SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------x

DENNIS MENDONI,

Plaintiff,

-against-

THE DURST ORGANIZATION, INC., THE DURST ORGANIZATION, L.P., THE DURST PROPERTIES TRUST, INC., and GOTHAM CONSTRUCTION COMPANY, LLC.

Defendants.

----------x

Index No. 154502/15
Motion Sequence 03

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants The Durst Organization, Inc., The Durst Organization, L.P., The Durst Properties Trust, Inc., ("Durst"), and Gotham Construction Company, LLC ("Gotham") (collectively, "Defendants") move for summary judgment pursuant to CPLR 3212 on the ground that they are not appropriate parties to this Labor Law action. In the alternative, Defendants move for partial summary judgment dismissing plaintiff Dennis Mendoni's ("Plaintiff") lost earning claims. Plaintiff does not oppose the motion with respect to the Durst defendants. Accordingly, all claims and cross-claims against the Durst Defendants are hereby dismissed. Gotham's motion is decided as set forth below.

The summons and complaint in this case was filed on May 6, 2015. Therein Plaintiff claims that he sustained personal injuries on a construction site located in Manhattan on 6th Avenue between 30th and 31st street. Liability on the part of the Defendants is premised upon their alleged violation of Labor Law §§ 200, 240(1), and 241(6), as well as their negligence under the common law.

In relevant part, Plaintiff testified[1] that he was a steamfitter who was employed by non-party FD Sprinkler at a construction site. On the day of his accident he was exiting the construction site for

[1] Plaintiff was deposed in this action on December 13, 2017. A copy of his deposition transcript is submitted as Defendants' exhibit D (Mendoni Deposition).

[1]

a coffee break when he slipped on a broken piece of concrete covered in ice (Mendoni Deposition pp. 48-50):

Q. Sir, can you describe how your accident occurred? . . .

A. . . . I was just walking to get my coffee. Like I said, it was bitter cold. I just said, guy, you got to be freezing just standing there all day long. I'm going next door, you want a cup of coffee. No, I'm good, I'm good. I said, oh, you sure. And that's when I just slipped. I came like this. My foot slipped down into the right, my right leg. And I felt myself going down. And then just threw everything to the left to grab this temporary barricade that was dividing the sidewalk from the street. . . .

Q. And the barricade, can you describe what it actually looks like? . . .

A. It's about a 48-inch high barricade made up of plywood. On top of that they would have some chicken wire or some kind of wire that led up to the overhead protection.

Q. Did you happen to see what you slipped on?

A. Yes.

Q. What did you slip on?

A. It was a broken piece of concrete with a severe downward slope to the right. And iced over. It was just a lot of ice.

Defendants argue that the area where Plaintiff fell was not actually part of the construction site. In this regard, Plaintiff testified as follows (*id.* at 43-44):

Q. Where did your accident occur specifically?

A. Okay. The accident occurred on – it was under the overhead protection. Then that's where that down slope and that iced over piece of concrete was. And that was that.

Q. When you say overhead protection, are you talking about a sidewalk shed or something else?

A. Maybe a sidewalk shed, I've heard that called.

Q. Was it actually on the sidewalk or, I guess, the inside of the premises?

A. It's always over the sidewalk. It's for the pedestrians.

Q. I'm sorry. Your accident, did it occur on the sidewalk or inside the premises?

A. It was on the construction site. It was on the sidewalk, but it's considered the construction site.

Q. I understand. I just want to make sure I'm clear. It was on the public sidewalk next to and adjacent to the construction site?

A. Actually, in between the construction sites. Because on the street side you had a loading dock. Then you had a barricade. Then you had the sidewalk, and then you had the thing blocking from getting onto the – getting through to do your work. You know.

