

Randazzo v 53+2nd Assoc., LLC

2008 NY Slip Op 31583(U)

June 5, 2008

Supreme Court, New York County

Docket Number: 0116788/2006

Judge: Marcy S. Friedman

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MARCY S. FRIEDMAN

PRESENT: _____

PART 57

Justice

Index Number : 116788/2006

RANDAZZO, SALVATORE

VS.

53 + 2ND ASSOCIATES

SEQUENCE NUMBER : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. 116788/006

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion ~~is~~ for partial summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

3

4, 5

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

JUN 10 2008

COUNTY CLERK'S OFFICE

NEW YORK

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

Dated: 6/5/08

Marcy Friedman

MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

SALVATORE RANDAZZO and IRENE
RANDAZZO,

Index No.: 116788/06

Plaintiffs,

DECISION/ORDER

- against -

53+2d ASSOCIATES, LLC and PLAZA
CONSTRUCTION CORP.,

Defendants.

_____ x

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this Labor Law action, plaintiff, Salvatore Randazzo, sues for injuries sustained in an accident at a construction site on August 22, 2006. Plaintiff moves for partial summary judgment on his Labor Law § 240(1) claim. Defendants 53+2nd Associates, LLC and Plaza Construction Corp., the owner and construction manager, respectively, cross-move for summary judgment dismissing plaintiff's claims under §§ 200 and 240(1). Plaintiff does not oppose the branch of the cross-motion for dismissal of the § 200 claim.

It is undisputed that at the time of his accident plaintiff was working on a scaffold that was approximately 16 to 19 feet high, and that he fell into a gap of approximately two feet between the wall on which he was working and the scaffold. It is also undisputed that plaintiff's accident involved an elevation-related hazard within the meaning of § 240(1). Defendants' defense is that plaintiff was a recalcitrant worker and was therefore the sole proximate cause of his accident.

In order to establish a recalcitrant worker defense, the defendant must establish “that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.” (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 [2004]; Kosavick v Tishman Constr. Corp., 50 AD3d 287 [1st Dept 2008].) The defense also requires a showing that the plaintiff “disregarded specific safety instructions.” (Tonaj v ABC Carpet Co., 43 AD3d 337, 338 [1st Dept 2007]. See Cahill, 4 NY3d at 39; Walls v Turner Constr. Co., 10 AD3d 261 [1st Dept 2004], affd 4 NY3d 861 [2005]; Salazar v United Rentals, Inc., 41 AD3d 684 [2d Dept 2007].)

In moving for summary judgment, plaintiff relies on his deposition testimony that the supervisors of his employer, Civetta Cousins (“Civetta”), never asked him to wear any safety equipment (P.’s Dep. at 56), and that he never saw any safety harnesses at the job site.” (Id. at 54.) In opposition, defendants submit the affidavit of Civetta supervisor Batista Bonello, in which he attests that he instructed employees “[o]n a daily basis * * * to wear safety harnesses while working on scaffolding”; that plaintiff was present when he gave such instructions; and that safety harnesses were available at the job site in a box in the trailer used by Civetta employees. (Bonello Aff., ¶¶ 4-6.) Defendant also submits the affidavit of Jose Garcia, a Civetta employee who was working at the job site on the date of plaintiff’s accident, who confirms that Mr. Bonello advised employees to wear harnesses on a daily basis, and that he “wore a harness at all times while working on scaffolding at this project.” (Garcia Aff., ¶ 3.)

The parties both made conclusory statements as to whether or not Civetta gave plaintiff specific instructions to use a harness while working on the scaffold. The parties’ “conflicting

[* 4]
versions of the facts raise issues as to whether adequate safety devices were available and as to whether plaintiff * * * disregarded specific safety instructions.” (See Tonaj, 43 AD3d at 338.)

It is accordingly hereby ORDERED that plaintiff’s motion for partial summary judgment is denied; and it is further

ORDERED that defendants’ cross-motion for summary judgment is granted only to the extent of dismissing plaintiff’s Labor Law § 200 claim.

This constitutes the decision and order of the court.

Dated: New York, New York
June 5, 2008


MARCY FRIEDMAN, J.S.C.

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK