

Lois v Flintlock Constr. Servs., LLC

2014 NY Slip Op 33421(U)

December 4, 2014

Supreme Court, Bronx County

Docket Number: 304208/09

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

JORGE LOIS,

Plaintiff,

-against-

FLINTLOCK CONSTRUCTION SERVICES, LLC
and BASS ASSOCIATES, LLC,

Defendants.

**MEMORANDUM
DECISION/ORDER**
Index No.: 304208/09

FLINTLOCK CONSTRUCTION SERVICES, LLC
and BASS ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

J & R GLASSWORKS, INC.,

Third-Party Defendant.

Third-Party Index
No.: 83755/10

FLINTLOCK CONSTRUCTION SERVICES, LLC
and BASS ASSOCIATES, LLC,

Second Third-Party Plaintiffs,

-against-

FLAG AR PROPERTY, LLC and HME HOLDINGS
OF NEW YORK, LLC,

Second Third-Party Defendants.

Second Third-Party
Index No.: 84082/13

HON. MARK FRIEDLANDER

Defendants/third-party plaintiffs, Flintlock Construction Services, LLC (“Flintlock”) and Bass Associates, LLC (“Bass”), move for an order, pursuant to CPLR§3212, granting to Flintlock

and Bass, summary judgment dismissing plaintiff's complaint and all causes of action based upon common law negligence and/or under Labor Law §§241(6) and 200, and all cross-claims. Third-party defendant, J & R Glassworks, Inc. ("J & R"), moves for an order, pursuant to CPLR§3212, dismissing the complaint and all cross-claims against J & R. The motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by him on July 27, 2007, as a result of his slipping on the edge of a piece of plastic which was covering a pile of construction debris. Plaintiff's bill of particulars alleges, in addition to common law negligence, that defendants violated Labor Law §§200, 241 and Rule 23 of the New York State Industrial Code, including but not limited to sections 23-1.5, 23-1.7, 23-1.33, 23-2.1, 23-3.1, 23-3.2 and 23-3.3.

The facts, as culled from the pleadings, deposition transcripts, exhibits and plaintiff's affidavit, are as follows: Bass was the owner of the Chelsea Arts Building, located at 545 West 25th Street, New York, New York ("the Building"). Flintlock was hired by Bass as the Construction Manager, serving as the General Contractor, to build a twenty story commercial condominium, with each floor to be separately purchased, for use as for fine art galleries, etc. Flintlock was to construct the Building core and shell, with each individual unit (floor) owner to do the "build out" of its individual unit/floor. Flintlock was not hired to do any interior work. Flintlock warranted the work for a period of one year from the date of substantial completion of the project. J & R was hired by Flintlock to do the facade glasswork for the entire Building. A temporary Certificate of Occupancy was issued in January, 2007. Flintlock substantially completed the project in March, 2007, with the exception of various punch list items, and turned

the Building over to the owner (Bass). People were sent back to the Building in the spring and summer of 2007 to work on punch list items. One of the items included a continuing problem with water leaking into the Building through the glass panels installed by J & R on some floors, including the 8th and 9th floors. Pursuant to its warranty, J & R returned to the Building to reseal some of the windows in order to remedy the leaking problem. Neither Flintlock nor Bass ever supervised J & R's work.

On March 1, 2007 and March 29, 2007, deeds to the 9th and 8th floors were recorded in the Office of the City Register, New York County, transferring title to these floors from Bass to Flag Art Property, LLC and HME Holdings of New York, LLC.

J & R had previously done window installation at the Building, providing all the materials, including caulking, framing, etc. According to Jorge Lois' ("Lois") deposition testimony and his affidavit, Lois was employed by J & R for approximately four years prior to his accident. On July 26, 2007, plaintiff's supervisor, Richard Fena, told Lois and Kevin Gorman ("Gorman"), a co-worker, that they would be going to the Building the following day to fix a window leak. Lois was Gorman's assistant. Plaintiff's duties at the Building consisted of putting in frames, aluminum and caulking. The leak Lois and Gorman were to fix was located on the 8th or 9th floor, but Lois could not remember which. On July 27, 2007, he arrived at the Building and went to the 8th or 9th floor. Upon reaching the floor, Lois saw two large piles of construction debris in the center of the floor. These piles consisted of broken concrete, wood, nails, screws and similar debris. The two piles, each approximately 8' by 15', were laid out from the window into the center of the room. There was a 2 – 3 foot space between the two piles. Each pile was covered with a plastic tarp similar to a thick, heavy duty black garbage bag. The

debris was not inside the garbage bag. There was nothing between the two piles. When asked if there was any plastic in the 2 – 3 feet space between the piles, Lois testified “not much, just an edge which I did not see.” The floor between the two piles was concrete.

