

Bahouali v Fordham Univ.

2019 NY Slip Op 32220(U)

March 14, 2019

Supreme Court, Bronx County

Docket Number: 23810/2014

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

AMINE BAHOUALI,

Index No.: 23810/2014

Plaintiff,

- against -

DECISION and ORDER

FORDHAM UNIVERSITY and GOTHAM
CONSTRUCTION COMPANY, LLC,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendants' motion for re-argument is whether the court overlooked or misapprehended facts or law, when it previously found questions of triable fact with respect to Plaintiff's claim under Labor Law §241(6) premised on Industrial Code 12 NYCRR §23-1.7(f). The court finds that Defendants failed to demonstrate that court overlooked or misapprehended facts or law in finding questions of triable fact requiring a denial of the instant motion.¹

A motion for leave to re-argue pursuant to CPLR §2221(d) is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dep't 1992).

Here, Defendants are challenging this court's prior decision and order wherein the court found that there were questions of triable fact whether Defendants violated 12 NYCRR §23-

¹ Notably, Plaintiff filed an affirmation in opposition to the instant motion. However, in his grounds of relief he improperly sought that his cross-motion for summary judgment be granted. That application is denied as Plaintiff failed to file his purported cross-motion in accordance with CPLR §2214(b). Therefore, the court will only consider Plaintiff's papers as an affirmation in opposition.

1.7(f) and whether that violation was the proximate cause of Plaintiff's injuries. Defendants argue that said Industrial Code is inapplicable to the case at bar because: (1) Plaintiff was not using the staircase to access different levels of the construction site; and (2) Plaintiff's allegation that the threaded rod, which caused him injury was hanging abnormally low was insufficient to create questions of triable fact. Both arguments are unpersuasive.

12 NYCRR §23-1.7(f) provides that vertical passages such as stairways ... shall be provided as the means of access to working levels above or below ground ... 12 NYCRR §23-1.7(f) imposes a duty upon defendants to provide a safe stairway, free of defects. *See Murphy v. Am. Airlines, Inc.*, 277 A.D.2d 25, 715 N.Y.S.2d 62 (1st Dep't 2000); *see also Vasquez v. Urbahn Assoc. Inc.*, 79 A.D.3d 493, 918 N.Y.S.2d 1 (1st Dep't 2010); *see also Garcia v. Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 A.D.3d 494, 980 N.Y.S.2d 6 (1st Dep't 2014).

Defendants cite two Appellate Division, First Department, cases *Miranda* and *Torkel* to support their proposition that 12 NYCRR §23-1.7(f) is inapplicable since Plaintiff was not using the staircase to access different levels of the construction site. *See Miranda v. NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 A.D.3d 445, 996 N.Y.S.2d 256 (1st Dep't 2014); *see also Torkel v. NYU Hosps. Ctr.*, 63 A.D.3d 587, 883 N.Y.S.2d 8 (1st Dep't 2009).

However, Defendants' reliance on said appellate authority is misguided and a misreading of the holdings therefrom. The reasoning and facts underpinning said Appellate Division, First Department's, decisions are distinguishable from the instant facts. In *Miranda* Plaintiff was injured when he fell from a six-foot-tall A-frame ladder that had been placed atop an approximately eight-foot-tall scaffold. Therefore, after a search of the record the court concluded that 12 NYCRR §23-1.7(f) was inapplicable because his injuries were not related to the use of vertical passages.

Similarly, in *Torkel* the ramp Plaintiff was using when his injury occurred bridged the height differential between a sidewalk curb and the adjacent road surface and did not provide access to an above or below ground working area within the meaning of the regulation. Therefore, again the court concluded Plaintiff that 12 NYCRR §23-1.7(f) was inapplicable because his injuries were not related to the use of vertical passages.

Here, Plaintiff's injury-producing work was squarely within a vertical passage as defined by 12 NYCRR §23-1.7(f). On the day of loss, Plaintiff was welding a curtain wall on a landing located underneath a stairway on the seventeenth floor of the construction site. Plaintiff testified that there were only two means of access to reach the location he was assigned, which was by an elevator or by ascending the stairway. Plaintiff alleged that he was injured by a one-inch thick threaded steel rod riser ("rod"), which protruded approximately five feet from the landing on the seventeenth floor. The rod was located directly above Plaintiff's head. As he stood up from a kneeled position he struck his head against the rod causing him to fall halfway down the stairway leading to the sixteenth floor and sustain injury.

Therefore, since Plaintiff's injury directly derived from an alleged defective condition with the stairway, which by its very nature is a vertical passageway that provided a means of access to working levels above or below the construction site it is within the meaning of Industrial Code 12 NYCRR §23-1.7(f).

Defendants' remining contention that Plaintiff's testimony was insufficient to create questions of triable fact with respect to his claim under Labor Law §241(6) premised on Industrial Code 12 NYCRR §23-1.7(f) is unavailing.

Defendants underpin their argument by citing to Appellate Division, First Department, cases which stand for the proposition that the affidavit of an expert did not create a triable issue of fact

as it failed to identify any specific industry wide safety guideline, specific statutory or building code violations upon which was relied upon to conclude that the stairway plaintiff was injured by was defective, inherently dangerous or constituted a hidden trap. *See Baker v. R.C. Church of the Holy See*, 136 A.D.3d 596, 26 N.Y.S.3d 48 (1st Dep't 2016); *see also Cassidy v. Highrise Hoisting & Scaffolding, Inc.*, 89 A.D.3d 510, 932 N.Y.S.2d 456 (1st Dep't 2011); *see also Burke v. Canyon Rd. Rest.*, 60 A.D.3d 558, 876 N.Y.S.2d 25 (1st Dep't 2009); *see also Sakol v. Kirsch*, 25 A.D.3d 523, 808 N.Y.S.2d 224 (1st Dep't 2006).

However, none of the cases cited are analogous to the instant facts as none were rendered in context of a Labor Law §241(6) claim. The cases cited that required an expert to specifically state industry wide safety guideline, specific statutory or building code violations upon which was relied upon to conclude that the subject stairway was defective, inherently dangerous or constituted a hidden trap were rendered in context of claims for common law negligence or its codification under Labor Law §200. Thus, that standard is not applicable to a Labor Law §241(6) claim, which require a different legal analysis than that of common law negligence or a Labor Law §200 claim.

To establish liability under Labor Law §241(6), a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation, which proximately caused plaintiff's injury. *See Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dep't 2007).

Therefore, here there exists triable issue of fact precluding summary judgment due to the conflicting testimony by Plaintiff and the averments of Defendant Gotham Construction Company, LLC.'s superintendent Andrew Hauser as to whether the rod that caused Plaintiff's injury was a defective as required by 12 NYCRR §23-1.7(f), and whether that defect was the

proximate cause of Plaintiff's injury.

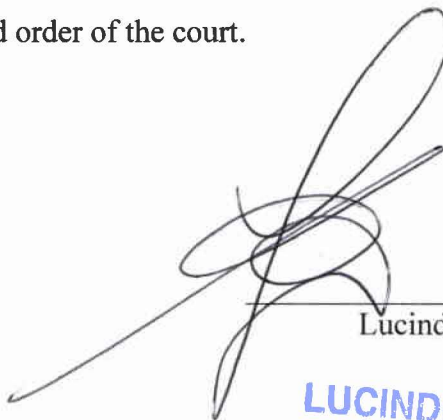
Thus, Defendants' application to re-argue this court's finding that there exist triable questions of fact whether Defendants violated 12 NYCRR §23-1.7(f), and whether that violation was the proximate cause of Plaintiff's injuries is denied as the court did not overlooked or misapprehended matters of fact or law.

Accordingly, it is

ORDERED, that Defendants' motion for re-argument is denied.

This constitutes the decision and order of the court.

Dated: March 14, 2019



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.