

Williams v 520 Madison Partnership

2006 NY Slip Op 30480(U)

July 21, 2006

Supreme Court, New York County

Docket Number: 114314-03

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. ROSALYN RICHTER

PRESENT: _____

PART 24

Index Number : 114314/2003

WILLIAMS, TREVOR

vs
520 MADISON PARTNERSHIP

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 25 2006

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**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: 7/21/06


HON. ROSALYN RICHTER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

-----x
TREVOR WILLIAMS and LUELANDA WILLIAMS,

Plaintiffs,

-against-

520 MADISON PARTNERSHIP and 520
MADISON VENTURE, as a New York General
Partnership,

Defendants.

-----x
520 MADISON PARTNERSHIP and 520
MADISON VENTURE, as a New York General
Partnership,

Third-Party Plaintiffs,

-against-

AMERICAN BUILDING MAINTENANCE, INC., and
SPIDER, A DIVISION OF SAFEWORKS, LLC,

Third-Party Defendants.

-----x
ROSALYN RICHTER, J.:

On June 3, 2002, Trevor Williams, an injection specialist employed by non-party defendant Balvac, Inc., was allegedly injured while repairing cracks on the exterior facade of the building at 520 Madison Avenue, owned by defendants/third-party plaintiffs 520 Madison Partnership and 520 Madison Venture (collectively "520 Madison"). According to plaintiffs, Williams was injured while using a permanent hanging scaffold, consisting of a basket and counterweighted platform, to effect such repairs. Plaintiffs allege that Williams had been working on the cracks on the exterior of the building in the basket, when he needed to move to his next location.

DECISION AND ORDER
Index No. 114314-03
Motion Sequence No. 1

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To do so required that the basket be moved, which according to Williams, required a return to the platform. Plaintiffs allege that Williams's accident occurred as he was stepping from the free-swinging basket to the platform.

According to plaintiffs, as Williams was stepping from the basket to the platform, a gust of wind came up, causing the platform and the basket to shift apart. Williams maintains that, at the time of the wind gust, he had already put his left foot on the platform, but that the resulting gap between the basket and the platform caused him to catch his right toe on the mesh in the basket. Plaintiffs allege that Williams fell five feet to the roof of the building below, injuring his right shoulder, left knee, and right hand. There is no dispute that the mechanism was not equipped with any ropes or hooks so as to secure the basket portion of the scaffold to the platform.

Plaintiffs' complaint alleges causes of action for common-law negligence and violations of Labor Law §§ 200, 240[1] and 241[6]. In this motion, plaintiffs move, pursuant to C.P.L.R. § 3212, for partial summary judgment against 520 Madison on the Labor Law § 240[1] claim. Under Labor Law § 240[1], owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that

failure. See *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991); *Rizzo v. Hellman Electric Corp.*, 281 A.D.2d 258 (1st Dept 2001). The statute is to be construed liberally to accomplish its purposes. See *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 (1985).

The Court concludes that plaintiffs are entitled to summary judgment on the Labor Law § 240[1] claim. Plaintiffs have submitted an affidavit of a Professional Engineer, Daniel S. Burdett, which maintains that the scaffold mechanism with which Williams was provided with was not sufficient for the purposes for which it was used. In particular, Burdett stated that good and accepted safe engineering practices would have required that workers be given safety hooks or ropes to secure the scaffold's basket to the platform so as to prevent the two sections from swinging apart as workers enter and exit the basket. Alternatively, Burdett points out that the dangerous shift in the basket could have been prevented if a co-worker had been stationed on the roof to hold and secure the basket upon entry and exit. Burdett concluded that had Williams been provided with either of these safety measures, the accident would not have happened.

In light of this expert affidavit, there is no merit to defendants' claim that plaintiffs have failed to show that the scaffold lacked an adequate safety device. Moreover, defendants offer no evidence of their own to rebut the expert's conclusions. Thus, it is undisputed that (1) Williams's scaffold suddenly shifted

causing him to fall to the roof; and (2) if the scaffold had been equipped with proper safety hooks, or if a co-worker were stationed on the roof, the basket would not have shifted and the accident would not have occurred. Under these circumstances, plaintiffs are entitled to summary judgment on the Labor Law § 240[1] claim. See, e.g., *Vanriel v. A. Weissman Real Estate*, 262 A.D.2d 56 (1st Dept. 1999) (plaintiff entitled to summary judgment on Labor Law § 240[1] claim, there being no dispute that the scaffold on which he was working did not prevent him from falling); *Andino v. BFC Partners, L.P.*, 303 A.D.2d 338 (2d Dept. 2003) (plaintiff entitled to summary judgment on Labor Law § 240[1] claim because evidence established that his injuries were proximately caused by the failure of the defendants to supply safe scaffolding at the elevated work site).

