

Chun Chan v Mehran Holdings Ltd.
2019 NY Slip Op 31245(U)
April 30, 2019
Supreme Court, New York County
Docket Number: 152145/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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CHUN CHAN,

Index No. 152145/2015

Plaintiff

- against -

MEHRAN HOLDINGS LTD. and HONG KONG
PLAZA MANAGEMENT CORP.,

Defendants

-----X
-----X

MEHRAN HOLDINGS LTD.,

Third Party Plaintiff

- against -

JEFFREY WU,

Third Party Defendant

-----X

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained May 30, 2014, when he fell from a ladder as he was performing demolition work on premises owned by defendant Mehran Holdings Ltd. and occupied by defendant Hong Kong Plaza Management Corp., pursuant to a lease that third party defendant Wu guaranteed. Mehran Holdings moves for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). Plaintiff separately moves for summary judgment on Mehran Holdings'

liability under New York Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). Mehran Holdings also separately moves for summary judgment on its third party claims. C.P.L.R. § 3212(b). For the reasons explained below, the court grants in part Mehran Holdings' motion and grants plaintiff's motion in the main action, otherwise denies Mehran Holdings' motion in the main action, and denies its motion in the third party action.

II. PLAINTIFF'S CLAIMS OTHER THAN UNDER LABOR LAW § 240(1)

As set forth above, Mehran Holdings moves for summary judgment dismissing all the claims in the complaint against this defendant. C.P.L.R. § 3212(b). In a stipulation dated March 7, 2019, however, plaintiff discontinued his claims under Labor Law § 200 and for negligence against Mehran Holdings, rendering irrelevant the issue whether Mehran Holdings was an owner out of possession of the premises.

To support plaintiff's Labor Law § 241(6) claim, plaintiff's complaint and bill of particulars cite only one regulation: 12 N.Y.C.R.R. § 23-1.5. Because this regulation simply sets forth an employer's responsibility for health and safety, without specific commands, the regulation does not support a Labor Law § 241(6) claim. Gasques v. State of New York, 15 N.Y.3d 869, 870 (2010); Martinez v. 342 Prop. LLC, 128 A.D.3d 408, 409 (1st Dep't 2015); Kochman v. City of New York, 110 A.D.3d 477, 478 (1st Dep't 2013); Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906 (1st Dep't 2011). While 12 N.Y.C.R.R. § 23-1.5(c)(3) does include a specific directive that may support a claim under the

statute, Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d 666, 667 (1st Dep't 2018); Williams v. River Place II, LLC, 145 A.D.3d 589, 589-90 (1st Dep't 2016); Becerra v. Promenade Apts. Inc., 126 A.D.3d 557, 558 (1st Dep't 2015), plaintiff neither expressly relies on this regulatory provision, nor alleges any facts to which it applies. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018); Jackson v. Hunter Roberts Constr. Group, LLC, 161 A.D.3d at 668.

Plaintiff nevertheless insists that, by claiming defendants violated 12 N.Y.C.R.R. § 23-1.5 et seq., he claims violation of all regulations in 12 N.Y.C.R.R. Part 23 following § 23-1.5. Such an expansive interpretation would render meaningless the purpose of bills of particulars to amplify pleadings and prevent surprise. Colwin v. Katz, 102 A.D.3d 449, 450 (1st Dep't 2013); Suits v. Wyckoff Hqts. Med. Ctr., 84 A.D.3d 487, 489 (1st Dep't 2011); Harris v. Ariel Transp. Corp., 37 A.D.3d 308, 309 (1st Dep't 2007).

