SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

OSCAR SERRANO

INDEX NO. 150375/16

MOT. DATE

- v -

MOT. SEQ. NO. 001

MAYFLOWER AGENCY CO., INC.

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). 21-27

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 29-32

Replying Affidavits NYSCEF DOC No(s).

This action arises from defendant's alleged violations of Labor Law §§ 240 and 241[6]. Plaintiff now moves for summary judgment in his favor on the issue of defendant's liability. Defendant opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

On December 24, 2015, plaintiff was injured while working at a construction project located at 99 Madison Avenue, New York, New York (the "building"). Plaintiff was injured when he fell from an un-guarded bakers scaffold (the "accident"). At that time, the building was owned by the defendant.

At his deposition, plaintiff testified with the aid of a Spanish language interpreter. The following facts are based on his deposition testimony. On the date of his accident, plaintiff worked for a company called One Ten Group doing "painting and plaster." Plaintiff was supervised by a foreman who worked for One Ten Group named "Ram".

Plaintiff worked for One Ten Group for approximately eighteen months prior to the accident, and testified he did not receive any training during that time. Plaintiff used scaffolding with wheels on it "the whole time" that he worked for One Ten Group.

The day before the accident, plaintiff and Ram assembled the scaffold in approximately ten minutes. Plaintiff used the scaffold the day before to scrape the ceiling, and stated that it felt secure. The scaffolding was set to its highest position, which was eight-feet off the ground. The next day, plaintiff was alone, using the scaffolding to plaster the ceiling. The height of the scaffolding was not changed from the day before.

There was a "driver" and an "elevator guy" who were at the premises on the date of the accident. The driver was on the floor, for approximately five minutes, about an hour before the accident. Plaintiff

Dated: 6/27/18

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

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

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

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

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

testified that he asked the driver "if someone was coming to help [him] and [the driver] told [plaintiff] he didn't know and he left." Meanwhile, approximately thirty minutes before the accident, the "elevator guy" came to the floor and asked plaintiff if "is everything fine?" and he responded "yes".

Plaintiff worked for about two to two and a half hours before the accident. As he worked, he testified that he moved the scaffold himself four times. After plaintiff moved the scaffold the fourth time, he was on it for about five minutes before the accident occurred:

A. ... I'm working, and the scaffold moved a little, it didn't even give me time to think what had happened. I don't know how it happened.

Q. Were you in the middle of plastering when the scaffold fell?

A. Yes, I was with the plate of material here (indicating) and the spatula and I fell with everything.

Originally, plaintiff testified that he did not know if the wheels on the scaffolding had locks, and plaintiff admitted that he did not do anything to lock the wheels. However, he went on to change his testimony:

Q. When you had last gone up the scaffold before your accident took place, did you do anything to lock the wheels of the scaffold in place?

A. No.

Q. Was there any way for you to have locked those wheels in place that day?

A. No.

Q. Have you ever seen a lock on a wheel of a scaffold like the type of scaffold you were using that day?

...

A. It has a safety, yes it does have a safety.

Q. And that safety mechanism secures the wheel; would that be correct?

A. Something like that.

Q. Did that scaffold you were using that day have that mechanism on its wheels?

A. They all have that mechanism.

Q. So before you went up the scaffold for the last time, did you lock the wheel locks?

A. Well, I had been working, I didn't have to see anything.

Q. You just told me that the wheels of the scaffold had a mechanism on them to lock the wheel; is that correct?

A. All the scaffolds have it.

Q. Right. I'm talking about this one you were using on the day of your accident?

A. It had one, yes, of course.

Q. Did you use those locks to lock the wheels in place when you would go up and work from the platform?

A. Of course, it has a brake.

Q. You step on it?

A. So that it doesn't move.

Q. Do you step on it to engage it?

A. Yes.

Q. All I want to know is, the last time you had moved the scaffold, before you went up onto the platform to do that work, did you engage those locks on the four wheels – brake?

A. The whole time you have to do this, you go up and you go down.

Q. So before you went up on the scaffold the very last time, did you engage those brakes on each of the four wheels?

A. I went down, I pushed the scaffold, I put the brake on and went up and I continued.

Q. Did you do that for all four wheels?

A. Yes.

Meanwhile, Kenneth Zuckerman, owner of One Ten Group, appeared and testified at a non-party deposition. Zuckerman stated that plaintiff's work at the building was supervised by him and Ram Sukhoo, One Ten Group's supervisor. Zuckerman claims that plaintiff and another One Ten Group employee erected a pipe scaffold on the first day at the site which was equipped with safety railings. According to Zuckerman, plaintiff was instructed to use the pipe scaffold, not the bakers scaffold, to reach the ceiling.

