Fuller v 2 Gold L.L.C.

2007 NY Slip Op 33475(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0116158/2004

Judge: Emily Jane Goodman

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SCANNED ON 10/25/2007

[* 1]

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

PRESENT: **EMILY JANE GOODMAN** PART 17

Index Number : 116158/2004

FULLER, RULLER

VS

2 GOLD L.L.C.

Sequence Number : 003

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 ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion decided per attached

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

FILED
OCT 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/15/07

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

FILED
OCT 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
--X
RALPH FULLER and ANN FULLER,

Plaintiffs,

-against-

Index No. 116158/04

2 GOLD L.L.C. and 2 GOLD GC L.L.C.,

Defendants.
--X

Emily Jane Goodman, J.S.C.:

Defendants move for summary judgment dismissing the complaint. Plaintiffs have withdrawn their Labor Law § 240 (1) cause of action.

On October 20, 2004, plaintiff Ralph Fuller (plaintiff), an ironworker then in the employ of non-party Transel Elevator (Transel), was lifting either a 200- to 300-pound elevator door or a 500- to 600-pound elevator frame, transferring it from a truck on to a movable or rolling platform placed next to the loading dock, when the platform allegedly shifted, and his back was injured. Plaintiff claims that the wheels on the platform, which had a locking mechanism, were not locked or secured against movement, causing the platform to shift, resulting in plaintiff's injuries. The rolling platform was apparently used by a variety of trades on the construction site and was constructed by Atlantic-Heydt, who is not named as a defendant in this action.

Defendant 2 Gold L.L.C. (Gold) owned the premises, a 52-story apartment building then being built at 2 Gold Street in lower Manhattan. Gold retained defendant 2 Gold GC L.L.C. (Gold GC) as the general contractor for the construction of the building. Gold GC subcontracted the work of installing elevators to Transel.

Before the court can discuss defendants' motion for summary judgment, it must address defendants' claim that plaintiffs seek to improperly amend the bill of particulars in opposition to the motion for summary judgment.[1] In opposition to the motion, Plaintiffs specify that defendants violated three subsections of the Industrial Code (12 NYCRR Part 23): 23-5.1 (b), 23-5.1 (c) (2), and 23-5.3 (g) (1). Because plaintiffs generally alleged a violation of Industrial Code 23-5.1 in the Verified Bill of Particulars, they claim that it is unnecessary to amend the Bill. However, if amendment is required, plaintiffs argue leave should be granted because the amendment would simply "amplif[y] and elaborate[] upon facts and theories already set forth in the original bill of particulars" (*Adams v Santa Fe Construction Corp.*, 288 AD2d 11, 12 [1st Dept 2001]).

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[1]Plaintiffs' counsel has appeared before this court numerous times, and the court has noticed a recurring, improper, practice by counsel of seeking to amend a bill of particulars, without motion, and for the first time, in opposition to a defendant's motion for summary judgment. This practice wastes opposing counsel's and the Court's resources and counsel is advised to cease such practices.

"CPLR 3025 (b) provides that leave to amend pleadings shall be freely given, and this rule has been applied to the amendment of bills of particulars as well, in the absence of prejudice or surprise" (*Katechis v Our Lady of Mercy Medical Center*, 36 AD3d 514, 516 [1st Dept 2007]). "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Construction Corp.*, 54 NY2d 18, 23 [1981]).

Defendants maintain in their reply papers that they would be prejudiced if amendment is permitted.[2] Defendants maintain that they were given no notice in plaintiffs' complaint and Bill of Particulars of these three sections. Thus, defendants claim that plaintiffs failed to disclose the details of how and where the accident happened until it was too late for defendants to investigate the matter, or, to inspect the wheels

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[2]The Court will not consider defendants' argument that plaintiff was not engaged in construction, demolition, or excavation work, raised by defendants for the first time in its Reply Affirmation, nor will the court consider the belatedly submitted affidavits attached thereto.

of the rolling platform.[3]

Plaintiffs are permitted to amend their bill of particulars to allege Industrial Code sections 23-5.1 (b), 23-5.1 (c) (2), and 23-5.3 (g) (1) as the sole basis for plaintiffs Labor Law § 241 (6) claim. As noted by plaintiffs, the complaint alleges that plaintiff was injured as a result of defendants' negligence, "who had loading docks, scaffolding and elevated platforms that were improperly placed, improperly operated and maintained." Defendants further admit that plaintiffs responded in part to its Demand for a Verified Bill of Particulars stating that "plaintiff was in the process of moving by hand 200-300 pound elevator doors when the elevated platform he was on shifted, moved, and shook." Thus, defendants were on notice of the allegation that the loading platform shifted or moved, which was a violation of Industrial Code section 23-5.1. Thus, any failure to inspect the platform early in the action, to determine why it shifted or moved, can only be attributed to defendants.

