

Rojas v 206 Kent LLC
2022 NY Slip Op 33158(U)
September 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 507914/2020
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of September, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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FABIAN ROJAS,

Plaintiff,

DECISION / ORDER

- against -

Index No. 507914/2020

Mot. Seq. # 1

206 KENT LLC, 206 KENT INVESTOR LLC,
CORNELL REALTY MANAGEMENT LLC, SEVENTH
FLOOR SERVICES, INC., TESSLER DEVELOPMENTS
LLC and TRADER JOE’S EAST, INC.,

Defendants.

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SEVENTH FLOOR SERVICES, INC.
and 206 KENT INVESTOR LLC,

Third-Party Plaintiffs,

-against-

MUNRO GENERAL CONSTRUCTION, INC.

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion and Affidavits (Affirmations) Annexed 38-54

Opposing Affidavits (Affirmations) 57-58

Reply Affidavits (Affirmations) 60

Memoranda of Law 59

Upon the foregoing papers, plaintiff Fabian Rojas (plaintiff) moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3212, granting him summary judgment on his claim against defendants 206 Kent Investor LLC (206 Kent Investor) and Seventh Floor Services, Inc. (Seventh Floor) (collectively, defendants) for violating Labor Law § 240 (1).

Background

On May 26, 2020, plaintiff commenced this action by filing a summons and verified complaint naming as defendants 206 Kent LLC, 206 Kent Investor LLC, Cornell Realty Management LLC, Seventh Floor Services, Inc., Tessler Developments LLC, and Trader Joe's East, Inc. Plaintiff alleges therein that on March 16, 2020, he suffered serious and permanent injuries when he fell from a ladder while engaging in construction work on a project located at 206 Kent Avenue, Brooklyn, New York (the project). In his complaint, plaintiff asserts claims for common law negligence, and violations of New York Labor Law §§ 200, 240, and 241 against defendants.

Defendants 206 Kent Investor LLC and Seventh Floor Services, Inc. interposed an answer in which they denied the material allegations in the complaint and asserted various affirmative defenses, after which discovery commenced. Plaintiff appeared for a deposition on September 13, 2020, and also provided documents to defendants. Defendants' witnesses, however, have not yet been deposed, despite the court (Knipel, J.) issuing a Compliance Conference Order on October 14, 2021, which ordered that their depositions be completed on or before December 15, 2021.

Defendants 206 Kent LLC, Cornell Realty Management LLC, and Tessler Developments LLC have not appeared or answered plaintiff's complaint. No default has been taken against any of these three defendants, and, as such, plaintiff has abandoned the action as against them. As more than a year has passed since their default, the court, *sua sponte*, dismisses this action against them as abandoned, pursuant to CPLR 3215(c).

On December 22, 2020, defendants 206 Kent Investor and Seventh Floor brought a third-party action against Munro General Construction, Inc., plaintiff's employer. It did not interpose an answer, and more than a year has elapsed since the default. As more than a year has passed since the default, the court, *sua sponte*, dismisses this third-party action as abandoned, pursuant to CPLR 3215(c).

On April 30, 2021, defendant Trader Joe's commenced a second third-party action against Munro General Construction Inc., plaintiff's employer. It did not answer or appear. Plaintiff discontinued the action as against Trader Joe's, filed 9/13/21, and Trader Joe's simultaneously discontinued its third-party action against plaintiff's employer.

On March 14, 2022, plaintiff filed this motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim against 206 Kent Investor LLC, the owner of the property, and Seventh Floor Services, Inc., the general contractor on the project. On May 12, 2022, a conference was scheduled in the Final Pre-Note Part, (FCP) but it was adjourned to November 2, 2022. No order was issued. Thus, on June 24, 2022, the date provided for filing the Note of Issue in the October 14, 2021 order, plaintiff filed a Note of Issue, certifying that all necessary discovery is complete and that this matter is ready for trial.

Plaintiff's Summary Judgment Motion

Plaintiff contends that on the day of the accident, he was working for Munro General Construction, Inc. (third-party defendant) as a carpenter, and was tasked with performing sheetrock work on the first floor of the building. Plaintiff's attorney refers to his deposition testimony in which he testified that he was using an extension ladder, supplied by one of the contractors on the project, to perform his work. While he was on the ladder, while holding a drill in his right hand and leaning against the sheetrock with his left hand, he suddenly felt the ladder slip, which caused him to fall to the ground below and sustain injuries. Plaintiff argues that defendants violated Labor Law § 240 (1) because they furnished him with an unsecured ladder that did not give him proper protection and which was the proximate cause of his accident and injuries. Plaintiff asserts that Labor Law § 240 (1) imposes absolute liability on the defendants, because they provided him with an unsecured ladder that slid out from underneath him. He further asserts that he cannot be found to have been solely at fault for his accident, based on the facts in this case.

