Morgan v Deco Towers Assoc. LLC
2019 NY Slip Op 31606(U)
June 5, 2019
Supreme Court, New York County
Docket Number: 162434/2014
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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RAYMOND MORGAN and MICHELE MORGAN,

Plaintiffs,

- v -

DECO TOWERS ASSOCIATES LLC, and DHU REALTY CORP.,

Defendants.

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INDEX NO. 162434/2014

MOTION DATE

MOTION SEQ. NO. 006, 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 121-146, 160, 162-167

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 147-159, 161, 168

were read on this cross motion for summary judgment.

Plaintiffs move for an order granting them partial summary judgment on their Labor Law 240(1) claim. (NYSCEF 121, mot. seq. 6). Defendant Deco Towers Associates, LLC opposes and cross-moves for an order summarily dismissing plaintiff's complaint and any cross claims against it. Defendant DHU Realty Corp. opposes plaintiffs' motion, and plaintiffs oppose Deco's motion.

Defendant DHU moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it. (NYSCEF 135, mot. seq. 7). Plaintiff opposes.

The motions are consolidated for disposition.

I. PLAINTIFFS' CLAIMS

DHU argues that given evidence that at the time of his fall from a ladder, plaintiff Raymond Morgan was performing routine maintenance work, he does not fall within the class of

those entitled to protection under the Labor Law. It offers in support an accident report that Raymond filled out while awaiting an ambulance after he had fallen. In that report, he described the accident as follows: "Changing light bulbs on 10' ladder the bottom of it broke." (NYSCEF 156).

In the alternative, DHU contends that Raymond's failure to use alternative devices available to him renders him the sole proximate cause of his accident, thereby warranting the dismissal of his causes of action for violations of Labor Law §§ 240(1) and 241.

DHU also argues that absent any supervisory authority it had over Raymond's work, it cannot be held liable for negligence under the common law or Labor Law § 200. Rather, it asserts, Raymond's work was solely directed, supervised, and controlled by his employer. It maintains that given Raymond's and his supervisor's testimony that they did not know to whom the ladder belonged, and Raymond's testimony that he had used the ladder before and had experienced no problems nor complained of any, there is no evidence that it created the condition or had actual or constructive notice of it. (NYSCEF 150).

In opposition, plaintiffs assert that Raymond had been directed to repair a light fixture, and was assigned to fix non-functioning light fixtures, whereas building employees changed light bulbs. In particular, Raymond testified that

> [w]hen a fixture is tagged, that means someone went and replaced the bulb and the fixture did not go back on. I will go up, replace the tombstone, rewire the fixture for the new ballast, and put the fixture back together again.

He also explained that to perform the work assigned on the day he fell, he was obliged to inspect the fixture to determine if there was a problem with it, and that even if the bulb was out, he would be obliged to rewire the fixture at a minimum. Approximately one month after the accident, Raymond testified, he returned to the site and performed the multi-step process

required for such a repair, which entails rewiring the fixture with a new ballast, changing the tombstones, replacing the valve, and reassembling the fixture.

Plaintiffs argue that there is no factual dispute that Raymond's injuries resulted from a ladder that collapsed under him while he was performing repair work in a building owned and leased by defendants. They also maintain that absent evidence as to the availability of other ladders known to Raymond, he cannot have been the sole proximate cause of his accident.

A. Routine maintenance

Raymond's statement in the accident report constitutes an admission against interest, and/or a prior inconsistent statement, and is thus admissible. (*See e.g., Benedikt v Certified Lumber Corp.*, 60 AD3d 98 [2d Dept 2009] [plaintiff established *prima facie* entitlement to summary judgment by submitting, *inter alia*, accident reports containing defendant's admission against interest]; *Vaden v Rose*, 4 AD3d 468 [2d Dept 2004] [statement contained in police accident report was exception to hearsay rule as admission against interest]; *Brown v URS Midwest, Inc.*, 132 AD3d 936 [2d Dept 2015] [statement in police accident report admissible as admission or prior inconsistent statement]; *Kamolov v BIA Group, LLC*, 79 AD3d 1101 [2d Dept 2010] [plaintiff's statement in ambulance report were admissible as admissions inconsistent with current account of accident]).

In light of the triable issues of fact raised by Raymond's inconsistent statements as to whether he was about to change a lightbulb or repair the light fixture when he fell off a ladder, plaintiffs fail to demonstrate their right to summary judgment on their cause of action for a violation of Labor Law § 240(1), the sole cause of action for which they seek such relief (NYSCEF 121, mot. seq. 8). (*See Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650 [2d Dept 2017] [plaintiff's testimony established triable issue as to whether he was "repairing"

light fixture at time of accident, and thus whether he was engaged in routine maintenance]; *Gopie v Mut. of Am. Life Ins. Co.*, 142 AD3d 820 [1st Dept 2016] [neither side entitled to summary judgment as triable issue existed as to whether plaintiff was engaged in protected activity or routine maintenance]).

Given these factual issues, defendants also fail to demonstrate entitlement to summary dismissal of plaintiffs' Labor Law § 240(1) claim.

B. Sole proximate cause

Liability under Labor Law § 240(1) may not be found absent a violation of the statute and where the plaintiff's actions were the sole proximate cause of the accident. (*Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35 [2004]). A plaintiff is the sole proximate cause of his or her accident when he has adequate safety devices available, knows they are available, is expected to use them, chooses for no good reason not to do so, and the injury would not have occurred had he not made that choice. (*Cahill*, 4 NY3d at 40).

Here, DHU submits no evidence showing that Raymond was aware of the availability of other ladders at the site, and thus fails to establish that he was the sole proximate cause of his accident. (*See Gallagher v New York Post*, 14 NY3d 83 [2010] [no evidence in record that plaintiff knew where to find safety devices that were allegedly readily available or that he was expected to use them]; *Messina v City of New York*, 148 AD3d 493 [1st Dept 2017] [no testimony as to whether there were other readily available, adequate safety devices that plaintiff declined to use]).

C. Deco's motion

As Deco previously obtained an order granting its motion for summary judgment on plaintiffs' cause of action for a violation of Labor Law § 200 (NYSCEF 65), its current cross

motion constitutes an inappropriate successive motion for summary judgment. (*See Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 814 [2d Dept 2018] [successive motions for summary judgment should not be entertained absent showing of good cause or newly discovered evidence]).

D. Remaining claims

As plaintiffs do not address, and therefore do not oppose, dismissal of their Labor Law §§ 241(6) and 200 and common law negligence claims, they are dismissed.

II. CROSS CLAIMS AGAINST DHU

As DHU advances no arguments for dismissal of any cross claims against it, the motion is denied to that extent.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment on their Labor Law 240(1) claim is denied (mot. seq. six); it is further

ORDERED, that defendant Deco Towers Associaties, LLC's cross motion is denied; it is further

ORDERED, that defendant DHU Realty Corp.'s motion for summary judgment dismissing plaintiffs' claims (mot. seq. seven) is granted to the extent of dismissing plaintiffs' Labor Law §§ 241(6) and 200 and common law negligence claims without opposition, and is otherwise denied.

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6/5/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE