Curci v Hunt/Bovis Lend Lease Alliance II
2011 NY Slip Op 30884(U)
April 11, 2011
Supreme Court, New York County
Docket Number: 110843/2008
Judge: Jane S. Solomon
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SCANNED ON 4/12/2011

[* 1]

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

JANE S. SOLOMON

PRESENT: _____ PART 55

Index Number : 110843/2008

CURCI, BRIAN

INDEX NO. _____

VS

HUNT/BOVIS LEND LEASE

MOTION DATE 11/29/10

Sequence Number : 002

MOTION SEQ. NO. _____

REARGUMENT/ RECONSIDERATION

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 ...	1-4
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision and Order.

NB 6/6/11 conf at 2PM put at end.

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/11/11

JANE S. SOLOMON J.S.C.

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

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 55

----------X

BRIAN CURCI,

Plaintiff,

-against-

HUNT/BOVIS LEND LEASE ALLIANCE II, A JOINT VENTURE, HUNT CONSTRUCTION GROUP, INC., BOVIS LEND LEASE, INC., NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, QUEENS BALL PARK COMPANY, LLC., and METS DEVELOPMENT COMPANY, LLC,

Defendants.

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Index No. 110843/2008

DECISION and ORDER

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SOLOMON, J.:

Plaintiff, an ironworker, was injured while constructing Citi Field, the New York Mets' new baseball stadium. He moved for summary judgment as to liability on his Labor Law § 240(1) cause of action, which was denied. He now moves for leave to reargue on the ground that the court misapprehended the law and facts in the underlying motion. Upon review of the papers, leave to reargue is granted, and the motion is decided as follows.

Plaintiff was working on the fourth floor of the west side of the stadium, which was made of "Q-deck," a permanent metal floor upon which concrete is poured to create the final flooring for the stadium's upper deck. While working, Plaintiff walked about 10 feet when a portion of the floor collapsed beneath him, causing him to fall partway into a square hole,

approximately 18 to 24 inches wide, that had been cut into the Q-deck to facilitate electrical and mechanical work. After the fall, he learned that he stepped on and fell through a thin "metal plastic" covering on the hole, which was the same color as the Q-deck.

The court, focusing on the nature of the floor, determined that no safety devices were needed to safely traverse the permanent Q-deck. Plaintiff argues that it was not the Q-deck that was at issue, but the lack of adequate protective covering over the hole. In support, he cites to *Carpio v. Tishman Construction Corporation of New York*, 240 AD2d 234 (1st Dept., 1997)(holding that a worker whose leg fell through a 10 x 14 inch wide hole in the floor had a valid § 240(1) claim), and directs the court's attention to the deposition testimony of Robert Wright (Wright), the safety manager for Hunt/Bovis. Wright testified that the Q-deck holes were supposed to be covered by plywood that was nailed into the decking (Wright deposition, attached to Motion, Ex. H, p. 24-5) and marked with "H-O-L-E" in orange (*Id.*, P. 47), but that the hole which Plaintiff fell through was not so protected.

Defendants oppose the motion with three arguments. They first argue that there was no elevation risk because the Q-deck was the "ground." This argument is unavailing under *Carpio*, supra, and its successor, *Salazar v. Novalex Contracting Corp*, 72

AD3d 418 (1st Dept., 2010). Next, Defendants argue that the denial of summary judgment was appropriate because the accident was unwitnessed and there remain questions as to Plaintiff's credibility (*Yellitz v. Brooklyn Union Gas Co.*, 242 AD2d 270 [2nd Dept., 1997]). While Plaintiff's partner did not see the fall, he was ten feet away, heard Plaintiff fall and call for help, and saw its immediate aftermath. He is a valid witness, and it cannot be said that Plaintiff's event was unwitnessed. Finally, Defendants argue that the fall is not one protected by the Labor Law because he only "fell into an opening up to his waist and only with one leg." This is not the law in the First Department (*Carpio* and *Salazar*, *supra*).

Upon review of the reargument, it is determined that the court's earlier decision misapprehended the law. Plaintiff's accident is materially similar to that of *Carpio*, and his accident is causally related to the failure to provide a secure cover for the opening (*Labbate v. Bayrock/ZAR Spring LLC*, 2010 WL 3536805 [Sup Ct., NY County, 2010]).

Accordingly, it hereby is

ORDERED that the motion of the Plaintiff, Brian Curci, for leave to reargue his motion for summary judgment on his Labor Law § 240(1) cause of action is granted; and it further is

ORDERED that, upon reargument, the prior order, dated August 18, 2010, is vacated and Plaintiff's motion for summary

judgment is granted as to liability on the Labor Law § 240(1) cause of action; 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 June 6, 2011 at 2:00 PM, of which courtesy copies of this order to counsel is notice.

Dated: 4/11/11, 2011

Enter:

J.S.C.

JANE S. SOLOMON

FILED

APR 12 2011

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