

**Arbusto v Bank St. Commons, LLC**

2012 NY Slip Op 33317(U)

January 27, 2012

Supreme Court, Bronx County

Docket Number: 21253/05

Judge: Mary Ann Brigantti-Hughes

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FEB 7 2012

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

\_\_\_\_\_  
RICHARD ARBUSTO, X

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 21253/05

BANK STREET COMMONS, LLC and HRH  
CONSTRUCTION, LLC, and HRH CONSTRUCTION and  
REGIONAL SCAFFOLDING & HOISTING CO., INC.,

Defendants.

\_\_\_\_\_  
The following papers numbered 1 to read on the below motions noticed on August 17, 2011 and  
duly submitted on the Part 15 Motion calendar of September 7, 2011: X

<u>Papers Submitted</u>		<u>Numbered</u>
Pl. Affirmation in Support of Motion, with Exhibits		1,2
Def's Affirmation in Opposition		3
Pls. Affirmation in Reply		7

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FEB - 7 2012

In an action to recover damages arising from personal injuries, Plaintiff Richard Arbusto (hereinafter the "Plaintiff") moves to renew and reargue its summary judgment motion on the issue of liability as to his Labor Law §240(1) claims. Defendants Bank Street Commons, LLC., HRH Construction, LLC, HRH Construction, and Regional Scaffolding & Hosting Co., Inc. (hereinafter "Defendants") oppose the motion.

I. Factual and Procedural History

On September 12, 2002, at approximately 9:30AM, construction was ongoing at Bank Street Commons in White Plains, New York. Plaintiff was a carpenter and shop steward employed by subcontractor Prince Carpentry.

Plaintiff was using a personnel and material hoist at relevant times. He described this mechanism as an elevator attached to the outside perimeter of the building at the job site, and enclosed with a wire like a "cage". The elevator was used to lift both workers and materials to

different elevations in the north tower structure of the construction site. It operated by rollers which move along tracks. The hoist car itself is 5-feet wide by 12-feet deep by 10-feet high, and is controlled by an operator stationed outside of the car. Plaintiff had used this elevator prior to the accident, "maybe once a day". In order to carry out his duties, Plaintiff had to use the elevator to transport materials to the upper floors of the construction site. Plaintiff would also use a metal "sheet rock dolly" with wheels and a brace to transport the materials. Plaintiff testified that when items were on this dolly, you would need to hold them in place with your hands to prevent them from falling. There were no straps or belts on the dolly to secure items in place. He testified that the elevator would customarily "jerk" when it approached a floor, with its doors closed.

At the time of this incident, Plaintiff was being transported in the elevator along with a bundle of track metal from the ground floor to one of the upper levels of the work site. The bundle consisted of strips of metal used to edge corners of sheet rock. The strips were 8-10 feet long, strapped together, and placed on a metal dolly by carpenters. The materials extended over the edges of the metal dolly. Plaintiff testified that because of the weight, he needed the assistance of another worker to push the metal dolly onto the elevator. The accident occurred when the elevator allegedly "jerked up and down" causing the unsecured material that was on the dolly to fall on top of him. Plaintiff testified that the material fell on his leg, causing him to fall and strike the floor. He could not recall if the metal dolly itself fell.

Plaintiff thereafter brought the instant action against Defendants, alleging violation of Labor Law §§240(1), 241(6), 200, and a claim of common-law negligence.

In a May 20, 2011 Decision and Order, this court granted Defendants' cross-motion for summary judgment, dismissing Plaintiff's claims made under Labor Law §240(1), but denied Defendant's cross-motion as to Plaintiff's claims under Labor Law §241(6), 200, and common-law negligence. Plaintiff now moves to renew and reargue that portion of the Order that denied its motion for summary judgment and granted Defendants' cross-motion for summary judgment on the issue of Labor Law §240(1).

II. Standard of Review

A motion to reargue may be granted only upon the showing that the court overlooked or misapprehended the facts of law, or for some reason mistakenly arrived at its earlier decision. *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 (1<sup>st</sup> Dept. 1992). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. *Id.*

III. Analysis

Plaintiff argues that this Court overlooked appellate court decisions in rendering its Decision and Order, and asserts that these decisions are controlling and applicable to the instant facts and circumstances. Plaintiff initially cites *Rendino v. City of New York*, 83 A.D.3d 540 (1<sup>st</sup> Dept. 2011). In that matter, the plaintiff stood in a basket six floors up in order to caulk some windows, and the basket “suddenly dropped several feet causing the plaintiff to fall within the basket and sustain injuries.” The court reversed denial of plaintiff’s motion for summary judgment on its Labor Law §240 claim, holding “[e]ven if the basket merely descended at a faster rate of speed than intended due to a mechanical defect, as claimed by defendants, defendants have still failed to show that the basket’s descent and plaintiff’s resulting injury were not related to the application of the force of gravity on the basket.” *Id.*

Plaintiff also cites *Harris v. City of New York*, 83 A.D.3d 104 (1<sup>st</sup> Dept. 2011). In that case, the plaintiff and his co-workers were removing portions of a decking of a bridge, when one one-ton slab failed to separate. Plaintiff was directed to use a four-by-four piece of lumber as a lever while a crane slowly lowered the other end of the slab. The slab, however, descended quickly, causing the four-by-four upon which plaintiff was perched to shatter, causing the plaintiff to fall 3-4 feet to the ground, causing injury. *Id.* Citing *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2010), the court found that the action was within the scope of Labor Law §240(1), holding “[a]lthough there is precedent that section 240(1) liability may not attach where a falling object descends at a *de minimus* distance [citation omitted], the *Runner* decision makes clear that the weight of the falling object and the amount of force it was capable of generating, even over the course of a relatively short descent, must be taken into account. *Id.*

*Harris* involves a hoisted one-ton weight being dropped, which caused injury when plaintiff's plank shattered, causing him to fall several feet. This case, however, allegedly involves a "jerking" elevator, which caused a dolly to fall over. There is no "descent" to speak of whatsoever, unlike in *Harris*. Accordingly, this case is factually distinguishable.

*Rendino, supra* is also readily distinguishable from the case at bar. In *Rendino*, the plaintiff's injury arose directly from a significant height differential, when the basket fell "several feet" causing plaintiff to fall within the basket. *Id.* There, the alleged injury was not merely tangentially related to the effects of gravity. In this matter, Plaintiff asserts that the elevator hoist "jerked" up and down, causing a dolly of materials he was standing near to fall over and cause him injury. Plaintiff does not allege that the hoist plummeted several feet or that there was a significant height differential between himself and the dolly with materials. The rule holds true that "the single dispositive question is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2010). *See also Wilinski v. 334 East 92<sup>nd</sup> St. Housing Dev. Fund Corp.*, \_\_\_ N.Y.3d \_\_\_, N.Y.S.2d \_\_\_, 2011 WL 5040902 (October 25, 2011), *mod'g* 71 A.D.3d 538 (1<sup>st</sup> Dept. 2010). There was no such significant elevation differential in this matter.

#### IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion to reargue is hereby granted, but upon reargument, the Court adheres to its May 20, 2011 Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: January 27, 2012



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Hon. Mary Ann Brigantti-Hughes, J.S.C.