Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

MARK FLYNN,

Plaintiff,

-against-

GREENE DEVELOPMENT GROUP LLC, JT MAGEN & CO., INC., and CAPITAL ONE BANK (USA) N.A., CAPITAL ONE FINANCIAL CORPORATION AND CAPITAL ONE, N.A.,

Defendant

JT MAGEN & CO., INC.,

Third-party Plaintiff,

-against-

A-VAL ARCHITECTURAL METAL CORP.,

Third-party Defendant.

Index No: 1751/09

Motion Date: 6/20/17

Motion Seq. No.: 5

The following papers numbered 1 to 12 read on this motion by plaintiff Mark Flynn (plaintiff) for an order restoring this matter to the trial calendar pursuant to CPLR 3216, for an extension of plaintiff's time to file the note of issue *nunc pro tunc*, and for partial summary judgment, pursuant to CPLR 3212 (c), on the issue of liability on his causes of action brought under Labor Law §§ 240 (1) and 241 (6), with costs and disbursements.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits ..... 1-4
Answering Affidavits - Exhibits ..... 5-10
Reply Affidavits ..... 11-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries that plaintiff allegedly sustained on October 1, 2008, due to alleged violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Plaintiff has alleged that while he was working at premises located at 858 Fulton Street, in Kings County, he fell from a scaffold, to the ground below. Defendant Greene Development Group LLC (Greene), was allegedly the owner of the subject premises. Plaintiff has alleged that defendants Capital One Bank (USA), N.A., Capital One Financial Corporation and Capital One, N.A., while doing business as Capital One Bank (collectively referred to as Capital One Bank), was a tenant at the subject premises that hired JT Magen & Co., Inc. (JT Magen), pursuant to a written agreement, to act as the general contractor for the work being performed at the time of the subject accident. JT Magen allegedly hired third-party defendant A-VAL Architectural Metal Corp. (A-VAL), to perform certain work at the premises and plaintiff was an employee of A-VAL.

As is relevant upon the instant motion, the procedural history of this action is as follows: Plaintiff commenced this action in or around January 2009, against Greene and JT Magen. In or around July 2009, JT Magen subsequently commenced a third-party action against A-VAL. In or around November 2009, plaintiff commenced a separate action against Capital One Bank. Pursuant to a court order dated June 7, 2010, and filed on June 17, 2010, the two main actions, along with the third-party action, were consolidated. In an order dated March 19, 2012, and filed on March 26, 2012, plaintiff's note of issue was vacated and instant case was marked off-calendar due to outstanding disclosure.

Plaintiff has now moved, pursuant to CPLR 3216, to restore this action to the trial calendar. Defendants have not opposed this branch of plaintiff's motion. The Note of Issue in this matter was stricken due to significant outstanding disclosure on March 19, 2012. Since no 90-day notice pursuant to CPLR 3216 was served, and since the additional disclosure has taken place, plaintiff is entitled to the relief sought on this branch of his motion (*see Gorski v St. John's Episcopal Hosp.*, 36 AD3d 757 [2d Dept 2007]; *Klevanskaya v Khanimova*, 21 AD3d 350 [2d Dept 2005]).

Accordingly, the Plaintiff is directed to serve and file a new Note of Issue, together with the payment of the requisite fee, no later than 30 days after the date of this order.

After filing the new Note of Issue, plaintiff shall serve a copy of this order with Notice of Entry upon the Clerk of the Trial Scheduling Part (TSP), together with a copy of the newly filed Note of Issue, whereupon the TSP Clerk shall place this action upon the TSP calendar for conference. In light of foregoing, the branch of plaintiff's motion to extend his time to file a note of issue *nunc pro tunc*, is denied as unnecessary.

Plaintiff has also moved for partial summary judgment on the issue of liability only on his causes of action brought under Labor Law §§ 240 (1) and 241 (6), and the court will not make a determination as to plaintiff's remaining causes of action on this motion. On a motion for summary judgment, a movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The existence of a genuine issue of material fact precludes summary relief (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

As an initial matter, in opposition to plaintiff's motion, Greene and A-VAL have argued plaintiff may not rely upon unsigned copies of deposition transcripts, namely, plaintiff's own deposition transcript dated August 2, 2011, and the deposition transcript of non-party Arkadiusz Gomola (Gomola), dated February 2, 2012. However, the record before the court contains an admissible, signed copy of Gomola's deposition transcript dated February 2, 2012. Nevertheless, the copy of Gomola's deposition transcript, which was annexed to plaintiff's motion papers, is admissible because it was certified by the reporter and no party has raised any challenges as to its accuracy (*see Boadu v City of New York*, 95 AD3d 918, 919 [2d Dept 2012]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]).

As to plaintiff's own deposition transcript dated August 2, 2011, CPLR 3116 (a) provides that:

> "The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed."

