SUPREME COURT OF THE STATE OF NEW YORK **Index No.:104474/11**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:002,003**

SILVERIO SAAVEDRA,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

64 ANNFIELD COURT CORP.,
64 ANNFIELD CORP., and
ULTIMATE ONE CONSTRUCTION CORP.,

Defendants

64 ANNFIELD COURT CORP.,

Third Party Plaintiff,

against,

ULTIMATE ONE CONSTRUCTION CORP.,

Third Party Defendant,

The following items were considered in the review of the following motions for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Notice of Motion and Affidavits Annexed	3
Affirmation in Opposition	4
Affirmation in Reply	5, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendant, third-party defendant Ultimate One Construction Corp. moves for summary judgment dismissing the plaintiff's complaint and all cross-claims and counter-claims. Similarly, the defendant, third party-plaintiff 64 Annfield Court Corp. Moves for summary judgment dismissing the plaintiff's Complaint. The motions for summary judgment made by

Ultimate One Construction Corp. and by 64 Annfield Court Corp. are granted.

Facts

This is an action to recover for personal injuries allegedly caused by violations of the Labor Law. In his complaint the plaintiff alleged that the defendants violated Labor Law § 240, § 241(6) and § 200. The defendants moved for summary judgment to dismiss the plaintiff's complaint arguing that the plaintiff failed to demonstrate any liability under those aforementioned statutes. In opposition to the defendants' motions the plaintiff withdrew and discontinued his causes of action pursuant to Labor Law § 200 and § 241(6). Therefore, this court must render its opinion with respect to plaintiff's claims pursuant to Labor Law § 240.

On February 5, 2010 the plaintiff was working at a construction site located at 64 Annfield Court, Staten Island, New York. On that day the plaintiff was tasked to perform interior framing that required him to attach plywood to a vertical metal beam. It is uncontested that in order to accomplish this task the plaintiff, along with a co-worker Alberto Rosas, constructed a makeshift scaffold. There is no indication in the record that any job site supervisor directed the plaintiff or Rosas to construct this makeshift scaffold. The plaintiff and his co-worker placed 2 x 10 wooden planks over exposed metal rods/rebar that jutted out from the concrete ground floor next to the vertical metal beams. The plaintiff testified that while he did not secure the wooden planks, someone had bound them together with wiring. According to the plaintiff's testimony the makeshift scaffold was approximately six feet off the ground. It is also without contention that there was a six foot ladder at the work site, but the plaintiff chose not to use it. In an affidavit submitted in opposition to the defendants summary judgment motions, the plaintiff states as follows:

> I could not have used a ladder or a Baker Scaffold to do work on the metal beam because the level below the first floor was filled with debris and was at an angle. Also, a six foot, A-frame ladder was not high enough for me to reach up and put the plywood on the

metal beam.

While the plaintiff was attaching the plywood to the metal beams the boards gave way and he fell into a depression approximately three feet deep. The plaintiff approximates that he fell eight to ten feet as a result of the boards giving way. The plaintiff testified during his deposition that he sustained a broken right ankle requiring surgery.

The defendant, Ultimate One Construction, moves for summary judgment dismissing the plaintiff's claim pursuant to Labor Law §240 arguing: 1) that the plaintiff's alleged injury was not a gravity related risk; and 2) that the plaintiff was the sole proximate cause of his injuries. The defendant, 64 Annfield Court Corp., moves for summary judgment dismissing the plaintiff's complaint arguing that it is exempt from liability because it did not direct or control the work being performed at the site.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

Motion 002 made by Ultimate One Construction Corp. for Summary Judgment

Ultimate One Construction argues that summary judgment must be granted in its favor pursuant to Labor Law § 240(1) because the plaintiff's alleged injury was not a gravity related risk; and that the plaintiff was the sole proximate cause of his injuries.

