Djokic v Trinity Boxing & Athletic Club, Inc.
2018 NY Slip Op 32935(U)
November 19, 2018
Supreme Court, New York County
Docket Number: 155114/15
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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GAJA DJOKIC,

Plaintiff,

-against-

TRINITY BOXING AND ATHLETIC CLUB, INC., and 110 GREENWICH STREET ASSOCIATES, LLC,

Defendants.

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Index No. 155114/15
Motion Sequences 02-04

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Motion sequence nos. 002 (MS 002), 003 (MS 003), and 004 (MS 004) are consolidated for disposition.

The complaint arises from Plaintiff Gaja Djokic's work as the superintendent for 110 Greenwich Street in Manhattan, a residential building that had a boxing gym on the first floor (Building). There is no dispute that the Building was owned by 110 Greenwich Street Associates, LLC (Greenwich), who leased the first floor to Trinity Boxing and Athletic Club, Inc. (Trinity) pursuant to a lease agreement.[1] As is relevant to this motion, the Lease contained an indemnification provision[2] which provides in relevant part that:

> . . . Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees, or licensees, or any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, invitees or licensees . . .

Non-party Jakobson Properties, LLC (Jakobson Properties) was the Building's managing agent. Plaintiff alleges that on March 9, 2014 he was repairing a column inside the gym when the leg on

[1] Trinity, exhibit K (Lease).

[2] The E-filed copy of the Lease at issue is impossible to read. However, none of the parties have disputed that the indemnification clause reads as set forth by Trinity in its moving papers (see pp. 15-16).

the ladder he was using unexpectedly shifted. As a result Plaintiff fell to the ground and injured his neck and back. Eventually he underwent two spinal surgeries. At the time Plaintiff was employed by JakPay, LLC (Jakpay), which is alleged to be an alter ego of Greenwich.

Plaintiff filed this action on May 20, 2015. The complaint asserts claims against Trinity and Greenwich for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). In MS 002, Trinity moves pursuant to CPLR 3212 for summary judgment dismissing all claims against it on the ground that it was not an owner, agent, or contractor as defined by the Labor Law. Trinity also seeks to dismiss Greenwich's cross-claim against it for contractual indemnification. In MS 003, Greenwich moves pursuant to CPLR 3212 for summary judgment on the ground that Plaintiff's claims are barred by New York's Workers' Compensation Law. In MS 004, Plaintiff moves for partial summary judgment on the issue of liability on his Labor Law 240(1) claim.

Mr. Djokic was deposed in September of 2017.[3] He testified that he had been working as the Building's superintendent and that he reported to a woman named Tammy Rice, whom he identified as his manager. On the date of the accident Tammy assigned Plaintiff to repair a five-foot section of a large concrete beam and a brick column. Because the gym's owner, Martin Snow, did not let him perform maintenance work while the gym was open to customers, Plaintiff gained access to the facility after it closed. He worked for about two hours without incident. Plaintiff then climbed the ladder that he had been using in order to apply sheetrock to the exposed area when one of the ladder's legs shifted and he fell to the ground. There were no braces, harnesses, or ropes available on-site that would have prevented him from falling. The only other person in the gym with the Plaintiff was his friend Elvis (Plaintiff's Deposition pp. 16-19, 38, 89-90, 101-105). Elvis did not witness the accident, but Plaintiff believes he may have heard it.[4]

[3] See Greenwich's moving papers, exhibit F (Plaintiff's Deposition).
[4] The parties have been unable to schedule Elvis for a non-party deposition.

Plaintiff believed that he was employed by Jakobson Properties, the Building's managing agent. He knew that his paychecks had the name "JakPay" on them but did not know what that meant. Following his accident the Plaintiff received Workers' Compensation benefits. The decision awarding him benefits lists JakPay as his employer.[5]

Martin Snow, Trinity's owner and president, was deposed on October 12, 2017.[6] He confirmed that Plaintiff was the Building's superintendent and that Tammy Rice was the Building's manager (Snow Deposition pp. 25-27). According to Mr. Snow, Trinity was in litigation with the Building at the time and did not want anyone from Greenwich entering the gym. He only allowed Plaintiff onto the floor after Plaintiff expressed his concern that he would get fired if he did not finish the work as directed. After that Mr. Snow told Plaintiff that he could not prevent him from accessing the Building after hours (Snow Dep. p. 26; see also p. 64):

> Q. Well, at some point in time, did you give permission to have the work done inside of the gym?
>
> A. No. Gaja told me that -- I mean he asked me several times and I said I didn't want him to because that would just be helping the building owners who I wasn't about to help, but then he told me that he would get fired if he didn't do it and I said, listen, Gaja, I mean I can't -- if they want you to do it, I don't want you to get fired. I also don't want to help them. So I mean I can't stop you when I am not there.