Defendants' Motion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-*

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[3]According to defendants, by the time that plaintiff was deposed, the project was fully completed, and all scaffolding, loading docks and elevated platforms had been dismantled and removed (*see* DePalma Dep., at 76 [**Q.** "Is that elevated work platform ... being used ... at 2 Gold anymore?" **A.** "No"]).

[*6]

Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200, the codification of the common law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley v Columbia Grammar and Preparatory School*, ___ AD3d ___, 2007 WL 2324611, *6, 2007 NY App Div LEXIS 9186, *17, 2007 NY Slip Op 06452, *7 [1st Dept, August 16, 2007]; *see also Gonzalez v Glenwood Mason Supply Co.*, 41 AD3d 338, 339 [1st Dept 2007]). Plaintiff maintains that the injury was caused by a defective condition on the premises, rather than because of the manner or method in which the work was performed. Where a premises defect exists, liability may be imposed upon a defendant which "fail[s] to show that it did not create the dangerous condition or that it lacked control over the premises and lacked actual or constructive notice of the dangerous condition" (*Verel v Ferguson Electric Construction Co.*, 41 AD3d 1154, 1156 [4th Dept 2007]; *see also McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 798 [2d Dept 2007]; *Dowd v City of New York*, 40 AD3d 908, 910 [2d Dept 2007]). In order to establish a defendant's notice, a dangerous condition must be "visible and apparent and it must exist for a

sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In addition, the "notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York University*, 12 AD3d 200, 201 [1st Dept 2004]).

However, although plaintiffs cite several cases involving premises defects, the condition at issue can not properly be considered premises defect. The condition did not relate to a condition on the land, but rather related to equipment which was placed on the land. Even if the condition could be considered a premises defect, there is no evidence in the record that either Gold or Gold GC had actual or constructive notice that the wheels were not secured when the accident allegedly occurred.

Plaintiffs further argue that Gold GC violated Labor Law §200 because it maintained supervisory control over safety of the work site, citing *Brennan v 42nd Street Dev. Project, Inc.*, (10 AD3d 302 [1st Dept 2004] [issue of fact existed as to whether construction manager was liable under Labor Law §200 where it had a representative of its own safety department on site, whose duty was to observe all contractors and make sure they complied with City safety regulations, and, had authority to stop work]) and

Bush III v Gregory/Madison Ave., LLC., 308 AD2d 360 [1st Dept 2003] [issue of fact existed as to whether contractor was liable under Labor Law §200 where it had a safety coordinator on site with authority to stop work if a dangerous condition arose]). As defendants note, however, plaintiffs' citation to these cases is confusing as the cases address Labor Law §200 claims involving the employer's manner or method of work, not claims involving a premises defect.

In any event, plaintiffs have not raised an issue of fact that Gold or Gold GC are liable because they controlled the manner or methods of plaintiff's work. There is no evidence that Gold was involved in the day-to-day construction at the site. As to Gold GC, plaintiffs point to the fact that its construction supervisor, DePalma, his assistant supervisors, and Total Safety Consultants were responsible for making safety inspections at the site, including the rolling platform. They also point to DePalma's acknowledgment that he would visually "look to see if the wheels were locked when they were using it (DePalma Dep. at 31) and that he had authority to stop work if he saw an unsafe condition (*id.* at 43). However, neither DePalma, his assistants nor Total Safety gave any of the subcontractors specific instructions on how to use the rolling platform (*id.* at 26), nor verified that the subcontractors were in fact inspecting the rolling platform prior to use (*id.* at 58). DePalma also

testified that it was Atlantic Heydt's responsibility to inspect the rolling platform which it built and other than that, no one but "[a]nyone who's getting on them" was responsible to inspect the rolling platform on a daily basis (*id.* at 16, 21-22, 46, 60, 62).

