Linares v RSP Realty LLC
2019 NY Slip Op 30445(U)
February 14, 2019
Supreme Court, New York County
Docket Number: 156663/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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JOSUE LINARES, Index No. 156663/2013

Plaintiff

- against -

RSP REALTY LLC and PINE MANAGEMENT INC.,

Defendants

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RSP REALTY LLC and PINE MANAGEMENT INC.,

Third Party Plaintiffs

- against -

KELRON, INC. a/k/a KELRON CONTRACTING, INC.,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries he sustained June 26, 2013, when he was struck by a wood plank while working on a construction site owned by defendant-third party plaintiff RSP Realty LLC and managed by defendant-third party plaintiff Pine Management Inc., where third party defendant Kelron, Inc., plaintiff's employer, was the general contractor. Defendants moved for summary judgment dismissing the complaint

and awarding them judgment on their third party action against Kelron, C.P.L.R. § 3212(b), but now withdraw their motion insofar as it sought relief against Kelron. Plaintiff discontinues his claims for violation of New York Labor Law § 200 and for negligence, but cross-moves for summary judgment on his claim for violation of Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court denies the remainder of defendants' motion and grants plaintiff's cross-motion.

II. LABOR LAW § 240(1) CLAIM

Defendants seek dismissal of plaintiff's Labor Law § 240(1) claim on the grounds that plaintiff was not engaged in work covered by the statute and that he was a recalcitrant worker or the sole proximate cause of his injury. Plaintiff seeks summary judgment in his favor on his Labor Law § 240(1) claim.

A. Plaintiff's Injury Is Covered by Labor Law § 240(1).

Plaintiff testified that he was injured when one of several wood planks two inches thick and four inches wide that his co-workers were lowering from a third floor apartment fire escape came loose from the hoist, fell, and struck his face. This testimony, if uncontroverted, establishes a violation of Labor Law § 240(1). Hill v. Acies Group, LLC, 122 A.D.3d 428, 429 (1st Dep't 2014); Humphrey v. Park View Fifth Ave. Assoc. LLC, 113 A.D.3d 558, 559 (1st Dep't 2014); Mercado v. Caithness Long Is. LLC, 104 A.D.3d 576, 577 (1st Dep't 2013); Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007). Plaintiff's further testimony that he was removing debris from demolition his

co-workers had performed demonstrates that his work was integral to that task and thus covered under Labor Law § 240(1). Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 126 (2015); Prats v. Port Auth. of N.Y. & N.J., 100 N.Y.2d 878, 881 (2003); Mananghaya v. Bronx-Lebanon Hosp. Ctr., 165 A.D.3d 117, 126 (1st Dep't 2018).

Although plaintiff also testified that the piece of wood hit the ground before striking him, indicating that the wood fell to the ground and ricocheted back up to his face, plaintiff consistently testified that the wood fell from above. The fact that the wood may have hit the ground before striking plaintiff does not negate defendants' liability under Labor Law § 240(1), Makkieh v. Judlau Contr. Inc., 162 A.D.3d 468, 468-69 (1st Dep't 2018), as the statute covers injuries caused by objects on the same level as a worker that fall and injure him. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 10 (2011); Marrero v. 2075 Holding Co. LLC, 106 A.D.3d 408, 409 (1st Dep't 2013). Plaintiff's description of his injury meets the dispositive test: the injury was the direct consequence of the failure to protect against a plank falling from a significant elevation because the plank was inadequately secured. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d at 10-11; Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 603 (2009); Makkieh v. Judlau Contr. Inc., 162 A.D.3d at 468-69; Marrero v. 2075 Holding Co. LLC, 106 A.D.3d at 409.

Nor is plaintiff's description of his injury inherently incredible, as defendants insist. Plaintiff testified through an

interpreter. When asked whether the plank hit the ground first and then hit his person, he answered affirmatively. His specific words, through the interpreter, were: "It was coming from above, it went to the ground, it come back up, it hit my face." Aff. of Katina Despas-Barous Ex. Q, at 87. While the plank is described repeatedly as two inches thick and four inches wide, its length is not specified. Assuming it was at least six feet long, when loose from the rope it was diving vertically to the ground, so that the lower end plausibly may have hit the ground while the upper end hit plaintiff's face.

B. Plaintiff Was Not the Sole Proximate Cause of His Injury.

Defendants support their contention that plaintiff was a recalcitrant worker or the sole proximate cause of his injury with affidavits by Timothy Kelly, Kelron's owner, and Ulysses Fahardo Calixto, its foreman. They attest (1) to plaintiff's account that, when he was lifting a garbage bag into a container on the street, he was injured by the contents from the bag that penetrated it and struck his forehead and (2) to his refusal to wear a hard hat and goggles despite an instruction to do so. Since Kelly bases his affidavit regarding these points entirely on information from Calixto, Kelly's affidavit is inadmissible hearsay insufficient to raise factual issues. Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583-84 (1st Dep't 2018); Ying Choy Chong v. 457 W. 22nd St. Tenants Corp., 144 A.D.3d 591, 592 (1st Dep't 2016); McGinley v. Mystic W. Realty Corp., 117 A.D.3d 504, 505 (1st Dep't 2014); Acevedo v. Williams

Scotsman, Inc., 116 A.D.3d 416, 417 (1st Dep't 2014). See Bhowmik v. Santana, 140 A.D.3d 460, 461 (1st Dep't 2016).