There is no merit to defendants' contention that there can be no liability because plaintiffs have not shown that the scaffold in question was defective. Plaintiff need only show the absence of adequate safety devices to prevent the scaffold from swaying or to protect plaintiff from falling. See *Montalvo v. J. Petrocelli Construction, Inc.*, 8 A.D.3d 173 (1st Dept. 2004) (holding that the plaintiff did not have show that the ladder upon which he was standing was defective); *Bonnano v. Port Authority of New York and New Jersey*, 298 A.D.2d 269 (1st Dept. 2002) (same). Nor are plaintiffs required to establish a violation of the Industrial Code in order to establish liability under Labor law § 240[1]. See *Orellano v. 29 East 37th Street Realty Corp.*, 292 A.D.2d 289 (1st

Dept. 2002) ("[the defendant's] contention that the plaintiff was required to show that . . . [the defendant] violated some rule of the Industrial Code is not the law").

Finally, defendants claim that there is a question of fact as to whether the gust of wind was an intervening factor so as to constitute the sole proximate cause of the accident. However, the wind gust here cannot be properly characterized as "intervening" because it preceded, and in fact caused, the swaying of the scaffold. Nor, in light of the fact that the scaffold lacked adequate safety devices, can the wind be viewed as the sole proximate cause of the accident. See *Curte v. City of New York*, 21 A.D.3d 1050 (2d Dept. 2005) (summary judgment granted on Labor Law § 240[1] claim where a gust of wind caused a tarp to exert pressure against ladder, the ladder moved away from the wall and the plaintiff fell); *Fichter v. Lynn H. Smith*, 259 A.D.2d 1023 (4th Dept. 1999); *Wittkopp v. ADF Construction Corp.*, 254 A.D.2d 775 (4th Dept. 1998); *Hakes v. Tops Markets, LLC*, 10 Misc.3d 1079A (Sup. Ct. Niagara Cty. 2004); *Agriculture Insurance Co. v. Ace Hardware Corp.*, 214 F.Supp.2d 413 (S.D.N.Y. 2002).¹

520 Madison's cross-motion for summary judgment dismissing

¹ Defendants' reliance on *Zeitner v. Herbmax Sharon Associates*, 194 A.D.2d 414 (1st Dept. 1993), is misplaced. In that case, there was no evidence that the placement or positioning of the ladder caused the plaintiff to fall, and it appears that the gust of wind was the sole cause of the accident. Here, in contrast, there is evidence showing that the absence of safety ties on the scaffold caused Williams to fall.

plaintiffs' complaint is denied as untimely. The Court's November 10, 2004 Preliminary Conference Order directed that summary judgment motions be filed within sixty days of the filing of the Note of Issue. The Note of Issue was filed on November 1, 2005, yet 520 Madison did not file its cross-motion for summary judgment until January 20, 2006, almost three weeks past the deadline. 520 Madison provides no explanation for its late filing. Thus, in the absence of a showing of good cause, 520 Madison's cross-motion must be denied as untimely. See *Miceli v. State Farm Mutual Automobile Insurance Co.*, 3 N.Y.3d 725 (2004); *Brill v. City of New York*, 2 N.Y.3d 648 (2004); *Levy v. Deer Trans. Corp.*, 27 A.D.3d 279 (1st Dept. 2006); *Buckner v. City of New York*, 9 Misc.3d 510 (Sup. Ct. N.Y. Cty. 2005).

The fact that 520 Madison's request for summary judgment was made in a cross-motion to a timely submitted motion for summary judgment does not make the cross-motion timely. See *Thompson v. Leben Home for Adults*, 17 A.D.3d 347 (2d Dept. 2005) (untimely cross-motion should not have been considered); *Colon v. City of New York*, 15 A.D.3d 173 (1st Dept. 2005) (same); *Castillo v. Bangladesh Society, Inc.*, ___ Misc.3d ___, 2006 N.Y. Misc. LEXIS 1494 (Sup. Ct. Queens Cty June 5, 2006) (same).

The Court recognizes that there are a small number of cases that allow an untimely cross-motion if it can be shown that it was made in response to a "nearly identical" timely and still-pending motion for summary judgment. See, e.g., *Bressingham v. Jamaica*

Hospital Medical Center, 17 A.D.3d 496 (2d Dept. 2005). Even under this more lenient standard, this Court could only address that aspect of 520 Madison's cross-motion seeking summary judgment on the Labor Law § 240[1] claim. In light of the fact that plaintiffs moved for relief on the Labor Law § 240[1] claim, the Court has considered, and has rejected on the merits, 520 Madison's cross-motion for summary judgment on this claim. However, 520 Madison's cross-motion also sought relief on entirely different claims from those in plaintiff's motion, such as common law negligence and Labor Law §§ 200 and 241[6]. Since these claims are not "nearly identical" to the Labor Law § 240[1] claim, 520 Madison's cross-motion for summary judgment on them is denied. Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on liability on the Labor Law § 240[1] claim is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing plaintiffs' complaint is denied.

This constitutes the decision and order of the Court.

July 21, 2006



Justice Rosalyn Richter

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JUL 25 2006

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