Zuckerman further testified that about a week after the accident, he met with plaintiff who told him the following about his accident:

A. He said he was working on the scaffolding and he shoved it, he gave it like a jolt and the wheel popped off and he fell.

Q. When you say he gave it a jolt, meaning that he tried to move it while he was standing on it?

A. That's correct.

Q. And that's when the wheel popped off?

A. That's correct.

Q. And that's what he told you?

A. That's correct.

Q. And when the wheel popped off, the scaffold fell over?

A. Yes.

When asked if a wheel would pop off a baker scaffold when its not moving, Zuckerman answered: "[t]hey shouldn't pop off. If it's not being moved it goes into the scaffold frame about three inches. So if the scaffold is not moving it seems highly unlikely the wheel would pop off."

Zuckerman explained that what plaintiff was doing was called "surfing" in the industry and is an unsafe practice. Zuckerman maintained that proper safety protocol is to descend the scaffold and move the scaffold over by pushing it and the ascending the scaffold. If Zuckerman observed one of his employees "surfing", he would immediately stop them and tell them not to do it. Ram also told Zuckerman that Ram had observed plaintiff "surfing" his scaffold at other jobsites.

Zuckerman also claimed that One Ten Group supplied safety railings for the baker scaffold that plaintiff used which were not installed on it at the time of plaintiff's accident. Zuckerman claimed that plaintiff had assembled "many" Baker scaffolds while working at One Ten Group and knew how to install the safety railings on a Baker scaffold had he chosen to do so.

Parties' arguments

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240[1] and § 241[6] claims because he was provided a scaffold which collapsed while he was on it. Further, plaintiff maintains that he was not provided adequate safety devices, to wit, side rails and safety harnesses, in violation of Industrial Code §§ 23-5.18[b] and 23-1.16, respectively. Further, plaintiff maintains that he was not the sole proximate cause of the accident or a recalcitrant worker.

In turn, defendant argues that the motion should be denied because there are triable issues of fact as to the existence of a statutory violation and whether plaintiff's actions were the sole proximate cause of his accident. Further, defendant maintains that plaintiff has failed to meet his burden with respect to the alleged violation of Industrial Code § 23-1.16.

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 § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

Here, *assuming arguendo* that plaintiff met his burden on this motion, defendant has raised numerous triable issues of fact which preclude summary judgment on the issue of liability. "[T]here can be no liability under section 240[1] when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident" (*Blake v. Neighborhood Housing Svcs. of NYC*, 1 NY3d 280, 290 [2003]). There is a question whether plaintiff was the sole proximate cause of the accident by moving the scaffolding while he was still on it. Admittedly, plaintiff was unable to describe why the scaffold collapsed, and plaintiff has not offered any competent evidence which would rebut defendant's theory that plaintiff was "surfing", or moving the scaffold but pushing off with one foot while he was on it which thereby caused the baker scaffold to tip over. Plaintiff admitted during his deposition that moving the scaffold while someone was still on it would be "dangerous" because of the risk of falling.

Further, there is a triable issue of fact as to whether adequate safety devices were provided to plaintiff (*Paz v. City of New York*, 85 AD3d 519 [1st Dept 2011] citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Zuckerman testified that safety railings for the baker scaffold were present at the site, and that plaintiff knew how to install them. Further, Zuckerman maintains that plaintiff was instructed to perform his work with the pipe scaffold, which had safety railings.

There is a further factual dispute as to whether the wheels of the scaffolding locked, and whether plaintiff engaged those lacks. These disputed issues of fact require credibility determinations which can only be resolved by a factfinder.

As for the Labor Law § 241[6] claim premised upon the failure to provide a safety harness, defendant is correct that plaintiff has failed to meet his burden with respect this claim. Plaintiff has failed to establish through admissible evidence that a safety harness was required while he performed his plastering work from atop the subject baker scaffold.

Accordingly, plaintiff's motion is denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment is denied in its entirety; and it is further

ORDERED that the parties are directed to appear on August 14, 2018 at 9:30am for a status conference in Part 8, 80 Centre Street, Room 278.

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: 6/27/18
New York, New York

So Ordered:

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