

Cruz v Ask Prop. Holdings, LLC
2019 NY Slip Op 32024(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 151495/2015
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD d'AUGUSTE PART IAS MOTION 55EFM

Justice

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MIGUEL GACHUZ CRUZ,

Plaintiff,

- v -

ASK PROPERTY HOLDINGS, LLC, 148 CORNELIA, LLC, GMT
CORNELIA, LLC, RFC CORNELIA, LLC, MP CORNELIA
PROPERTY GROUP, LLC,

Defendants.

INDEX NO. 151495/2015

MOTION DATE 04/06/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion is granted.

As an initial matter, the Court issued an interim order directing the parties to “re-brief all issues within the original motion [and] opposition.” NYSCEF Doc. No. 101. The parties’ subsequently filed briefs were read and considered on this motion despite the untimeliness of plaintiff’s supplemental opposition.

This action arises out of an alleged accident that occurred during the renovation of an apartment unit when plaintiff’s left leg fell through a subfloor after he slipped from the exposed floor beam he was walking on. Plaintiff and a co-worker had removed the plywood flooring three or four days prior to the alleged accident as a component of the renovation project.

Defendants/Third-party plaintiffs Ask Property Holdings, LLC, 148 Cornelia, LLC, GMT Cornelia, LLC, RFC Cornelia, LLC and MP Cornelia Property Group, LLC (“defendants”) move for summary judgment dismissing plaintiff Miguel Gachuz Cruz’s causes of action under Labor Law Sections 241(6) and 200 and common law negligence. Defendants also seek to renew their

prior motion for a default judgment against Samos Construction, Inc. (“Samos”). The motion is granted in part and denied in part for the reasons set forth below.

Labor Law Section 241(6)

To prevail on a claim under Labor Law Section 241(6), a plaintiff must allege and establish a violation of a provision of the Industrial Code. To serve as a predicate for Labor Law Section 241(6) the alleged provision of the Industrial Code must impose a specific, active duty and be applicable to the case at hand. *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 271 (1st Dep’t 2007).

Defendants/Third-party plaintiffs Ask Property Holdings, LLC, 148 Cornelia, LLC, GMT Cornelia, LLC, RFC Cornelia, LLC and MP Cornelia Property Group, LLC (“defendants”) have established their entitlement to summary judgment dismissing plaintiff’s Labor Law Section 241(6) claim by demonstrating that the Industrial Code provisions relied upon by plaintiff are inapplicable to his claimed injuries or insufficiently specific to serve as a predicate for Labor Law 241(6).

Rather than attempting to raise a triable issue of fact as to the applicability or specificity of any particular provision of the Industrial Code in his original opposition papers, plaintiff merely asserts that because defendants’ original affirmation failed to address Industrial Code Sections 23-1.16, 23-1.17, and 23-1.21, the entire motion must be denied. In his supplemental opposition brief, plaintiff adds the argument that Industrial Code Section 23-1.5 is sufficiently specific to support a claim under Labor Law section 241(6). Plaintiff does not address any other provisions in his moving papers.

Industrial Code Sections 23-1.16, 23-1.17 and 23-1.21

Plaintiff's contention that defendants' failure to address Industrial Code Sections 23-1.16, 23-1.17 and 23-1.21 in their moving papers requires denial of their entire motion is unavailing, especially considering that defendants adequately addressed all of plaintiff's other alleged provision violations and included these remaining three provisions in both their reply papers and their subsequent re-briefing ordered by the Court.

Furthermore, upon a search of the record, the Court finds Industrial Code Sections 23-1.16, 23-1.17, and 23-1.21, which were omitted in some portions of plaintiff's pleadings but, confusingly, included in others, are inapplicable to the facts of this case.

Industrial Code Sections 23-1.16 and 23-1.17, which set forth specific standards for safety belts, harnesses, tail lines and lifelines (23-1.16) and life nets (23-1.17), are inapplicable as it is undisputed that plaintiff was not provided with any of these safety devices. *See Dzieran v. 1800 Bos. Rd., LLC*, 25 A.D.3d 336 (1st Dep't 2006) (citing *see D'Acunti v. New York City School Constr. Auth.*, 300 A.D.2d 107, 108, 751 N.Y.S.2d 459 (3d Dep't 2002)). Industrial Code Section 23-1.21 is likewise inapplicable because plaintiff's alleged accident did not involve ladders or ladderways in any way.

Industrial Code Section 1.5

Plaintiff abandoned any reliance Industrial Code Section 1.5, the sole provision addressed by plaintiff in his supplemental opposition, (NYSCEF Doc. No. 104) since "since he failed to specify any particular subsection or subdivision of this provision." *Tomala-Campoverde v. Trumbull Equities LLC*, No. 7020492012, 2017 WL 3220130, at *3 (N.Y. Sup. Ct. June 27, 2017) (citing *see McLean v Tishman Const. Corp.*, 144 AD3d 534 (1st Dep't 2016).

Moreover, the unpleaded subsections contained in plaintiff's opposition brief have previously been held to lack sufficient specificity to serve as a predicate for a Labor Law Section 241(6) claim. *Hawkins v. City of New York*, 275 A.D.2d 634 (1st Dep't 2000).

Remaining provisions

Plaintiff failed to address any other provisions of the Industrial Code and his reliance on the same are deemed abandoned. *Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474 (1st Dep't 2012) (“[i]t is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section.”)

Labor Law 200 and Common Law

Plaintiff's Labor Law 200 and Common Law claims are also dismissed as defendants did not exercise sufficient control over the work being performed to warrant liability under the statute or common law. *See Paz v. City of New York*, 85 A.D.3d 519, 519–20, 925 N.Y.S.2d 453, 454 (2011) (holding that giving general instructions on what needs to be completed, monitoring and oversight of timing and quality of the work, and having general duty to ensure compliance with safety regulations and authority to stop work for safety reasons is insufficient to impose liability under Labor Law Section 200).

Motion for Default Judgment against Samos Construction, Inc.

In an order dated August 13, 2015, the Court (Kern, J.) denied without prejudice defendants' prior motion for a default judgment against third-party defendant Samos Construction, Inc. (“Samos”) as premature on the grounds that liability had not yet been determined in the main action. On this motion, defendant again moves for a default judgment against Samos. However, it remains the case that liability has yet to be determined. Therefore, the Court adheres to Justice

Kern's prior denial. The alternative relief sought by defendant for an order granting summary judgment on three out of four of its causes of action asserted against Samos in its third-party complaint is also denied as it essentially seeks the same relief. Accordingly, the branch of defendants' motion seeking a default judgment against Samos is denied without prejudice.

ORDERED that the motion is granted; and it is further

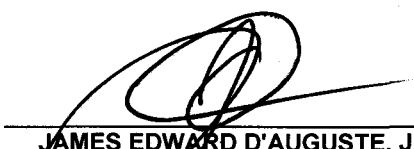
ORDERED that plaintiff's cause of action based upon Labor Law Section 241(6) is dismissed; and it is further

ORDERED that plaintiff's cause of action based upon Labor Law Section 200 and common law negligence is dismissed; and it is further

ORDERED that the branch of the motion seeking a default judgment against third-party defendant Samos Construction, Inc. is denied without prejudice to bring a new motion upon a determination of liability in the main action or other resolution of this matter.

This constitutes the decision and order of the Court.

7/5/2019
DATE


JAMES EDWARD D'AUGUSTE, J.S.C.

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