

Caetano v I7th St. Dev. NY Corp.

2008 NY Slip Op 32878(U)

October 16, 2008

Supreme Court, New York County

Docket Number: 118296/06

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART _____

Index Number : 118296/2006

CAETANO, JOSE

vs.

17TH STREET DEVELOPMENT

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

OCT 21 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 10/16/08

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 10

-----X
JOSE CAETANO,
Plaintiff

-against-

17TH STREET DEVELOPMENT NY CORP.,
BBD DEVELOPERS, LLC, MCE CORP.,
PAV-LAK CONTRACTING INC., and
PAV-LAK INDUSTRIES, INC.,

Defendants.
-----X

Decision/Order

Index No.: 118296/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

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NEW YORK

Papers

Pltf's x/m (§3212) w/RJK affirms, exhs	1
Def's' SA affirm in opp	2
Pltf reply w/RJK affirm	3

Upon the foregoing papers the court's decision is as follows:

In this action, plaintiff alleges that he sustained personal injuries as a result of defendants' violations of the labor laws. Plaintiff now moves for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim. Issue has been joined, but the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The defendants oppose the motion as being premature [CPLR § 3212 (f)] and also on the merits. Therefore, in evaluating plaintiff's motion for summary judgment, not only must it decide whether plaintiff has tendered sufficient evidence to eliminate any material issues of fact from the case [Winegrad v. New York Univ. Med. Ctr., 64

N.Y.2d 851, 853 (1985)], it must further consider whether the information necessary for defendants to fully oppose the motion remains under plaintiff's control. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93 (1st dept 2006) (*internal citations omitted*).

The court's decision and order is as follows:

Arguments

On October 16, 2006, defendant 17th Street Development NY Corp ("17th Street") was lessee of the premises at 236-246 West 17th Street, New York, New York (the "premises") and defendant BBD Developers, LLC ("BBD") was the title owner of the premises. At that time, 17th Street had hired Pav-Lak Industries, Inc. ("Pav-Lak"), pursuant to a contract dated December 14, 2005, to serve as construction manager for a construction project at the premises in which an existing floor was to be demolished and seven new floors were to be added (the "project"). Pav-Lak hired defendant MCE Corp. ("MCE") to perform certain work at the project, and in turn, MCE hired Unicer, plaintiff's employer, as subcontractor. There is no dispute that defendant Pav-Lak Contracting, Inc. had no involvement at the project.

On October 16, 2006, plaintiff was performing carpentry work at the project. Just before his accident, plaintiff was working on approximately the 34th floor, putting up plywood as part of the subflooring for concrete forms. Plaintiff testified at his deposition that while he was working, he stepped on a piece of plywood below him which covered a floor opening. Plaintiff thought the plywood would support him, but instead, the plywood cracked, causing plaintiff to fall through the opening and land on the floor

below. The height differential between the two floors was approximately ten feet. Plaintiff testified that the floor opening was about two feet by four feet in size. Plaintiff stated that the plywood was not marked off and there were no warnings present to indicate that the plywood could not support him. Plaintiff also testified that "a bunch of guys" witnessed the accident, including a man named Rojerio, Chico and Fernando, "the boss."

Plaintiff further testified that his boss drove him to the hospital, despite plaintiff's request for an ambulance. Plaintiff stated:

I ask [the boss] why [he didn't call an ambulance], and he said if he called the ambulance, the cops come in, everybody come in and maybe shut him down, the job. Because special OSHA, if they go too, they are going to shut him down, the job, because it's not – he wasn't protected, especially the hole, when I fell, it – it wasn't properly protected. That's what he told me.

Plaintiff contends that he has established a *prima facie* violation of Labor Law § 240 (1). Defendants argue that plaintiff has failed to establish that he was not provided with safety devices, and, therefore, summary judgment should be denied. Alternatively, defendants argue that the motion is premature because discovery is incomplete. Specifically, defendants claim that depositions of plaintiff's employer, the defendants themselves and of witnesses to plaintiff's accident may reveal whether proper protection was offered to plaintiff and whether he refused said protection.

Plaintiff, in reply, maintains that defendants have failed to offer an evidentiary basis demonstrating that further discovery may lead to relevant evidence.

Discussion

The court finds that plaintiff's motion for summary judgment must be denied as

premature on the ground that there is outstanding discovery sought by defendants, *inter alia*, the opportunity to depose eyewitnesses and other witnesses. At his deposition held on April 7, 2008, plaintiff identified partial names of several eyewitnesses and other witnesses with knowledge of plaintiff's alleged accident, all of whom are not parties to this action. The note of issue in this action is not due to be filed by plaintiff until February 17, 2009. Because the aforementioned discovery may establish critical components of the claims and defenses in this action, such discovery may lead to relevant evidence. Therefore, defendants are entitled to such non-party depositions provided they are able to identify the relevant non-parties. Moreover, plaintiff has failed to demonstrate any prejudice as a result of such discovery.

Two further points. Defendants need for discovery does not include depositions of its own clients. Defendants, presumably, have unlimited access to such person(s). Additionally, defendants are reminded to pursue this discovery diligently. Failure to do so within the time set out by the court for the completion of discovery may be deemed a waiver.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is denied as premature.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
 October 16, 2008

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Hon. Judith J. Gische, JSC