Lopez v Lefrak Org.
2018 NY Slip Op 30888(U)
April 23, 2018
Supreme Court, Bronx County
Docket Number: 303820/2013
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Efrain Lopez,

Plaintiff, Index No. 303820/2013

-against-

DECISION AND ORDER

Lefrak Organization, Peru Leasing LP, and GMJC Construction Corporation,

Defendants.

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Peru Leasing LP,

Third-Party Plaintiff,

-against-

GMJC Construction Corporation,

Third-Party Defendant.

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Hon. Howard H. Sherman, J.S.C.:

Plaintiff moves for summary judgment on his causes of action under Labor Law 240(1) and 241(6). Defendant/third-party defendant GMJC Construction Corporation ("GMJC") moves to dismiss all claims and cross-claims against it on the ground that it was not plaintiff's employer, and was not responsible for the alleged accident or supervision of the work performed by the plaintiff. Defendants Lefrak Organization and Peru Leasing LP (collectively, "the Lefrak defendants") cross-move to preclude the testimony of certain fact witnesses, or, in the alternative, to strike the note of issue.

The salient facts underlying this personal injury action are sharply disputed. The plaintiff asserts that he was employed by a person identified as Martinez, who paid plaintiff in cash, to perform demolition work during construction at Lefrak City in Queens, New York. Plaintiff asserts that he was required, despite his complaints to Martinez, to use a defective A-frame ladder in connection with his work, which was ostensibly made available by the Lefrak defendants for use by the contractors performing the renovations.

The ladder was missing three of its four rubber "feet," and the metal supports holding the two sides of the frame in place when opened were defective.

Plaintiff claims that the accident occurred on February 25, 2013, in the Lobby of the Peru Building at Lefrak City, as he was demolishing a ceiling made of concrete and metal wire. As he was breaking the ceiling and removing the heavy pieces, a large piece of the ceiling began to fall. The piece either struck the ladder, or the ladder moved as plaintiff attempted to avoid being struck, causing plaintiff to fall to the ground. On the third day after the accident, plaintiff went to the hospital, where he was diagnosed with a wrist fracture.

In support of his version of the accident, plaintiff submits the affidavit of co-worker Alfredo Rojas Bravo ("Bravo"), who avers to facts consistent with plaintiff's account.

Defendant/third-party defendant GMJC moves for summary judgment, contending that it was not plaintiff's employer, that it was not working at the Peru Building, and that it did not breach any duty to plaintiff. GMJC notes that plaintiff does not allege in this action that GMJC was his employer. GMJC submits payroll records from an outside service that do not list plaintiff as an employee.

In opposition to plaintiff's motion, the Lefrak defendants contend that plaintiff inexplicably, despite a comminuted fracture of the left distal radius, never reported the accident to anyone but his co-workers, even though a guard station was located within 50 feet of the accident location. In addition, plaintiff did not seek medical attention until three days after the accident. Further, the report of the attending physician at the emergency room stated that plaintiff "slipped and fell." An Employee Claim Form signed by the plaintiff at the hospital recites that, "The ceiling fell, and resulting him (sic) to fall down

the stairs." In addition, the Lefrak defendants seek preclusion, or the striking of the note of issue, in that plaintiff never disclosed Bravo as a witness, despite the Lefrak defendants' discovery demands, and a PC Order directing such disclosure.

Analysis

Plaintiff's motion for partial summary judgment

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1), through his testimony, and that of Bravo, stating that he was not provided with adequate safety equipment that could have protected him while performing his work. (*Faver v Midtown Trackage Ventures, LLC*, 150 A.D.3d 580, 580, 52 N.Y.S.3d 626, 627 [1st Dept. 2017] [plaintiff established entitlement to partial summary judgment on his Labor Law § 240(1) claim through his testimony that he was hit in the arm by an electrical wire that shot out of a section of conduit pipe after being jammed inside, causing the unsecured ladder he was standing on to wobble, which resulted in plaintiff losing his balance and falling to the ground].) Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker "proper protection," in opposition, defendants are required to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact to preclude summary judgment. (*Erkan v McDonald's Corp.*, 146 A.D.3d 466, 467, 44 N.Y.S.3d 429, 431 [1st Dept. 2017].)