The only other regulation plaintiff cites specifically is in opposition to Mehran Holdings' motion for summary judgment dismissing his claims: 12 N.Y.C.R.R. § 23-1.21(b)(4)(ii), which neither his complaint nor his bill of particulars mentions. This regulatory provision supports a claim under Labor Law § 241(6) by specifically directing that: "All ladder footings shall be firm. Slippery surfaces . . . shall not be used as ladder footings." 12 N.Y.C.R.R. § 23-1.21(b)(4)(ii). See Estrella v. GIT Indus., Inc., 105 A.D.3d 555, 555 (1st Dep't 2013); Cevallos v. Morning

Dun Realty, Corp., 78 A.D.3d 547, 549 (1st Dep't 2010); Hart v. Turner Constr. Co., 30 A.D.3d 213, 214 (1st Dep't 2006). As long as plaintiff's belated specification of this regulatory provision does not depend on new factual allegations, raise a new theory of liability, or prejudice Mehran Holdings, plaintiff may rely on this provision to oppose Mehran Holdings' motion and may amend his bill of particulars to include the provision. Harris v. City of New York, 83 A.D.3d 104, 111 (1st Dep't 2011); Cevallos v. Morning Dun Realty, Corp., 78 A.D.3d at 549; Latchuk v. Port Auth. of N.Y. & N.J., 71 A.D.3d 560, 560 (1st Dep't 2010); Walker v. Metro-North Commuter R.R., 11 A.D.3d 339, 340-41 (1st Dep't 2004).

Plaintiff alleges a single new fact, not mentioned in his complaint, bill of particulars, or deposition, to support a violation of 12 N.Y.C.R.R. § 23-1.21(b)(4)(ii). In an affidavit opposing Mehran Holdings' motion for summary judgment dismissing his claims, he attests that: "A photograph attached to this affidavit as Exhibit A is a fair and accurate depiction of . . . the tile flooring that the ladder was placed on while I was working." Aff. in Opp'n of Christian Kubic Ex. B ¶ 3. The photograph depicts a dull, mottled gray surface with a black line that may depict the division between two tiles, but the surface does not appear shiny, slick, or any more slippery than slip-resistant. Whether or not this new allegation of tile flooring raises a new theory of liability or prejudices Mehran Holdings is therefore immaterial, as the new fact fails to show a slippery

surface or the lack of firm footing under plaintiff's ladder. Nor does plaintiff ever suggest that his ladder moved due to the surface under the ladder.

Having failed to allege facts that demonstrate a violation of 12 N.Y.C.R.R. § 23-1.21(b)(4)(ii), plaintiff may not base his Labor Law § 241(6) claim on that regulatory provision. Since plaintiff fails to specify any further regulation, his Labor Law § 241(6) claim fails altogether. Foley v. Consolidated Edison Co. of N.Y., Inc., 84 A.D.3d 476, 478 (1st Dep't 2011); Balbuena v. New York Stock Exch., Inc., 45 A.D.3d 279, 280-81 (1st Dep't 2007); Favia v. Weatherby Constr. Corp., 26 A.D.3d 165, 166 (1st Dep't 2006).

III. PLAINTIFF'S CLAIM UNDER LABOR LAW § 240(1)

Mehran Holdings' motion for summary judgment also seeks dismissal of plaintiff's Labor Law § 240(1) claim. Plaintiff's motion, in turn, seeks summary judgment on defendants' liability on his Labor Law § 240(1) claim.

Defendants' failure to provide adequate safety devices to protect against elevation related hazards in construction, as required by Labor Law § 240(1), imposes absolute liability on the owner of the construction site, if that failure proximately caused plaintiff's injury. Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008); Albanese v. City of New York, 5 N.Y.3d 217, 219 (2005); Abbatiello v. Lancaster Studio Assoc., 3 N.Y.3d 46, 50-51 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287, 289 (2003). Plaintiff consistently

testified at his deposition that, as he worked at an elevation to remove a cylinder from a metal door above his head, a metal piece came loose, lacerated his arm, and caused the ladder to move. After the ladder moved, he lost his balance and fell to the ground. Plaintiff's testimony that the unsecured ladder he was using moved establishes a violation of Labor Law § 240(1).

Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 544 (1st Dep't 2018); Merino v. Continental Towers Condominium, 159 A.D.3d 471, 472 (1st Dep't 2018); Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583 (1st Dep't 2018).