Photographs taken of the accident scene confirm Plaintiff's testimony that the area in question was covered by a sidewalk shed.[2]

Gotham superintendent Richard Agresta was deposed on behalf of the Defendants.[3] He testified that Gotham was hired as the site's construction manager. In addition to coordinating the work on site and ensuring that general safety protocols were followed, Gotham's role included general oversight over the various contractors (Agresta Deposition pp. 6-8). With respect to the area in question, Gotham was ultimately responsible for maintaining the sidewalk underneath the shed, which included things like snow removal. However, Mr. Agresta did not recall anyone complaining about any defects like snow accumulation (*id.* pp. 10-11, 16, 18-19):

Q. Did Gotham have their own laborers on this job site?
A. Yes.
Q. Back in 2015, what was the job of the laborers for Gotham?
A. Gotham laborers was just cleanup of the site.
Q. When you say general cleanup?
A. Interior work cleaning all the debris, sheetrock, concrete, block or anything, just keep the floors clean and everything.
Q. What about ice and snow condition, did Gotham laborers have any responsibility in regard to that?
A. Yes.
Q. What?
A. Shoveling snow on the sidewalks surrounding the property, throwing ice down whenever.
Q. When you say sidewalks, you're talking about the city sidewalks?
A. Yes.
Q. Why were they responsible to throw salt down and shovel snow on the city sidewalks?
A. Along at that time along 31st Street we had a sidewalk bridge that was over the sidewalk and it was used for a pedestrian walkway, so because it was over the bridge, or I should say under the bridge the pedestrian walkway, our responsibility was to maintain that sidewalk.
. . . .

* * * *

[2] Defendants' exhibit G.

[3] Mr. Agresta's deposition transcript is submitted as exhibit E (Agresta Deposition).

Q. Were there any inspections done, after the sidewalk shed was erected was there any inspections done to determine whether or not the sidewalk had been damaged or changed in any way?

A. Official inspections, no.

Q. Would that be part of someone's observation if they walked past there?

A. Yes.

Q. Such as the site safety manager?

A. Yes.

Q. Was there any inspection done as to the effect of inclement weather, whether or not water collected on top of the sidewalk bridge?

A. The laborers, we had a labor foreman and he would go out to shovel snow, ice or water or what have you.

* * * *

Q. Do you know if there is anything specific in the safety plan in regard to sidewalk bridges?

A. Other than being inspected, yes, or I should say no, other being inspected, no. . . .

Q. If the site safety manager found a hazardous condition in regard to the sidewalk bridge or the sidewalk underneath it that the bridge was covering, what would his responsibilities be, if any.

A. If it was a minor infraction if you want to call it that, he would call the labor foreman to take care of it, if it was anything major he would have reached out to me.

Q. Do you recall him ever reaching out to you in regard to any defects or dangerous conditions in regard to the sidewalk under the sidewalk shed?

A. No.

After the construction was completed the sidewalks would be repaved as a matter of course. This repaving was done on every project, regardless of the sidewalk's condition (*id.* pp. 37-38).

Gotham was contractually obligated to perform several duties during the pre-construction phase of the project.[4] These duties included furnishing the site's owner with names of trade contractors for each of the principal portions of the work that needed to be performed. It also included examining the entire construction site, attending project meetings, and procuring building permits (Contract pp. 13-19). Once construction began, Gotham was responsible for administering, coordinating, and managing

[4] Defendants' exhibit J (Contract).

the work. This included monitoring the performance of the various subcontractors by ensuring that they timely completed their respective projects and by ensuring that materials and equipment were timely and properly delivered and installed. Gotham's administrative responsibilities included scheduling, budgeting, and payment processing. In terms of site safety, Gotham was required to devise and implement safety procedures for the entire construction site and review them with the subcontractors (*id.* at pp. 19-33). Gotham was also required to "assure that streets and sidewalks around the Project Site [were] maintained in a clean condition" (*id.* at 34).

One of the questions on this motion is Plaintiff's lost earnings claims. In this regard, Defendants reference Plaintiff's deposition testimony from another lawsuit[5] in which this accident was at issue. In that case Plaintiff testified that he was laid off in February of 2015 (2015 Deposition, p. 10-11):

Q. Are you currently employed, sir.
A. No.
Q. When is the last time you had been employed?
A. February of 2015.
Q. At that time, where were you working?
A. I worked for Local 638, steamfitters. . . .
Q. Were you laid off in February 2015?
A. Yes.

According to Gotham, "the prior testimony in his 2015 suit . . . shows he testified just six months after the accident that he had been *laid off* in February 2015 and *not* that he was out of work due to a disabling injury. . . . Where a party changes their position as to a material fact in separate litigations, courts will bar the subsequent claims that would be supported by the inconsistency."[6]

---

[5] *Mendoni v New York Plaza Financial Associates, LLC, et al.*, Index No. 151625/11 (Sup. Ct. NY Co.). Plaintiff's testimony from that action is submitted as Defendants' exhibit H (2015 Deposition).