In opposition, the Lefrak defendants have met their burden of raising issues of fact as to plaintiff's credibility, and as to the happening of the accident. (*Hobbs v MTA Capital Constr.*, 2018 N.Y. App. Div. LEXIS 1716, *1-2 [1st Dept. 2018] [conflicting accounts of

how the accident occurred raised an issue of fact that precluded the granting of summary judgment].) The plaintiff's version of the events is called into question by the circumstances that plaintiff failed to report the accident, failed to seek medical treatment for three days, and that the plaintiff made contrary statements as to the happening of the accident (i.e., that the accident occurred on a stairway).[1]

Plaintiff asserts that the Employee Claim Form relied upon by the Lefrak defendants is "bogus." Despite having signed the form, plaintiff explains that the reference to a fall on a "stairway" was due to an error in translation, as the same word in the Spanish language can be translated "stairway" or "ladder." This argument, while plausible, merely shows that questions of fact exist which must be resolved before a determination can be made.

Defendant/ third-party plaintiff's cross motion for summary judgment

There also exist issues of fact as to whether GMJC was plaintiff's employer, requiring that GMJC's cross-motion be denied.

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[1] The Court has also considered the statement in the hospital record that recites that plaintiff "slipped and fell." Plaintiff correctly argues that there is no evidence attributing the statement to the plaintiff. However, a hearsay statement may be considered in opposition to summary judgment if it is not the only evidence in opposition to the plaintiff's motion. (cf. *Mosqueda v Ariston Dev. Group*, 155 A.D.3d 504, 504-505, 65 N.Y.S.3d 140, 142 [1st Dept. 2017] [defendants offered no evidence connecting plaintiff to the statements in the medical records allegedly attributable to him; while hearsay may be used to defeat summary judgment so long as it is not the only evidence relied on, the medical records constituted the only evidence relied on by defendants on the issue].)

Although GMJC's principal denied that plaintiff was an employee, there is contrary evidence in the record sufficient to raise an issue of fact as to whether GMJC was the only contractor performing demotion of the ceiling at issue in the Peru Building. There is also evidence, as the Lefrak defendants argue, that GMJC's payroll records, on which it now relies, do not reflect the number of "man hours" for which GMJC was paid, suggesting that it had additional employees "off the books."

The affidavit of Anthony Scavo, the Vice President of Newport Construction, LLC, the construction manager for the project at issue, states that he was in contact with Gil Morales of GMJC; that GMJC would supply workers and crews, with their own forepersons who would direct the manner in which the work was performed; that neither Martinez nor the plaintiff were hired by Newport; that GMJC's work records do not reflect the number of "man hours" for which they were paid; and, that demolition at the Peru building was performed only by GMJC. The affidavit of David Jenkins, an agent of the Lefrak defendants, states that ladders and scaffolds were provided, but the choice of what to use was placed on the work crew's foreman. Further, the plaintiff submits the deposition of Sheila Mason, a supervisor employed by a non-party contractor at the job site, who testified that she observed plaintiff at the job site, that he was supervised by Martinez, and that they were performing the work assigned to GMJC. She further testified that she knew plaintiff in the past as an employee of GMJC.

Further, GMCJ admits in a sur-reply that the Workers' Compensation Board found that plaintiff was its employee. The facts concerning the determination are not clear on the present motion, but at the least, the determination raises issues of fact in this regard. (*Vera v. NYC Partnership Hous. Dev. Fund Co.*, 40 A.D.3d 472, 472, 837 N.Y.S.2d 47, 48 [1st

Dept. 2007] [". . . [W]e decline to give res judicata effect to the Workers' Compensation Board determination, which lists third-party plaintiff as plaintiff's employer. In light of the conflicting evidence on the record, and the absence of an administrative record to give the Board determination context, the listing is not dispositive, and there is a question of fact on the point"]; *Vitello v Amboy Bus Co.*, 83 A.D.3d 932, 933, 921 N.Y.S.2d 159, 160 [2d Dept. 2011] [WCB decision did not collaterally estop the defendant from arguing that it was the plaintiff's employer, because there was no indication in the record that the issue was disputed at the Workers' Compensation proceeding, or that the WCB specifically adjudicated this issue].)

