

Messina v Tishman Construction Corporation
2005 NY Slip Op 30059(U)
May 2, 2005
Supreme Court, Queens County
Docket Number: 0011510/5102
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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MARC MESSINA,

Plaintiff,

-against-

Index No.: 11510/03

Motion

Dated: April 26, 2005

Cal. No.: 13 & 14

TISHMAN CONSTRUCTION CORPORATION,
35-39 WEST 33RD STREET, LLC AND
ATLANTIC-HEYDT CORPORATION,

Defendants.

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The following papers numbered 1 to 15 read on this motion by plaintiff for summary judgment against defendants TISHMAN CONSTRUCTION CORPORATION and 35-39 WEST 33RD STREET, LLC, and this motion by defendant ATLANTIC-HEYDT CORPORATION for dismissal of plaintiff's Complaint and all cross-claims and counterclaims against it.

Papers
Numbered

Plaintiff's Notice of Motion, Affirm., Exhs., Memo..1-5
Atlantic's Notice of Motion, Affirm., Exhs., Memo...6-10
Tishman's Affirmation in Opposition, Exhibits.....11-13
Plaintiff's Reply Affirmation.....14-15

Upon the foregoing papers, it is ordered that these motions are determined as follows:

On November 25, 2002, plaintiff was working as a laborer on an elevated scaffold when it collapsed, causing him to fall and sustain injuries. Plaintiff was working for non-party Del Savio, a subcontractor of construction manager defendant Tishman Construction Corporation (hereinafter referred to as "Tishman"),

on a building owned by defendant 35-39 West 33rd Street, LLC (hereinafter referred to as "35-39 West 33rd"). Plaintiff also sued subcontractor defendant Atlantic-Heydt Corporation under the common law and Labor Law § 200.

Plaintiff moves for summary judgment against defendants Tishman and 35-39 West 33rd, arguing that they are liable for his injuries as a matter of law. Plaintiff presents his deposition testimony, affidavit of merit, a notice to admit, and an affidavit from Richard Labbate in support of his motion. Plaintiff states that while he was working on the building, he stood on a pipe scaffold that had no safety railings. While walking across the scaffold, the planks came up and he fell through the scaffold to the ground. Mr. Labbate worked as a safety coordinator at the worksite and wrote the reports regarding plaintiff's accident. Plaintiff argues that defendants Tishman and 35-39 West 33rd violated Labor Law § 240(1) because they failed to provide safety equipment or have railings on the scaffold, which caused his injuries.

Defendants Tishman and 35-39 West 33rd Street oppose plaintiff's motion, arguing that there are issues of fact in dispute. Defendants argue that there were no witnesses to plaintiff's accident other than plaintiff, who gave conflicting reasons for his injury. As it is unclear how plaintiff fell from the scaffold, plaintiff is not entitled to summary judgment.

Defendant Atlantic-Heydt Corporation moves for summary judgment and dismissal, arguing that it cannot be held liable for plaintiff's injuries. Defendants present the affidavit and deposition testimony of Kiernan Ennis, its general foreman, and plaintiff's deposition in support of its argument. Defendant was a subcontractor who performed exterior work on the building, such as sidewalk bridges and roof protections. Defendant Atlantic-Heydt performed no work inside where plaintiff fell, which plaintiff concedes. Further, there is no evidence that defendant Atlantic-Heydt erected or installed the pipe scaffold upon which plaintiff was injured or had notice of a dangerous condition. None of the parties presented opposition to defendant Atlantic-Heydt's motion.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for

summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

Labor Law § 240(1) imposes a non-delegable duty upon owners and contractors to provide safe work places and that breach of the duty may result in liability notwithstanding the absence of actual supervision or control over the work. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].)

Plaintiff established a prima facie entitlement to summary judgment against Tishman and 35-39 West 33rd, by demonstrating that he was on an elevated scaffold which collapsed, causing him to fall and sustain injuries. (See *Aguilar v. Henry Marine Service, Inc.*, 12 AD3d 542 [2nd Dept. 2004].) Plaintiff demonstrated that defendants failed to provide safety equipment or a properly working scaffold with railings, which proximately caused his injuries. (See *Stein v. Yonkers Contracting, Inc.*, 244 AD2d 474 [2nd Dept. 1997].)

Defendants Tishman and 35-39 West 33rd failed to raise a triable issue of fact in dispute. (See *Merante v. IBM*, 169 AD2d 710 [2nd Dept. 1991].) Defendants failed to present any evidence that they provided adequate safety devices or that the scaffold was in proper working condition. Defendants also presented no objective evidence to challenge or rebut plaintiff's version of the facts. (See *Farrell v. City of New York*, 162 AD2d 655 [2nd Dept. 1990]; *Braun v. Dormitory Authority of State of N.Y.*, 118 AD2d 614 [2nd Dept. 1986].) Instead, they merely presented their attorney's affirmation, who has no personal knowledge of the facts in this matter, and only offered speculation as to the cause of the accident. (See *Fresse v. City of New York*, 238 AD2d 374 [2nd Dept. 1997].)

Defendant Atlantic-Heydt presented a prima facie entitlement to summary judgment, as there is no evidence for which defendant can be liable under Labor Law § 200. (See *Walker v. Ekleco, Co.*, 304 AD2d 752 [2nd Dept. 2003].) Labor Law § 200 codifies the common law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has control over the performance of the activity causing the injury or had notice of a dangerous condition. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].) Defendant Atlantic-Heydt exercised no supervision or

control over plaintiff and performed no work on the scaffold. Defendant also had no notice of any dangerous condition with regard to the scaffold or safety devices. (See *Nobre v. Nynex Corp.*, 2 AD3d 602 [2nd Dept. 2003].) As none of the parties opposed defendant's motion, there is no evidence to suggest an issue of fact exists with regard to defendant Atlantic-Heydt.

Accordingly, plaintiff's motion for summary judgment is granted against defendants' Tishman Construction Corporation and 35-39 West 33rd Street, LLC. Defendant Atlantic-Heydt Corporation's motion for summary judgment and dismissal is granted without opposition, and all causes of action relating to it are dismissed.

Dated: May 2, 2005

Augustus C. Agate,
J.S.C.