# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

PEDRO BAUTISTA

INDEX NO. 154001/17

MOT. DATE

- v -

MOT. SEQ. NO. 001

HUGHES & HUGHES CONTRACTING CORP.

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

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

Replying Affidavits NYSCEF DOC No(s).____

This is a personal injury action arising from plaintiff's fall from a scaffold at a construction project. Plaintiff now moves for partial summary judgment on liability as to his Labor Law § 240[1] claim. Defendant opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is denied as premature.

The following facts are not in dispute. Plaintiff was injured in the course of his employment as a roofer for Harbor Roofer, an unincorporated business entity owned by Richard Moynagh. while repairing a detached garage associated with a church rectory used for both residential and church purposes. Defendant herein was the general contractor for the construction project.

There was a prior action against the owner of the premises, Catholic Church of Christ the King, and the Archdiocese of New York (collectively the "Church"). After discovery had taken place in that action, plaintiff moved for partial summary judgment on liability under Labor Law § 240[1] and the Church cross-moved for summary judgment dismissing the complaint. By that point, defendant herein had been impleaded into the prior action as a third-party defendant.[1]

The Honorable Fernando Tapia denied both motions in an decision/order dated June 15, 2017 because "material issues of fact exist regarding which of the defendants [Church Defendants or former Third Party-Defendant] is strictly liable and whether or not the rectory was solely used as a residence." Judge Tapia referred to the defendant herein as the former third-party defendant because the third-party action had been severed in an order dated June 6, 2016.

On appeal, the Appellate Division, First Department, modified the trial court's 6/15/17 decision/order so as to grant the Church's cross-motion in a decision/order dated August 30, 2018.[2] The First Department

Dated: 10/9/19

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

[1] Defendant served an answer to the third-party complaint in the prior action dated April 12, 2016.

[2] The First Department also reversed the trial court's denial of the Church's motion for a default judgment against plaintiff's employer.

dismissed the prior action because: [1] the owner established that the homeowner exemption applied to it, mandating dismissal of the Labor Law § 240[1] and 241[6] claims against it; and [2] plaintiff's work was supervised solely by his employer, which was fatal to his Labor Law § 200 and common law negligence claims; and [3] the Archdiocese of New York was not liable as an agent of the owner under the Labor Law.

In the prior action, plaintiff testified about his accident as follows.

Q. Do you remember what the weather was like on the day of your accident?

A. Yes. It was raining.

...

Q. What were you and Mr. Moynagh doing at the time that you had your accident?

A. Mr. Moynagh was at a corner installing the rain gutters. And I was at this corner installing the fascia.

Q. So you and Mr. Moynagh at two opposite ends of the garage?

A. Yes.

Q. And did you have any tools in your hand at the time that you had your accident?

A. Yes.

Q. What tools did you have in your hand at the time?

A. A nail gun. Something big.

...

Q. What happened at the time of your accident?

A. I think I slipped with the same water, because it was already raining a lot on the metal. That's the only thing I knew about. And I fell. We didn't have any protection of any type.

Q. The plank that you were standing on, was it made of metal?

A. Yes, it was metal.

...

Q. What happened at that point as you fell?

A. When I fell, after falling, I lost consciousness for some time. When I recovered consciousness, I think they were asking me what had happened. And the young man asked me to stand up. But I said no, I cannot, because I couldn't move at all. And they called Mr. Richard to help me out. It was all wet at that point.

...

Q. Can you tell us how far off the ground the plank was at the time of your accident?

A. Yes. Six feet or six feet and a half high, more or less.

...

Q. I just want to go back to the day of the accident for a second. When you were standing on the plank, what were the ladders resting on?

A. No. Standing on the ground, the ladders open and on top of the plank on the steps.

Q. How many planks were there laid across the ladders?

A. Only one plank.

Q. Did Mr. Moynagh place anything underneath the ladders for support?

A. No.

Plaintiff now argues that he is entitled to summary judgment on liability under Labor Law § 240[1] against defendant. Defendant opposes the motion, arguing that plaintiff's accident was not due to a "significant height elevation differential", that material questions of fact exist and that the motion is premature because there has been no discovery in this action. Issue has been joined but note of issue has not yet been filed.

**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:

Here, the court finds that the motion is premature because significant discovery is outstanding. Generally, a motion for summary judgment is considered premature when facts or evidence is exclusively in the movant's possession and the opponent is otherwise entitled to same in order to oppose the motion (CPLR §3212[f]). Here, defendant has not taken a deposition of the plaintiff. Although plaintiff was deposed in the prior action, defendant was not a party at that time and therefore was not present at plaintiff's deposition. Defendant has therefore not been able to put its own questions to plaintiff about how the accident occurred.

While defendant has engaged in some delay in this action by only requesting a preliminary conference after plaintiff filed the instant motion more than a year after issue was joined, such delay does not invalidate defendant's position. Indeed, summary judgment is drastic relief. It is a trial on papers. To consider the instant motion without permitting defendant an opportunity to depose plaintiff about his accident would result in an injustice. Defendant is entitled to ask plaintiff its own questions about how plaintiff's accident occurred such as where and how the metal plank was placed on the ladder. These questions bear on the ultimate issue of whether liability can be imposed under the Labor Law.

Finally, neither the trial court nor the First Department stated expressly that as a matter of law plaintiff had demonstrated *prima facie* liability under the Labor Law so as to have preclusive effect herein.

Therefore, the motion must be denied as premature without prejudice to renew after discovery has been completed.

Accordingly, it is hereby

**ORDERED** that the motion is denied as premature. Plaintiff may renew his motion after the completion of discovery; and it is further

**ORDERED** that the parties are directed to appear for a preliminary conference on November 26, 2019 at 9:30am in Part 8, 80 Centre Street.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/7/19
New York, New York

So Ordered:

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