[6] Affirmation of Douglas Miller, Esq. dated January 5, 2018, p. 14. Mr. Miller continues: "Plaintiff testified one way – that he had merely been laid off and was looking for work—in his earlier suit. Now, looking at . . . the prospect of a seven figure recovery, he has changed his story to assert a full disability." *Id.* at 15.

Gotham argues that this case falls outside of the scope of the Labor Law because it was merely a construction manager who had no power to control the means and methods of Plaintiff's work and because the public sidewalk on which Plaintiff fell is not a "passageway" for purposes of New York City's Industrial Codes. Gotham also argues that Plaintiff is estopped from asserting a lost wage claim given his testimony from his prior action that he was laid off. In opposition, Plaintiff argues that Gotham should be considered a general contractor for purposes of the Labor Law because of the significant control it exercised over the construction site and that the sidewalk was a "passageway" because it was covered by scaffolding. With respect to the lost wages claim, Plaintiff contends that any alleged inconsistencies in his testimony merely goes to the weight of his lost wage claim for trial purposes and does not preclude him from seeking to recover lost earnings as a matter of law.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Construction Manager / General Contractor

A construction manager does not presumptively fall within the scope of the Labor Law, but under certain circumstances it can be deemed a party to a Labor Law suit if it was the "functional equivalent" of a general contractor. *Rodriguez v Dormitory Auth. Of State*, 104 AD3d 529, 531 (1st Dept 2013). The standard by which courts examine this issue was set forth by the Court of Appeals in *Walls v Turner Construction Co.*, 4 NY3d 861 (2005). In *Walls*, Turner Construction entered into a contract with a school district to serve as construction manager for a capital improvement project. The school district did not retain a general contractor. The Court found that Turner assumed the role of the general contractor for Labor Law purposes because it had the "broad responsibility" of both a "coordinator and overall supervisor for all the work being performed on the job site." *Id.* at 864. Turner was contractually obligated to cease all construction if it discovered an unsafe condition, and it was responsible for monitoring the work performed by the other trades and for periodically advising the owner and architect of any safety issues. Turner essentially functioned as the owner's "eyes, ears, and voice". *Id.*

In reaching its conclusion, the *Walls* court considered the totality of the facts and circumstances, but focused specifically on four things: the contract terms, the absence of a general contractor, the construction manager's duty to oversee the construction site and the trade contractors, and the admission by the construction manager that it had the authority to control certain activities and stop any unsafe work practices. Looking at each of these factors in the context of this case, it is evident that Gotham is covered by the Labor Law. Like the defendant in *Walls*, Gotham entered into a contract with the site's owner which created an agency relationship. There was also no general contractor at the project. The contract itself unequivocally provides that Gotham had control over the construction site, and the various contractors, and had the ability to stop the work if Gotham

determined that one of the contractors was engaging in unsafe work practices. For example, the Contract provides (Contract pp. 19, 20, 28, 34):

> Construction manager agrees to furnish a staff for the overall administration, coordination, management, and superintendence of the work . . .
>
> * * * *
>
> Construction manager shall arrange, on behalf of the Owner, for all work, labor, services, supplied, and equipment necessary for the execution and timely completion of the Work, including without limitation, monitoring the performance of the work by the Trade Contractors and coordinating and scheduling the Work of all the Trade Contractors . . .
>
> Construction manager shall review and coordinate the programs of the Trade Contractors who shall have the obligation to comply with the Project Safety program devised by Construction manager.
>
> * * * *
>
> Construction Manager has devised and provided, and shall implement . . . and enforce the safety program and procedures for the project . . . Construction Manager shall inspect the work as appropriate to check safety precautions or programs for the Project, and shall provide a full time site safety supervisor . . .
>
> * * * *
>
> The Construction Manager shall assure that the streets and sidewalks around the Project Site are maintained in a clean condition

The fact that Gotham exercised the necessary degree of control for Labor Law purposes is confirmed by Mr. Agresta's testimony regarding Gotham's daily responsibilities, especially that its site safety manager had the authority to stop the work if he detected a hazardous condition (Agresta Deposition pp. 7-9):

Q. When you say construction managers, what did they do as construction managers?

A. We ran the daily day to day construction on site, monitored the subcontractors and their relative contracts.

Q. Was there also a general contractor?

A. No. . . .

Q. Can you tell me, you say you monitored the trades on the jobsite, correct?

A. Yes.

Q. Did you coordinate their work?

A. Yes. . . .

Q. What was Mr. Barnes' role on this job site as site safety manager?

A. To ensure that the employees or the workers were conforming to the safety rules set in their contract as well as protecting the public, that's what the site safety manager really is supposed to do. . .

Q. And if he saw a hazardous condition on the job site, what would he do?

A. He would ask me. If it was a potential dangerous condition he would stop work immediately, or if it was a minor infraction he would ask them to rectify it, so he had the authority to stop work or have them rectify it.

In light of this evidence, I find that Gotham served as the functional equivalent of a general contractor and is therefore a proper party to this Labor Law action. *See Rodriguez*, 104 AD3d at 531; *Barrios v City of New York*, 75 AD3d 517, 519 (2d Dept 2010); *Paljevic v 998 Fifth Ave. Corp.*, 65 AD3d 896, 897-898 (1st Dept 2009); *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 (2d Dept 2007).

II. Labor Law 240[7]

Plaintiff does not argue, and there is nothing in the record to show, that Plaintiff's injuries resulted from an accident covered by Labor Law 240. *See Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009) (quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]) ("'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'"); *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 (2001); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). Accordingly, Defendants' motion to dismiss Plaintiff's Labor Law 240 claims is granted, and Plaintiff's Labor Law 240 claims are hereby dismissed.

[7] Labor Law 240(1) provides in relevant part that "[a]ll 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."

III. Labor Law 200[8]

Labor Law 200 codifies the common law duty imposed upon owners and general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contruction Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law 200 claims are generally predicated upon a two-pronged showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

Since Plaintiff's claims relate to a dangerous condition at the worksite and not to the manner in which his work was performed, the issue is whether the Defendants created the allegedly dangerous condition or had actual or constructive notice of it. In this respect, Mr. Agresta conceded that Gotham was responsible for snow and ice removal on the sidewalks. But, there is insufficient evidence that Gotham had actual notice of the slippery ice condition or that it should have known ice had accumulated prior to the accident. There was no testimony that it had rained or snowed in the hours or days prior to the accident, no evidence that Plaintiff or any of his coworkers noticed the condition previously, and no evidence as to how water would have accumulated under the sidewalk bridge in the first place. *See Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149 (1st Dept 2000) (issue of fact as to notice was raised by plaintiff's testimony that he saw the ice patch the day before he fell); *New York Presbyt. Hosp. v Siemens Bldg. Tech., Inc.*, 2012 NY Misc. LEXIS 68, *13 (Sup. Ct. NY Co. Jan. 9, 2012, Ling-Cohan, J.) (issues of fact as to whether the alleged ice condition existed for a sufficient

[8] Labor Law 200 provides in relevant part that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

length of time where there was testimony that it had snowed the day before and equipment was covered in snow); *Alfano v LC Main, LLC*, 2013 NY Misc. LEXIS 1020, *4 (Sup. Ct. Westchester Co. Mar. 18, 2013, Connolly, J) (issue of fact regarding liability under Labor Law 200 where plaintiff testified ice condition existed for weeks prior to accident). In fact, Mr. Agresta testified that the sidewalk bridge was specifically designed to drain water away from the sidewalk (Agresta Deposition p. 16-17). There being no evidence as to how and when the icy condition formed, Plaintiff's Labor Law 200 claims must be dismissed.

IV. Labor Law 241(6)

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> 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 constructing 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 lawfully frequenting such places. The [New York State Commissioner of Labor] 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.

To recover damages on a Labor Law 241(6) cause of action, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Plaintiff's Bill of Particulars alleges violations of numerous Industrial Codes, but on this motion Plaintiff limits its discussion to 12 NYCRR § 23-1.7(d), entitled "Slipping hazards", which provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface 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." As applied to this case, the parties disagree whether the sidewalk area where Plaintiff fell can be considered a "passageway."

In truth, none of the cases cited by either party are entirely analogous to the facts in this case. Gotham's citations discuss loading docks and open, unpaved areas, not defined passageways. *See Guido v Dormitory Auth. of the State of N.Y.*, 145 AD3d 591, 592 (1st Dept 2016) ("area outside the gate to the loading dock where plaintiff parked his truck was not a passageway"); *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD 3d 585, 585-86 (1st Dept 2014) (open, unpaved area not a passageway); *Johnson v 923 Fifth Ave. Condominium,* 102 AD3d 592, 593 (1st Dept 2013) ("the area of the sidewalk where plaintiff was unloading materials was not a 'passageway'"); *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1266 (3d Dept 2010). Plaintiff's cases also do not involve public sidewalks. *See Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 (1st Dept 2016) (area created by placement of two large piles of debris created a de facto passageway); *Gherardi v City of New York*, 49 AD3d 280, 280 (1st Dept 2008) (Labor Law extends to entrance ramp used for worker ingress and for bringing in materials); *DeStefano v Amtad N.Y., Inc.*, 269 AD2d 229 (1st Dept 2000) (no cause of action under § 241(6) where plaintiff, first to arrive at construction site, tripped on snow, absent evidence showing that someone had notice of overnight accumulation).

There are cases, however, which collectively stand for the general proposition that the term "passageway" or "walkway" was meant to refer to any defined pathway used to traverse between discrete areas. *See Prevost v One City Block LLC*, 155 AD3d 531, 535 (1st Dept 2017) (citing *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]); *see also Alfano v LC Main, LLC*, 2013 NY Misc. LEXIS 1020, *16 (Sup. Ct. Westchester Co. Mar. 18, 2013, Connolly, J.). From a definitional standpoint this would include sidewalks. As one example, the Industrial Code provision

governing the construction of sidewalk sheds, 12 NYCRR 23-1.18, refers to the sidewalk beneath a sidewalk shed as a "walkway."

Applying this general concept to the facts of this case, I find there to be a material issue of fact whether the sidewalk area where Plaintiff fell was a "passageway" as contemplated by 12 NYCRR § 23-1.7(d). For one thing, the photographs depicting the area where the accident occurred show that the sidewalk was defined by barricades on all sides except for two small doorways that led to the street. At the time his accident occurred the Plaintiff was utilizing this defined area as a pathway, specifically as a means of egress from the construction site. The evidence also shows that Gotham was responsible for constructing the sidewalk shed, including its barricades and doorways, and was contractually responsible for maintaining the sidewalk area in a reasonably safe condition, by, among other things, removing snow and ice. This is indicative of the fact that the sidewalk was considered by everyone at the site to be part of the construction area. Under these unique circumstances Plaintiff has presented enough evidence so that its Labor Law claims premised on 12 NYCRR § 23-1.7(d) may proceed.

V. Lost Wage Claim

Defendants' judicial estoppel argument is summarily denied. To be sure, Plaintiff did testify in his prior action that he was "laid off" from work in February of 2015. However, the remainder of Plaintiff's testimony includes an admission by Plaintiff that he slipped and fell on the sidewalk at issue, that he injured his neck, back, knee, and shoulder, and that he had filed a Workers' Compensation action arising from the accident (2015 Deposition, pp. 101-103). Thus, Gotham's contention that Plaintiff has disingenuously tried to downplay his injuries is not accurate. The cases Gotham cites to show otherwise are distinguishable on their facts. *See D&L Holdings, LLC v RCG Goldman Co. LLC*, 287 AD2d 65 (1st Dept 2001); *Perkins v Perkins*, 226 AD2d 610 (2d Dept 1996). In short, Gotham has not shown that equitable considerations require the extreme remedy of barring Plaintiff from pursuing his lost wage claim.

CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that Defendants' motion is granted in part and denied in part; and it is further

ORDERED that all claims and cross-claims against The Durst Organization, Inc., The Durst Organization, L.P., The Durst Properties Trust, Inc. are hereby severed and dismissed; and it hereby

ORDERED that Plaintiff's Labor Law 200, Labor Law 240(1), and common-law negligence claims are severed and dismissed in their entirety; and it is further

ORDERED that Plaintiff's Labor Law 241(6) claims are dismissed, except for those against Gotham predicated upon a violation of 12 NYCRR § 23-1.7(d); and it is further

ORDERED that Defendants' motion to preclude Plaintiff from asserting a lost wage claim is denied; and it is further

ORDERED that the remaining parties shall appear in Part 30 for a pre-trial settlement conference on July 23, 2018 at 9:30AM.

The Clerk of the Court shall enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 5-24-18

SHERRY KLEIN HEITLER, J.S.C.