The Labor Law states that:

> [a]ll contractors and owners and their agents, except owners of one and two-family dwellings w ho contract for but do not direct or control the work, in the erection, demolition, repairing altering, painting, cleaning or pointing fo 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 an operated as to give proper protection to a person so employed. . .[6]

In interpreting this statute the Appellate Division, Second Department summarized a line of Court of Appeals cases as follows:

> . . . Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective devices proved inadequate to shield the injured worker from harm directly flowing for the application of the force of gravity to an object or person . . . Labor Law § 240 (1) therefore

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[4] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[5] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[6] NY Labor Law § 240(1).

> applies where the accident is the result of a difference in elevation between the worker and the work being performed, or a difference between the elevation level where the worker is positioned and the higher level of the material being hoisted or secured . . .[7]

Here, there is no question that the plaintiff needed to work at an elevated height to accomplish his task of attaching plywood to the metal beams. Ultimate One Construction points out that a ladder was present at the work site, and it submitted photographic evidence to that effect in its motion. The fact that Ultimate One Construction states that the plaintiff is the proximate cause of his own injuries because he used a makeshift scaffold, rather than the six foot A-Frame ladder at the work site belie the fact that the work to be performed was one that required the plaintiff to work at a height.

The cases cited by the plaintiff in its motion to support its position that the plaintiff's injuries were gravity related injuries are not applicable to these facts. In *Jacome v. State of New York*, the Appellate Division, Second Department dismissed a plaintiff's complaint where it found that the plaintiff sustained injuries while unloading a steel plate from a truck. The Appellate Division, Second Department held that the act of unloading a truck did not constitute an elevation risk in the context of Labor Law § 240(1).[8] Similarly, *Rose v. Servidone*, is not applicable to the facts in this case.[9] There, the Appellate Division, Second Department held that stepping down from a truck on to uneven ground littered with debris did not constitute an elevation risk in the context of Labor Law § 240(1).[10] This is not the case here.

In examining Labor Law § 240(1) the Court of Appeals reasoned in *Rocovich v.*

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[7] *Jacome v. State of New York,* 266 AD2d 345, 346 [2d Dept. 1999](internal citations omitted)

[8] Id.

[9] *Rose v. Servidone*, 268 AD2d 516 [2d Dept. 1997].

[10] Id.

Consolidated Edison Co. as follows:

> The legislative purpose behind this enactment [Labor Law § 240] is to protect 'workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor . . . instead of on workers, who are scarcely in a position to protect themselves from accident.' . . . It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. . . Thus, we have interpreted this section as imposing absolute liability for a breach which has proximately caused an injury. Negligence, if any, of the injured worker is of no consequence. . .[11]

"Where a 'plaintiff's actions [are] the sole proximate cause of his injuries . . . liability under Labor Law § 240(1) [does] not attach" . . . Instead, the owner or contractor must breach the statutory duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them."[12]

However, the plaintiff acknowledges that he knew a six foot A-Frame ladder was present at the work site but he did not use it. During the plaintiff's deposition the following exchange occurred:

> Q. Mr. Saavedra, on the date of your accident, before you decided to put the 2x10s on the concrete with rebar, did you consider putting the ladder on the lower level so that you could use that to fasten the sheetrock to the metal?
>
> A. No.
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> ***
>
> Q. Did you ever ask Mr. Manuel to have scaffolding placed on

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[11] *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]. (internal citations omitted).

[12] *Robinson v. East Med. Ctr., LP*, 6 NY3d 550, 554 [2006].

> this side of the building where your accident happened to assist you in fastening the plywood?
>
> A. No.[13]

The Court of Appeals examined a case with a similar fact pattern in *Robinson v. East Med. Ctr. LP.*[14] In that case, the plaintiff was injured when he attempted to complete work that he knew required at an eight foot ladder, with a six foot ladder. In affirming the Appellate Division, Fourth Department's dismissal of the plaintiff's case, the Court of Appeals reasoned that plaintiff knew he needed an eight foot ladder, and that the proper equipment was at the job site. The Court of Appeals found that the plaintiff instead chose to proceed with his work on a ladder he knew was not tall enough to complete the task.

