SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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LUKASZ JANICKI,

Plaintiff,

-against-

BEAUX ARTS II LLC, THE BRODSKY ORGANIZATION, LLC., URBAN ASSOCIATES, LLC., STEVEN FARKAS AND SILVERCUP SCAFFOLDING 1 LLC,

Defendants.

Index Number: 156299/2013

Sequence Number: 005

Decision and Order

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendants' motion, pursuant to CPLR 3212, for partial summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition of Motion 2
Reply Affirmation - Exhibits 3

Facts

On August 1, 2012, plaintiff, Lukasz Janicki, allegedly sustained personal injuries to his hand, neck, and back as a result of falling off a scaffold while performing construction work at a building owned and operated by defendant Beaux Arts II LLC ("Beaux Arts") and located at 307 East 44th Street, New York, NY 10017 ("Building"). Plaintiff alleges that defendants The Brodsky Organization LLC. ("Brodsky"), Urban Associates, LLC. ("Urban"), and Silvercup Scaffolding 1 LLC ("Silvercup") supervised the construction work at the Building. Plaintiff's injuries occurred during the course of his employment with Veneer Construction ("Veneer"), a subcontractor doing work at the Building.

Procedural History

On July 11, 2013, plaintiff commenced this action initially against defendant Beaux Arts only, to recover for the personal injuries he allegedly sustained while working at the construction project. The complaint alleges violations of Labor Law §§ 200, 240(1), and 241(6).

Following receipt of Beaux Arts' answer, plaintiff moved, pursuant to CPLR 3025, for leave to serve a Supplemental Summons and Amended Complaint on Brodsky, Urban, Steven Farkas, and Silvercup, adding them as direct defendants. This Court granted the motion in a Decision and Order dated May 14, 2014; on May 15, 2014, plaintiff e-filed a Supplemental Summons and Amended Complaint. Per stipulation dated June 26, 2014 plaintiff voluntarily discontinued the instant action against Silvercup. By order dated March 23, 2016, this Court dismissed the complaint as against Steven Farkas. The remaining defendants are Beaux Arts, Brodsky, and Urban.

After plaintiff's failure to appear for three scheduled IMEs, the Court, by so-order stipulation dated March 18, 2015, granted defendants' motion to compel and directed plaintiff to appear for the three IMEs. Plaintiff once again failed to appear. Defendants demonstrated that its insurance carrier, York Risk Services Group, paid $2,600 in no-show fees to doctors and interpreters for the three missed IMEs. As a result, by motion dated September 28, 2015, defendants moved

to strike plaintiff's complaint for failure to appear at the IMEs and compel plaintiff to pay the no-show fees. By Decision and Order dated April 11, 2016, the Court denied defendants' motion to strike the complaint, but granted their motion to compel plaintiff to pay the no-show fees.

By Decision and Order dated March 24, 2016, the Court directed plaintiff to file its Note of Issue within 30 days of the date of entry of judgment. On March 28, 2016, plaintiff filed its Note of Issue.

The Instant Motion

The remaining defendants move, pursuant to CPLR 3212, for summary judgment, except for the 12 NYCRR § 23-1.8(c)(4) claim under Labor Law § 241(6) as against Beaux Arts, which defendants admit Beaux Arts may have "plausibl[y]" violated. However, as for plaintiff's Labor Law §§ 240(1) and 200 claims, defendants allege that they did not have exclusive and complete control over the premises, nor did they direct or control the means and methods of plaintiff's work, and that they should be dismissed from the action.

On October 13, 2016, plaintiff opposed the motion. Plaintiff alleges that defendants request to dismiss his Labor Law § 241(6) claim, except for an NYCRR regulation, is an improper request for relief. On the other hand, plaintiff concedes that Urban should be dismissed from the action and that defendants are entitled to a dismissal of plaintiff's Labor Law § 200 claim.

On November 9, 2016, defendants replied. Defendants argue that plaintiff's affidavit ("Affidavit"), dated October 11, 2016, which was written in English, submitted in opposition to defendants' summary judgment motion, is inadmissible because it was not accompanied, as required by CPLR 2101(b), by an affidavit of a qualified translator attesting to the accuracy of the English-language affidavit.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

The Court acknowledges that the Affidavit was not accompanied by an affidavit of a qualified translator attesting to the accuracy of the English-language affidavit. However, the Affidavit's defect does not prejudice defendants, as the facts that plaintiff attests to therein are consistent with those he swore to during his deposition, which was held on January 22, 2015. Thus, as defendants have not been prejudiced, and in the interest of time and efficiency, the Court disregards the Affidavit's defect and grants plaintiff leave to correct it. See CPLR 2101(f) ("A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given"). Alternatively, for the reason stated, the Court could disregard the Affidavit, but consider the deposition, in which the result is the same.

Plaintiff concedes that Urban should be dismissed from the action and that defendants are entitled to a dismissal of plaintiff's Labor Law § 200 claim. Accordingly, the Court hereby dismisses Urban and plaintiff's Labor Law § 200 claim from this action.