Mr. Snow testified that he did not hire or ask Plaintiff to perform the work, did not supervise or direct Plaintiff's work, and did not provide Plaintiff with any materials or equipment (*id.* at 54, 157, 172).

Peter Jakobson, Jr. was deposed on behalf of Greenwich.[7] He testified that Greenwich owned the Building at the time of the accident and that the repairs to the beam were needed to replace a piece of broken "cladding" used for fire-proofing. Greenwich undertook this project to

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[5] Greenwich, exhibit G.

[6] Greenwich, exhibit H (Snow Deposition).

[7] Greenwich, exhibit I (Jakobson Deposition).

prepare the Building for an inspection and eventual sale. Plaintiff's direct manager was Jennifer Weinberg, the Building's junior property manager. Ms. Weinberg's manager was Tammy Rice, whom the Plaintiff identified as his manager. Mr. Jakobson testified that either Ms. Weinberg or Ms. Rice would have communicated with the Plaintiff regarding his work assignments. (Jakobson Dep. pp. 23-24, 26, 46-47, 54-55). Mr. Jakobson conceded that Greenwich supplied the Plaintiff with the materials and equipment he used to perform his tasks, including the ladder he used on the day of his accident (Jakobson Dep. pp. 17, 34-35, 60-61), but did not recall if the Plaintiff would have been provided with any safety equipment (*id.* at 49):

Q. And the work that Mr. Djokic was charged with in March 2014, do you know at what elevation he would have had to have been working?

A. It would have been several feet below the ceiling level.

Q. So if the ceilings is ten to 12 feet, that would be what? You mean three, four, something else?

A. Could be ten to eight?

Q. Do you know whether there was any fall arrest equipment provided at the premises for Mr. Djokic?

A. I do not.

Q. Do you know of any type of safety equipment provided at the premises for Mr. Djokic to use in connection with the March 2014 work?

A. I do not.

Mr. Jakobson also confirmed that all of the work Plaintiff performed was on behalf of Greenwich, JakPay, and Jakobson Properties, not Trinity Boxing (*id.* at 75-76).

A sizable portion of Mr. Jakobson's deposition testimony focused on the relationship between Greenwich, Jakobson Properties, and JakPay. According to Mr. Jakobson, Greenwich is a real estate holding company. Its members were the Peter Jakobson, Jr. Qualified Annuity Trust; John R. Jakobson Family, LLC; Thomas Jakobson; Robert C. Kautz; and 110 Greenwich Management, LLC (*id.* at 8-9). Jakobson Properties was a property management company (*id.* at 10). JakPay was a payroll company which employed several office employees. JakPay and

Jakobson Properties had the same two members, Mr. Jakobson and his brother, Thomas Jakobson (*id.* at 11-15). All three entities shared principal office space at 11 Waverly Place in Manhattan (*id.* at 31-32).

In addition to Mr. Jakobson's testimony, the record contains an affidavit from Mr. Jakobson which "further clarif[ies] the relationship between these entities."[8] He avers that Jakobson Properties was created for the sole purpose of managing the various properties within the Jakobson family's real estate portfolio, including Greenwich. However, Greenwich and Jakobson Properties do not have any employees. This role was filled by JakPay, which employs all of the individuals who worked under the Jakobson real estate umbrella, including the Plaintiff. (¶¶ 3, 5). He further avers that Greenwich, Jakobson Properties, and JakPay "were and are run as a single integrated entity", "have the exact same ownership", the same general liability insurance policy, and use the "same office staff, telephones and computers within the offices located at 11 Waverly Place" (*id.* at ¶¶ 6, 8, 9). He concludes that "Gaja Djokic, was an employee of the single entity made up of the LLC's owned by the Jakobson Principals and that Mr. Djokic's claim is one for Workers' Compensation, which he has received." *Id.* at ¶ 13.