Plaintiff is not required to show a defect in the ladder to establish a Labor Law § 240(1) violation. Caminiti v. Extell W. 57th St. LLC, 166 A.D.3d 440, 441 (1st Dep't 2018); Hill v. City of New York, 140 A.D.3d 568, 570 (1st Dep't 2016); Fanning v. Rockefeller Univ., 106 A.D.3d 484, 485 (1st Dep't 2013); Estrella v. GIT Indus., Inc., 105 A.D.3d at 555. The failure of the ladder to provide adequate protection from the hazards of work at an elevation also demonstrates that plaintiff was not the sole proximate cause of his injury. Nolan v. Port Auth. of N.Y. & N.J., 162 A.D.3d 488, 489 (1st Dep't 2018); Plywacz v. 85 Broad Street LLC, 159 A.D.3d at 543; Ross v. 1510 Assoc. LLC, 106 A.D.3d 471, 471 (1st Dep't 2013); Lizama v. 1801 Univ. Assoc., LLC, 100 A.D.3d 497, 498 (1st Dep't 2012).

IV. MEHRAN HOLDINGS' SECOND MOTION FOR SUMMARY JUDGMENT

Mehran Holdings filed a second motion for summary judgment on third party defendant's liability on the third party claims for breach of contract and for contractual and non-contractual, implied indemnification. Upon plaintiff's service by e-filing of the note of issue July 20, 2018, within the deadline for the note of issue, the 120 days for summary judgment motions expired November 17, 2018, a Saturday, postponing the deadline for the motions until Monday, November 19, 2018. C.P.L.R. § 3212(a); N.Y. Gen. Constr. Law § 25-a(1). Mehran Holdings complains that plaintiff filed the note of issue prematurely, but never claimed outstanding disclosure when the note of issue was filed, see Stern v. Starwood Hotels & Resorts Worldwide, Inc., 149 A.D.3d 496, 497 (1st Dep't 2017); Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D.3d 538, 539 (1st Dep't 2015); Hoffman v. Wyckoff Hqts. Med. Ctr., 129 A.D.3d 526, 526 (1st Dep't 2015); Jeffrey v. DeJesus, 116 A.D.3d 574, 575 (1st Dep't 2014), let alone moved to vacate it on that basis. 22 N.Y.C.R.R. § 202.21(e). By moving for summary judgment in the third party action, Mehran Holdings maintains that all material factual issues are resolved, so no further disclosure is needed. See Green v. Metropolitan Transp. Auth. Bus Co., 127 A.D.3d 421, 422-23 (1st Dep't 2015).

Plaintiff timely served his motion for partial summary judgment November 16, 2018. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't

2009); Ageel v. Tony Casale, Inc., 44 A.D.3d 572, 572 (1st Dep't 2007); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). Mehran Holdings served its first motion for summary judgment November 19, 2018, also within the deadline, and then a second summary judgment motion November 20, 2018, which was untimely. C.P.L.R. § 3212(a).

Since Mehran Holdings fails to excuse its late motion for summary judgment, id.; Aristova v. Derkach, 155 A.D.3d 517, 517 (1st Dep't 2017); Kenny v. Turner Constr. Co., 155 A.D.3d 479, 479-80 (1st Dep't 2017); Puello v. Georges Units, LLC, 146 A.D.3d 561, 562 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017), the court may not consider Mehran Holdings' late second motion except insofar as it responds to and addresses claims "nearly identical" to plaintiff's timely motion for summary judgment on his Labor Law § 240(1) claim. Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 692 (1st Dep't 2018); Gualpa v. Leon D. Matteis Constr. Corp., 121 A.D.3d 416, 419 (1st Dep't 2014); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449 (1st Dep't 2013). Mehran Holdings' third party claims for breach of contract and contractual and implied indemnification against Wu, however, are not nearly identical to plaintiff's Labor Law § 240(1) claim. Therefore the court may not consider Mehran Holdings' late second motion for summary judgment on its third party complaint. Mugattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500 (1st Dep't 2018); Jarama v. 902 Liberty Ave.

