Supreme Court of the State of New York
County of Kings

Part LL1

ANTONIO ESPINOSA,

Plaintiff,

against

MAC 60 LLC AND ROYAL HOME IMPROVEMENTS, INC.,

Defendants.

MAC 60 LLC AND ROYAL HOME IMPROVEMENTS, INC.,

Third-Party Plaintiffs,

against

GILMAR DESIGN CORP.,

Third-Party Defendants.

Index Number 515277/2018
Seqs. 003, 005

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2–4
Replying Affidavits	4
Exhibits	
Other	

Upon the foregoing papers,[1] plaintiff's motion for summary judgment (Seq. 003) and defendants' cross-motion for summary judgment (Seq. 005) are decided as follows:

Procedural History and Factual Background

This action arises out of injuries allegedly sustained on January 11, 2018, when a piece of cinderblock fell through an open window opening of a building under construction and struck the plaintiff on the head. The following is undisputed: Defendant Royal Home Improvements, Inc.

[1] Affirmations in reply in further support of cross-motions are not afforded by the CPLR and were not permitted here; accordingly, the affirmation in reply on motion sequence 005 will not be considered by the court.

(Royal) was the general contractor at the premises and Mac 60 LLC (Mac) was formed to develop the premises located at 2357 60th Street, Brooklyn, NY, and owned the premises. Plaintiff was employed by third-party defendant Gilmar Design Corporation (Gilmar), a masonry sub-contractor retained by Royal. Plaintiff's supervisor was Gilmar's foreman Abrik Mukamadiyev, and Gilmar was owned by Marat Gilmanov.

The foundation of the building existed when Gilmar began work at the site. Gilmar installed cinderblock, bricks, and cement to form the interior walls. Gilmar workers constructed scaffolding on the interior of the building to allow its masons to construct the exterior wall (Gilmanov EBT at 116; Espinosa Jan. 2020 EBT at 47). One of the scaffolds was a "materials scaffold" with an OSHA pulley system (Gilmanov EBT at 120). The materials scaffold was built on the concrete slab on the highest completed floor on the interior of the building (Espinosa Oct. 2020 EBT at 86), which was the third floor at the time of plaintiff's accident. Plaintiff was told to load buckets with mixed cement and use a pulley system on the exterior of the building to raise the cement to masons working above (Espinosa Oct. 2020 EBT at 79). Though the pulley system was on the exterior of the building, the scaffold to which it was attached was on the interior (*id.* at 85–86).

Mr. Gilmanov testified that the window openings could be covered once the masonry work was finished (Gilmanov EBT at 131), and that the masonry work was in fact finished on the lower-level window openings at the time of plaintiff's accident. These windows had not yet been fitted with glass and were not otherwise covered by temporary coverings. Plaintiff testified that the exterior of the building was to his right while he was operating the pulley system and hoisting materials to the masons above (Espinosa Oct. 2020 EBT at 99). Plaintiff hoisted two

buckets of cement to the masons above, at which point he claims he was struck by a falling block (Espinosa Jan. 2020 EBT at 54–56).

Mr. Gilmanov testified that the block that fell on plaintiff fell from the scaffold erected by Gilmar (*id.* at 122). Mr. Gilmanov did not witness the accident, but testified that he was told by a Gilmar worker, Ravshan Djaliove, that he (Mr. Djaliove) was the one who knocked the block off while the scaffold was being cleared off for deconstruction (*id.* at 125). Mr. Mukamadiyev also testified to receiving the same information from Mr. Djaliove (Mukamadiyev EBT at 72).

Both parties now seek summary judgment.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, plaintiff filed the note of issue on October 14, 2022, and the defendants' cross-motion was filed on April 5, 2023—173 days later. Under the local rules, motions for summary judgment must be filed within sixty (60) days after the note of issue, and the CPLR requires motions to be filed no more than 120 days after the note of issue (CPLR 3212; *Brill v City of New York*, 2 NY3d 648 [2004]). Because the plaintiff's primary motion addresses Labor Law §§ 240 (1) and 241 (6), these issues are already properly before the court and therefore the defendant's cross-motion will be considered as to these claims (*Grande v Peteroy*, 39 AD3d 590, 592 [2d Dept 2007], *as amended* [Dec. 18, 2007]). However, the

plaintiff's Labor Law § 200 is not addressed in the primary motion, and therefore that section of the untimely cross-motion will not be considered.

Labor Law § 240 (1)

Labor Law § 240 (1) imposes a non-delegable duty on owners and general contractors to provide safety devices necessary to protect workers from gravity-related risks, including falling objects (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). Liability attaches where a plaintiff proves that the defendant violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). Liability for falling objects under section 240 (1) "is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758 [2008]).

Plaintiff testified that he did not know what caused that brick to fall (Espinosa Jan. 2020 EBT at 55), and therefore largely relies on Mr. Gilmanov's admission that his employee Mr. Djaliove admitted to knocking the block off of the scaffold while clearing it in preparation for deconstruction. Although Mr. Djaliove's statement is hearsay, it is adopted by Mr. Gilmanov (the principal of Gilmar) as a description of how the accident occurred. The statement is therefore admissible as an admission against party interest against both the party and against any party who is vicariously or, as here, statutorily liable (*see e.g. Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014] [non-owner driver's admission admissible to establish liability against an owner pursuant to VTL § 388]).

Plaintiff has demonstrated that the cinderblocks were in the process of being hoisted and secured so that the scaffold could be disassembled and moved, and were therefore the kind of falling objects contemplated by Labor Law § 240 (1) (*see e.g. Coque v Wildflower Estates*

Developers, Inc., 31 AD3d 484, 488 [2d Dept 2006]; *see also Outar v City of New York*, 5 NY3d 731, 732 [2005]). Additionally, plaintiff has demonstrated that he would not have been injured if there had been temporary window coverings or other overhead protection. Mr. Gilmanov testified that cement was supposed to be mixed on the floor where it was being used (Gilmanov EBT at 121), and therefore providing overhead protection or covering the window opening should not have been contrary to the work that plaintiff was performing. However, even if the cement had to be elevated using the pulley, fall protection could have been installed in the lower window opening and at the lower level generally with cut-outs for the pulley system and materials. The absence of any safety device to prevent falling objects from exiting the window openings and striking workers below constitutes a statutory violation of Labor Law § 240 (1).

Additionally, it is inconceivable that plaintiff precipitated the falling piece of block that struck him. Therefore, defendants' sole proximate cause argument is unavailing. Allegedly standing in the wrong place, which is the balance of defendants' argument, would not make plaintiff the sole proximate cause even if taken as true.

Plaintiff's motion is granted as to Labor Law § 240 (1).

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In the instant action, plaintiff alleges violations of I.C. §§ 23-1.7 (a) (proper protections for areas normally exposed to falling objects).

Defendants argue that there is no evidence that the area was one normally exposed to falling objects. Some evidence is required to show that an area is one "normally exposed" to falling objects (*see e.g. Reyes v Sligo Constr. Corp.*, 214 AD3d 1014 [2d Dept 2023]). In this case, plaintiff did not testify that this area was one normally exposed to falling objects, and there is not otherwise evidence in the record that this was such an area. Plaintiff's motion is therefore denied due to a question of fact about whether the area was normally exposed to falling materials.

Labor Law § 200

Defendants Mac and Royal argue that they did not direct or control the work at the site, and therefore cannot be held liable under LL § 200. Irrespective of the merits of the defendants' arguments, this issue is not properly before the court as it was raised for the first time in the untimely cross-motion. Defendants' cross-motion is denied.

Conclusion

Plaintiff's motion (Seq. 003) is granted as to Labor Law § 240 (1) and therefore as to liability; for completeness of analysis, plaintiff's motion is denied as to Labor Law § 241 (6) due to questions of fact.

Defendants' cross-motion (Seq. 005) is denied.

This constitutes the decision of the court.

September 1, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court