolding", but they don't give it.

...

Q. Who did you ask?

A. I asked William.

...

Plaintiff was asked about the events which occurred after his accident and testified as follows:

Q. When the person came back to the platform who had gone to get coffee, what did you say to him, if anything?

A. I told him that the form fell on top of my and I hurt my knee. That my knee exploded.

Q. Do you recall the name of this person?

A. No.

...

Q. At some point in time, did you leave the platform?

A. I left.

Q. When did you leave the platform?

A. Then the boss told me, "Oh, no, just stick around. Stick around, that's nothing. You'll get better soon."

...

Q. Did you continue to do work after you fell?

A. Just a little because I couldn't bear any weight and my knee was all swollen.

Plaintiff then claims that he told William he was injured and asked to be taken to the hospital, but William refused. Plaintiff testified that he continued to work through the rest of the day even though he was experiencing a lot of pain. Plaintiff picked up some wood and did other "little work." At the end of the day, plaintiff got a taxi and took the train home. When he got home, plaintiff took Tylenol and put a "gel" on his knee. Plaintiff had trouble sleeping that night because of the pain in his knee and back.

Plaintiff went to work the next day. When he got there, plaintiff told William he was "not well" but William told him to work and drink water. Plaintiff then did some light work like sweeping. At about 11am, plaintiff stopped working and sat down because he couldn't handle the pain anymore. At about 1pm, plaintiff was sent with another Hispanic worker "to a clinic".

As for the presence of the oil that he slipped on, Plaintiff theorized that the oil was present because when "the sun hits" the forms and "its so hot", "the oil then comes down to the floor."

Defendants are CSC, Inc. ("CSW"), which owns the Premises, and Flintlock Construction Services, LLC ("Flintlock"), which was the general contractor for the construction at the site. Flintlock produced Dennis Alfonso for deposition. On the date of plaintiff's accident, Alfonso was Flintlock's Senior Superintendent at the construction site. Kenry was Flintlock's concrete subcontractor. Kenry was responsible for erecting the superstructure of the building. Alfonso walked the site daily and conducted safety inspections. There was also a site safety manager named Ralph Camardo on the site.

Alfonso was asked about how concrete laborers performed their work and testified as follows:

Q. Were work platforms used at or about the 32nd floor by the concrete laborers at the site in connection with their work with the concrete forms?

A. Yes.

...

Q. How did the concrete laborers get to elevated heights to strip the forms from the platform if the forms were beyond their reach?

A. They would step on the flanges.

Alfonso further explained that the workers would step on the flanges and attach themselves to a line using a lanyard clipped to their harnesses.

Non-party Ralph Camardo testified at a deposition. He was employed by Site Safety as a site safety manager for the construction site. Carnardo confirmed that on the date of plaintiff's accident there was a work platform but no pipe scaffolding on the 32nd floor. The only way a worker could elevate himself to strip forms above his reach was to use a climbing harness; he could not use a ladder. Camardo opined that it was foreseeable that the oil that was used in connection with the form work would render the platform slippery.

Parties' arguments

Plaintiff argues that he has established that he was not provided with proper protection under Labor Law § 240[1] as a matter of law. Plaintiff's counsel argues that CWC, as owner, is statutorily liable under Labor Law § 240[1]. Plaintiff's counsel argues that Flintlock is responsible as general contractor since its contract with CWC gave Flintlock the right to exercise control over the work at the site and was otherwise responsible for safety. Plaintiff further contends that Labor Law § 240(1) was violated "because despite being provided with a safety harness/belt and lanyard, which Plaintiff was utilizing at the time of the accident, and a safety cable to which Plaintiff had attached his lanyard, the safety cable was improper, defective and unsafe in that it had too much slack and, thus, failed to arrest Plaintiff's fall at the time of the accident." Therefore, plaintiff's position is that he was not provided with proper protection as a matter of law.

