Taveras v R. & L.M. Astorino, Inc.
2020 NY Slip Op 32014(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 152403/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** ***Justice***

PART **IAS MOTION 2EFM**

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JUAN TAVERAS

Plaintiff,

- v -

R. & L.M. ASTORINO, INC.,

Defendant.

---X

INDEX NO. 152403/2017

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 50, 52, 54, 57, 58, 61

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 53, 55, 56, 59, 60, 62

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on September 4, 2015 when, while working at a construction site located at 17 Crickwood Circle South, Yonkers, New York, also known as 9 Agawam South, Yonkers, New York (the Premises), he fell from a ladder and suffered injuries.

In motion sequence number 001, defendant R. & L.M. Astorino, Inc. (RLM or defendant) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

In motion sequence number 002, plaintiff Juan Tavares moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against RLM.

FACTUAL AND PROCEDURAL BACKGROUND

On the day of the accident, the Premises were owned by RLM. RLM hired non-party Ross Windows (Ross) to install new windows at the Premises (the Project). Plaintiff was an employee of Ross.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Ross as the supervisor for the window installation Project at the Premises. His duties at the Project included supervising other Ross workers as well as installing windows himself. His work often required him to work from a ladder. He was the primary supervisor on the project. He did not receive supervision from RLM, except general direction as to what areas of the Premises were ready for his crew to work.

The Project at the Premises was approximately a three-month job. Ross had six workers at the Premises, including plaintiff. To assist in their work, plaintiff and his coworkers were provided two or three A-frame ladders by Ross. Plaintiff did not recall ever having an issue with a ladder in the nearly 30 years that he worked for Ross.

The aluminum A-frame ladder plaintiff used on the day of the accident (the Ladder) was an old ladder. "It was wobbly but [plaintiff] was used to it" (plaintiff's tr at 132). He never raised an issue about the Ladder's wobbly nature because "it was natural, it was normal" (*id.* at 148).

Plaintiff's accident occurred after lunch, around 2:30 p.m. Plaintiff had been using the Ladder all day without incident. He placed the Ladder flush against the wall near a window frame to caulk a newly installed window. He confirmed that it was opened and fully secured.

He climbed the first few steps without issue, then climbed up to the second to last step of the Ladder when he felt it move backwards. Plaintiff tried to brace himself against the wall, "but the ladder fell on the ground" taking him with it (*id.* at 251). As he fell, his head struck the window and the windowsill, and he lost consciousness.

Plaintiff also testified that, in or around 2013, he was diagnosed with epilepsy, a condition that causes seizures. Between 2013 and the day of the accident, plaintiff suffered "one or two" seizures (plaintiff's tr at 26). He did not know whether he had a seizure immediately prior to the accident, but he did not remember feeling any symptoms of a seizure prior to his fall.

Deposition Testimony of Luigi M. Astorino (Defendant's Principal)

Luigi Astorino testified that, on the day of the accident, he was one of the principals of RLM, along with his wife. He was present at the time of the accident and witnessed plaintiff's fall.

Specifically, Astorino testified, at the time of the accident, he was present in the apartment where plaintiff was performing his work, along with the tenant of the apartment, "Mr. Flynn" (*id.* at 61). Plaintiff's back was to Astorino, but Astorino could see him working. Astorino was speaking with Flynn when he noticed plaintiff, while on the second or third step of the ladder, begin to shake. Astorino clarified that he did not observe the ladder shaking, only plaintiff. After he observed plaintiff shaking, Astorino testified that plaintiff "started coming down the ladder. . . . He looked to me like he was having [a] tick" (*id.* at 65). Then, when he was one or two steps from the floor, plaintiff's body "swung" to the left side and he fell to the floor, taking the ladder with him. Once plaintiff was on the floor, "[h]e was shaking, shaking, then he got foam coming out of his mouth" (*id.* at 81).

Astorino had ladders at the Premises, but he never let the Ross workers use them. He never provided any materials or equipment to plaintiff or any of his coworkers.

Deposition Testimony of Martin Rosenberg (Ross's Owner)

Martin Rosenberg testified that, on the day of the accident, he was the owner of non-party Ross. Ross was hired by RLM to install windows at the Premises. Plaintiff was Ross's supervisor for the Project at the Premises. Plaintiff only took direction from Rosenberg.

