Hernandez v 2076-78 Creston Ave Owner LLC
2018 NY Slip Op 31299(U)
May 25, 2018
Supreme Court, Bronx County
Docket Number: 301046/2015
Judge: Lucindo Suarez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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JOSE HERNANDEZ,

Plaintiff,

- against -

2076-78 CRESTON AVE OWNER LLC,

Defendants.

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DECISION AND ORDER

Index No. 301046/2015

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's April 6, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof (Motion Sequence #3); defendant's April 26, 2018 affidavit in opposition and the exhibits submitted therewith; plaintiff's May 21, 2018 affirmation in reply and the exhibits submitted therewith; defendant's April 11, 2018 notice of motion and the affidavit and exhibits submitted in support thereof (Motion Sequence #4); plaintiff's May 14, 2018 affirmation in opposition and the affidavit and exhibits submitted therewith; defendant's May 22, 2018 affirmation in reply; and due deliberation; the court finds:

Plaintiff claims to have fallen from an A-frame ladder while performing work on defendant's premises and moves for partial summary judgment on the issue of defendant's liability on his Labor Law § 240(1) cause of action. Defendant, an owner of the property at the time of the accident, moves for summary judgment. The motions are consolidated for decision.

In support of his motion, plaintiff avers in an affidavit that he was employed by E & M Harlem Portfolio, LLC and was on the ladder removing and replacing plaster when the ladder tipped over and he fell. He further averred he had not been provided with any other safety devices. This proof sufficiently establishes *prima facie* entitlement to summary judgment. *See Tuzzolino v. Consol. Edison Co. of N.Y.*, 2018 NY Slip Op 02755 (1st Dep't Apr. 24, 2018).

Defendant argues that plaintiff has failed to provide more description of the accident and

the ladder, but does not raise an issue of fact with admissible evidence. The fact that plaintiff's accident may have been unwitnessed is not a bar to summary judgment, *see Verdon v. Port Auth. of N.Y. & N.J.*, 111 A.D.3d 580, 977 N.Y.S.2d 4 (1st Dep't 2013), unless "he or she provides inconsistent accounts of the accident, his or her account of the accident is contradicted by other evidence, or his or her credibility is otherwise called into question with regard to the accident." *Smigielski v. Teachers Ins. & Annuity Assn. of Am.*, 137 A.D.3d 676, 676, 29 N.Y.S.3d 272, 272-73 (1st Dep't 2016) (citations omitted). Defendant raises no issue as to plaintiff's credibility. *See Goreczny v. 16 Court St. Owner LLC*, 110 A.D.3d 465, 973 N.Y.S.2d 54 (1st Dep't 2013). Defendant's bare denial that plaintiff was injured on the subject premises in a work-related accident is without stated basis and is insufficient to defeat summary judgment.

Whether plaintiff successfully used the ladder previously is irrelevant. Even if the ladder were secured and fully functional, this is not necessarily dispositive to the issue of a statutory violation and do not necessarily render any additional protective device redundant. Plaintiff's testimony that the ladder tipped is sufficient. *See Ocana v. Quasar Realty Partners L.P.*, 137 A.D.3d 566, 27 N.Y.S.3d 530 (1st Dep't 2016), *lv dismissed* 27 N.Y.3d 1078, 35 N.Y.S.3d 300, 54 N.E.3d 1172 (2016); *Picano v. Rockefeller Ctr. N., Inc.*, 68 A.D.3d 425, 889 N.Y.S.2d 579 (1st Dep't 2009). It is apparent that plaintiff was not prevented from falling by the ladder, *see Yu Xiu Deng v. A.J. Contr. Co.*, 255 A.D.2d 202, 255 A.D.2d 303, 680 N.Y.S.2d 223 (1st Dep't 1998), and that no other protective devices were supplied, *see Hill v. City of New York*, 140 A.D.3d 568, 35 N.Y.S.3d 307 (1st Dep't 2016).

Whether someone else was securing the ladder is also irrelevant. A co-worker is not a safety device contemplated by the statute. *See Noor v. City of New York*, 130 A.D.3d 536, 15 N.Y.S.3d 13 (1st Dep't 2015), *lv dismissed* 27 N.Y.3d 975, 31 N.Y.S.3d 451, 50 N.E.3d 919 (2016); *see also Ortiz v. Burke Ave. Realty, Inc.*, 126 A.D.3d 577, 3 N.Y.S.3d 582 (1st Dep't

2015). "Nor, even if plaintiff had disobeyed an instruction to have [an] apprentice hold the ladder steady for him, would the owners' and general contractor's liability for failing to provide adequate safety devices be reduced." *McCarthy v. Turner Constr., Inc.*, 52 A.D.3d 333, 334, 859 N.Y.S.2d 648, 649 (1st Dep't 2008). Defendant does not dispute that the ladder functioned as a safety device, *see Acosta v. Kent Bentley Apts., Inc.*, 298 A.D.2d 124, 747 N.Y.S.2d 507 (1st Dep't 2002), and that it failed to protect plaintiff from falling, *see Dhillon v. Bryant Assocs.*, 306 A.D.2d 40, 759 N.Y.S.2d 673 (1st Dep't 2003). Accordingly, there is no dispute regarding a violation of Labor Law § 240(1) and its contribution to the accident.

With respect to defendant's motion, defendant's manager avers that plaintiff's claims are barred by the exclusivity of Workers Compensation because while plaintiff claims to have been employed by E & M Harlem Portfolio, LLC, no such corporation has registered with the New York State Secretary of State and defendant did not hire the entity registered with the similar name of SG2-E&M Harlem Portfolio LLC. Defendant's affiant concludes that if plaintiff was working on the premises, "then he necessarily would have been performing such work at the direct request of the defendant."

Whether or not the employer was authorized to conduct business in the State of New York, to come within the class of persons who benefit from the special protections of the Labor Law, plaintiff need merely demonstrate "that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent." *Whelen v. Warwick Val. Civic & Social Club*, 47 N.Y.2d 970, 971, 393 N.E.2d 1032, 419 N.Y.S.2d 959, 959 (1979). Here, defendant has not established that plaintiff was not authorized to work at the premises, nor has it established without resort to speculation that plaintiff was defendant's direct employee.

Defendant mentions that plaintiff commenced a proceeding before the Workers

Compensation Board which resulted in a settlement, but does not mention who was identified as plaintiff's employer. Plaintiff submits a proposed decision of the Workers Compensation Board that lists the employer as "E & M Harlem Portfolio dba." If plaintiff was, in fact, an employee of SG2-E&M Harlem Portfolio LLC, then the conflicting assertion of defendant creates an issue of fact which may not be resolved on a summary judgment motion. *See Santos v. Temco Serv. Indus.*, 295 A.D.2d 218, 744 N.Y.S.2d 20 (1st Dep't 2002). Unless defendant establishes as a matter of law that it was plaintiff's employer, "[t]he issue of whether plaintiff was employed by [any particular] entity is of no moment, as long as it is undisputed that plaintiff was 'permitted or suffered to work' on the premises on the date of the accident." *Vera v. Low Income Mktg. Corp.*, 145 A.D.3d 509, 511, 43 N.Y.S.3d 307, 309 (1st Dep't 2016).

Accordingly, it is

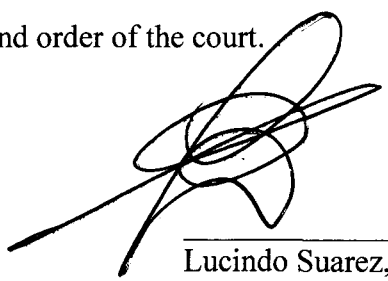
ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendant's liability on plaintiff's Labor Law § 240(1) cause of action is granted (Motion Sequence #3); and it is further

ORDERED, that defendant's motion for summary judgment is denied (Motion Sequence #4); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff on the issue of defendant's liability on plaintiff's Labor Law § 240(1) cause of action.

This constitutes the decision and order of the court.

Dated: May 25, 2018



Lucindo Suarez, J.S.C.