DISCUSSION

The basis of Trinity's motion is that it is not owner, agent, or contractor within the meaning of the Labor Law. Trinity also moves to dismiss Greenwich's contractual indemnification claim, arguing that Plaintiff's accident did not trigger the indemnification provision within its lease and Greenwich cannot be indemnified for its own negligence MS 002). Greenwich's motion is grounded in New York's Workers' Compensation Law as well as its claim that Greenwich and JakPay (Plaintiff's employer) are alter egos of one another (MS 003). Plaintiff argues that the

[8] Affirmation of Peter D. Lechleitner, p. 7; Greenwich's exhibit J (Jakobson Affidavit)

Defendants violated Labor Law 240(1) by failing to provide him with adequate fall protection, ultimately causing his injuries (MS 004).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Trinity

At the outset, the court notes that Greenwich did not oppose the portion of Trinity's motion which seeks dismissal of Greenwich's cross-claims for contractual indemnification, breach of contract, common law indemnification, and contribution. Nor is there any evidence in the record to support such cross-claims. Accordingly, all cross-claims against Trinity are dismissed without opposition and for good cause shown.

With respect to Plaintiff's direct claims, the argument is that Trinity, even though it was merely a lessee, can be considered an "owner" for Labor Law purposes. In this regard, the Labor Law "places a duty on 'contractors and owners and their agents.' It says nothing about lessees."

Ferluckaj v Goldman Sachs & Co., 12 NY3d 316, 320 (2009). But this does not mean that lessees can never be liable, as "lessees who hire a contractor, and thus have the right to control the work being done, are 'owners' within the meaning of the statute." *Id.*; *see also Copertino v Ward*, 100 A.D.2d 565, 566 (2d Dept 1984) ("The term [owner] has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit."). "[I]t is the right to control the work that is significant, not the actual exercise or nonexercise of control." *Id.* at 567.

In this case it is clear that Trinity was not an owner or an agent for Labor Law purposes. The Plaintiff himself conceded that Trinity did not hire the Plaintiff, did not ask him to perform the injury-causing work, was not present during the relevant time period, and did not provide him with any materials or equipment. There is also no evidence that the work was being performed at Trinity's request. To the contrary, Mr. Jakobson testified that he wanted the beam fixed to prepare the building for sale, not for the benefit of Trinity or its customers.

In opposition Plaintiff contends that there is a material issue of fact whether Trinity "controlled" the worksite by reason of the fact that Mr. Snow would not allow the Plaintiff to work during normal business hours. While this appears to be true, this fact is more indicative of the poor relationship between Mr. Snow and Mr. Jakobson and does not change the fact that Trinity had nothing to do with the injury-causing work. Plaintiff also asserts that Trinity had a contractual obligation to repair the column. In so doing, however, Plaintiff refers to a lease provision about plumbing and heating systems with no explanation as to how it could apply to the brick and steel column at issue. In reality there is no evidence that Trinity was contractually responsible for maintaining and/or repairing the column.

Accordingly, Trinity's motion for summary judgment is granted in its entirety.

II. Greenwich

Greenwich contends that Plaintiff's claims against it are barred by the Workers' Compensation Law because it is an alter ego of Plaintiff's employer.[9] An employer is entitled to the protections of WCL § 11 if it provides the injured employee with workers' compensation coverage pursuant to an insurance policy that was in effect at the time of the accident. *See Hyman v Agtuca Realty Corp.*, 79 AD3d 1100 (2d Dept 2010). If an employer maintains a valid workers' compensation insurance policy, claims against the employer are generally barred unless a written contract was entered into prior to an accident by which the employer expressly agreed to contribution or indemnification or the employee sustained a "grave injury." WCL § 11; *see also Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 365 (2005).

"The protection against lawsuits by injured workers that is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities that are alter egos of the entity which employs the plaintiff." *Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 840 (2d Dept 2017) (quoting *Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 618-619 [2d Dept 2013]). "A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer." *Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 (2d Dept 2013). A

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[9] WCL §10 provides in relevant part that "[e]very employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . . ."

WCL §11 provides that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that "one of the entities controls the other or that the two operate as a single integrated entity." *Quizhpe*, 103 AD3d at 619. Factors relevant to the determination of this issue include:

> ... whether the two entities share a common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers or are owned by the same person. Additional factors include whether the alter ego has any employees, whether the alter ego leases property pursuant to a written lease or pays rent to the plaintiff's employer, and whether one entity pays the bills for the other even if those bills are for the benefit of the nonpaying entity.

(*Buchwald v 1307 Porterville Rd., LLC*, 160 AD3d 1464, 1465 [4th Dept 2018]). "Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct." *Longshore v Paul Davis Sys. of the Capital Dist.*, 304 AD2d 964, 965 (3d Dept 2003).

Here, Greenwich has established that it shared similar members as Jakobson Properties and JakPay, all three entities were covered under the same general liability insurance policy, and all three entities shared office space at 11 Waverly Place in Manhattan. It is evident that they were all part of the Jakobson real estate portfolio and were integrated to a certain extent. On the other hand, it is equally evident that these entities served different purposes. Greenwich was formed specifically to serve as the owner of the Building where the Plaintiff was injured. It never had any employees and it had no assets other than the Building itself. Jakobson Properties managed each of the 25 buildings within the Jakobson real estate portfolio. JakPay served as the payroll company for the Jakobson real estate portfolio and had several employees, including the Plaintiff. While these three corporations used the same accountant, they filed separate tax returns and maintained separate finances. By Mr. Jakobson's own testimony, Greenwich and JakPay were separate and distinct

(Jakobson Deposition, pp. 59-60). It also appears that Greenwich and Jakobson Properties were excluded from JakPay's Workers' Compensation policy.[10]

Taking into consideration the totality of these circumstances, I find that Greenwich has not established, as a matter of law, that it was JakPay's alter ego. The two entities are certainly related, but they also appear to be separate and distinct, as evidenced by the fact that they file separate income tax returns, have separate finances, and serve distinct business functions. *See Buchwald*, 160 AD3d at *1465*; *Salcedo*, 146 AD3d at 841; *Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 459 (1st Dept 2012); *Morato-Rodriguez v Riva Constr. Group, Inc.*, 88 AD3d 549, 549 (1st Dept 2011); *Gonzalez v 310 W. 38th, LLC*, 14 AD3d 464, 464 (1st Dept 2005); *Longshore*, 304 AD2d at 965; *Cruz v Regent Leasing, Ltd. Partnership*, 14 Misc. 3d 307, 310 (Sup. Ct. Bronx Co. Nov. 2, 2006, Renwick, J.), aff'd at 39 AD3d 396 (1st Dept 2007). Also, as a policy matter, the court cannot disregard the fact that the Jakobson principals made the conscious decision to divide their portfolio into several distinct corporate entities, presumably for some business, tax, or legal benefit. This structure should "not lightly be ignored at their behest, in order to shield one of the entities they created from third-party common-law tort liability." *Buchner v Pines Hotel, Inc.*, 87 AD2d 691, 692 (3rd Dept 1982); *see also Boggs v Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979), cert. den. 444 US 836 (1979) (corporate "owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee."). In sum, there are issues of fact with regard to the relationship between JakPay and Greenwich that preclude summary judgment.

[10] See Greenwich's exhibit D.

III. Plaintiff's Motion - Labor Law 240

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they had actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility. . . ." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. A violation of this duty that proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or agent strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

"In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason", the Court of Appeals has "continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. . . . Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence — enough to raise a fact question — that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8, (2003).

Plaintiff's testimony is that while he was working on the ladder the leg shifted, causing both him and the ladder to fall to the ground. He was not provided with any safety braces, harnesses, or ropes to prevent him from falling (Djokic Deposition pp. 92, 97, 38):

A. I was going up and about like to put the tools on that platform on the ladder.

Q. Is that when the accident happened as you were climbing up?

A. Yes.

* * * *

Q. How many steps up the ladder had you taken before you felt the leg of the ladder move?
. . .

A. I wasn't on top. I tried like -- I don't know exactly. My foot was like 5, 6 foot high, maybe. Something like that. . . .

Q. When you believe you felt one leg of the ladder move, your foot was 5 to 6 feet off the ground?

A. I think so. Something like that. It was high.

* * * *

Q. Was there anything, other than a ladder, that you would be able to use to get to heights, like scaffolding or anything like that, that they had?

A. I don't have scaffolding.

Q. Do you know if there were any braces or harnesses for use in the building.

A. No.

Q. No, there were none or no, you don't know.

A. You mean like safety line or something like that or some ropes?

Q. Yes.

A. No. We don't have that.

Consistent therewith, and as set forth above, Mr. Jakobson did not know if safety harnesses or other forms of safety equipment were available (Jakobson Deposition, p. 49). In light of this testimony, Plaintiff has *prima facie* established that Greenwich violated Labor Law 240(1).

In opposition, Greenwich argues that Plaintiff was the only witness to his accident and there is documentary evidence which calls his credibility into question. In this regard, the "fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment." *Cardenas v 111-127 Cabrini Apts. Corp.*, 145 AD3d 955, 957 (2d Dept 2016).