The fact that Gold GC may have had the authority to stop the work for safety reasons is insufficient to raise an issue of fact with respect to whether the general contractor exercised the requisite degree of supervision and control over plaintiff's work to sustain a claim under Labor Law §200 (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2007]). There is no evidence that DePalma controlled plaintiff's manner or method of work. Thus, the fact that DePalma visually inspected the wheels on the rolling platform on some occasions to verify that they were locked is no import absent a duty to do so. Although Gold GC did not instruct the subcontractors to check the locking mechanism prior to use, or verify that the subcontractors did so, plaintiffs have cited no precedent for imposing such a duty on Gold GC, where the only evidence is that the rolling platform was built by (and presumably owned by) Atlantic-Heydt. Therefore, summary judgment is granted in Gold's and Gold GC's favor dismissing plaintiffs' Labor Law § 200 and common-law negligence claims.

Labor Law § 241 (6)

"Labor Law § 241 (6) 'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers'" (*Walker v EklecCo*, 304 AD2d 752, 752 [2d Dept 2003], quoting *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order "to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Walker v Metro-North Commuter Railroad*, 11 AD3d 339, 340 [1st Dept 2004]), as opposed to "those that establish general safety standards" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). In addition, the cited provisions must be applicable to the facts of the case (*see e.g. Favia v Weatherby Construction Corp.*, 26 AD3d 165, 166 [1st Dept 2006]).

Here, plaintiffs have "withdrawn" their reliance on all the Industrial Code sections cited in their complaint and bill of particulars, except Industrial Code §§ 23-5.1 (b), 23-5.1 (c) (2), and 23-5.3 (g) (1). The part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is granted to the extent that such claim is based on any Industrial Code provisions cited in the complaint and bill of particulars except these sections.

Subpart 23-5 of the Industrial Code pertains to all

scaffolding. Plaintiffs allege that the particular sections cited apply because the rolling platform was the functional equivalent of a scaffold. Defendants have made no arguments, nor pointed to any evidence, in this regard.

Industrial Code subsections 23-5.1 (b) requires that footings "be secure against movement in any direction." Subsection 23-5.1 (c) (2) provides that all scaffolding be provided with "adequate horizontal and diagonal bracing to prevent any lateral movement." Both are sufficiently specific to support a claim under Labor Law 241 (6) (*see O'Connor v Spencer Invest. Ltd.*, 2 AD3d 513 [2d Dept 2003]). Because subsection 23-5.3 (g), providing that footings of metal scaffolds be "secure against movement in any direction," is substantively similar to 23-5.1 (b), it is also sufficiently specific. There has been no evidence submitted as to whether the rolling platform is made of metal.

Defendants have not meet their burden to show that the three cited provisions are not applicable. Section 23-1.4 (b) (45) of the Industrial Code defines as scaffold as "[a] temporary elevated working platform and its supporting structure including all components." The Court of Appeals has defined a scaffold as "a temporary structure of timber, boards, etc., for various purposes for supporting workmen and materials in building" (*Caddy v Interborough Rapid Transit Co.*, 195 NY 415 [1909]). The

Appellate Division, Third Department has held that in order for a structure to be a scaffold, one of its purposes must be to facilitate the work to be done by supporting the workers and materials (*see Olson v Pyramid Crossgates Co.*, 291 AD2d 706 [3d Dept 2002]).

Although DePalma made it very clear in his testimony that the rolling platform was not a scaffold (DePalma Dep., at 46), he also used or responded to the term "scaffold" in other parts of his testimony (*see e.g.* DePalma Dep at 21, 32). DePalma also admitted that the rolling platform was constructed out of scaffolding material (*id.* at 46-47). It is undisputed that the structure was used by plaintiff to walk on and to support materials being unloaded on to a dock. DePalma also admitted that the elevated structure contained rails around it to protect people from falling (*id.* at 46). Notably, if a structure is a scaffold, the Industrial Code requires safety railings absent certain exceptions (see 23-5.1 [j]). Accordingly, defendants have failed to demonstrate, as a matter of law, that the three provisions are inapplicable to the facts here or are insufficiently specific to support a Labor Law §241 (6) claim.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' request for amendment of their bill of particulars is granted; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against 2 Gold L.L.C. is granted; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against 2 Gold GC L.L.C. is granted; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is denied as to Industrial Code §§ 23-5.1 (b), 23-5.1 (c) (2), and 23-5.3 (g) (1), but is in all other respects granted.

This Constitutes the Decision and Order of the Court.

Dated: October 15, 2007

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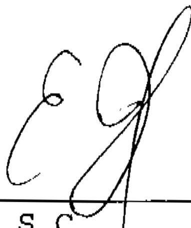

J.S.C.

EMILY JANE GOODMAN

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