Upon Lois’ arrival on the floor, he began assisting Gorman. This work involved removing a window from the metal frame, repairing the frame, re-caulking and then reinstalling the window. Lois assisted Gorman in removing the window and frame. Once the window was removed, Gorman instructed Lois to move the window to a safe location while Gorman repaired the frame and re-caulked it. Lois carried the window through the passageway between the two piles of debris and leaned the window against one of the piles approximately one half of the way across the room. After the item was repaired, prepped and ready, Gorman told Lois to carry the window back to the glass wall to be reinstalled. Lois retrieved the window and began walking back to the glass wall. As he was walking down the passageway, carrying the window, he stepped on the corner of the black plastic tarp and he felt his foot step onto a hard object, causing his knee to twist and he slipped and fell. While Lois was on the ground, just seconds after the accident, he saw his footprint on the black tarp where he had just stepped and a loose piece of broken concrete approximately 2" wide by 4 – 5" long sticking out from under the tarp. The concrete was located just on the edge of the large pile of construction debris that had been left on the floor.

In response to defendants’ motion for summary judgment, the only sections plaintiff actually defends are Industrial Code §23-1.7(e) (1) and (2). Plaintiff’s attorney has specifically withdrawn all claims pursuant to Labor Law §241(6), except those predicated on 12 NYCRR §23-1.7 (e) (1) and (2) (¶32 of the affirmation in opposition to defendants’ motion).

Accordingly, plaintiff's claims as to commons law negligence, and his claims under Labor Law §200, the other Industrial Code Sections, and OSHA Sections, are deemed abandoned, and the defendants are entitled to summary judgment dismissing plaintiff's claims thereunder.

Labor Law Section 241(6) provides:

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 lawfully frequenting such places. The commissioner may make rules 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.

This statutory section, which imposes a non-delegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers, is not self-executing. In order to establish liability under the statute, a plaintiff must specifically plead and prove the violation of the applicable Industrial Code regulation. The Code regulation must constitute a specific positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]. *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 271 (1st Dept. 2007).

Industrial Code Provisions, 12 NYCRR 23-1.7(e)(1) and (2), constitute concrete specifications providing a predicate cause of action under Labor law Section 241(6). *Smith v. McClier Corp*, 22 A.D.3d 369 (1st Dept. 2005); *Farina v. Plaza Constr. Co.*, 238 A.D.2d 158,

159 (1997). They provide:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulation of dirt and debris and from any other obstructions or conditions which could cause tripping...

(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 * * * insofar as may be consistent with the work being performed.

The Court finds that the transfer of title, to the individual condominium unit, to a new owner prior to plaintiff's accident, does not relieve defendants Bass and Flintlock from their obligations imposed under 12 NYCRR 23-1.7(e)(1) and (2), for work being performed under their original contract and subcontracts. Notwithstanding the fact that the project was "substantially completed" in March, 2007, and the Building turned over by Flintlock to Bass, warranty work on the core of the Building was still being done by Flintlock subcontractor J & R.

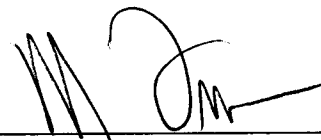
Further, there are issues of fact as to whether 12 NYCRR 23-1.7(e)(1) and/or (2) were violated (*e.g.*, whether the area where plaintiff tripped and fell was a passageway and/or a working area). Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's Labor Law 241(6) claims based upon the alleged violation of 12 NYCRR 23-1.7(e)(1) and/or (2) is denied. All other aspects of the motion by Flintlock and Bass are granted, as above indicated.

The branch of third-party defendant J & R's motion seeking dismissal of plaintiff's complaint is denied for the reasons stated above. The branch of third-party defendant J & R's motion seeking dismissal of all cross-claims is denied. Pursuant to paragraph 4.6 of the contract between J & R and Flintlock, J & R agreed to defend and indemnify Flintlock and Bass from injuries arising out of J & R's negligence in prosecution of its work, the absence of which has not

demonstrated by J & R.

The foregoing constitutes the Decision and Order of the Court.

Dated: 12/4/14



MARK FRIEDLANDER, J.S.C.