

**Downey v HRH Constr., LLC**

2008 NY Slip Op 32672(U)

September 2, 2008

Supreme Court, New York County

Docket Number: 105950/06

Judge: Barbara R. Kapnick

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

PRESENT: HON. BARBARA R. KAPNICK

PART 12

Justice

Index Number : 105950/2006

DOWNEY, DAVID N.

vs

HRH CONSTRUCTION, LLC

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO.

105950/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

Is 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

*and*  
*cross motion are decided*  
*in accordance with the*  
*accompanying memorandum*  
*decision.*

**FILED**

SEP 05 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

Dated: 9/2/08

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

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):

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

-----X  
DAVID DOWNEY,

Plaintiff,

- against -

HRH CONSTRUCTION, LLC,

Defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 105950/06  
Motion Seq. No. 001

**FILED**

SEP 25 2008

COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff David Downey, an ironworker employed by Rebar Lathing Corp., seeks to recover damages for personal injuries he allegedly sustained on September 10, 2003 during the construction of a new MTA building located at 46-25 Metropolitan Avenue in the Ridgewood section of Brooklyn. Plaintiff claims to have fallen approximately 10 feet from a ladder on which he was working. Defendant HRH Construction, LLC ("HRH") was the general contractor of the project.

Plaintiff previously commenced an action in Supreme Court, Queens County against the Metropolitan Transportation Authority ("MTA"), the New York City Transit Authority ("NYCTA") and HRH. Pursuant to Stipulation dated April 27, 2006, that action was discontinued with prejudice as against defendants MTA and NYCTA only, and was discontinued without prejudice as against defendant HRH.

Plaintiff now moves in the instant action for partial summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1).

Defendant opposes the motion and cross-moves for summary judgment dismissing this action.

Plaintiff has annexed an affidavit from Michael Thomas, the shop steward on the jobsite for all of the structural steel ironworkers, who states, in relevant part, as follows:

4. On this project at the time of David Downey's accident, in order to access the mezzanine level of the project, ironworkers were using the top half of an extension ladder. The ladder that was used to access the mezzanine level did not have flat rubber feet. It was not tied off at the top and it reached only a few inches above the mezzanine level.

5. Although I did not actually see David Downey fall, I was on the ground level approximately eight to ten feet away from where he fell, and I heard the fall. After he fell, several of us observed him on the ground. Also on the ground was the top half of the extension ladder that had fallen. The top half of the extension ladder that was on the ground floor next to David Downey after his fall was not tied off at the top and it did not have feet. The ladder was round at the bottom.

After Mr. Thomas' name and location were identified in the moving papers, defendant served a non-party subpoena upon him, and Mr. Thomas was deposed while this motion was pending.

Defendant argues that Mr. Thomas' affidavit should not be considered because he admitted at his deposition that it was drafted by plaintiff's counsel. In addition, defendant contends

that Mr. Thomas' testimony contradicts his affidavit, since Mr. Thomas testified that he "didn't scrutinize the ladder."

When asked if there was any way that he could describe any part of the ladder other than that it was an aluminum ladder, Mr. Thomas answered, "No." He further clarified that he was not plaintiff's shop steward and did not really know him. Mr. Thomas also testified that he did not know exactly what type of pads the particular ladder had.

Moreover, defendant contends that plaintiff was not injured as a result of the September 10, 2003 accident, but rather an accident that occurred on October 10, 2003 while plaintiff was working for Koch Construction on an unrelated Manhattan bridge project.

In the prior Queens action, plaintiff listed the date of the accident as October 10, 2003 which he testified was a Friday, and testified that he had never injured his neck or back prior to that date. Plaintiff filed for Workers' Compensation benefits for injuries sustained on October 10, 2003. In addition, plaintiff did not seek any medical treatment prior to October 10, 2003 and the records refer to an accident on that date.

Plaintiff contends that there was an initial mistake as to the date of the accident, but now claims that Wednesday, September 10,

2003, is the correct date of the accident and that an amended statement has been filed with the Workers' Compensation Board.

In reply, defendant admits that it may not be for a Court to judge issues of credibility when evaluating a summary judgment motion, but argues that "it is almost incredible as a matter of law for plaintiff to have been mistaken over the course of several years until the prior action was discontinued on April 27, 2006 on the eve of trial." Defendant further argues that it is not "credible that plaintiff would have reported the wrong date of accident to his employer, to several of his own treating physicians, to his own attorney, [and] to the Workers' Compensation Board, in verified legal pleadings, to examining physicians, etc."

In addition defendant argues that plaintiff's claim pursuant to Labor Law § 240(1) must be dismissed on the grounds that plaintiff was provided with adequate safety devices, and is a recalcitrant worker. Plaintiff argues that defendant has not set forth any proof in support of these contentions.

Based on the papers submitted and the oral argument held on the record on July 2, 2008, this Court finds that there are triable issues of fact as to the date and details of the plaintiff's accident.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1) as well as that portion of defendant's cross-motion for summary judgment dismissing said claim, are denied as premature.

Defendant argues, in the alternative, that plaintiff's claims pursuant to Labor Law § 200 and for common law negligence must be dismissed on the ground that it did not supervise or control plaintiff's work. This branch of the cross-motion is granted without opposition and said claims are hereby dismissed.

Finally, defendant argues that plaintiff's claim pursuant to Labor Law § 241(6) must be dismissed on the ground that plaintiff has failed to cite to an applicable or sufficiently specific provision of the Industrial Code.

Plaintiff argues that this branch of the motion should be denied because defendant has not specifically addressed any of the provisions set forth in his Bill of Particulars, i.e., sections 23-1.16 (safety belts), 23-1.21(a) (ladder approval), 23-1.21(b) (ladder general), 23-1.21(c) (single ladders) and 23-1.21(d) (extension ladders).

This Court finds that defendant has made a prima facie showing of its entitlement to summary judgment on plaintiff's Labor Law §

241(6) claim. Absent any substantive opposition from plaintiff, this branch of the cross-motion is granted.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on September 24, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: September 2, 2008

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

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

**FILED**  
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