However, the "denial of summary judgment is appropriate where the injured party is the sole witness to the accident, as the salient facts are exclusively within his knowledge and his credibility is placed in issue." *Donohue v Elite Assoc., Inc.*, 159 AD2d 605, 606 (2d Dept 1990).[11]

Greenwich relies upon *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096 (2d Dept 2012), *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799 (1st Dept 2016), and *Jones v West 56th St. Assoc.*, 33 AD3d 551 (1st Dept 2006). In *Robinson*, plaintiff established his *prima facie* Labor Law 240(1) cause of action through testimony that his fall from a ladder occurred when one of its front feet "kicked out," the foot of the ladder began "walking the floor," and the ladder fell over. The defendants raised a triable issue of fact as to whether the plaintiff was the sole proximate cause of his injuries by submitting an accident report suggesting that the ladder fell over when he lost his footing, not that it kicked out. Two other reports also indicated that the plaintiff fell off the ladder, but not that the ladder kicked out or that it fell over.

In *Albino*, plaintiff testified that he was attempting to swing down from a roof onto a scaffold when a wire snapped, causing him to fall. A completely separate version of events was provided by the foreman, who testified that the plaintiff admitted to him that he fell because he slipped, not because of any broken wire. The court held that these contradictory versions of how the accident occurred raised an issue of fact. *Id.* at 800. Finally, in *Jones*, the plaintiff testified that he fell from a scaffold when the saw he was using malfunctioned. Plaintiff reported to his supervisor and chiropractor that he hurt his back without mentioning the saw or the scaffold. *Id.* at 552. These discrepancies were enough to raise an issue of fact.

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[11] In *Donohue*, the court denied Plaintiff's motion for summary judgment because "the vague and sometimes contradictory statements . . . in his deposition testimony, his amended verified bill of particulars, and his affidavit in support of the motion for summary judgment fail[ed] to demonstrate the manner in which the accident occurred and the proximate cause of his fall."

Greenwich submits five documents in this case as evidence to challenge Plaintiff's testimony: a FDNY Prehospital Care Report Summary which provides that Plaintiff "was on a 10 foot ladder working when he lost his balance and fell approx. 10ft to the ground"[12]; a record from Bellevue Hospital which notes that Plaintiff "was working on a ladder when he lost his balance and fell to the ground"[13]; Plaintiff's discharge summary from Bellevue Hospital which again states that Plaintiff "lost his balance and fell to ground"[14]; an updated medical record, again from Bellevue, which states that Plaintiff "reported that he was working on ladder when he lost his balance and fell to ground"[15]; and a Request for Workers' Compensation Information from Bellevue which reports Plaintiff as having "lost balance and fell from a ladder, hitting his head". Significantly, none of these records indicate that Plaintiff fell because the ladder unexpectedly shifted. For this reason, I find that there is a material question of fact whether Plaintiff fell because the ladder malfunctioned, which would be a Labor Law 240(1) violation, or whether the Plaintiff simply lost his balance and fell to the ground, which would not be actionable. *See Robinson, Albino, Jones, supra*; *see also Eitner v 119 West 71st St. Owners Corp.*, 253 AD2d 641, 642 (1st Dept 1998); *Isdith v City of New York*, 2017 NY Misc. LEXIS 4222, *10 (Sup. Ct. NY Co. Nov. 2, 2017, Freed, J); *Hernandez v Aspenly Co. LLC*, 2017 NY Misc. LEXIS 5418, *6 (Sup. Ct. Queens Co. Oct. 30, 2017, McDonald, J.). Plaintiff's summary judgment motion is therefore denied.

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[12] Greenwich Affirmation in Opposition, dated August 3, 2018, exhibit A.

[13] *Id.*, exhibit B.

[14] *Id.*, exhibit C.

[15] *Id.*, exhibit D.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Trinity's motion for summary judgment is granted in its entirety; and it is hereby

ORDERED that all claims and cross-claims against Trinity are hereby severed and dismissed; and it is further

ORDERED that Greenwich's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motion for summary judgment on his Labor Law 240(1) claim is denied; and it is further

ORDERED that all remaining causes of action shall continue as against all remaining defendants; and it is further

ORDERED that counsel for Plaintiff and Greenwich appear for a pre-trial conference in Part 30 on January 14, 2019 at 9:30AM.

The Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 11-19-18

SHERRY KLEIN HEITLER, J.S.C.