Defendants' Opposition

In opposition, defendants (206 Kent Investor and Seventh Floor) argue that plaintiff's summary judgment motion should be denied as premature, pursuant to CPLR 3212(f), because they have not had an opportunity to appear for depositions. Defendants contend that their depositions are "critical to the instant motion" because the various contractors who worked on the project would be able to testify about the worksite, the equipment available, and whether plaintiff was permitted to use the subject ladder that he claims caused his injuries. In particular, defendants assert that the depositions of 206 Kent Investor and

Seventh Floor will help to shed light on the operations that were being conducted at the project site and will provide them with more information regarding the other equipment that was available to plaintiff. Defendants argue that plaintiff, by moving for summary judgment before filing a Note of Issue and prior to the completion of discovery, deprived them of the opportunity to make necessary inquiries and obtain relevant testimony. Defendants, therefore, urge the court to deny the motion, without prejudice, with leave to renew upon the completion of discovery.

Defendants also argue that plaintiff's summary judgment motion should be denied because there exist triable issues of fact as to whether the ladder plaintiff used violated Labor Law § 240 (1), and whether such violation was the proximate cause of his injuries. Defendants assert that plaintiff has to provide proof that the ladder was defective in order to prevail on his claim. They further assert that since plaintiff admitted that he used the ladder multiple times without incident, he cannot demonstrate that it was defective or that the defect proximately caused his injuries. Thus, defendants contend that questions of fact exist as to whether the ladder was defective or failed to provide proper protection for the work he was doing on the project, thereby precluding summary judgment.

Plaintiff's Reply

In response, plaintiff states that he has been attempting to schedule defendants' depositions for eight months to no avail, and that defense counsel has expressed on several occasions that they do not have a witness with any knowledge of the accident. Plaintiff references e-mails he submitted to the court with his motion [Doc 50] which he argues confirm defendants' statements to that effect. Plaintiff points out that defendants did not

submit any affidavits from anyone to refute his account of the accident, which he argues confirms that no such person exists. He further notes that defendants admit to plaintiff's account of the accident in their counterstatement of material facts -- that plaintiff was working on a ladder that slipped out from under him, causing him to fall. Plaintiff, therefore, argues that he has established a prima facie case for summary judgment on his Labor Law § 240 (1) claim. He asserts that there is no additional discovery that would lead to any relevant evidence, and thus his summary judgment motion is not premature.

Plaintiff also contends that defendants misapprehend the applicable case law in arguing that he is required to show a defect in the ladder he used. Plaintiff argues that in order to establish a prima facie case on a Labor Law § 240 (1) claim, he is only required to show that defendants failed to secure the ladder and that such failure was a substantial factor in causing his injuries. He asserts that the mere fact that the ladder shifted and caused him to fall is sufficient to establish that it was not secured, warranting summary judgment. Plaintiff also argues that defendants' argument that he may have been the sole proximate cause of his injuries, or a recalcitrant worker, is unsupportable, because there is no evidence that plaintiff was directed not to use the ladder or refused to use any safety devices that were available to him.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*see Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]).

Defendants argue that plaintiff’s motion for summary judgment is premature and should be denied pursuant to CPLR 3212 (f), which provides: “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just” (CPLR 3212 [f]). Motions for summary judgment have been denied as premature when a party opposing summary judgment is entitled to further discovery and “when it appears that facts supporting the position of the opposing party exist but cannot be stated.” (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738, 739 [2d Dept 2010]; see *Aurora Loan Servs., LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578 [2d Dept 2009]; *Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637 [2d Dept 2006]). Moreover, “ ‘where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied’ ” *Juseinoski*, 29 AD3d at 637, citing *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 792-793 [2d Dept 1988]).

Here, defendants have satisfied their burden of demonstrating why plaintiff's motion for summary judgment should be denied as premature. Defendants are entitled to discover information from their employees and other potential witnesses which might shed light on the happening of plaintiff's accident, as well as regarding the operations and activity at the project when the accident occurred. In addition, the court notes that none of the defendants' depositions have yet taken place. Since it appears from defendants' opposing affirmation that there are unknown facts that are essential to prepare opposition to the motion that "may exist but are incapable of being stated at this time," [CPLR 3212(f)] further discovery, including depositions, should be conducted. Specifically, the e-mails in Doc 50 do not state that defendants have no witness, as plaintiff claims, but discuss scheduling the witnesses' EBTS. Accordingly, plaintiff's motion for summary judgment is denied as premature.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's summary judgment motion (mot. seq. one) is denied, without prejudice, with leave to renew upon the completion of discovery, and it is further

ORDERED that, as the action has been abandoned as against the non-answering defendants, the complaint is dismissed as against them, and the third party action is likewise dismissed, as the sole third-party defendant has not answered or appeared, and no default has been taken against it.

Accordingly, the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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FABIAN ROJAS,

Plaintiff,

-against-

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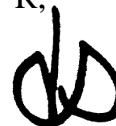
206 KENT INVESTOR LLC and
SEVENTH FLOOR SERVICES, INC.,

Defendants.

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This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.