Coaxum v Metcon Constr., Inc.
2010 NY Slip Op 33904(U)
March 9, 2010
Supreme Court, Bronx County
Docket Number: 24303/04
Judge: Patricia Anne Williams
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[* 1] FILED Nov 19 2010 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 24

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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COAXUM,SCOTT Index №. **0024303/2004**

-against- Hon..**PATRICIA ANNE WILLIAMS** ,

METCON CONSTRUCTION,INC. Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **December 04 2009** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed decision and order of same date.

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Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 11/9/2010

Hon. Patricia Anne Williams
PATRICIA ANNE WILLIAMS, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-24

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SCOTT COAXUM,

Plaintiff, **DECISION & ORDER**

- against - **INDEX NO. 24303/04**

METCON CONSTRUCTION, INC.,
200 WEST 26, L.L.C. and BUY
BUY BABY, INC.,

Defendants,

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200 WEST 26 L.L.C. s/h/a/ 200 WEST 26,
L.L.C. and BUY BUY BABY, INC.,

Third-Party Plaintiff, **T.P. INDEX NO.85169/06**

- against -

METCON CONSTRUCTION, INC.,

Third-Party Defendant.

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WILLIAMS, PATRICIA ANNE, J.:

The defendant/third-party plaintiffs 200 West 26, L.L.C and Buy Buy Baby, Inc. have filed the instant motion pursuant to Rule 3212 of the Civil Practice Law and Rules (the "CPLR"). The defendant/third-party plaintiffs seek summary judgment and the dismissal of the plaintiff's complaint on the ground that they bear no liability for the occurrence which resulted in his injuries. The plaintiff, Scott Coaxum, has responded in opposition to the instant motion. For the reasons set forth hereinafter, the defendant/third-party plaintiff's application is denied in its entirety.

The plaintiff commenced this action following an injury which occurred on August 12, 2002. The plaintiff filed a Summons and Verified Complaint with the Bronx County

Clerk's office on or about October 28, 2004. An Amended Summons and Verified Complaint was filed on February 9, 2005 which now included Buy Buy Baby, Inc. as a defendant. Issue was joined with the service of defendants 200 West 26, L.L.C. and Buy Buy Baby, Inc.'s joint Verified Answer on or about March 17, 2005. The moving defendants subsequently served two amended Verified Answers. The defendant Metcon Construction, Inc., has never appeared in this action. The plaintiff served his Verified Bill of Particulars on or about July 18, 2005. He was subsequently deposed on November 13, 2008. The defendant/third-party plaintiff Buy Buy Baby Inc. produced one Jeffrey Feinstein for deposition on December 10, 2008. Mr. Feinstein was employed as vice president, secretary and treasurer of Buy Buy Baby Inc. from 1996 until September 25, 2008. His responsibilities included site selection for future stores, store design, management, and buying.

Factual Background

The plaintiff Scott Coaxum worked with the non-appearing defendant/third-party defendant Metcon Construction, Inc. ("Metcon") for approximately one year up to the date of the accident – August 12, 2002. The plaintiff worked as a taper, which required him to tape sheetrock prior to its being painted. The plaintiff testified during his deposition that just prior to the accident he had been up on the scaffold taping sheetrock and had come down to move something. As he was on his way back up the scaffold he was stopped by another worker on the site who proceeded to move his scaffold aside and insisted that he would be working in the area where the plaintiff had been working. Therefore the plaintiff would not be able to continue working in this

particular area.

Mr. Coaxum further testified that he did not know who this worker was and that he had never seen him before. Moreover, he was not sure exactly which company he worked for but believed he was working on the installation of the HVAC system. The plaintiff described this worker as a heavy set, Caucasian male. This gentleman insisted on working in the same area as the plaintiff and when the plaintiff refused to concede the space to him he allegedly pushed the plaintiff causing him to step back into the uncovered hole which was in the middle of the concrete floor of the work site. The plaintiff described the hole as approximately two to three feet deep. The hole was for a drainage pipe upon which work had been performed to affix a grate to the floor. However, the work had not been completed and as of the date of the accident, there was no grate, nor was there anything else covering the hole.

The plaintiff lay in the hole for approximately half an hour before the ambulance arrived. He was unable to get up because his right tibia had broken in half as a result of the fall. He was eventually taken by ambulance to Bellevue Hospital where emergency surgery was performed on his right leg which included the insertion of plates and metal rods. Mr. Coaxum remained hospitalized at Bellevue for approximately six weeks. He further testified that he has not worked since the date of the accident.

Discussion

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is arguable. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y. 223, 231, 413 N.Y.S.2d 141, 145 (1978). To obtain

summary judgment the moving party must establish his cause of action or defense sufficiently to warrant the court granting judgment in his favor as a matter of law. The opposing party "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuses for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597-598 (1980).

Thus, the function of summary judgment is issue finding, not issue determination. The court must scrutinize the papers on the motion carefully in the light most favorable to the party opposing summary judgment and should draw all reasonable inferences in favor of the non-moving party. *Sosnoff v. Jason D. Carter, et al.*, 165 A.D.2d 486, 492, 568 N.Y.S.2d 43, 47 (1st Dept. 1991); *Assaf, et al. v. Ropog Cab Corp., et al.*, 153 A.D.2d 520, 521, 544 N.Y.S.2d 834, 835 (1st Dept. 1989). In this case, such scrutiny requires this Court to deny the defendants' motions

The moving defendants argue that summary judgment should be granted in their favor because at the time of the alleged accident the plaintiff was not engaged in activity protected under either Sections 200, 240 and/or 241 of the Labor Law. Specifically, defense counsel alleges that at the time the plaintiff obtained his injuries he was engaged in an altercation with another worker on the construction site. The defendants cite to selective portions of the plaintiff's deposition testimony in order to substantiate this point. However, in so doing, the defendants elect to view the plaintiff's

activities in a vacuum as opposed to viewing them in their totality. It is clear from the plaintiff's deposition transcript that immediately prior to his accident he had been working on a scaffold in the process of taping sheetrock. The plaintiff testified that he came down from the scaffold solely in order to move something out of the way with the intention of getting right back up on the scaffold. In fact, he was about to go back up the scaffold and continue working when he was stopped by an unknown worker who moved his scaffold and pushed him causing him to fall into an uncovered hole on the worksite.

