SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 36

Present: **HON. STEVEN M. JAEGER**

_____X

MIGUEL LOPEZ

Plaintiff,

-against-

TRI-STATE WINDOW FACTORY CORP.,

Defendant.

_____X

Index No.:609325/2018
Mot. Seq. Nos.: 001,002,003
Motion Submit Date: 03/13/20
Decision & Order

Papers submitted on this motion:

Plaintiff's Notice of Motion/Supporting Exhibits	x
Defendant's Notice of Motion/Supporting Exhibits	x
Defendant's Opposition Papers to Plaintiff's Motion	x
Plaintiff's Opposition Papers to Defendant's Motion	x
Plaintiff's Reply Papers	x
Defendant's Reply Papers	x

Plaintiff, Miguel Lopez (Plaintiff) moves (mot. seq. 001) this Court, pursuant to CPLR §3212, for an order granting summary judgment on the issue of liability. Defendant, Tri-State Window Factory Corp. (Tri-State), opposes Plaintiff's motion and moves (mot. seq. 003) for summary judgment on the issue of liability. Plaintiff opposes Tri-State's motion. Tri-State's motion to strike the note of issue (mot. seq. 002) was withdrawn.

Plaintiff commenced this action by service of a summons and complaint filed on July 13, 2018. Issue was joined by service of an answer filed on October 9, 2018. The complaint alleges liability pursuant to Labor Law § 240(1) and 240(6).

The facts are based upon the verified complaint, deposition testimony, and documents annexed as exhibits. On July 15, 2016, the Plaintiff fell from a roof while working at a private home (premises). The Plaintiff was employed by R & D Construction Company (R & D) and was part of a crew that was hired to remove old windows and install new ones at the premises. Tri-State contracted with the owner of the premises to perform the window work, and Tri-State then hired R & D, as a subcontractor, to perform the work pursuant to Tri-State's contract with the owner. This Court shall address the issue of liability pursuant to Labor Law § 240(1), as it finds that this issue is determinative of both motions.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (see Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Friends of Animals, Inc. v. Associated Fur Mfrs., 46 NY2d 1065 [1979]; Zuckerman v. City of New York, 49 NY2d 5557 [1980]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegard v. New York University Medical Center, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see Zuckerman v. City of New York, 49 NY2d 5557 [1980], supra).

The primary purpose of a summary judgment motion is issue finding, not issue determination, Garcia v. J.C. Duggan, Inc., 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (see also Andre v. Pomeroy, 35 N2d 361 [1974]).

Labor Law §240(1) states:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

A defendant who violates § 240(1) will be held strictly liable for any injury sustained by a worker proximately caused by said violation (see, e.g., Runner v New York Stock Exchange, Inc., 13 NY3d 599 [2009]). Labor Law section 240(1) imposes a non-delegable duty on the owner and/or contractor to provide protection to employees subject to elevation-related risks (see, e.g. Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]. A prima facie case pursuant to § 240(1) requires the risk of injury from an elevation-related hazard be foreseeable, and that the absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged (Shipkoski v Watch Case Factory Assocs., 292 AD2d 588 [2d Dept 2002]); see Danielewski v Kenyon Realty Co., LLC, 2 AD3d 666 [2d Dept 2003] [summary judgment to plaintiff

due to the lack of safety devices]). A violation of § 240(1) by failing to provide proper safety devices to workers working within a protected activity is, as a matter of law, a proximate cause of the worker's injuries (Elkins v Robbins & Cowan, Inc., 237 AD2d 404 (2d Dept 1997).

Here, the Plaintiff was assigned to go onto the roof, which was about 10 to 12 feet high, to remove debris that was caused by the removal of old windows and the installation of new ones. The risk of an elevation-related hazard, falling from the roof, was foreseeable. The Plaintiff fell while he had one foot on the roof and was attempting to place the other on the roof. It is not disputed that the Plaintiff was not provided with any type of fall protection, such as a harness, lifeline, or safety nets while working on the roof. The Plaintiff was performing an activity protected by the statute: he was performing construction work on an elevated surface (the roof). The failure to provide a proper safety device to the Plaintiff, who fell from the roof, constitutes proximate cause as a matter of law. Elkins, supra.

Tri-State argues that the Plaintiff should be denied summary judgment on the grounds that Tri-State is not a "contractor" within the meaning of § 240(1). Tri-State's argument is without merit. An entity is considered a "contractor" if it directs or controls the work or chooses subcontractors to perform the work (Futo v Brescia Bldg. Co., 302 AD2d 813 [3d Dept 2003]). In a case analogous to the present one, the Second Department held that a home improvement company that hired subcontractors to perform the work, was

a "contactor" within the meaning of § 240(1). Williams v Dover Home Improvement, 276 AD2d 626 (2d Dept. 2000). In Dover, the Second Department stated,

> Dover [the home improvement company] is clearly a "contractor" under Labor Law § 240(1). Dover hired the parties to actually perform the work, entered into oral contracts with them, and required that each contractor produce a certificate of insurance. A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240 (1). Dover's status as a contractor under Labor Law § 240 (1) is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right.

(id. [internal citations omitted])

Here, Tri-State chose the subcontractor, D & R, entered into a contract with D & R to perform work on the premises pursuant to Tri-State's contract with the homeowner, and required D & R to procure insurance. Tri-State thus had authority to exercise control over the work; and therefore, Tri-State is a "contractor" within the meaning of § 240(1).

Moreover, contrary to Tri-State's argument, it is not required that the Plaintiff establish that the ladder was defective in order to establish his entitlement to summary judgment. The evidence establishes that the Plaintiff was on the roof, not on the ladder,

when the accident occurred. The Plaintiff testified that one foot was on the roof and that he was trying to put the other foot onto the roof, when he slipped from the roof. Had he had a proper safety device to protect him from falling from the roof (harness, etc.), he would not have fallen to the ground. Here, the condition of the ladder is not essential to Plaintiff's claim.

The Plaintiff's evidence satisfies all the elements of a claim pursuant to § 240(1). The Plaintiff has met his burden of establishing that there are no triable issues of fact with regard to his claim pursuant to Labor Law § 240(1). As the Plaintiff has met his burden, the burden shifts to Tri-State to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Tri-State has failed to meet this burden. Accordingly, the Plaintiff is entitled to summary judgment in his favor on the issue of liability.

For the reasons set forth above, Tri-State has failed to meet its burden that it is entitled to summary judgment in its favor pursuant to Labor Law § 240(1).

As the Court has determined that the Plaintiff is entitled to summary judgment in his favor on the issue of liability pursuant to Labor Law § 240(1), it need not address the further claims of the Plaintiff.

The Court has considered the other arguments of Tri-State and finds them to be without merit.

Accordingly, it is

ORDERED, that Plaintiff's motion for summary judgment (mot. seq. 001) in his favor on the issue of liability is **GRANTED**, and it is further

ORDERED that Tri-State's motion for summary judgment (mot. seq. 003) is **DENIED**; and it is further

ORDERED that Tri-State's motion to strike the note of issue (mot. seq. 002) is **DENIED**, as moot, as the motion was withdrawn.

This constitutes the decision and order of this Court.

Dated: May 14, 2020
Mineola, NY

Steven M. Jaeger

Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

ENTERED

May 18 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE