Gaudioso v St. John's Univ.
2010 NY Slip Op 33633(U)
January 6, 2010
Sup Ct, New York County
Docket Number: 115584/2008
Judge: Jane S. Solomon
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SCANNED ON 1/10/2011
[* 1]

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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 115584/2008

GAUDIOSO, PATRICK

vs

ST. JOHN'S UNIVERSITY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE 9/20/10

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order

FILED

JAN 10 2011

NEW YORK COUNTY CLERK'S OFFICE

→ Note Pre trial set for 2/7/11

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

Dated: 1/6/11

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

PATRICK GAUDIOSO and MARYANNE GAUDIOSO,

Plaintiffs,

-against-

ST. JOHN'S UNIVERSITY and STRUCTURE TONE, INC.,

Defendants.

Index No. 115584/2008

DECISION & ORDER

FILED

JAN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Patrick Gaudioso (Gaudioso) and his wife, Maryanne Gaudioso (collectively, Plaintiffs) sue the defendants, under labor law sections 200, 240(1) and 241(6), for damages suffered in a workplace incident, and for loss of consortium. Plaintiffs move for summary judgment on the section 240(1) and 241(6) claims. Defendants jointly oppose the motion, which is decided as follows.

FACTS

In 2007, St. John's University (St. John's) hired Structure Tone, Inc. (Structure) as its general contractor for a construction project on its campus in Queens, New York. Structure hired non-party Berardi Stone Setting, Inc. (Berardi) as a subcontractor. Gaudioso was an employee of Berardi at the worksite. On September 6, 2007, he was directed to retrieve water from a pail that was situated between a large trash container and a dormitory which was under construction. While doing so, he was struck by a three by five foot piece of

sheetrock that was thrown (or dropped) towards the container from the dormitory's second story window. Gaudioso testified that prior to his accident, he had seen debris being thrown into the container from above and had complained to Berardi's foreman (Gaudioso EBT, attached to Motion, Ex. H, p. 120). Structure's project manager, Louis Teja (Teja), testified that workers were instructed to throw debris from the window, but only at the end of the work day (Teja EBT, attached to Motion, Ex. I, p. 29-30).

DISCUSSION

A. Labor Law § 240(1)

Plaintiffs argue that the defendants failed to provide adequate overhead protection and safety devices for an area that was exposed to falling debris, and that the sheetrock should have been properly secured rather than thrown. Citing to *Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001], Defendants counter that section 240(1) applies only to objects that fall while being hoisted or secured, and that the sheetrock was not material being hoisted or a load that required securing.

In *Narducci*, a worker was struck by window glass that fell from a building while no one was working on the window; there was no evidence that anyone had worked on it during the project. The court held that the "absence of a necessary hoisting or securing device of the kind enumerated in Labor Law § 240 (1) did not cause the falling glass here" (*Narducci*, 96 NY2d at 268-9). In analyzing *Narducci*, the First Department explained

that "[w]hat is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" (*Buckley v. Columbia Grammar and Preparatory,* 44 AD3d 263, 269 [1st Dept., 2007]), and, in a later decision, further noted that "falling-object liability is not limited to cases in which the object is being hoisted or secured at the precise time that it falls" (*Vargas v. City of New York,* 59 AD3d 261 [1st Dept., 2009]; see also *Outar v. City of New York,* 5 NY3d 731 [2005][unsecured work equipment within statute]; *Quattrocchi v. F.J. Sciame Construction Co., Inc.,* 11 NY3d 757 [2008][falling planks used to brace air conditioner within statute]).

Here, it is unquestioned that the debris that fell was generated during work, and was not a general hazard of the workplace such as in *Narducci*. Proper securing devices would have prevented the free fall, and a hoist would have eliminated the need to throw the material. Moreover, because Structure directed its workers to throw debris from the window, the possibility that a passing worker could be hit by it was foreseeable. Whether the debris was thrown intentionally or slipped accidentally is of no moment, and defendants are liable to Gaudioso under Section 240(1), and summary judgment is granted on this claim.

B. Labor Law § 241(6)

Section 241(6) places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross* v. *Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Plaintiffs argue that defendants violated 12 NYCRR 23-1.7(a)(1), entitled "overhead hazards," which provides, as relevant:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.

"[W]here an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley v. Columbia Grammar and Preparatory,* 44 AD3d 263, 271 [1st Dept., 2007]).

Defendants argue that a question of fact remains regarding whether the area was normally exposed to falling hazards because Teja stated at his EBT that employees were instructed to throw debris from one specific window on the second floor, only at the end of the day, after all workers were gone from the area (Teja EBT, attached to Motion, Ex. I, p. 29-30), while Gaudioso states that debris was regularly dropped from the window during working hours. This issue is one of credibility and is best left to the determination of a jury, and summary judgment as to the section 241(6) cause of action is denied.

In accordance with the foregoing, it hereby is

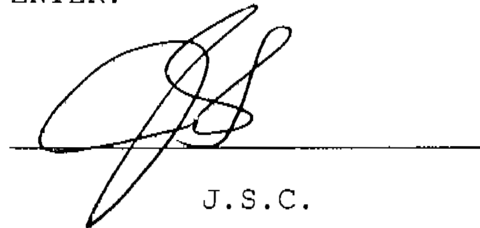
ORDERED that the motion is granted as to liability

on the Labor Law § 240(1) claim, and is otherwise denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on February 7, 2011 at 2 PM.

Dated: January 6, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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