Rosenberg testified that he did not witness the accident. He learned of the accident from one of his employees, who told him that plaintiff had a seizure and fell from the Ladder. Rosenberg testified that Ross did not supply ladders for the Project at the Premises because they were not required for window installation. "It's not necessary" (Rosenberg tr at 31). "If someone used a ladder, it was either their own ladder or borrowed from somebody" (*id.* at 12). Instead of using ladders, Ross employees were told to stand on the windowsill.

Rosenberg was shown a copy of Ross's workers' compensation form for the accident and confirmed that it stated that plaintiff "had a seizure and fell off ladder" (*id.* at 26). The form was filled out by his secretary. He did not know who told her the information in the report.

Deposition Testimony of Daniel Henriquez (Plaintiff's Co-Worker)

Daniel Henriquez testified that, on the day of the accident, he was employed as a window installer for Ross. He worked with plaintiff on the day of the accident and, when the incident occurred, he was working in another area and was told that plaintiff had fallen from a ladder. He investigated and saw plaintiff on the ground "seizuring," with foam coming out of his mouth

(Henriquez tr at 27). Police and EMTs had already arrived. He did not know what caused plaintiff to fall.

Henriquez testified that the Ladder was undamaged and had rubber footing on all four feet. He had used the Ladder occasionally and it "was good" (Henriquez tr at 20). To his knowledge, the Ladder belonged to plaintiff.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 001 and 002)

Plaintiff moves for summary judgment in its favor as to liability on his Labor Law § 240 (1) claim against defendant. Defendant moves for summary judgment dismissing the same claim as against it.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use,

or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Initially, as the owner of the Premises, defendant is a proper Labor Law defendant.

Here, neither plaintiff nor defendant have established entitlement to summary judgment on the Labor Law § 240 (1) claim because a question of fact remains as to whether the Ladder shifted and caused plaintiff to fall, or whether his fall was caused by a seizure. Specifically, although plaintiff testified that the Ladder was unsteady and moved, causing him to fall, Astorino testified that he never saw the Ladder move. Rather, Astorino testified that plaintiff began shaking and was unsteady while climbing down the Ladder before he swung off the Ladder, pulling it down with him. Accordingly, there are two distinct credible versions of the accident, one in which defendant would be liable under section 240 (1) and one in which it would not be liable. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Munford v Pressmad Corp.,* 277 AD2d 135, 135 [1st Dept 2000] [denying plaintiff's summary judgment motion because questions of fact existed as to whether the plaintiff fell because he was not provided with a safe ladder or because he suffered a seizure]; *Hucke v Suffolk County Water Auth.*, 119 AD3d 735, 735 [2d Dept 2014] [denying plaintiff's summary judgment motion because a question of fact existed as to whether plaintiff fell because of missing guardrails or because he lost consciousness]).

Finally, each party supplies a medical expert's opinion as to plaintiff's condition at the time of the accident, and whether he suffered a seizure before falling from the Ladder. However, these opinions are at odds with one another and merely "present[] a battle of the experts for the jury to resolve" (*Shillingford v New York City Tr. Auth.*, 147 AD3d 465, 465 [1st Dept 2017]).

Thus, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim, and defendants are not entitled to summary judgment dismissing the same.

The Labor Law § 241 (6) Claim (Motion Sequence Number 001)

Defendant moves for summary judgment dismissing the Labor Law § 241 (6) claim against it. That section provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81

NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, he does not move for summary judgment in his favor as to those alleged violations, nor does he oppose their dismissal. Therefore, since the entirety of the Labor Law § 241 (6) claim is unopposed, it is deemed abandoned and defendant is entitled to summary judgment dismissing said claim (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 001)

Defendant moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it. Notably, plaintiff does not move for summary judgment in his favor on these claims, nor does he oppose their dismissal.

Assuming, *arguendo*, that the accident occurred as plaintiff has alleged, defendant has shown entitlement to summary judgment dismissing these claims. The record establishes that defendant did not "exercise[] *actual* supervision of the injury-producing work" – i.e. the use and securing of the Ladder (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

Thus, defendant is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the part of defendant R. & L.M. Astorino, Inc.'s (RLM) motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted and those claims are dismissed as against RLM, and the remainder of the motion is denied; and it is further

ORDERED that plaintiff Juan Taveras's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this constitutes the decision and order of the court.

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6/26/2020	KATHRYN E. FREED, J.S.C.
DATE	

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
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