Supreme Court of the State of New York
County of Kings

Part LL1

Index Number 530660/2021
Seqs. 002, 003, 004

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	1–3
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2–4
Replying Affidavits	5
Exhibits	Var.
Other	

WALTER INTRIAGO,

Plaintiff,

against

18TH HIGHLINE ASSOCIATES, LLC, 515 WEST 18TH STREET CONDOMINIUM, AND RELATED CONSTRUCTION LLC,

Defendants.

Based on the foregoing papers, plaintiff's motion for summary judgment (Seq. 002), defendant's cross-motion for summary judgment (Seq. 003), and plaintiff's cross-motion to preclude (Seq. 004) are decided as follows:

Introduction

Plaintiff commenced this action to recover for damages he claims to have sustained on February 3, 2021, when he fell from a pile of debris at a construction site located at 515 West 18th Street, Brooklyn (the premises). It is undisputed that 18th Highline Associates, LLC (Highline) was the owner of the premises.[1] It is further undisputed that Related Construction LLC (Related) was the general contractor at the site. Related sub-contracted with IDL Construction (IDL), and IDL employed the plaintiff.

Factual Background

Plaintiff testified as follows: Plaintiff was working at the premises on the date of his accident (Intriago EBT at 24). Plaintiff's supervisors at the site were "Ricky," "Jerry," and

[1] 515 West 18th Street Condominium is identified in plaintiff's moving papers as an "i/s/h/a" alias of Highline.

"Jamil" (27–29). Ricky and Jerry were present on site on the date of plaintiff's accident (*id.*). On February 3, 2021, Ricky told plaintiff and several of his co-workers to move a pile of discarded metal doors and other debris into a trash receptacle (*id.* at 34). Ricky took his orders from Related (*id.* at 37). Jerry told the workers to use a cart to move the doors (*id.* at 55).

Plaintiff further testified: Due to a snowstorm the prior day, plaintiff and his co-workers had not worked on February 2, 2021 (*id.* at 44–45). To reach the doors, the workers were instructed to shovel a path to the doors (*id.* at 50–52). The workers asked for a shovel but were not given one, so they used a piece of metal to shovel the snow (*id.*). Ricky told the plaintiff that, since plaintiff was the most experienced worker, he needed to climb on top the doors to remove the snow (*id.* at 61). Plaintiff asked for a ladder and a shovel and was not provided with either (*id.*); instead, he was given a pipe with which to remove snow from the doors (*id.* at 62). The pile of doors was approximately seven feet tall and was topped with an additional two to three feet of snow (*id.* at 72). After using the pipe to remove snow, plaintiff was descending the stack and the stack shifted, causing him to fall (*id.* at 62).

Defendants submit an affidavit of Ricardo Morales, the IDL supervisor at the site who plaintiff identified as "Ricky." Mr. Morales' affidavit provides a materially different account of the events leading up to plaintiff's accident than plaintiff's testimony. Plaintiff moves to preclude Mr. Morale's affidavit, and that motion is addressed below.

Analysis

Preclusion

Since the analysis of the summary judgment motions is largely influenced by the admissibility of Mr. Morales' affidavit, the court will first address plaintiff's motion for preclusion. Pursuant to CPLR 3101 (h), parties are under a continuing obligation to "amend or

supplement discovery responses when later information is obtained that renders an earlier response inaccurate or incomplete" (*Pizzo v Lustig*, 216 AD3d 38, 48 [2d Dept 2023]). Willfully failing to provide evidence, including the identity of a witness, may result in the preclusion of that evidence (*Frenk v Frederick*, 38 AD3d 593 [2d Dept 2007]; CPLR 3126).

In this action, plaintiff issued a notice for discovery and inspection (D&I) on June 28, 2022, in which plaintiffs demanded the names and addresses for those witnesses about whom the defendants' knew (D&I at ¶ 3). In a discovery order issued by the Final Conference Part, Justice Ruchelsman directed defendants to respond to the D&I requests by August 30, 2023. The discovery order contained a condition, but was not self-executing, indicating that "pursuant to CPLR §3126, failure to strictly comply with this final order, will result in preclusion, the striking of a pleading and/or sanctions as may be appropriate upon further motion" (FCP Order dated June 16, 2023). The defendants ultimately served a response on September 18, 2023, which listed, *inter alia*, "plaintiff's supervisor(s) who directed him on the day of his accident" without identifying those people by name or providing their contact information (D&I Response at ¶ 3 [1]). The affidavit from Mr. Morales is dated January 16, 2024, and was first served on the plaintiff with the defendants' cross-motion on March 13, 2024.

