

Quintero v 520 Madison Owners LLC

2021 NY Slip Op 31465(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 159128/2016

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 57

-----X
 TEO QUINTERO,

Plaintiff,

- v -

520 MADISON OWNERS LLC, 520 MADISON VENTURE,

Defendant.

INDEX NO. 159128/2016

MOTION DATE 11/10/2020

MOTION SEQ. NO. 005

**DECISION + ORDER ON
 MOTION**

-----X
 520 MADISON OWNERS LLC

Plaintiff,

-against-

PAL ENVIRONMENTAL SERVICES, INC.

Defendant.

Third-Party
 Index No. 595118/2017

-----X
 HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiff Ted Quintero moves for an Order pursuant to CPLR §3212, entering summary judgment on behalf of the Plaintiff on the issue of liability pursuant to New York State Labor Law Section 240(1) against Defendant 520 Madison Owners LLC.

This Labor Law action stems from serious injuries allegedly sustained by Plaintiff on July 8, 2016, while in the course of his employment at the premises located at 520 Madison Avenue, New York, NY. Plaintiff contends that he was caused to fall approximately eight (8) feet when the scaffold upon which he was laboring tipped as he attempted to disembark from it

while engaging in asbestos removal. As a result, Plaintiff alleges that he sustained serious permanent personal injuries, including but not limited to herniations of his lumbar spine which required a surgical fusion.

Specifically, Plaintiff contends that he has established *prima facie* entitlement to summary judgment on his Labor Law §240(1) claim as it is undisputed that the scaffold tipped and fell, and that plaintiff fell from the scaffold. Plaintiff further argues that it is irrelevant what caused the scaffold to tip or whether plaintiff can identify a specific defect with the scaffold.

In opposition, Defendants allege that Plaintiff's own conduct in misuse of the scaffolding was the proximate cause of his injuries. Further, Defendants contend that supervisor Bryan Pilgrim's deposition testimony and the expert affidavits of Angela Levitan, Ph.D. and Kelly D. Scott, P.E., create a question of fact as to how the accident occurred thereby precluding a finding of summary judgment.

Factual Evidence

Plaintiff's Deposition

Plaintiff was deposed over four days on February 26, 2019, June 11, 2019, July 18, 2019 and August 5, 2019. Plaintiff testified that on July 7, 2016 he arrived at the jobsite at 6:00 p.m., and his fall occurred at approximately 2:00 a.m. on July 8, 2016 (NYSCEF Doc. No. 158). Plaintiff stated that he communicated with his supervisor, Brian, in Spanish and that Brian told him to go to an area and remove the ceiling insulation (NYSCEF Doc. No. 158, p. 153). Plaintiff stated that Brian addressed everyone as a group, saying "guys, go to the scaffolds and start working." (NYSCEF Doc. No. 158, p. 156). Plaintiff testified that the work area had several scaffolds set up when he got there (NYSCEF Doc. No. 158, p. 154-159).

Plaintiff stated that after Brian gave the instruction to begin working, he climbed up a scaffold and started working (NYSCEF Doc. No. 158, p. 167). He stated that he was working with "Jason" that day because he had to work with a partner in order to be able to move the scaffold over the course of the day (NYSCEF Doc. No. 158, p. 168-170).

Plaintiff testified that he got on the scaffold using the ladder/steps that were attached to the scaffold (NYSCEF Doc. No. 158, p.184). He stated that he got on and off the scaffold many times before his fall (NYSCEF Doc. No. 158, p.186). Further, he said that after moving the scaffold each time he made sure the wheels were locked and he always got on and off using the ladder (NYSCEF Doc. No. 158, p .205). Plaintiff testified that just before his fall, Jason got off the scaffold to go get water (NYSCEF Doc. No. 158, p. 219-221). He stated that while he was on the first step of the ladder attempting to disembark the scaffold, the scaffold started to tip sideways, causing him to fall and the scaffold to fall on top of him (NYSCEF Doc. No. 158, pp. 219-20, 222). Plaintiff stated that he landed on the cement floor with the scaffold on him (NYSCEF Doc. No. 158, p. 223). He stated that he had both hands on the ladder when it tipped and that his body moved to the left as he fell. Plaintiff testified that he went from the holding the ladder to landing face down on the cement (NYSCEF Doc. No. 158, p. 224).

Bryan Pilgrim's Deposition

Bryan Pilgrim was Third Party Defendant PAL Environmental Services' Field Supervisor on the date of plaintiff's accident, July 8, 2016 (NYSCEF Doc. No. 171, p. 24). Pilgrim testified that plaintiff failed to follow a direct instruction he gave at the beginning of plaintiff's shift on July 7, 2016 (NYSCEF Doc. No. 171, p. 93). Specifically, he stated that he told plaintiff to use the stairwells of the scaffold (NYSCEF Doc. No. 171, p. 93). Pilgrim testified that plaintiff fell because he exited the scaffold using the guardrails and not the steps of the ladder on the side of

the scaffold (NYSCEF Doc. No. 171, p. 85-86). He testified that plaintiff's accident would not have happened if plaintiff had used the integrated ladder (NYSCEF Doc. No. 171, p. 86). He also testified that he did not witness the exact moment of the accident and never saw plaintiff actually use the guardrails to get off the scaffold (NYSCEF Doc. No. 171, p. 56).

Pilgrim stated that based on his knowledge of scaffold use and safety, plaintiff wouldn't have fallen if he had not incorrectly exited the scaffold (NYSCEF Doc. No. 171, p. 86). He explained that the scaffold would become unbalanced if a worker tried to descend from the middle of the scaffold, as plaintiff did, instead of using the stairwells on the sides of the scaffold (NYSCEF Doc. No. 171, p. 96-97). Pilgrim further testified that he told plaintiff to use the stairwells of the scaffold to get on and off the scaffold during the daily safety meeting that he conducted in both English and Spanish on the accident date, prior to the accident (NYSCEF Doc. No. 171, p. 104-105). He stated that both plaintiff's signature and his signature, appear on the PAL daily safety meeting sheet for July 7, 2016 (NYSCEF Doc. No. 171, 106-107; see also NYSCEF Doc. No. 172, p. 4-5).

Yeison Villa's Deposition Testimony

Villa testified that he worked for PAL with Teo Quintero at 520 Madison Avenue on July 8, 2016 as his partner (NYSCEF Doc. No. 173, p. 13, 20). He stated that they were working on Baker scaffolds (NYSCEF Doc. No. 173, p. 21). Villa stated that the scaffold was already set up when they got there to work (NYSCEF Doc. No. 173, p. 28). He testified that the platform on the scaffold was six to seven feet off the ground (NYSCEF Doc. No. 173, p. 31). Villa stated that he is six feet tall and he could not have gotten off the scaffold by climbing through the guardrail – it is too high (NYSCEF Doc. No. 173, p.32). He also stated that it would have been too high for plaintiff to get off that way as well (NYSCEF Doc. No. 173, p. 32).

Affidavits of Angela Levitan, Ph.D. and Kelly D. Scott, P.E.

The affidavits of biomechanical engineer and Certified Professional Ergonomist, Angela Levitan, Ph.D., and licensed professional engineer Kelly D. Scott, P.E., submitted in opposition to plaintiff's motion, support defendants' arguments that the plaintiff's description of the accident is inconsistent with the laws of physics and the principles of biomechanics. Levitan states that, given plaintiff's testimony as to the placement of his body on the integrated ladder and the subsequent movement of the scaffold at the time of his accident, when compared to the final resting position of his body, it would be impossible for the accident to have occurred as plaintiff described (NYSCEF Doc. No. 169, para. 10(g), 11). Scott further states that based upon a reasonable degree of engineering and construction safety certainty, the plaintiff could not have been standing on the rungs of the integrated ladder for the scaffold to tip in the manner he described (NYSCEF Doc. No. 170, para. 9(a)). Scott concludes that between plaintiff's version and that indicated in the accident report, only the accident report scenario is consistent with the positioning of the plaintiff and the scaffold after the accident (NYSCEF Doc. No. 170, para. 9(a)).

Analysis

“The 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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also

DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Further, issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

New York State Labor Law Section 240(1)

New York Labor Law § 240(1) states as follows:

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.

Plaintiff contends that “[i]t is well settled law that the failure to properly secure a ladder [or scaffold] to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)” (*see Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 740 NYS2d 16 [1st Dept 2002]; *Vail v 1333 Broadway Associates, LLC*, 105 AD3d 636, 963 NYS2d 647 [1st Dept 2013]). However, Plaintiff’s reliance on these cases is misplaced as these matters all involved scaffolds that lacked safety rails or guardrails. The scaffold as described, even in Plaintiff’s deposition, had appropriate safety rails and guardrails.

Plaintiff has not met his burden on summary judgment and has failed to demonstrate that no material issues of fact remain regarding liability. There is not only contrary evidence as to

how to Plaintiff's accident occurred, but also significant issues as to credibility that cannot be resolved on summary judgment.

Accordingly, it is hereby;

ORDERED that Plaintiff's motion for summary judgment is denied.

<u>4/28/2021</u> DATE		 SHAWN TIMOTHY KELLY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE