Singh v Dormitory Auth. of the State of N.Y.

2018 NY Slip Op 30213(U)

February 2, 2018

Supreme Court, New York County

Docket Number: 154287/15

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

DARA SINGH

INDEX NO. 154287/15

MOT. DATE

- v -

MOT. SEQ. NO. 001, 002 and 003

DORMITORY AUTHORITY OF THE STATE OF NEW YORK

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

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 19-33
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 84-105
Replying Affidavits NYSCEF DOC No(s). 112, 118

The following papers were read on this motion to/for vacate NOI, extend time to file motions for SJ, x-mot to sever 3rd party

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 34-40
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 51-63
Replying Affidavits NYSCEF DOC No(s). 82, 114, 116

The following papers were read on this motion to/for vacate NOI, extend time to file motions for SJ

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 41-49
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 64-75
Replying Affidavits NYSCEF DOC No(s). 88

This action arises from alleged violations of the Labor Law. In motion sequence number 001, plaintiff moves for partial summary judgment on the issue of defendant Dormitory Authority of the State of New York ("DASNY")'s liability for violation of Labor Law § 240[1]. DASNY opposes the motion and cross-moves for summary judgment in its favor. Issue has been joined and the motion and cross-motion were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

In motion sequence number 002, third-party defendant Charan Electrical Enterprises, Inc. ("Charan") moves to vacate note of issue, extend plaintiff's time to file motions for summary judgment. Plaintiff cross-moves to sever the third-party action. Charan opposes the cross-motion.

Finally, in motion sequence number 003, DASNY also moves to vacate note of issue, for a conference to resolve outstanding discovery disputes, and to extent its time to file a motion for summary judgment. Plaintiff also opposes that motion.

At the outset, the motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court will first consider the motion and cross-motion for summary judgment, since its resolution impacts the balance of the motions. The court's decision follows.

Dated: 2/2/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (001) ☐ DENIED ☒ GRANTED IN PART (002+003) ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

On April 14, 2014, plaintiff sustained injuries while working as an electrician for Charan at a major renovation of the Baruch College Library and Technology Building located at 151 East 25th Street, New York, New York (the "building"). Plaintiff sustained his injuries when a 1000+ pound spool of electrical cable rolled down a flight of stairs and crushed his leg. DASNY owned the building. There is no dispute that DASNY did not provide any safety devices to secure the heavy spool of cable and prevent it from moving and rolling down the stairs. Therefore, plaintiff argues that he is entitled to partial summary judgment on the issue of liability.

DASNY argues, in opposition to the motion, that plaintiff's accident was not caused by the effects of gravity and therefore Labor Law § 240[1] is inapplicable. DASNY also argues that plaintiff was the sole proximate cause of his accident. DASNY further argues that there are material issues of fact as to how the accident occurred, that plaintiff's affidavit should be rejected and disputes the conclusions drawn by plaintiff's expert submitted in support of the motion.

Plaintiff testified at two separate depositions and has also provided his sworn affidavit in support of the motion. Plaintiff's claims are largely undisputed and as follows. At his deposition in a proceeding before the Court of Claims on February 23, 2015, plaintiff testified through the use of a Punjabi translator as follows. Plaintiff claimed that he was instructed to bring the spool of wire, which belonged to Charan, to the roof from the ground floor. The wire was to be routed through the interior of the building from the roof. Plaintiff testified that he had done this before. Like before, plaintiff took the spool of wire to the elevator and went to the interior roof level. Once plaintiff exited the elevator at that level, he traveled down a corridor and exited through a door to a landing with a set of steps to the exterior roof of the building. Pictures of this landing and the steps to the roof have been provided to the court. It was on this landing and these steps where plaintiff's accident occurred.

Plaintiff testified as follows:

Q. Did you carry the spool down the stairs or did you let the spool roll down the steps?

A. Well, I had to slowly push it and while I was doing that it didn't hold, and it came and stuck in my gloves.

Q. When you say that it stuck in your gloves, did the spool cable roll over and lay flat and trap your glove?

A. It is actually round shape right, so it rolled down so fast that I was not able to control and it got stuck.

Q. Are you saying that your gloves got stuck on that spool of cable, and it took you down the steps injuring you?

A. It actually pulled me. It pulled me, and I was trying to pull with my gloves because it was going so fast my gloves slipped, and then I fell down on the metal ramp, and it came over me over my leg.

Q. As you were trying to move the spool of cable to the roof you loss (sic) control of the spool of cable, because of its weight and it dragged you down and ran over your leg?

A. Yes, it pulled me and I loss control.

Q. That was on the set of steps, correct?

A. Actually, I fell on the steps. It pulled me down and I was trying to protect my hands and it came and injured my leg.

Plaintiff again appeared for a deposition on October 28, 2015. He confirmed the aforementioned testimony and elaborated as follows. In order to make two turns, one from the elevator on the interior roof floor to the interior corridor, and another from the interior corridor to the exterior landing, plaintiff had to "steer [the spool of wire] while it's in motion" "because of the extreme weight of the thing." Plaintiff was moving the spool of wire before his accident by himself, and no one else was there.

From the exterior landing, there is a set of steps approximately five or six feet below it to the roof. Plaintiff admitted at his second deposition that once he got the spool of wire onto the landing, his "job was to leave it there and park it there." Then, plaintiff's foreman, Soni, told him to turn the spool of wire on the landing. Soni then left the area to "finish his errand, to pick up some stuff." Plaintiff then testified that "after [he] turned it and [he] started walking backwards, [his] gloves caught." Plaintiff clarified that his glove got caught on a nail or piece of wood from the rim of the spool of wire. As to why the spool of wire moved and subsequently rolled over his leg, plaintiff explained:

> So, I put my foot back into the original position, tried again pulling at the gloves, When I tried it again, the wind was howling, the wind behind me, the wind pressure was so intense. So, because of that, plus my own thing with the hand and glove problem, to spool started rolling down.

Plaintiff has also provided to the court a Jobsite Incident Report dated October 10, 2014 on DASNY letterhead prepared in connection with his accident. Regarding a description of the accident, the incident report states in pertinent part:

> As per his own statement, he was standing near the reel of cable by himself and was waiting for help to position the reel to its final position. Suddenly due to wind blow or vibration on metal stairs, cable reel starts moving down the stairs which he can't stop and reel hit him and he fell on the stairs and reel roll over him causing him severe pain on his right leg.

Under a section calling for "[a]ctions to prevent recurrence", the report states "[d]eliver the cable reels in similar scenario should be by Crane directly on top of Roof, whenever needed." It is unclear who prepared and/or signed the report. None of defendant's witnesses were able to identify the preparer.

Plaintiff has further provided the affidavit of Herbert Heller, a professional engineer, who opines that a chock, block or sling would have prevented the spool of wire from rolling down the flight of stairs and crushing plaintiff's leg.

DASNY's own employees who were produced for deposition admitted that DASNY did not provide plaintiff with any safety devices because it was the responsibility of the contractor, aka Charan. DASNY's witnesses did not observe the accident and generally did not have personal knowledge regarding plaintiff's factual claims.

DASNY has provided a "statement" its counsel claims was obtained from a Charan employee, Amanjod Thind. The statement, however, is not notarized. Indeed, as plaintiff points out in reply, the statement is written in a different handwriting than the alleged signature of Thind. The statement is not in admissible form and is therefore rejected by the court.

DASNY further claims that it intends to subpoena nonparty Thind at trial, who is presently unwilling to execute an affidavit. DASNY maintains that Thind will offer testimony which differs as to how plaintiff's accident occurred.

