

Montoya v Chelsea Operating, Inc.
2019 NY Slip Op 31448(U)
May 22, 2019
Supreme Court, New York County
Docket Number: 158694/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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FRANCISCO MONTOYA,	INDEX NO. <u>158694/2016</u>
Plaintiff,	MOTION DATE <u>05/22/2019</u>
- v -	MOTION SEQ. NO. <u>002</u>

CHELSEA OPERATING, INC.,

DECISION AND ORDER

Defendant.

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NYSCEF Doc Nos. 40–68 were read on this motion for summary judgment.

Motion by Plaintiff Francisco Montoya pursuant to CPLR 3212 for summary judgment on the issue of the liability of Defendant Chelsea Operating, Inc. under Labor Law §§ 240 (1) and 241 (6) is denied as untimely filed in material part.

BACKGROUND

As is relevant here in this personal injury case involving Plaintiff's alleged fall from an A-frame ladder, the Court's August 1, 2017 preliminary conference order stated that "[a]ny dispositive motion(s) shall be filed [within] 60 days of filing of the [note of issue]." (Edelman affirmation, exhibit I, ¶ 10.) Plaintiff filed the note of issue on October 19, 2018. As such, any dispositive motions were required to be filed in full no later than December 18, 2018.

On December 18, 2018, Plaintiff e-filed the following documents: Notice of Motion; Affirmation in Support; Exhibits A–R; and Affidavit of Service. (NYSCEF Doc Nos. 40–60.) The Notice of Motion set a return date of January 31, 2019, for Plaintiff's motion pursuant to CPLR 3212 for summary judgment on the issue of the liability of Defendant under Labor Law §§ 240 (1) and 241 (6). The Affidavit of Service, dated December 17, 2018, indicates that, on December 17, 2018, the affiant mailed "the within: NOTICE OF MOTION" to counsel for Defendant by first class mail. (NYSCEF Doc No. 60.) The Affidavit of Service does not indicate whether additional documents other than the Notice of Motion were served in the mailing.

The six-page Affirmation in Support, dated December 15, 2018, contains no argumentation. Rather, it consists primarily of a statement of facts citing to certain of the annexed Exhibits (Affirmation in Support ¶¶ 9–24) and asserts that, as Plaintiff filed the note of issue on October 19, 2018, "the within motion is timely" (*id.* ¶ 7.) The Affirmation in Support further states that, "[i]n accordance with the aforementioned discussion of facts, evidence and testimony and the accompanying memorandum of law, Plaintiff respectfully requests [the motion be granted]." (*Id.* ¶ 25 [emphasis added].)

As per NYSCEF, in fact, no memorandum of law was filed on December 18, 2018.

On January 15, 2019, Defendant filed its affirmation in opposition. Defendant makes two points in its argument: “Plaintiff’s motion must be denied as there are serious issues concerning his credibility” and “Plaintiff is the sole proximate cause for [sic] his accident.”

On January 30, 2019, February 4, 2019, and February 27, 2019, the parties stipulated to adjourn the motion, presumably to allow time for Plaintiff to file reply papers, with the return date ultimately being fixed as March 28, 2019.

On March 27, 2019, one day before the return date of the motion, Plaintiff filed a ten-page Memorandum of Law in Support, dated December 15, 2018 as indicated on the last page next to the signature, and a Reply Affirmation, dated March 27, 2019. (NYSCEF Doc Nos. 66–67.) In these papers, for the first time in the motion as filed, Plaintiff makes arguments and cites to case law in support of his argument that the motion should be granted on the issue of Defendant’s liability under Labor Law §§ 240 (1) and 241 (6). As to Labor Law § 241 (6), Plaintiff indicates in these papers filed on March 27, 2019, for the first time in the motion, that he is moving for summary judgment pursuant to Labor Law § 241 (6) as to the Defendant’s specific violation of Industrial Code § 23-1.21 (b) (4) (iv).¹ In the Reply Affirmation, Plaintiff argues that he has established Defendant’s violation of Industrial Code § 23-1.21 (b) (4) (iv) and remarks that, “[n]otably, the defendant, in its opposition papers[,] does not specifically challenge or contest the applicability of this provision in this matter to serve as a predicate for the Labor Law 241(6) claim.” (Reply Affirmation ¶ 19.)

On March 28, 2019, the motion was marked fully submitted, and, on or about April 5, 2019, after the motion papers were sent to chambers, the Court set the matter down for oral argument, to be held on May 29, 2019. The working copy of the motion submitted to chambers includes a copy of the Memorandum of Law in Support, dated December 15, 2018. Specifically, Plaintiff’s papers as provided to the Court are bound together in the following order: Notice of Motion; Affirmation in Support; Memorandum of Law in Support; Exhibits A-R. A loose copy of the Reply Affirmation is also in the motion folder. The Reply Affirmation bears the New York County Clerk’s header stamp which indicates the NYSCEF Document Number, 67, and the date of filing, March 27, 2019. The copy of the Memorandum of Law in Support provided to the Court does not bear a header stamp.

DISCUSSION

Now, upon reviewing the file both in hard copy and on NYSCEF, it appears to the Court that Plaintiff’s Memorandum of Law in Support was not filed with the moving papers on the December 18, 2018 deadline, but, rather, was filed over three months late, on March 29, 2019. The Affidavit of Service as it appears on NYSCEF and as provided with the working copy merely states that the “Notice of Motion” was mailed to Defendant. As previously mentioned, the Affidavit of Service does not indicate whether additional documents other than the Notice of Motion were served in the mailing.