Although defendants did not serve their first response to plaintiff's D&I notice by August 30, it is not clear that plaintiff was prejudiced by the 19 days that elapsed before defendants' first general responses were provided. However, defendants' generalized response with respect to "plaintiff's supervisors" contrasted with their subsequent production of a detailed affidavit from Mr. Morales is more problematic. Plaintiff argues that defendants willfully violated their duty to update their discovery responses when they became aware of, and particularly when they decided to acquire an affidavit from, Mr. Morales.

In opposition, defendants essentially advance two arguments. First, defendants argue that they did not provide Mr. Morales' name and address because plaintiff already knew about him. Defendants claim that they were not aware of "Ricky" until plaintiff testified, and that plaintiff himself could have hired an investigator to find "Ricky" if he chose to do so. This argument is unpersuasive. Once plaintiff properly served discovery demands and the court issued discovery orders, defendants were under an obligation to abide by those orders and provide the requested discovery. Defendants cannot merely claim that the discovery plaintiff sought was redundant and decline to provide it. Once defendants knew "Ricky's" full name and address, they were under an ongoing obligation to amend their prior discovery response to comply with the court's orders.

Second, defendants claim that their September 18, 2023 response substantially complies with the discovery demand because it identified "Ricky" as a potential witness. Defendants then argue that, if plaintiff wanted more information, he could have made further demands, engaged in motion practice, or conducted discovery himself (aff. in opp. at ¶ 22). This argument is unavailing for two reasons. First, defendants did not specifically identify Mr. Morales in their original discovery response—instead, they provided a vague, broad response that included all of plaintiff's co-workers and supervisors, none of them by name. Second, plaintiff's discovery demand *did* request the addresses of expected witnesses. Discovery devices would be rendered meaningless if parties were obligated to follow up on every vague or partial response to reassert demands for information previously requested. Indeed, that is precisely the scenario that CPLR 3101 (h) seeks to avoid—parties are obligated to keep their discovery responses current without waiting for subsequent demands or motion practice.

Ultimately, defendants arguments show that their decision not to comply with plaintiff's discovery demands was deliberate and willful. Defendants do not claim, for example, that they were prevented from complying because they did not possess the demanded info, by time pressures, or by law office failure. Instead, defendants argue that plaintiff already knew about Ricky and that, if he wanted more information, he should have tried to obtain on his own rather than seeking it from defendants. Neither of these rationales are sufficient reasons for failing to comply with duly issued discovery demands. In the absence of any argument that the failure to comply was not deliberate, and in light of the uncompelling arguments for why disclosure was not accomplished, the appropriate remedy is the preclusion of the undisclosed witness, Mr. Morales, pursuant to CPLR 3126.

Summary Judgment

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, defendants' cross-motion for summary judgment is untimely. The note of issue was filed on October 5, 2023, and defendants' cross-motion was filed on March 13, 2024. Defendants do not make an argument pursuant to *Brill* for excuse to file a late summary judgment motion and the cross-motion does not seek relief on "nearly identical grounds," instead requesting summary judgment on plaintiff's Labor Law §§ 241 (6) and 200 claims (*see Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]). That motion is, therefore, denied.

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where a plaintiff is exposed to elevation-related risks and is not provided with adequate safety devices to prevent him from falling (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

In this action, plaintiff testified that he was instructed to work on top of a pile of debris comprised primarily of metal doors. Plaintiff's task included removing snow from the top of the pile. Plaintiff requested a ladder to access the top of the pile and was not given one, nor was he provided with any other safety device to protect him from falling. While descending the pile, plaintiff fell and was injured. Based on this testimony, plaintiff has made out his prima facie case that he was exposed to an elevation-related risk at a job site, was denied adequate safety equipment, and was injured due the lack of safety equipment.

Without Mr. Morales' affidavit, defendants do not provide any evidence to dispute plaintiff's account of the accident. Timothy McNamara, who testified on behalf of Related, did not witness the accident and did not provide testimony which contradicted plaintiff's account. Additionally, the affidavit from Michael Cronin, P.E., is not based on actual knowledge and does not rebut plaintiff's testimony about how the accident occurred.

Therefore, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted.

Conclusion

Plaintiff's cross-motion to preclude (Seq. 004) is granted.

Plaintiff's motion for summary judgment Plaintiff's motion for summary judgment on Labor Law § 240 (1) (Seq. 002) is granted.

Defendants' cross-motion for summary judgment (Seq. 003) is denied.

This constitutes the decision and order of the court.

October 1, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court