

Zeta v Vornado Realty Trust

2006 NY Slip Op 30742(U)

October 5, 2006

Supreme Court, New York County

Docket Number: 101561/05

Judge: Water B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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JOHN ZETA

Plaintiff,

Index No. 101561/05
Mtn Seq. 001, 002

-against-

VORNADO REALTY TRUST and BOVIS
LEND LEASE, INC.

Defendants.

-----x

WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are consolidated for disposition. By motion sequence 001, Defendants seek an order vacating Plaintiff's note of issue dated April 21, 2006. Plaintiff cross-moves for summary judgment on liability under Labor Law §240(1). Defendant cross-moves pursuant to CPLR §3212 dismissing the complaint and pursuant to CPLR 3211(a)(7) dismissing Plaintiff's claim of labor law violations under Labor Law §240(1). By motion sequence 002 Defendant seeks an order compelling Plaintiff to accept Defendants' Response to Plaintiff's Notice to Admit, or in the alternative to deem the contentions set forth therein as denied. Plaintiff cross-moves for an order to providing that the matters denied in the Notice to Admit be proven and Judicial Notice of Defendant, Vornado Realty Trust, as owner of 731 Lexington Avenue, New York along with costs of the proof pursuant to CPLR §3123(C).

FILED
OCT 10 2006
NEW YORK
COUNTY CLERK'S OFFICE

Facts

Plaintiff, a laborer from Del Salvio Construction, claims he was injured while passing a cinder block to a coworker standing on the scaffold above him. Plaintiff claims he was on the second level of a three level scaffold. A person on each level would pass up cinder blocks to the person on the next level. Plaintiff was injured while he passed a cinder block to the worker on the third level, he bent down to get the next block from a worker on the first level and a cinder block fell from above and stuck him on his back. Plaintiff then fell to the ground level of the scaffold and lost consciousness.

Discussion

Note of Issue

Defendants move for an order striking the Note of Issue arguing that discovery is not complete. Specifically, Defendants claim that; (1) Plaintiff has failed to provide a supplemental bill of particulars that addressed notice and itemizes what machinery and safety equipment Plaintiff should have been given to perform his job safely¹; (2) Defendants further claim that Plaintiff failed to exchange expert witness disclosure; (3) Defendants claim that Plaintiff failed to disclose W-2s for

¹Defendants claim that in Plaintiff's third supplemental Bill of Particulars, these items are mentioned by plaintiff but that details were not given.

two years prior to the date of the accident and two years after the accident; and (4) Defendants claim that the last names and addresses of two witnesses noticed by Plaintiff, "Louie" and "Joey," should be provided.

As a general rule, the function of a Note of issue and Certificate of Readiness for Trial is to ensure that only those cases which are actually trial ready are placed on the calendar. Accordingly, courts have vacated a plaintiff's note of issue and removed cases from the trial calendar under circumstances where there was found to be outstanding discovery between the parties. (Friedman & Kaplan v. Hoffman, 166 AD2 188 [1st Dept 1990]).

First and foremost the court notes that it appears that Defendants motion is untimely in that it was not made within the twenty day rule. (Arnold v. New York City Housing Authority, 282 AD2d 378 [1st Dept 2001]; 22 NYCRR 202.21 [e]). After such period, except in tax assessment review proceedings, no such motions are permitted except for good cause shown. (22 NYCRR 202.21 [e]). However, at any time, the court may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of 22 NYCRR 202.21 [e]. (Id.) Notwithstanding Defendants' late filing of this motion, Defendants' motion is granted to the extent hereinafter indicated.

Defendants first raise the issue of a supplemental bill of particulars to address the issues of notice and specific machinery and safety equipment that Plaintiff should have been provided. Plaintiff's Verified Bill of Particulars states that Defendants failed to erect the scaffold with proper netting, braces and supports and that there were an insufficient people performing the work. Plaintiff's Bills of Particulars are deemed sufficient and this branch of Defendants' motion is denied.

As to expert witnesses disclosures, they are to be exchanged within 30 days. Moreover, Defendants are to provide Plaintiff with the previously ordered IME report within 30 days.

Plaintiff will provide authorizations to obtain Plaintiff's tax records. Defendants are entitled to W-2s for two years prior to the date of the accident and two years after the accident. In the papers submitted to the court, Plaintiff annexed W-2s for two year prior to the incident however, Plaintiff will also turn over the W-2s for the two years after the accident.

Lastly, Plaintiff testified at his deposition that "Joey" is Joey Falu and that "Louie" is Louis Morales. Plaintiff does not know their last known address. It follows that there is nothing further that the Plaintiff has to disclose as to these witnesses.

The parties are directed to appear for a conference on December 1, 2006 at which time the court will set a Trial date. All outstanding discovery will be complete by that date.

Cross-Motions for Summary Judgment

Both parties seek summary judgment on Labor law §240(1). Section 240 deals with scaffolding and other devices for use of employees. Section 240(1) of the Labor Law states in relevant part:

All contractors and owners and their agents...who contract for but do not control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of 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 and operated as to give proper protection to a person so employed.

The scaffolding law imposes upon owners and contractors a non-delegable duty to provide proper and adequate safety devices to afford proper protection to those working on a building or structure subject to elevation related hazards. (Correia v. Professional Data Management, Inc., 259 AD2d 60 [1st Dept 1999]). The scaffolding law is also meant to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. (Ray v. Niagara Mohawk Power Corp., 256 AD2d 1070 [4th

Dept 1998])). The "special hazards" however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (Ross v. Curtis-Palmer Hydro Electric Co., 81 NY2d 494 [1993]). Here, Plaintiff was working on an elevated work site, and his injury resulted from the force of gravity. Plaintiff's motion for summary judgment on his Labor Law §240(1) claim is granted.

Motion Sequence 002

By this motion Defendant seeks an order compelling Plaintiff to accept Defendants' Response to Plaintiff's Notice to Admit, or in the alternative to deem the contentions set forth therein as denied. Plaintiff cross-moves for an order to providing that the matters denied in the Notice to Admit be proven and Judicial Notice of Defendant, Vornado Realty Trust, as owner of 731 Lexington Avenue, New York along with costs of the proof.

Defendants' motion to compel Plaintiff to accept the late Notice to Admit is granted. CPLR §3123(a) deems admitted those matters concerning which an admission has been requested if the noticed party fails to serve a sworn statement of denial within twenty days, or within such further time as the court may allow.

(CPLR §3123(a); Misrendino, Krull and Foley v. Crump, 64 AD2d 842, 329 [4th Dept 1978]). Defendants contend that they had an informal agreement with Plaintiff. The conduct of the parties supports Defendants' contention that they believed that they had an agreement with Plaintiff to accommodate each other. This being the case, Defendants had a justifiable excuse for failing to respond to the notice to admit. It follows that Defendants motion to have the Notice to Admit deemed timely is granted.

Plaintiff's cross-motion seeks to prove the matters, which Defendants denied in their Response to the Notice to Admit, and requests the costs associated with those matters. The Plaintiff also requests that the court take judicial notice of the ownership of the subject premises at the time of the incident. The appropriate time to prove matters denied in a response to a notice to admit is at the time of trial. (LaRocca v. Baywood at Noyack, Inc., 241 AD2d 308 [1st Dept 1997]). If it is determined at trial that Defendants unreasonably denied facts in Plaintiff's Notice to Admit, then Plaintiff will be awarded costs and expenses pursuant to CPLR §3123 (C).

As for Plaintiff's motion for judicial notice of Vornado Realty Trust as owner of 731 Lexington Avenue, that motion is denied. "A court may only apply judicial notice to matters of common and general knowledge, well and established and authoritatively settled, not doubtful or uncertain. The test is

whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof." (Dollas v. W.R. Grace and Company, 225 AD2d 319, 320 [1st Dept 1996]). In order for a court to take judicial notice of a fact, the source of the underlying information must be widely accepted and unimpeachable to be considered of indisputable reliability. (Ptasznik v. Scholtz, 247 AD2d 197, 198 [2d Dept 1998]). The ownership of the property is not a proposition of general knowledge capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Plaintiff has annexed an internet copy of Vornado Realty Trust's Schedule 14A, Information Required in Proxy Statement, filed by same with the United States Securities and Exchange Commission along with other internet sites indicating that Vornado is the owner of said property. The court, however, will not take judicial notice of the property's ownership because it is unclear from these sources whether Vornado was the owner of said property on the date of the incident.

Accordingly it is

ORDERED that Defendants' motion to vacate the Note of Issue is denied and discovery is to proceed as outlined above; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is granted solely on his Labor Law §240(1) claim; and it is