In turn, defendants dispute that plaintiff's accident even occurred. Defendants have submitted the sworn affidavit of William Ramirez, who claims to be the William plaintiff referred to in his deposition. Ramirez states that he was employed by Kenry as a labor foreman and he worked at the construction site from 2015 onward. He claims to personally remember plaintiff "as a worker that was performing concrete form work" at the site. Ramirez claims that plaintiff was "one of several concrete workers that were released from their employment" at the site. Specifically, Ramirez states that he "recall[s] informing several workers, including Jose, that their services were no longer needed..." Ramirez explains that "the need for concrete form workers began to decline" as the building at the site reached the higher floors.

Further, Ramirez maintains that he only learned about plaintiff's accident on June 22, 2015 after plaintiff was laid off. Plaintiff showed up at the site and told Ramirez that he had been injured when his hammer hit his knee. Ramirez states: "[plaintiff] never told me that he fell down while removing forms and never told me that he injured his back."

Ramirez goes on to describe the equipment and other safety devices present at the site and claims that he never received any complaint about not having "necessary tools or materials." Ramirez maintains that all of Kenry's workers, including plaintiff, were instructed "about the proper way to prepare forms for installation and how to remove forms." Defendants

Defendants further claim that plaintiff was not employed by Kenry, but rather, L.P. Concrete Consulting Inc. ("LP Concrete"). In support of that claim, defendants have provided the affidavit of Laura Phillips, who was President of LP Concrete, with her response to a subpoena and LP Concrete's payroll records showing that plaintiff was paid by LP Concrete from February 26, 2015 through June 17, 2015.

Defendants have also provided Camardo's site safety manager logs, prepared for various dates including the date of the accident. Camardo did not record plaintiff's accident in these logs.

Finally, defendants have provided certified records from CityMD in connection with treatment sought by plaintiff. In a document entitled Visit note dated June 23, 2015, the record provides in pertinent part: "Pt reports that he struck his knee accidentally with a hammer on Saturday while working. Applying bengay, taking advil and Tylenol. No prior injury to knee. Patient declines this as a workers comp case."

Defendants maintain that the motion should be denied because there are disputed issues of fact as to whether plaintiff's accident occurred at all, or even how he claims it did. Defense counsel points to what he perceives as inconsistencies by plaintiff about the height from which he fell as well as "the unknown length of plaintiff's lanyard."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> 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."

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991].

Here, assuming *arguendo* that plaintiff met his burden on this motion, defendants have raised triable issues of fact sufficient to defeat the motion. First and foremost, is whether the accident actually occurred. Here, defendants have come forward with plaintiff's supervisor's affidavit claiming that no accident occurred on the date plaintiff claims he was injured. Defendants have also provided Camardo's site safety log, which does not indicate that an accident occurred on the subject date, as well as plaintiff's medical records from CityMD, which indicate that plaintiff treated several days later and wherein he did not claim that he fell, but only that he struck his knee with a hammer. Further, in those CityMD records, plaintiff denied that this was a worker's compensation case, which a reasonable fact-finder could conclude meant that plaintiff did not injure his knee while he was at work. Issues of credibility such as these preclude summary judgment (see i.e. *Lacagnino v. Gonzalez*, 306 AD2d 250 [2d Dept 2003]; see also *Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335 [2011] [plaintiff's own claims enough to survive summary judgment but not sufficient standing alone for plaintiff to win summary judgment]).

While plaintiff is correct that his status as an employee on the date of the accident at the construction site is not in dispute, whether he was employed by Kenry or LP Concrete does in fact go to his credibility. Nonetheless, plaintiff has not met his burden on this motion. Plaintiff's Labor Law § 240[1] claim is premised on the fact that he was not provided with an adequate safety device, to wit, there was slack in the safety line. Plaintiff's own deposition testimony about how the accident occurred is not clear to the court. Whether the length of the safety line and the safety lanyard which plaintiff was provided was improper remains a question of fact. Even if the accident occurred, a reasonable fact-finder may conclude on this record that plaintiff's account of how the accident occurred is not accurate, i.e. that plaintiff was not attached to the safety line at the time of his accident.

Accordingly, for at least these reasons, plaintiff's motion for summary judgment must be denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/16/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.