I. Defendant Brodsky is Hereby Dismissed from this Action

The Court finds plaintiff's argument that Brodsky is the Building's manager or agent, as defined by Labor Law § 240(1) and 241(6), unavailing. There is no evidence that Brodsky had the authority or exercised any control over the work being done by plaintiff or Veneer. See Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 (1981) ("Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241. To hold otherwise ... would lead to improbable and unjust results and

would directly contravene the express legislative history accompanying the 1969 amendments to these provisions"); see also Bjelicic v Lynned Realty Corp., 152 AD2d 151, 154 (1st Dept 1989) ("It is the ability to control or supervise the work giving rise to the duties imposed under Labor Law § 240 which renders a third party, who is neither an owner nor a general contractor, liable as their statutory 'agent' for any violation of section 240"). Additionally, the affidavits of Andrew Zeller, a Brodsky member, and Teena Mau, Urban's Assistant Property Manager for the past 12 years, both establish that Brodsky did not have any authority to supervise and/or control the work plaintiff performed. Thus, Brodsky is not a proper party to the action, and the case is dismissed as against it.

Accordingly, defendants' request to dismiss the action as against Brodsky is hereby granted.

II. Plaintiff's Labor Law § 240(1) Claim As Against Beaux Arts

Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty that proximately caused an injury. See Panek v County of Albany, 99 NY2d 452, 457 (2003) ("the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves"). Also, liability under this statute is applicable only when plaintiff's injuries involve or result from an extraordinary elevation-related hazard or risk. See Melber v 6333 Main St., Inc., 91 NY2d 759, 763 (1998) ("[Labor Law § 240(1) is] limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured").

Beaux Arts has failed to establish its right to summary judgment at this stage, as questions of fact still exist. Although defendants are correct in pointing out that plaintiff's allegation of acid burn injuries to his hands is not, as defined by Labor Law § 240(1), an elevation-related risk, plaintiff's allegation of slipping and falling 10-12 feet off the scaffold certainly is elevation-related. Defendants submit the affidavit of plaintiff's co-worker, Mieczylslaw Przystuplak, in which Pryzstuplak alleges he never witnessed plaintiff fall from the scaffold on the date of the alleged accident, in support of their motion. The conflicting testimony creates a question of fact, which cannot be decided at the summary judgment stage. See Quiles v Greene, 291 AD2d 345, 346 (1st Dept 2002) ("The conflicting versions provided by [plaintiff] and [defendant] reveal issues of disputed material fact"). These are issues of credibility and fact for the jury to decide, issues that cannot be decided on a motion for summary judgment. See People v Stavris, 75 AD2d 507 (1st Dept 1980) ("the court should not have decided the question of consistency as a matter of law but should have passed it to the jury to decide, with a proper instruction, as an issue of fact bearing on credibility"); see also People v Olivera, 45 AD3d 154 (1st Dept 2007) ("It is for the jury to decide what weight is to be given to evidence and if reasonable questions are raised concerning the credibility of such evidence, the jury has it within its power to completely disregard that evidence in arriving at a verdict").

Accordingly, defendants' motion for summary judgment on plaintiff's Labor Law § 240(1) claim as against Beaux Arts is denied as a matter of law.

III. Plaintiff's Labor Law § 241(6) Claim As Against Beaux Arts

Labor Law § 241(6) is meant to "protect workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition." See Nagel v D & R Realty Corp., 99 NY2d 98, 101 (2002). The allegations must be premised upon sufficiently specific New York State Industrial Code ("Industrial Code") sections in order to substantiate a finding of liability under the statute. See Ross v Curtis-Palmer Hydro-Elec. Co., supra at 502 ("plaintiff's Labor Law § 241(6) claim must fail because of the inadequacy of his allegations regarding the regulations defendants purportedly breached"); Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 851 (2d Dept 2006) ("plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards . . . In addition, the provision must be applicable to the facts of the case"). Furthermore, plaintiff's comparative negligence is a defense to a Labor Law § 241(6) claim. See Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 521 (1985) ("[Labor Law 241(6)] cannot rise to the level of negligence as a matter of law [because] contributory negligence was, and comparative negligence now is, a defense to [such] an action").

Defendants themselves concede in their motion for summary judgment that it is "plausible" that Beaux Arts violated 12 NYCRR § 23-1.8(c)(4), which requires every construction employee working with corrosive chemicals to be provided with the "appropriate protective apparel." See id. Additionally, once again, the parties offer conflicting testimony.

Plaintiff claims that he was not provided the correct type of gloves when working with acid, as the gloves given to him were made of cloth, and defendants claim that the appropriate gloves and goggles were undisputably provided. See Quiles v Greene, 291 AD2d at 346; see also People v Stavris, 75 AD2d at 507; see also People v Olivera, 45 AD3d at 154. Thus, genuine questions of fact remain, questions which cannot be summarily resolved.

Accordingly, defendants' motion for summary judgment as to plaintiff's Labor Law § 241(6) claim as against Beaux Arts is denied.

Conclusion

Motion granted in part, denied in part. The clerk is hereby directed to enter judgment (1) dismissing plaintiff's Labor Law § 200 claim; and (2) dismissing Urban Associates, LLC and The Brodsky Organization, LLC from this action.

The parties are to proceed to trial on plaintiff's Labor Law §§ 240(1) and 241(6) claims as against Beaux Arts II LLC.

Dated: October 4, 2017

Arthur F. Engoron, J.S.C.