Hous. Dev. Fund Corp., 161 A.D.3d at 692; Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Maggio v. 24 W. 57 APE, LLC, 134 A.D.3d 621, 628 (1st Dep't 2015). See Belgium v. Mateo Prods., Inc., 138 A.D.3d 479, 480 (1st Dep't 2016).

For similar reasons the court may not consider Mehran Holdings' late motion as if it was never served, search the record of plaintiff's motion for summary judgment, and grant Mehran Holdings summary judgment as a non-moving party. C.P.L.R. § 3212(b). Such a fiction not only would treat the moving party as a non-moving party, but would impermissibly grant relief on the breach of contract and indemnification claims against Wu that are unrelated to plaintiff's Labor Law § 240(1) claim against Mehran Holdings and are unsupported by the record of plaintiff's motion. Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 429-30 (1996); New Hampshire Ins. Co. v. MF Global, Inc., 108 A.D.3d 463, 467 (1st Dep't 2013); Castlepoint Ins. Co. v. Moore, 105 A.D.3d 472, 474 (1st Dep't 2013); Atiencia v. MBBCO II, LLC, 75 A.D.3d 424, 424 (1st Dep't 2010).

Nor may Mehran Holdings' late motion relate back to its first motion for summary judgment. Successive motions for summary judgment are not permitted unless the moving party justifies the timing of the subsequent motion. Ferolito v. Vultaggio, 99 A.D.3d 19, 29 (1st Dep't 2012); Jones v. 636 Holding Corp., 73 A.D.3d 409, 409 (1st Dep't 2010); Turner Constr. Co. v. H.E.L.P. Social Serv. Corp., 43 A.D.3d 731, 732 (1st Dep't 2007). Even if Mehran Holdings excused its lateness,

Mehran Holdings offers no explanation warranting consideration of its second motion, such as previously unavailable evidence, Fleming & Assoc., CPA, PC v. Murray & Josephson, CPAs, LLC, 127 A.D.3d 428, 428 (1st Dep't 2015); Brown Harris Stevens Westhampton LLC v. Gerber, 107 A.D.3d 526, 527 (1st Dep't 2013); Whalen v. New York City Dept. of Env'tl. Protection, 89 A.D.3d 416, 417 (1st Dep't 2011); Turner Constr. Co. v. H.E.L.P. Social Serv. Corp., 43 A.D.3d at 732; an intervening appellate decision affecting applicable law, Amill v. Lawrence Ruben Co., Inc., 117 A.D.3d 433, 433-34 (1st Dep't 2014); superseding pleadings, Healthcare I.O., LLC v. Tsai Chung Chao, 118 A.D.3d 98, 103 (1st Dep't 2014); or the court's permission. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626. See Bruckner Realty LLC v. Cruz, 139 A.D.3d 413, 414 (1st Dep't 2016), aff'd, 28 N.Y.3d 1138 (2016). Finally, even if the court considered the merits of the second summary judgment motion, the court would deny it because it is unsupported by authenticated, admissible evidence of Wu's guarantee. See Whalen v. New York City Dept. of Env'tl. Protection, 89 A.D.3d at 417; Jones v. 636 Holding Corp., 73 A.D.3d at 410.

V. CONCLUSION

Consequently, the court grants defendant Mehran Holdings Ltd.'s motion for summary judgment dismissing the complaint against Mehran Holdings only to the extent of discontinuing plaintiff's Labor Law § 200 and negligence claims based on his stipulation and dismissing his Labor Law § 241(6) claim and

otherwise denies the motion. C.P.L.R. §§ 3212(b) and (e), 3217(a)(2) and (b). The court grants plaintiff's motion for summary judgment on Mehran Holdings Ltd.'s liability for violating Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). The court denies Mehran Holdings Ltd.'s motion for summary judgment on its third party complaint. C.P.L.R. § 3212(a) and (b). This decision constitutes the court's order and judgment. The Clerk shall enter a judgment according to this decision.

DATED: April 30, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.