Plaintiff's deposition transcript is admissible because it was certified by the reporter and, having been submitted by plaintiff himself, it has been adopted as accurate by the deponent (*see David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]; *Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 986 [2d Dept 2012]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d at 936). Furthermore, in their opposition papers, Greene and A-Val have demonstrated that a copy of plaintiff's deposition transcript was sent to him on or about August 11, 2011. As such, since 60 days have passed since that time, the deposition transcript "may be used as fully as though signed" (CPLR 3116[a]). Turning now to the merits of the action, the court will first address plaintiff's cause of action brought under Labor Law § 240 (1).

Labor Law § 240 (1)

Plaintiff has moved for partial summary judgment on the issue of liability on this cause of action and has argued that the scaffold provided to him on the date of his accident failed to provide him with adequate protection within the meaning of Labor Law § 240 (1), and that a violation of that section proximately caused his alleged injuries. In opposition, Greene and A-VAL and JT Magen and Capital One Bank have all argued that plaintiff has failed to establish his prima facie entitlement to summary judgment because triable issues of fact remain as to how the accident happened and if the accident occurred at all.

Labor Law § 240 (1) provides that:

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect workers against elevation-related hazards (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2d Dept 2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2d Dept 2009]). A prima facie case under Labor Law § 240 (1) requires a showing that a defendant's statutory violation was a proximate cause of the plaintiff's injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). "Once the plaintiff makes

a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289 n 8; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

The record contains plaintiff's deposition testimony, the testimony of Gomola, an employee of A-VAL, the testimony of Manuel Vazquez (Vazquez), a project manager for Capital One, N.A., the deposition testimony of William Collins (Collins), an employee of JT Magen, and a copy of an agreement between Capital One Bank and JT Magen. It is undisputed in the record that Greene was the owner and lessor of the subject premises and that Capital One Bank was the lessee of the premises at the time of the accident. Based upon Vazquez's and Collin's testimony and upon a copy of an agreement between Capital One Bank and JT Magen, plaintiff has demonstrated that Capital One Bank hired JT Magen to act as the construction manager and general contractor for the construction work taking place at the premises and that JT Magen hired A-VAL. Therefore, plaintiff has demonstrated that Greene, as the owner, Capital One Bank, as the lessee, and JT Magen, as the general contractor and construction manager, are subject to comply with the requirements of Labor Law § 240 (1) (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 7; *Sanchez v Metro Builders Corp.*, 136 AD3d 783, 786 [2d Dept 2016]; *Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d at 868).

Plaintiff testified that he was an employee of A-VAL on the date of the accident and that he was working with a fellow A-VAL employee, Gomola, on a Baker's scaffold that was provided by A-VAL, that was approximately six feet in height. Plaintiff further testified that while he was standing on top of the scaffold at height of approximately six feet above the sidewalk, the wheels of the scaffold were locked into place, and that a plank of wood that he was standing on was also locked into place. Plaintiff testified that he was gathering his tools while Gomola had returned inside the building, that no one witnessed his accident, and that his foot became caught on a "lip" of the scaffold, which caused him to lose his footing and fall off the scaffold which did not have any railings or other devices to aid in preventing his fall. Plaintiff testified that when Gomola returned outside after his fall, he told Gomola about the accident.

Gomola testified that he did not witness an accident involving. Contrary to plaintiff's testimony, Gomola also testified that plaintiff did not inform him of any accident on the date that plaintiff has alleged the accident occurred. Furthermore, Gomola testified that when he later was informed by A-VAL's employees about plaintiff being involved in an accident, he informed A-VAL's employees that he did not recall such an accident occurring.

"'It is not the court's function on a motion for summary judgment to assess credibility'" (*Silva v FC Beekman Assoc., LLC*, 92 AD3d 754, 756 [2d Dept 2012], quoting *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). In light of the conflicting evidence, in a case such as this one, where plaintiff was the sole witness to the alleged accident and his credibility has been placed in issue as to whether the accident occurred, the granting of partial summary judgment to plaintiff on his cause of action pursuant to Labor Law § 240(1), is precluded (*see Woszczyna v BJW Assoc.*, 31 AD3d 754, 755 [2d Dept 2006]; *Hirsch v Greenridge Assoc., LLC*, 26 AD3d 411, 412 [2d Dept 2006]; *Nelson v Ciba-Geigy*, 268 AD2d 570, 571–72 [2d Dept 2000]). As such, plaintiff is not entitled to the relief sought on this branch of his motion.

Labor Law § 241 (6)

The court will now turn to plaintiff's cause of action brought under Labor Law § 241 (6), with regard to which, plaintiff has moved for partial summary judgment on the issue of liability. In light of the court's determination that plaintiff's credibility has been placed in issue as to whether the subject accident occurred, summary relief on this branch of plaintiff's motion is also precluded (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d at 315; *Silva v FC Beekman Assoc., LLC*, 92 AD3d at 756).

Accordingly, the branch of plaintiff's motion to have the case placed on the trial calendar is granted, plaintiff is directed, as indicated above, to file a new note of issue, and his motion is denied in all other respects.

A copy of this Order is being mailed to t he attorneys for the parties.

Dated: November 3, 2017

J.S.C.