

**Zeta v Bovis Lend Lease, Inc.**

2007 NY Slip Op 33486(U)

October 18, 2007

Supreme Court, New York County

Docket Number: 0101561/2005

Judge: Walter Tolub

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

PRESENT: \_\_\_\_\_  
Justice

PART 15

John Zeta

INDEX NO. 101561/05

Boris Leno Lease,  
INC., ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 4

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 is consolidated with motion sequence 005 for disposition and

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

**FILED**  
OCT 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/19/07

W

**WALTER B. TOLUB** <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

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

-----x  
JOHN ZETA.

Plaintiff,

Index No. 101561/05  
Mtn. Seq. 004,005

-against-

BOVIS LEND LEASE, INC., ALEXANDERS, INC.,  
And SEVEN THIRTY ONE LIMITED PARTNERSHIP,

Defendants.  
-----x

**FILED**  
OCT 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**WALTER B. TOLUB, J.:**

Motion Sequences 004 and 005 are consolidated for disposition.

By motion sequence 004, Defendants ALEXANDERS INC and SEVEN THIRTY ONE LIMITED PARTNERSHIP ("Moving Defendants") seek to dismiss Plaintiff's common law negligence claims and Labor Law §§ 200, 240 and 241 claims. The Moving Defendants' motion is denied as to Labor Law § 200 and common law negligence claims and granted as to Labor Law §§ 240(1) and 241(6) claims.

By motion sequence 005 all of the Defendants seek to quash the subpoena served by Plaintiff upon Daniel Berger of Vornado Realty Trust, dated July 24, 2007. Defendants' motion to quash is denied.

Facts

As stated in this court's prior decisions, Plaintiff was a laborer employed by Del Salvio Construction. This is an action for personal injuries that Plaintiff claims he sustained on May

14, 2004, when 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 when he bent down to get the next block from a worker on the first level and a cinder block fell from above and struck him on his back. Plaintiff then fell to the ground level of the scaffold and lost consciousness.

Plaintiff initially commenced an action in the Supreme Court, New York County, titled Zeta v. Vornado Realty Trust and Bovis Lend Lease under index number 101561/05 and also Zeta v. Alexander's Inc. and Seven Thirty One Limited Partnership, under index number 110786/06. These actions were consolidated pursuant the decision of this court dated February 28, 2007 under index No. 101561/05.

The complaint alleges that Plaintiff was injured while working on the renovation of the premises located at 731 Lexington Avenue, New York, NY. The complaint alleged that Defendant Alexander's Inc. and 731 Limited Partnership alternately owned, maintained, managed, were managing agent or controlled the subject premises. The complaint also alleged, inter alia, violations of Labor Law §§200, 240 and 241(6).

Defendants answered and denied the substantive allegations in the complaint, including the allegations of negligence, Labor

Law violations and ownership of the subject premises. Defendants also alleged, inter alia, the affirmative defenses of culpable conduct, joint and several liability, lack of control over work performed and that Plaintiff was a recalcitrant worker.

By order dated February 28, 2007, this court held that; (1) Labor Law §240(1) did not apply to the facts of this case because Plaintiff claimed the cinder block fell on not while in the process of being hoisted or secure, rather, the cinder block was being passed hand to hand; (2) this court also granted Defendant's motion to dismiss Plaintiff's Labor Law § 241(6) causes of action because the industrial codes cited were inapplicable; (3) this court granted the motion to dismiss against Vornado but denied it as to Defendant Bovis Lend Lease because there were questions of fact regarding negligence and Labor Law § 200 causes of action. This court held that "the issue of the extent and control exercised by Bovis is a matter to be resolved at the trial of the action . . ." (Decision and Order dated February 28, 2007 p. 8; D Ex. D).

In motion sequence 004, the Moving Defendants, Alexander's Inc and Seven Thirty One Limited Partnership, seek an order (1) dismissing Plaintiff's claims under Labor Law §240(1) and 241(6); and (2) dismissing the Labor Law § 200 and common negligence causes of action. By motion sequence 005 Defendants seek to quash the subpoena served by Plaintiff upon Daniel Berger

of Vornado Realty Trust, dated July 24, 2007.

Discussion

Motion Sequence 004

By motion sequence 004, the Moving Defendants seek an order to dismiss (1) Plaintiff's claims under Labor Law §240(1) and 241(6); and (2) the Labor Law § 200 and common negligence causes of action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The Moving Defendant's motion for summary judgment on Labor the Labor Law §§ 240(1) and 241(6) causes of action is granted since they were previously dismissed against Vornado and Bovis. Plaintiff cannot assert the same claims, based on the same facts, because collateral estoppel precludes a party from re-litigating an issue which has previously been decided in a proceeding with which he had a fair opportunity to fully litigate the question presented. (Siddiqi v. Ober, Kaler, Grimes & Shriver, 224 AD2d 220 [1<sup>st</sup> Dept 1996]). The requirements which must be satisfied for this doctrine to be invoked are: (1) the identical issue must have previously been decided; and (2) the party to be precluded from re-litigating the issue must have had a full and fair

opportunity to consent to the prior determination. (Id. at 22).

Plaintiff's Labor Law §240 (1) claim was dismissed based on the facts of this matter. The issue of ownership was not a factor in that part of the February 28, 2007 decision. Since the facts are unchanged, this court's February decision is the law of the case. Similarly, Plaintiff's Labor Law § 241(6) claims were dismissed based on the facts of the accident and inapplicable Industrial Code violations. The same issue is before the court now, and therefore the February decision is the law of the case for these claims as well. It follows that the Moving Defendant's motion for summary judgment on Labor the Labor Law §§ 240(1) and 241(6) causes of action is granted and the claims are dismissed as to ALEXANDERS INC and SEVEN THIRTY ONE LIMITED PARTNERSHIP.

The Moving Defendants also argue that the motion for summary judgment dismissing Plaintiff's Labor Law §200 and common law negligence claims should be granted because the Moving Defendants did not retain the required control or supervision of the activity causing the accident. The Moving Defendants' motion for summary judgment must be denied as to the Labor Law § 200 and common law negligence causes of action because there are two questions of fact which must be addressed regarding the ownership of the premises at the time the accident occurred and whether any property "owner" had control over the work performed at the work site. (See D Exs. G p. 24-34; D Ex. H p. 12). It follows that

the Moving Defendants motion to dismiss the Labor Law §200 and common law negligence claims are denied.

Motion Sequence 005

By this motion all of the Defendants seek to quash the subpoena served by Plaintiff upon Daniel Berger of Vornado Realty Trust, dated July 24, 2007 pursuant to CPLR §2304.

The subpoena is for the trial appearance of the same person who testified at the Defendants depositions. Mr. Berger's testimony is relevant, as is clear by Defendants having put him forward, because he has knowledge about the ownership of the property. It follows that Defendants motion to quash is denied.

Counsel for the parties are directed to appear in room 335 on October 29, 2007, as scheduled to select a jury.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/18/07

**FILED**  
OCT 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
*[Signature]*  
HON. WALTER B. TOLUB, J.S.C.