First looking at the plaintiff's claims pursuant to Labor Law § 241(6) the statute requires that:

> All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, when construction or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work shall comply therewith.

The plaintiff argues that the defendants failed to provide adequate protection from the open hole and specifically violated12 NYCRR 23-1.7(b)(1) and 23-1.7(e)(1) and (2). The first of these statutes is applicable to the facts set forth in the instant action and reads as follows:

> (b) Falling hazards.
>
> (1) Hazardous openings

> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Given the facts set forth by the plaintiff during his deposition, which the defendants do not deny, there was indeed an uncovered hole in the middle of the area where the plaintiff was working. There were no barricades, ropes, or caution signs to separate this area from the rest of the work site nor was there any planking covering the opening itself. Accordingly, given the facts set forth by the plaintiff it is apparent that the defendants violated the regulation contained in 12 NYCRR 23-1.7(b)(1).

The plaintiff also alleges that the defendants violated regulation 12 NYCRR 23-1.7(e)(1) and (2) which reads as follows:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as my be consistent with the work being performed.

Given the facts of the instant case, this regulation is applicable only insofar as the uncovered hole could be deemed a "condition which could cause tripping" as stated in subsection 1. However, the provisions of subsection 2 are not applicable to the facts before this court.

The defendants argue that they bear no liability for plaintiff's injuries not because they had no duty to cover the hole or safeguard the worksite, but rather because the plaintiff's own actions were the sole proximate cause of his injuries. The defendants

further argue that the plaintiff was not involved in construction work at the time he fell into the hole but was in the midst of an altercation with another worker and that said activity is unprotected by the Labor Law statutes.

The defendants' argument fails to take into consideration the plaintiff's activity immediately preceding this incident. The plaintiff had been working on a scaffold and had intended to continue working on the scaffold, but was stopped through no fault of his own. For the purposes of the statute, the plaintiff was involved in construction work as defined in 12 NYCRR 23-1.4(b)(13). The defendant's failure to cover or cordon off the hole located in the middle of the worksite would also serve as a basis for the plaintiff's claim under Labor Law §200 which is a codification of a claim of common law negligence. Accordingly, with respect to the plaintiff's claims under Labor Law §200 and §241(6) this court can not grant judgment in favor of the defendants as a matter of law as there are questions of fact in existence which must be answered by the ultimate trier of fact.

With respect to the plaintiff's Labor Law §240 (1) claim the relevant portions of the statute reads as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

This statute is intended to protect workers by placing the ultimate responsibility for safety on the worksite upon the owner and general contractor, rather than upon the

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workers. *Gordon v. Eastern Railway Supply, Inc. et al*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 129 (1993). Thus, the liability imposed on owners, contractors and their agents for any breach of their statutory duty is absolute. *Gordon v. Eastern Railway Supply, Inc. et al.*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 129 (1993). A plaintiff is not required to prove negligence on the part of the defendant owner, contractor or subcontractor in order to sustain his claim under Labor Law §240; however, he must demonstrate that he was subjected to an elevation-related risk which the statute was designed to obviate and that there was a causal connection between a violation of the statute and the injury sustained. Here given the facts before this court and recent case law set forth by the Appellate Division First Department, this court can not grant judgment in the defendants' favor as a matter of law.

In *Salazar v. Novalex Contracting Corp.*, 72 A.D.3d 418, 987 N.Y.S.2d 423 (1st Dept., 2010), the Appellate Court held that where a worker traversing a basement floor in the process of laying cement fell into an uncovered trench approximately two feet wide and four feet deep, the protections of the Labor Law § 240 were applicable. The Appellate Court held that the difference between the level of the basement floor and the bottom of the trench into which the plaintiff Salazar fell constituted an elevation related risk to the plaintiff to which Labor Law § 240 applied. In the instant action, the plaintiff testified that the depth of the hole into which he fell was two to three feet deep. While the Salazar court stated that a hole the depth of eighteen inches or less did not qualify as a sufficient elevation related differential, there is no bright line rule as to what depth is sufficient and/or necessary to expose the worker to a gravity related hazard requiring

protection as opposed to a hazard that is just one of the usual and ordinary dangers associated with a construction site. Moreover, in addressing the regulations applicable to the plaintiff's Labor Law § 241 claim the *Salazar* court states that "this Court has defined the term 'hazardous opening' as an opening 'large enough for a person to fit into.'" *citing Messina v. City of New York*, 300 A.D.2d 121, 123, 752 N.Y.S.2d 608 (1st Dept., 2002). Accordingly, given the facts of the instant matter this court can not grant the defendants' application for summary judgment as a matter of law.

CONCLUSION

The foregoing constitutes the decision and order of this Court.

DATED: NOVEMBER 9, 2010

PATRICIA ANNE WILLIAMS
ACTING JUSTICE OF THE
SUPREME COURT