Sollitto v 7 Third Ave. Fee, LLC.
2018 NY Slip Op 32118(U)
July 9, 2018
Supreme Court, Bronx County
Docket Number: 308244/2011
Judge: Norma Ruiz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

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MICHAEL SOLLITTO

Index No. 308244/2011

Plaintiff,

- against -

DECISION/ ORDER

7 THIRD AVENUE FEE, LLC., et al.

Defendants.

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Hon. Norma Ruiz

Upon the foregoing papers defendants RIVCO CONSTRUCTION CORP, 7 THIRD AVENUE FEE, LLC, 7 THIRD AVENUE LEASEHOLD LLC, SAGE REALTY LLC, and HUNTER ROBERTS CONSTRUCTION move and cross-move for summary judgment pursuant to CPLR 3212. After careful consideration of the motions and respective opposition thereto and upon due deliberation, the motions are decided as delineated herein.

Plaintiff, an electrician, was performing work at 777 Third Avenue, a commercial skyscraper owned by defendants 7 THIRD AVENUE FEE, LLC, 7 THIRD AVENUE LEASEHOLD LLC, and managed by defendant SAGE REALTY LLC. Defendant HUNTER ROBERTS was the general contractor and hired plaintiff's employer as the electrical subcontractor. Defendant RIVCO CONSTRUCTION CORP ("RIVCO") was the drywall and ceiling subcontractor. Plaintiff alleges that while engaged in renovating a space within the building, he ascended an A-frame ladder that "violently" shook and caused him to fall, sustaining injury. Plaintiff commenced the instant action alleging violations of Labor Law §§ 200, 240 (1) and 241 (6) and asserting claims for common law negligence.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Rodriguez v Parkchester South Condominium, Inc.*, 178 AD2d 231 [1st Dept. 1991]). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party seeking summary judgment may not merely point to gaps in the opponent's proof to obtain relief. Rather, the movant must adduce affirmative evidence of it entitlement to summary judgment *(Torres v Industrial Container*, 305 AD2d 136 [1st Dept. 2003]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]); *Sillman v Twentieth Century Fox Film Corp.*, *supra.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Lesocovich v 180 Madison Avenue Corp.*, 81 NY2d 982 [1993]). Upon this showing, the burden shifts to plaintiff to come forward with sufficient evidence in admissible form, to defeat defendant's motion (*Licari v Elliott*, 57 NY2d 234 [1982]).

Defendant RIVCO CONSTRUCTION CORP moves for summary judgment contending it had no supervision and control over plaintiff's work, nor did it act as an agent for the general contractor, and thus it can have no liability under the Labor Law, statutorily or otherwise. Further, RIVCO contends that there is no evidence that it created a hazardous condition nor did RIVCO have actual

or constructive notice of any hazardous condition or defect such that they cannot be held liable for common law negligence. The court agrees. Labor Law §§ 200, 240 (1) and 241 (6) impose liability only upon owners, general contractors and their agents —RIVCO doesn't fit the bill for any of these. Further, as to plaintiff's claims for common law negligence, there is no evidence that RIVCO created any hazard giving rise to plaintiff's injuries. Although plaintiff alleges the defective ladder might have belonged to RIVCO, there is no evidence, beyond mere speculation, that will suffice to defeat summary judgment. The complaint, and all cross-claims against RIVCO, are hereby dismissed.

The remaining defendants have demonstrated their prima facie entitlement to summary judgment as to plaintiff's Labor Law §§ 200, 241 (6) and common law negligence claims, ONLY. First, there is no evidence that defendants had any direction or control over the manner of plaintiff's work, such that liability under Labor Law § 200 would attach (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). In fact, plaintiff himself testified that he took direction from no one other than his employer. As to plaintiff's common law negligence claims, there is no evidence that any of the herein defendants created a hazardous condition or had actual or constructive notice of same. Accordingly, plaintiff's common law negligence and Labor Law § 200 claims are dismissed as to all defendants.

Next, in order to establish a violation of Labor Law § 241 (6), the underlying statute or rule that the violation is premised upon must be one that mandates concrete specifications rather than a general safety standard (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]). Plaintiff failed in this regard and his ad hoc attempts to cite the requisite "concrete specifications" for the first time in opposition will not be considered. Notably, plaintiff did not cross-move or otherwise seek to amend his complaint or bill of particulars to assert these Industrial Code violations (*cf. Galarraga*

v City of New York, 54 AD3d 308, 310 [2d Dept 2008]). Accordingly, plaintiff's Labor Law § 241 (6) claims are dismissed as against all defendants.

Notwithstanding, there are triable issues of fact surrounding plaintiff's remaining Labor Law § 240 (1) claim. Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners, general contractors, and their agents for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute *(Fabrizi v 1095 Ave. of the Ams.*, LLC, 22 NY3d 658, 662 [2014]). "Labor Law § 240 (1) was designed to prevent those types of 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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To prevail on liability under Labor Law § 240 (1), the plaintiff must establish a violation of the statute, and that the violation was a proximate cause of the injuries *(Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

Here, defendants actually illuminate the issue of fact that is fatal to their motion: it is not certain whether plaintiff fell from a ladder or injured himself in another manner. Accordingly, that will be for a jury, hearing plaintiff's testimony of what transpired, to assess plaintiff's credibility and determine whether the statute was violated. It is not the court's function on a motion for summary judgment to assess credibility (*Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 631 [1997]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment" (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013] [citation and internal quotation marks omitted]).

Accordingly, plaintiff's claims for common law negligence and Labor Law §§ 200 and 241 (6) are dismissed as to all defendants. Plaintiff's claims for Labor Law § 240 (1) survive as against defendants 7 THIRD AVENUE FEE, LLC, 7 THIRD AVENUE LEASEHOLD LLC, SAGE REALTY LLC, and HUNTER ROBERTS CONSTRUCTION only. The complaint and all cross-claims are dismissed as to defendant RIVCO CONSTRUCTION CORP.

Dated: 7/09/18

ENTER,

Norma Ruiz, J.S.C.