¹ In the Bill of Particulars annexed as exhibit H to the moving papers, Plaintiff asserted that Defendant violated “Industrial Code 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.21 (b)(1) (3)(i)(ii)(iii)(iv) (4)(iv) (8)(e)(2).” (¶ 4.)

As Plaintiff himself observed, as evidenced by remarks in the Reply Affirmation, Defendant did not specifically challenge or contest Plaintiff's Labor Law § 241 (6) claim or Industrial Code § 23-1.21 (b) (4) (iv). While Plaintiff regards this as notable, Defendant cannot challenge or contest what it does not have. It appears that Defendant did not receive the Memorandum of Law in Support prior to filing its opposition papers, given that the Memorandum of Law in Support was not filed until over two months after Defendant filed its opposition papers, and given that the Affidavit of Service merely indicates that a mailing of the Notice of Motion, only, was made to Defendant, presumably because the several hundred pages in the motion were available to Defendant on NYSCEF to view, download, or print itself.

Pursuant to CPLR 3212 (a), a motion for summary judgment must be made by a date set by the court, with the date being no earlier than thirty days after the filing of the note of issue, and with no motion being made any later than that date except with leave of court on good cause shown. A showing of good cause requires that the movant explain its tardiness to the motion court satisfactorily. (*See Brill v City of New York*, 2 NY 3d 648, 652 [2004].) That a motion for summary judgment may be meritorious or nonprejudicial does not affect this bright-line rule. (*Id.*; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013]; *Glasser v Abramovitz*, 37 AD3d 194 [2d Dept 2007].) Where a court ordered that summary judgment motions were to be filed within 60 days of the filing of the note of issue, a summary judgment motion that was served prior to the deadline but filed after the deadline was properly rejected as untimely where the movant offered no excuse for the late filing. (*See Corchado v City of New York*, 64 AD3d 429, 429 [1st Dept 2009].) Such a late filing is not properly before the Court.

Here, the Court finds that Plaintiff's Memorandum of Law in Support was a material part of his moving papers. Although Plaintiff's Affirmation in Support referred to an "accompanying memorandum of law," as per NYSCEF, none was filed with the moving papers. While a plaintiff need not file a memorandum of law, this Plaintiff did, and his Memorandum of Law in Support contained all his argumentation on the motion, including the specific Industrial Code section on which Plaintiff moved. That Plaintiff had previously listed certain Industrial Code provisions in his bill of particulars, which was annexed to the part of the motion that was filed on December 18, 2018 as exhibit H, is of no moment. A plaintiff must indicate the specific Industrial Code provision or provisions upon which it is relying in a motion for summary judgment. If multiple sections are provided in a bill of particulars, a plaintiff may move on all, some, or none of them. Without a plaintiff identifying and arguing a specific section, there can be no prima facie showing, and there is nothing to rebut.

It appears to the Court based on the papers submitted that Defendant had no opportunity to oppose in a full and fair way the sole specific violation of the Industrial Code on which Plaintiff apparently sought to move based on the Memorandum of Law in Support and Reply Affirmation. Further, Defendant had no full or fair opportunity to address any specific arguments from Plaintiff on his Labor Law § 240 (1) claim.

As such, based upon the NYSCEF record and the Affidavit of Service, Plaintiff has failed to show prima facie that the Memorandum of Law in Support, a material part of its moving papers, containing the entirety of the argumentation and the sole assertion of an Industrial Code provision, was timely filed to NYSCEF or served on Defendant. Rather, all of Plaintiff's

arguments in this motion have been filed in reply, on March 27, 2019, over three months after the deadline for dispositive motions, over two months after Defendants submitted its opposition papers, and one day prior to the return date of the motion.

As such, Plaintiff having offered no explanation for his late filing of the Memorandum of Law in Support as would support any finding of good cause for the delay, the Court rejects the entirety of Plaintiff's papers for Plaintiff's failure to file all material parts of his motion in full by the deadline set by this Court pursuant to CPLR 3212 (a).

Even if the Court were not to reject the entirety of Plaintiff's papers, but, rather, was unconstrained to consider the papers as filed, it is well-settled in the Appellate Division, First Department, that "[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion" and that "[t]his Court has and will require consistent application of the rule." (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]; see also *McClave v Port Auth. Of NY and NJ*, 134 AD3d 435, 436 [1st Dept 2015].) Here, as previously discussed, all of Plaintiff's legal arguments and case citations in support of his motion for summary judgment were e-filed, and thus advanced, on March 27, 2019, over three months after the deadline for dispositive motions, over two months after Defendants submitted its opposition papers, and one day prior to the return date of the motion. As such, none of the arguments would merit consideration by this Court under the well-settled Appellate Division, First Department case law cited. To find otherwise would severely prejudice Defendant. Rather, the case will remain on the trial calendar.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Francisco Montoya pursuant to CPLR 3212 for summary judgment on the issue of the liability of Defendant Chelsea Operating, Inc. under Labor Law §§ 240 (1) and 241 (6) is denied as untimely filed in material part.

The foregoing constitutes the decision and order of the Court.

5/22/2019
DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.