Turgeman v Congregation Beth El of Flatbush

2020 NY Slip Op 33437(U)

October 13, 2020

Supreme Court, Kings County

Docket Number: 504684/2018

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
---X
DAN D. TURGEMAN,

Plaintiff,

-against-

CONGREGATION BETH EL OF FLATBUSH, ISAAC SASSON AND RENEE SASSON.

Defendants.
---X

Index No.: 504684/2018
Motion Date: 8-17-20
Mot. Seq. No.: 1-2

DECISION/ORDER

The following papers numbered 1 to 6 were read on these motions:

Papers:	**Numbered:**
Notices of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law..................	1-2
Answering Affirmations/Affidavits/Exhibits/Memo of Law.......	3-4
Reply Affirmations/Affidavits/Exhibits/Memo of Law..............	5-6
Other..	

Upon the foregoing papers, the motions are decided as follows:

In his action to recover damages for personal injuries, the plaintiff moves for, *inter alia*, an order pursuant to CPLR §3126 granting him spoliation sanctions against defendant, CONGREGATION BETH EL OF FLATBUSH. By separate notice of motion, the defendant, CONGREGATION BETH EL OF FLATBUSH, moves for an order pursuant to CPLR §3212, granting summary judgment dismissing plaintiff's complaint. Defendants ISAAC SASSON and RENEE SASSON have not appeared in the action. The two motions are consolidated for disposition.

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ms #02 - XMD

Plaintiff's Motion for a Spoliation Sanction:

This action arises out of an incident that occurred on October 5, 2017, at defendant's premises located at 2181 East 3rd Street, Brooklyn, New York. The plaintiff claims that at that time and place, he fell from a defective ladder owned by the defendant. At the time of the accident, the plaintiff was fixing the roof of a sukkah.

At his deposition, which took place on July 10, 2019, the plaintiff testified as follows:

Q: How did the accident occur?

A: I went up to fix the schach, the roof of the sukkah. And after it, I slipped and fell.

Q: While you were putting that sukkah together, did you have to stand on any ladders or anything?

A: Yes. We had two ladders. We worked together to finish it.

Q: What kind of ladders were they?

A: From the shul. ...

Q: Who gave you the ladders?

A: The synagogue.

Q: Did you ever see these ladders at the temple before?

A: Yes.

Q: These specific ladders?

A: Yes, yes.

Q: Where did you see the ladders before?

A: Inside the shul.

Q: Now, you mentioned there were two ladders. One was a 6-foot and the other was a 9-foot ladder. Which one did you get?

A: The 6-foot.

Q: Did you fall off that top step?

A: Yes.

Q: Mr. Turgeman, when you went back to the synagogue the following day after your accident, did the rabbi ask you what caused you to fall from the ladder?

A: No. I just told him I fell off the ladder. It twisted on me.

Q: It twisted on you?

A: Yes.

Q: What twisted on you?

A: The ladder. It totally twisted on me. He said, "I am sorry to hear that." That is all he said.

Q: After you fell, did you observe the ladder? Did it fall to the floor as well?

A Yes.

Q: When you saw it on the floor, was it still in a locked position?

A: It was on like, uneven, like, twisted.

Q: Did you fall as a result of the ladder's legs being uneven?

A: I know. I saw it uneven. But I was so dizzy, I didn't care about it. I just want to go put myself on the chair.

Q: Have you seen that ladder since the date of your accident?

A: Yes. When I came back to shul.

Q: It was in the synagogue when you saw it?

A: Yes. In the same place on the wall.

Plaintiff's request for spoliation sanctions is based on his contention that the defendant did not preserve the ladder. The only relevant proof that plaintiff submitted concerning the issue of whether the defendant preserved the ladder was the deposition testimony of Rabbi David Ani, who testified on behalf of defendant CONGREGATION BETH EL OF FLATBUSH on September 10, 2019. In sum and substance, Rabbi David Ani testified that he did not know whether the ladder plaintiff was using at the time of the accident was still in defendant's

possession. While he testified that the ladder may have been stolen, he gave no definitive statement to that effect.

Prior to moving for spoliation sanctions, plaintiff's counsel never made a demand to inspect the ladder and the Court had never issued on order directing the defendant to produce the ladder for inspection. Indeed, the proceedings that have taken place since plaintiff moved for sanctions suggests that the ladder still exists and is still in defendant's possession. Since plaintiff has not been demonstrated that the ladder is missing or that it has been altered or destroyed, plaintiff's motion for spoliation sanctions is denied

Defendant's Motion for Summary Judgment:

Turning to defendant's motion, the defendant maintains that the plaintiff does not have an actionable claim under the common law and that since he was working as a volunteer at the time he was injured, he is not entitled to the protections of the Labor Law. Defendant points out that the day of the accident was a religious holiday and that pursuant to under Jewish Law, plaintiff was prohibited from working that day. Defendant further claims that as a religious institution, it would have never allowed the plaintiff to work on a day where work was prohibited. Defendant admits, however, that it hired the plaintiff the day before the accident to help erect the sukkah and paid him for his services.

"The Labor Law protects employees, defined as workers for hire (*see* Labor Law § 2 [5])" (*Passante v. Peck & Sander Props., LLC,* 33 A.D.3d 980, 980, 823 N.Y.S.2d 220). To invoke the protections afforded by the Labor Law and be within the class of persons for whose benefit liability is imposed, a plaintiff must demonstrate he or she was both permitted or suffered to work on a building or structure and that he or she was hired by someone, be it a contractor, an

owner or its agent (*see Whelen v. Warwick Val. Civic & Social Club,* 47 N.Y.2d 970, 971, 419 N.Y.S.2d 959, 393 N.E.2d 1032).

Here, the defendant failed to establish, prima facie, that the plaintiff was not "employed" within the meaning of Labor Law § 2(7) at the time of the accident. Indeed, defendant admitted to hiring the plaintiff to help build the sukkah and paying him for his services (*Aloise v. Saulo*, 51 A.D.3d 829, 830, 858 N.Y.S.2d 355, 357). Simply because the defendant did not know that plaintiff would try to fix the roof on the sukkah on the day of the accident does not equate to a finding that there can be no liability under the Labor Law. Even if the plaintiff was not supposed to work that day, it does not follow that plaintiff was acting outside the scope of his employment (*Calaway v. Metro Roofing & Sheet Metal Works, Inc.*, 284 A.D.2d 285, 286, 727 N.Y.S.2d 426, 427).

In sum, the defendant has not demonstrated as a matter of law that the plaintiff was not was not "employed" at the time of his injury (*Reeves v. Red Wing Co.*, 139 A.D.2d 935, 527 N.Y.S.2d 916, 917). Consequently, that branch of the defendant's motion which is for summary judgment dismissing the complaint on the ground that the plaintiff was a volunteer must be denied regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642).

With respect to plaintiff's Labor Law § 240(1), the defendant did not demonstrate, as a matter of law, that the statute does not apply to this case, that the statute was not violated or that a violation of the statute was not a proximate cause of plaintiff's accident. Accordingly, the defendant did not establish its entitlement to summary judgment dismissing plaintiffs Labor Law § 240 (1) claim. In light of this determination, the Court need not consider defendant's remaining arguments.

Accordingly, it is hereby

ORDRED that that both motions are **DENIED.**

This constitutes the decision and order of the Court.

Dated: October 13, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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