Calixto's affidavit, which was "translated from English to Spanish by Esteban Roman of Bauer Trial Preparation," Despas-Barous Aff. Ex. S, Aff. of Ulysses Fahardo Calixto at 2, is inadmissible because the affidavit lacks Roman's attestation of his bilingual qualifications and the translation's accuracy. C.P.L.R. § 2101(b); Sylla v. Condominium Bd. of the Kips Bay Towers Condominium, Inc., 159 A.D.3d 430, 430 (1st Dep't 2018); Peralta-Santos v. 350 W. 49th St. Corp., 139 A.D.3d 536, 537 (1st Dep't 2016); Eustaquio v. 860 Cortlandt Holdings, Inc., 95 A.D.3d 548, 548 (1st Dep't 2012). Defendants thus fail to show that plaintiff was a recalcitrant worker or the sole proximate cause of his injury. Cardona v. New York City Hous. Auth., 153 A.D.3d 1179, 1179 (1st Dep't 2017); Ying Choy Chong v. 457 W. 22nd St. Tenants Corp., 144 A.D.3d at 592; Eustaquio v. 860 Cortlandt Holdings, Inc., 95 A.D.3d at 548-49.

Even accepting defendants' hearsay and incompetent affidavits, plaintiff's refusal to wear a hard hat or goggles would not raise factual issues regarding the Labor Law § 240(1) violation because a hard hat and goggles are not safety devices under that statute. Mercado v. Caithness Long Is. LLC, 104 A.D.3d at 577; Singh v. 49 E. 96 Realty Corp., 291 A.D.2d 216, 216 (1st Dep't 2002). Nor do defendants show that a hard hat or goggles would have protected against the injury to plaintiff's face, let alone that his failure to wear them was the sole

proximate cause of his injury. Plaintiff's comparative fault is not a defense to his Labor Law § 240(1) claim. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 289 (2003); Cardona v. New York City Hous. Auth., 153 A.D.3d at 1180; Hill v. Acies Group, LLC, 122 A.D.3d at 429.

Regarding the alleged inconsistent accounts by plaintiff of how he was injured, defendants also offer an unsigned C-2 Workers Compensation form July 10, 2013, which Kelly attests he wrote himself based on a telephone conversation with plaintiff. Defendants fail either to show who translated that conversation, see Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012), or to lay a business record foundation for the form. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); O'Connor v. Restani Constr. Corp., 137 A.D.3d 672, 673 (1st Dep't 2016); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012). Even if the court considered this form, its account does not contradict plaintiff's testimony that he was injured when he was struck by a piece of wood that fell from above. Hill v. City of New York, 140 A.D.3d 568, 570 (1st Dep't 2016).

III. LABOR LAW § 241(6) CLAIM

Plaintiff limits his Labor Law § 241(6) claim to a violation of 12 N.Y.C.R.R. § 23-1.7(a)(1), which provides that: "Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection." The parties dispute that the area

where plaintiff was injured was normally exposed to falling objects.

Plaintiff testified that his co-workers used a single rope to tie five or six of the planks, each two by four inches, and to lower them to the ground from a third floor apartment fire escape; that Calixto instructed plaintiff to store this wood in the basement; and that one of the planks struck plaintiff from above as he exited the basement to retrieve more wood. This testimony demonstrates that the area below the third floor apartment fire escape and outside the basement normally was exposed to falling material. Clarke v. Morgan Contr. Corp., 60 A.D.3d 523, 524 (1st Dep't 2009); Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d at 480; Murtha v. Integral Constr. Corp., 253 A.D.2d 637, 638-39 (1st Dep't 1998). See Griffin v. Clinton Green S., LLC, 98 A.D.3d 41, 49 (1st Dep't 2012); Buckley v. Columbia Grammar & Preparatory, 44 A.D.3d 263, 271 (1st Dep't 2007). Since defendants present no admissible evidence to contradict plaintiff's account, as discussed above, they fail to support dismissal of plaintiff's Labor Law § 241(6) claim.

IV. CONCLUSION

Consequently, the court denies defendants' motion for summary judgment insofar as it seeks to dismiss plaintiff's claims under Labor Law § 240(1) and under Labor Law § 241(6) premised on a violation of 12 N.Y.C.R.R. § 23-1.7(a)(1). C.P.L.R. § 3212(b). Plaintiff has discontinued all other claims with defendants' consent. See C.P.L.R. § 3217(a)(2) and (b).

The court grants plaintiff's cross-motion for summary judgment on defendants' liability for a violation of Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment.

DATED: February 14, 2019

LUCY BILLINGS, J.S.C.

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