

Rios v 731 Commercial LLC
2008 NY Slip Op 31384(U)
May 9, 2008
Supreme Court, New York County
Docket Number: 0100528/2005
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

J.S.C.

PRESENT: _____
Justice

PART 12

Index Number : 100528/2005

INDEX NO. _____

RIOS, ROLANDO

MOTION DATE _____

vs

731 COMMERCIAL

MOTION SEQ. NO. _____

Sequence Number : 003

MOTION CAL. NO. _____

SUMMARY JUDGMENT (partial)

s 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

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/9/08

[Signature]

BARBARA R. KAPNICK

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION J.S.C.

Check if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
ROLANDO RIOS and RAMONA RODRIGUEZ,

Plaintiffs,

- against -

731 COMMERCIAL LLC and STRUCTURE-
TONE, INC.,

Defendants.

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 100528/05
Motion Seq. Nos.
003 and 004

FILED
MAY 13 2005
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Rolando Rios, a construction worker, on October 5, 2004, while he was performing sanding/detailing work on the ceiling of the third floor of the building located at 731 Lexington Avenue, New York, New York. Plaintiff claims to have fallen approximately six feet when one of the wheels on the Baker's scaffold on which he was standing fell into an unprotected hole in the floor, causing the scaffold to sway, shift, move and topple over. Plaintiff claims that he did not observe the hole before the accident because the hole, which had been cut for placement of a light fixture, was covered by electrical cables.

Defendant 731 Commercial LLC was the owner of the building. Defendant Structure-Tone, Inc. was the general

contractor/construction manager. Plaintiff's employer, non-party Nastasi & Associates, was a drywall subcontractor.

Plaintiffs now move, under motion sequence number 003, for partial summary judgment on the issue of liability on plaintiffs' claim pursuant to Labor Law § 240(1).

Defendants oppose the motion and move, under motion sequence number 004, for summary judgment dismissing plaintiffs' Complaint.

Defendants argue that plaintiffs' claim pursuant to Labor Law § 240(1) must be dismissed on the grounds that: (i) there is no evidence that the scaffold was defective; and (ii) plaintiff's own conduct was the sole proximate cause of his accident because plaintiff testified that he placed the scaffold, only locked two wheels into position and examined the surface of the floor to make sure it was safe.

Plaintiffs oppose this portion of the defendants' motion and argue that they are entitled to partial summary judgment on the grounds that: (i) there is no evidence that there were any barricades or signs to warn workers of the presence of an exposed hole; (ii) it is undisputed that plaintiff was not provided with any safety devices such as a belt, harness, safety line or

guardrails, to protect him from falling; and (iii) the scaffold was unsecured.

Defendants contend that no other safety devices were mandated and/or warranted, and that such additional protections could not have prevented the accident which did not involve plaintiff stepping off the scaffold, but rather the capsizing of the entire scaffold.

However, the Appellate Division, First Department, has held that

[i]t does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff misstepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident (citation omitted).

Vergara v SS 133 W. 21, LLC, 21 AD3d 279, 280 (1st Dep't 2005).

Since there was "no dispute that the six-foot high, manually propelled scaffold, which plaintiff was directed to use in order to plaster a 15-foot-high ceiling, had no side rails, and no other protective device was provided to protect him from falling off the sides", the Court held that plaintiff was entitled to partial summary judgment on his Labor Law § 240(1) claim. *Vergara v SS 123 W. 21, LLC, supra* at 280.

Since plaintiff Rolando Rios was instructed to work on an unsecured scaffold in this case and was provided with no other safety devices to prevent him from falling in the event the scaffold fell or tipped, plaintiff cannot be held solely to blame for his injuries. See *Vega v Rotner Management Corp.*, 40 AD3d 473 (1st Dep't 2007); *Peralta v American Telephone and Telegraph Co.*, 29 AD3d 493 (1st Dep't 2006); *Velasco v Green-Wood Cemetery*, 8 AD3d 88 (1st Dep't 2004).

Accordingly, based on the papers submitted and the oral argument held on the record on March 12, 2008, this Court finds that plaintiffs are entitled to partial summary judgment on their claim pursuant to Labor Law § 240(1).

Plaintiffs' motion is, therefore, granted and that portion of defendants' motion seeking to dismiss said claim is denied.

Defendants next argue that plaintiffs' claim pursuant to Labor Law § 241(6) must be dismissed on the ground that none of the provisions of the Industrial Code which plaintiffs claim were violated are factually and/or legally applicable to this case.

Plaintiffs argue in opposition to this branch of defendants' motion that they have sufficiently alleged violations of sections 23-1.7(e), 23-1.15, 23-1.16, 23-1.17, 23-5.1(b) and (c)(2), and 23-5.18(b) of the Industrial Code.

This Court finds that there are triable issues of fact as to whether defendants violated sections 23-1.15 and 23-5.18 in failing to equip the scaffold with a safety railing, section 23-5.1(c)(2) in failing to provide the scaffold with adequate horizontal and diagonal bracing to prevent any lateral movement, and section 23-1.16 in failing to provide or furnish plaintiff with a safety belt or harness, and whether said violation(s) were a substantial factor in causing plaintiff's accident.

Accordingly, that portion of defendants' motion seeking to dismiss plaintiffs' claim pursuant to Labor Law § 241(6) based on those sections is denied.

The motion is, however, granted to the extent that it seeks to dismiss said claim based on the other provisions of the Industrial Code, including (i) section 23-1.7(e) which does not apply here since there is no evidence that plaintiff (as opposed to the equipment) was caused to "trip" in a "passageway" and/or that "accumulations of dirt and debris", "scattered tools and materials" and/or "sharp projections" in plaintiff's working area caused his accident; (ii) section 23-1.17 which applies only where a life net is used; and (iii) section 23-5.1(b) which applies only to fixed scaffolds designed to be secured against movement in any direction.

Finally, defendants argue that plaintiffs' claims pursuant to Labor Law § 200 and for common law negligence must be dismissed on the ground that they did not supervise or control the conduct of his work.

However, Richard Cunningham, Structure-Tone's Superintendent, testified that it was the job of Structure-Tone's employees to cover the holes with masonite.

Thus, there are triable issues of fact as to whether Structure-Tone was negligent in failing to ensure that all holes in the floor were covered or protected.

Accordingly, this branch of the motion is denied with respect to defendant Structure-Tone. The motion is, however, granted to the extent of dismissing said claims against defendant 731 Commercial LLC.

FILED

A pre-trial/settlement conference shall be held on ^{MAY 13, 2008} in IA Part 12, 60 Centre Street, Room 341 on May 28, 2008 at 10:00 a.m.

**COUNTY CLERK'S OFFICE
NEW YORK**

This constitutes the decision and order of this Court.

Date: May 9, 2008



Barbara R. Kapnick
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**