GMJC argues that irrespective of the identity of the employer, the Lefrak defendants supplied the ladder and directed the work. It is premature, while GMJC's status as an employer is in unresolved, to postulate on the various factual scenarios under which GMJC, depending on the findings of the trier of fact, could be found liable. However, in the event it is found that plaintiff was GMJC's employee, and that the accident was caused not by any defect in the ladder but solely by the failure of GMJC to provide a scaffold or to secure the ladder, then GMJC would then be negligent, and the Lefrak defendants only vicariously liable.

Lefrak defendants' cross-motion to strike or preclude

Plaintiff contends that the Lefrak defendants failed to move the strike the note of issue within the 20-day period after filing as required by 22 NYCRR 202.21(e). That section provides "[a]fter such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown." The Lefrak defendants have

shown good cause, because even if the name of the witness was mentioned in some way in this action, the Lefrak defendants could not have been aware that of the substance of his testimony, nor did they have any means to locate the witness until plaintiff made the present motion. (*Allstate Ins. Co. v 8 W. 65th St. Condominium Corp.*, 105 A.D.3d 495, 496, 964 N.Y.S.2d 6, 7 [1st Dept. 2013] [defendant condominium learned of certain damages when opposing party submitted opposition to the condominium's initial motion to dismiss after note of issue was filed and discovery was essentially concluded].)

Plaintiff asserts that the failure to disclose the witness was somehow the fault of the defendants, in that the defendants themselves obstructed discovery, and that the defendants themselves had the means to identify and locate the witnesses in the work crew associated with the plaintiff. This argument is entirely unsupported, and inconsistent with the simple requirement that the plaintiff is obligated to disclose known eyewitnesses and notice witnesses. (*Ravagnan v One Ninety Realty Co.*, 64 A.D.3d 481, 883 N.Y.S.2d 490 [1st Dept. 2009] [precluding testimony].)

A motion court may properly preclude evidence by plaintiff's eyewitness to the accident when the plaintiff fails to disclose those witnesses in discover. (*Caraballo v. Rivas-Barzola*, 92 A.D.3d 532, 532, 939 N.Y.S.2d 21, 22 [1st Dept. 2012] [same].) Nevertheless, preclusion is a drastic remedy, and may be denied absent proof that plaintiff's conduct was willful and contumacious. (*Spitzer v. 2166 Bronx Park E. Corps.*, 284 A.D.2d 177, 726 N.Y.S.2d 639 [1st Dept. 2001] [it was a proper exercise of the motion court's discretion to consider plaintiff's evidence, while striking plaintiff's note of issue and giving defendants an opportunity to depose the witness].)

In the present case, the facts as to plaintiff's employment status and the happening of the accident are far from clear. The defendants should thus be afforded an opportunity to depose Bravo (and any other eyewitness or notice witness plaintiff intends to call) as to the issues in this case. The Court accordingly finds that the motion of the Lefrak defendants should be granted to the extent of striking plaintiff's note of issue and giving defendants an opportunity to depose Bravo, as well as any other presently undisclosed witnesses. (*Spitzer v. 2166 Bronx Park E. Corps., supra.*)

It is therefore

ORDERED that the motion of the plaintiff is denied, and it is further

ORDERED that the cross-motion of defendant/third-party defendant GMJC Construction Corp. is denied, and it is further

OREDERD that the motion of defendants Lefrak Organization and Peru Leasing LP is granted to the extent of striking plaintiff's note of issue in order to permit further discovery including the deposition of the witness Alfredo Rojas Bravo, and any other eyewitness or notice witness identified subsequent to this Order.

This constitutes the Decision and Order of the Court.

Dated: 4/23, 2018

Hon. Howard H. Sherman, J.S.C.