

Miglionico v Bovis Lend Lease, Inc.

2007 NY Slip Op 31013(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0104786/2003

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

GERALD MIGLIONICO,
Plaintiff,

Index No.: 104786/03

Motion Date: 12/05/06

- v -

Motion Seq. No.: 01

BOVIS LEND LEASE, INC., COLUMBUS CENTRE,
LLC, THE RELATED COMPANIES, L.P. and
AOL/TIME WARNER CENTER,
Defendants.

Motion Cal. No.: 57

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1 - 4	_____
5	_____
6	_____

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves for summary judgment on his Labor Law 240 (1) claim on the grounds that there is no issue of fact that the defendants' violated the statute by their failure to provide the plaintiff with adequate safety devices. Plaintiff was injured in a fall from the 39th to the 34th Floor while working on the construction of the AOL/TimeWarner Center on August 8, 2002.

Plaintiff and his co-worker Christopher Morelli testified at their depositions that they had not been issued any elevation-related safety devices such as harnesses, lanyards, ladders or

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):

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safety netting, although they were working on putting column forms into place on the then uncompleted 39th Floor. This testimony is sufficient to meet plaintiff's prima facie burden on this motion as the plaintiff has demonstrated an absence of safety devices and that such absence caused his fall and injuries thus shifting the burden to the defendants to establish that a trial on liability is warranted. See Turner v ISR Solutions, 2005 NY Slip Op 51302(U), 806 NYS2d 449 (Sup Ct, NY County, Aug 9, 2005) (plaintiff's uncontradicted affidavit that safety equipment was inadequate provides a sufficient evidentiary basis for the purposes of summary judgment).

In opposition, defendants argue that there are material issues of fact that preclude summary determination in plaintiff's favor. Defendants cite the deposition testimony of their site safety managers and employees that safety devices were available for use by employees as creating an issue of fact as to plaintiff's testimony. The defendants also adduce testimony that they employed more than 30 site safety managers on the project and held various meetings with workers on job safety. The evidence cited by the defendants, however, has one glaring and ultimately dispositive omission: that is the defendants have failed to introduce any evidence to contradict the plaintiff's testimony that he was not provided with any safety devices at the time of the accident nor was plaintiff provided with any safety

training. The affidavit of Sobara Construction Corporation's site safety manager, Carl Curatolo, states that the plaintiff was required to participate in safety meetings and received safety equipment and training in its use. However, the affidavit does not contain facts in admissible form because it fails to set forth the affiant's basis of knowledge; that is, the affiant fails to set forth that the plaintiff intentionally failed to attend a mandatory safety meeting or that plaintiff was observed receiving safety equipment. This same infirmity afflicts the affidavit of defendants' expert because the expert's opinion that the plaintiff was issued safety devices and instructed how to use them fails to find any support in the record before this court. See Robinson v NAB Const. Corp., 210 AD2d 86, 87 (1st Dept 1994) ("expert's opinion lacked probative force due to its speculative, conclusory nature").

Defendants' rebuttal to plaintiff's prima facie case of a Labor Law 240 (1) violation fails to cite a single factual observation of plaintiff either receiving a safety device or otherwise being instructed in its use. Rather, defendants argue that an issue of fact is created by the mere fact other workers may have received safety devices and training. See DePalma v Metropolitan Transp. Authority, 304 AD2d 461, 462 (1st Dept 2003) ("the fact that safety harnesses may have been available at the work site is insufficient to allow defendants to escape

liability"); but see Miro v Plaza Const. Corp., __ AD3d __, 2007 NY Slip Op 02649 (1st Dept, Mar 29, 2007) (where plaintiff is instructed in the use of adequate safety devices and is aware that safety devices are available upon request, plaintiff's failure to request same is the sole proximate cause of plaintiff's accident). Notably, defendants do not cite a single instance where the plaintiff was given a safety device and refused to use it or failed to attend safety training that was specifically required of the plaintiff. Mere conjecture of the type contained in defendants' affidavits is insufficient to raise an issue of fact in rebuttal to plaintiff's evidence on this motion. Furthermore, defendants' concede that the method the plaintiff utilized while working on the column was, as stated by defendants' expert, "a widely accepted practice of climbing on secured clamps to reach the upper level of columns."

As the defendants have failed to present "any evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility, summary judgment [is] properly awarded to the plaintiff." Klein v City of New York, 89 NY2d 833, 835 (1996).

Accordingly, it is

ORDERED that plaintiff's motion is GRANTED; and it is further

[5]
ORDERED that plaintiff is GRANTED summary judgment on liability on plaintiff's claim for damages under Labor Law 240 (1); and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before Part Mediation-2 at 9:30 A.M. on April 30, 2007, and if the case is not settled thereat the parties are to appear for a pre-trial conference to set a before this court on May 15, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set a trial date.

This is the decision and order of the court.

Dated: April 20, 2007

ENTER:

~~DEBRA A. ...~~
J.S.C.
DEBRA A. ...
J.S.C.

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