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 New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). 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, plaintiff has established entitlement to summary judgment on the issue of DASNY's liability. The effects of gravity acted upon the spool of wire, causing it to roll down the stairs and over plaintiff's leg, thereby causing his injuries. Further, there is no dispute on this record that plaintiff was not provided any safety devices to protect against the injury caused, as contemplated by Section 240(1).

In turn, defendants have failed to raise a triable issue of fact. DASNY argues that plaintiff's affidavit is tailor-made and contradicts his prior sworn deposition testimony. After a thorough review of both deposition transcripts, the court disagrees. DASNY next contends that there is a material issue of fact as to how plaintiff's accident occurred. The court disagrees. Once plaintiff has met his burden, DASNY must

then come forward with evidence in admissible form to raise a triable issue of fact. As the court previously stated, the Thind "statement" is not in admissible form and cannot be considered in opposition to plaintiff's motion. Further, that Thind may offer testimony at trial which would contradict plaintiff's claims is unfounded and speculative and cannot defeat plaintiff's motion. Indeed, defendants have failed to come forward with any evidence which puts into dispute plaintiff's version of events. That wind acted upon the spool of wire yet did not blow plaintiff off the roof, as defense counsel argues, is of no moment. Plaintiff's clearly claims that it was wind, coupled with him trying to loosen his hand from the wooden spool of wire, which caused the spool to move and roll down the stairs.

Nor has defendant established at triable issue of fact as to whether plaintiff was the sole proximate cause of his accident. It is indeed forseeable that a 1000+ pound spool of wire at the top of a relatively small landing might roll down said landing absent appropriate safety devices. Further, no reasonable fact-finder would conclude on this record that plaintiff's glove becoming caught on the spool was not also forseeable. Otherwise, based on the court's reasoning above, since there was a statutory violation of Labor Law § 240[1] which was a proximate cause of plaintiff's injury as a matter of law, the plaintiff cannot be solely to blame for his accident, and this argument therefore fails (see *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003]).

Finally, DASNY's arguments with regard to plaintiff's expert's conclusions are also rejected. The court finds that Heller's opinions are supported by the testimony and evidence in this case and DASNY has failed to raise a triable issue of fact as to his claims through either the affidavit of its own expert or any other means.

Accordingly, plaintiff's motion for partial summary judgment is granted and DASNY's cross-motion for summary judgment is denied.

The court next turns to the remaining motions. Charan argues that note of issue should be stricken, and that it should be given additional time to complete discovery and also move for summary judgment. DASNY's arguments are notably similar, insofar as they relate to the status of the third-party action. While plaintiff filed note of issue as he was instructed to do so by the prior Justice assigned to this case, the court finds that substantial discovery remains outstanding warranting vacatur of the note of issue.

Plaintiff admits that the defendant is entitled to a subsequent IME insofar as he has amplified his claims in a supplemental bill of particulars which was served on or about January 23, 2017, after all discovery was supposed to be completed. Assuming *arguendo* that Charin did delay in litigating this case for 6-8 months as plaintiff's counsel contends, the court does not find that this delay warrants severance of waiver of any outstanding discovery. The court, however, does not agree with DASNY that plaintiff's injuries in the supplemental bill are "new" therefore warranting any additional relief.

To the extent that plaintiff seeks an order severing the third-party action, the court does not find that such relief is warranted at this time. The court will schedule this action for a status conference on February 27, 2018, at which time the parties will be directed to schedule all outstanding discovery on an expedited basis.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 001 is decided as follows: plaintiff's motion for partial summary judgment on the issue of DASNY's liability for violation of Labor Law § 240[1] is granted and DASNY's cross-motion is denied; and it is further

ORDERED that motion sequence numbers 002 and 003 are decided as follows: Charan and DASNY's motions are granted to the extent that plaintiff's note of issue is stricken and the parties are

directed to appear for a status conference on February 27, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278, at which time the parties will be directed to schedule all outstanding discovery on an expedited basis, and the motions and cross-motion are otherwise 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: 2/12/18
New York, New York

So Ordered:

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