

Brady v Tiago Holdings, LLC

2011 NY Slip Op 32200(U)

August 9, 2011

Supreme Court, New York County

Docket Number: 116674/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 116674/2008

BRADY, LAWRENCE

vs

TIAGO HOLDINGS

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 5/16/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion: Yes No

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

Note - Pre trial conf for 9/12/11 set at end

FILED

AUG 10 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/9/11

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.

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

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

-----X
LAWRENCE BRADY,

Index No. 116674/2008

Plaintiff,

DECISION & ORDER

-against-

TIAGO HOLDINGS, LLC, BLOOMFIELD
DEVELOPMENT, INC. and RC DOLNER, LLC,

Defendants.

-----X

SOLOMON, J.:

FILED

AUG 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Lawrence Brady (Brady) sues, under New York State Labor Law (Labor Law) §§ 200, 240(1) and 241(6), for injuries suffered while he worked at a construction site on property owned by Tiago Holdings, LLC. (Tiago) and Bloomfield Development Group, Ltd. i/s/h/a Bloomfield Development, Inc. (Bloomfield; together, Defendants). By stipulation, the action has been discontinued as against defendant RC Dolner, LLC. Defendants move for summary judgment on each Labor Law claim. Brady opposes the motion, but withdraws his § 240(1) claim.

FACTS

Brady was a Teamster shop steward employed by Tishman Construction Corp., the construction manager for the East River Plaza project, a major construction project located on the far East side of Manhattan, between 117th and 118th Street. He alleges that at 7:00 A.M. on a cold December morning, he slipped and fell on a sheet of ice that the Defendants failed to remove, sand, or cover, in violation of the Industrial Code.

The area where he fell consisted of a gravel surface (installed by Tishman), on top of which were parked five work trailers, which served as offices. The gravel covered a wide area, near the entrance/exit to the site, where vehicles regularly parked. A line of orange safety cones was put down on the gravel in order to create a demarked walkway for workers. The site also contained a "mobile wash station," where work vehicles were cleaned before leaving the site. Prior to the incident, the station was removed, and workers were required to clean their vehicles in a jury-rigged wash station. The cleaning water occasionally leaked out on to the gravel, pooled, and froze into icy patches (Affidavit of Thomas Kelly, attached to Opposition, Ex. 2).

Brady's job required him to traverse the gravel area regularly during the work day. On the morning in question, he slipped and fell on ice while walking on the path between the cones. Defendants dispute that the cones created a walkway within the meaning of the Industrial Code.

Labor Law § 200

Defendants argue that Brady has not established actual or constructive notice of the hazard. Brady counters that the condition was created by water run-off from the wash station, and Defendants knew of the problem from repeated worker complaints.

In support he supplies the affidavits of two witnesses, Thomas Kelly and Frank Hauber, both operational engineers at the work site. They state that the wash station "constantly leaked water" and "caused floods" (Kelly Affidavit, attached to Opposition, Ex. 2; Hauber Affidavit, attached to Opposition, Ex. 3). Kelly also states that he repeatedly complained to Tishman and the owners' representatives about the problems (Id.). In reply, Defendants state that the wash station was over three hundred feet from the accident area and could not have been its cause. This is a question of fact best left to the jury. Accordingly, summary judgment must be denied on this cause of action.

Labor Law 241(6)

Labor Law § 241(6) was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections. It 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]).

The Industrial Code sections at issue here are § 23-1.7(d) (slipping hazards):

Employers shall not suffer or permit any employee to use a floor, passageway, walkway . . . which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

and § 23-1.30 (illumination):

Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations . . .

In support of their arguments, Defendants cite to *Roberts v. Worth Construction, Inc.*, 21 AD3d 1074 (2nd Dept., 2005), which held that a "dirt roadway, which was located in an open area at ground level . . . did not constitute a walkway..." From this holding, Defendants argue that the Industrial Code "do[es] not apply to outside areas at construction sites, which are open areas or areas which exist between buildings." This argument is unpersuasive. Brady's description of the area where he fell is not that of a "dirt roadway" in an "open area." He described a dedicated pedestrian gravel path, within the work site, cordoned off by orange cones for the purpose of maintaining an area free of vehicles (both construction and personal). As described, the area where Brady fell is a "walkway," and is covered by Industrial Code § 23-1.7(d).

Finally, Defendants argue that Brady's insufficient illumination claim must fail because it is conclusory and unsubstantiated. It is neither. Brady corroborates his own statement that the area was dark and unlit with the affidavits of Kelly and Hauber. Notably, it is undisputed that there were no lights provided in or around the area where Brady fell, and neither side provides the time for sunrise on December 17, 2007.

In light of the foregoing, Brady's § 241(6) claims may not be dismissed as a matter of law; and it hereby is

ORDERED that Defendants' motion for summary judgment is 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 September 12, 2011 at 2 PM.

Dated: 8/9/11, 2011

Enter: 

J.S.C.

FILED

AUG 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

WILLIAM R. BLOOM