Moreover, in *Montgomery v. Federal Express Corp.*, the Court of Appeals affirmed the dismissal of a plaintiff's Labor Law § 240(1) claim where the plaintiff chose to invert a bucket to jump between floors when he knew ladders were at the work site.[15] The Court of Appeals concluded that,

> We agree with the Appellate Division that, since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law § 240(1). . . [16]

While it is undeniable that the plaintiff's injuries were indeed caused by gravity, Ultimate One Construction demonstrated a prima facie entitlement to judgment as a matter of law based on the plaintiff's failure to use the ladder provided at the work site.

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[13] Saavedra Transcript p. 59-60.

[14] *Robinson v. East Med. Ctr., LP.*, 6 NY3d 550 [2006].

[15] *Montgomery v. Federal Express Corp.*, 4 NY3d 805 [2005].

[16] Id.

The testimony elicited from the plaintiff during his deposition demonstrates that a scaffold did not exist in the area where he was working. Moreover, the plaintiff's own testimony demonstrates that he was aware of the A-Frame ladder, but failed to even attempt to use it prior to using the makeshift scaffolding created by his co-worker. In an attempt to create an issue of fact, the plaintiff submits an affidavit in opposition where in he states that:

> I could not have used a ladder or Baker Scaffold to do the work on the metal beam because the level below the first floor was filled with debris and was at an angle. Also, a six foot, A-frame ladder was not high enough for me to reach up and put the plywood on the metal beam.

Here, the plaintiff's affidavit is manufactured to defeat summary judgment. When questioned during his deposition, the plaintiff clearly stated that he did not consider using the ladder at the work site, nor did he notify his supervisor of the need for scaffolding. An affidavit is not sufficient to defeat a summary judgment motion when it contradicts the affiant's deposition testimony and appears to be tailored to avoid the consequences of that testimony.[17] Consequently, the plaintiff has failed to rebut the defendant's prima facie entitlement to judgment as a matter of law. Therefore, the plaintiff's complaint is dismissed as against Ultimate One Construction Corp.

Motion 003 made by 64 Annfield Court Corp. for Summary Judgment

The defendant 64 Annfield Court Corp. (also sued as 64 Annfield Corp.) moves for summary judgment dismissing the plaintiff's complaint pursuant to the homeowner's exemption to the Labor Law. Owners of a one or two family dwelling are exempt from liability under Labor Law § 240 and 241, unless they directed or controlled the work being performed.[18] However, this

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[17] *See, Garcia v. Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept. 2009]; *see also, Baretta v. Trump Plaza Hotel and Casino*, 278 AD2d 263 [2d Dept. 2000].

[18] *Hossain v. Kurzynowski*, 92 AD3d 722 [2d Dept. 2012].

exemption does not apply to properties held solely for commercial purposes.[19] Here, it is asserted that while the principal of 64 Annfield Court, Staten Island, New York does not reside at the location, it is due to the fact that the location is still under construction. The defendant has come forward with work stoppage orders from the New York City Department of Buildings, to support the contention that the residence is a "dream home" which will not be able to be sold off as the plaintiff suggests.

In opposition to the defendant's motion the plaintiff fails to offer any evidence beyond conjecture that this construction project is for commercial purposes. Unlike the defendant in the case of *Van Amerogen v. Donnini* where the Court of Appeals found that the defendant was not entitled to the homeowner's exemption, the plaintiff has not been able to demonstrate a course of use of the location for profit making purposes. Therefore, the motion made by 64 Annfield Court Corp. is granted and the complaint is dismissed.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by Ultimate One Construction Corp. is granted and the plaintiff's complaint and the third party complaint are dismissed; and it is further

ORDERED, that the motion for summary judgment made by 64 Annfield Court Corp. is granted and the plaintiff's complaint is dismissed; and it is further

[19] *See, Van Amerogen v. Donnini*, 78 NY2d 880 [1991].

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: January 13, 2014

Joseph J. Maltese
Justice of the Supreme Court