SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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FRANK MERENDINO,

Plaintiff,

-against-

COSTCO WHOLESALE CORP., E.W. HOWELL CO., LLC, AND MERENDINO CORP.,

Defendants.

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E.W. HOWELL CO., LLC,

Third Party Plaintiff,

-against-

MERENDINO CORP.,

Third Party Defendant.

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COSTCO WHOLESALE CORPORATION

Fourth Party Plaintiff

-against-

E.W. HOWELL CO., LLC and MERENDINO CORP.,

Fourth Party Defendants.

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COSTCO WHOLESALE CORPORATION

Fifth Party Plaintiff,,

-against-

STARR INDEMNITY AND LIABILITY COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Fifth Party Defendants.

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Index No. 154010/12
Motion Seq. 006

DECISION & ORDER
ARLENE P. BLUTH, JSC

The motion by defendant Merendino Corp. (Merendino) for summary judgment

dismissing the claims asserted against it by plaintiff is granted.

Background

This action arises out of alleged injuries suffered by plaintiff while he was working on a renovation job at a Costco facility located in Staten Island, NY on December 1, 2011. Plaintiff claims that he was working on a scaffold when he fell and suffered serious injuries. Plaintiff insists that he was not provided with a harness or safety equipment and that he fell while erecting a scaffold.

Defendant Costco is the property owner where the alleged injury occurred and contracted with defendant Howell (the general contractor) to oversee the renovation. Howell then entered into a contract with sub-contractor Merendino Corp., who then purportedly entered into an oral contract with Merendino Industries (a company run by plaintiff) to handle certain tasks, including demolition.

In support of its motion, Merendino argues that the Court should dismiss plaintiff's claims against Merendino because the Court already ruled that plaintiff was the sole proximate cause of his injuries. Merendino argues that because it is a subcontractor, the Labor Law does not apply to it. Merendino stresses that plaintiff testified that there was nothing wrong with the scaffold and that plaintiff did not wear a safety harness despite having one available in his car.

In opposition, plaintiff insists that this Court's previous decision dismissing other defendants does not compel the Court to dismiss the claims against Merendino. Plaintiff argues that Merendino failed to provide proper safety devices to keep him from falling to the ground.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court need not decide the "law of the case" argument because the simple fact is that plaintiff was the sole proximate cause of his accident. In his deposition, plaintiff claims that he was the boss at the job site and that he did not report to a foreman (Frank Merendino tr at 22). Plaintiff also testified he controlled the manner and methods of his work and that no one from defendant Merendino Corp. supervised his work (*id.* at 28).

Plaintiff claims that he was at the job site on the day of the accident to finish up some work and to take left-over equipment (*id.* at 31). Plaintiff insists that he got a phone call from

'Nick' (an employee of Howell) who asked when he would create an opening for a door (*id.* at 25, 32). Plaintiff then started constructing a scaffold by himself (*id.* at 32-33). Plaintiff asserted that he thought the scaffold belonged to Charlie – the owner of Merendino Corp. (*id.* at 32). Plaintiff claims that he fell while installing planks on the scaffold (*id.* at 35). He testified that a harness was available in the truck (*id.* at 39) and that he fell 12 feet off the scaffold while pulling on a plank (*id.* at 40).

Plaintiff further testified that he did not wear a safety harness because he thought it was not necessary (*id.* at 357). Plaintiff swore that no one was supposed to give him a safety harness, that no one was supposed to be supervising him on the day of the accident, and that he had everything required to complete his task (*id.* at 360-61). Plaintiff also testified that the scaffold was not defective (*id.* at 361).

Plaintiff also offers an affidavit (NYSCEF Doc. No. 316) in opposition to Meredino's motion. As an initial matter, plaintiff offers an assertion that directly contradicts his deposition testimony; plaintiff now claims that Howell and Merendino would supervise his work (*id.* at 2). Further, this affidavit, dated April 3, 2017, fails to address the availability of the harness in plaintiff's truck or that plaintiff took it upon himself to construct the scaffold alone. This affidavit does not create an issue of fact. "A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298, 743 NYS2d 97 [1st Dept 2002]).

The deposition testimony cited above establishes that plaintiff was the sole proximate cause of his accident. Plaintiff fell off a scaffold that he was constructing under his own

supervision and plaintiff chose not to wear a harness despite having one available. In fact, plaintiff insisted that he did not wear a harness because he thought it was not necessary. Plaintiff should have known of the dangers of constructing a scaffold and taken the appropriate precautions. Plaintiff failed to utilize a readily-available safety device that would likely have prevented his alleged injuries. Although plaintiff insists that the scaffold was owned by Merendino, the exact ownership of the scaffold does not matter for this motion because plaintiff testified that the scaffold was not defective and offered no evidence that his alleged fall was caused by the scaffold itself. These circumstances foreclose liability against Meredino on plaintiff's Labor Law §§ 200, 240(1), 241(6) and common law negligence claims.

Accordingly, it is hereby

ORDERED that Meredino Corp.'s motion for summary judgment is granted and plaintiff's claims against Merendino Corp. are hereby severed and dismissed.

This is the Decision and Order of the Court.

Dated: June 28, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC