Meighn v Suggs
2019 NY Slip Op 32986(U)
October 8, 2019
Supreme Court, New York County
Docket Number: 157183/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

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SHAWN MEIGHN and VANTYNE MEIGHAN, as Co-Administrators of the Estate of RUDOLPH MEIGHN, deceased, and IVY MEIGHN, individually,

DECISION AND ORDER
Index No.: 157183/2016

Plaintiffs,

-against-

WILLIE K. SUGGS,

Defendant.

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HON. KATHRYN E. FREED, J.S.C.:

The following documents, filed with NYSCEF, were considered in deciding motion sequence 001: 14-26, 43, 55-74

The following documents, filed with NYSCEF, were considered in deciding motion sequence 002: 27-41, 44-53

Motion sequences 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries and the wrongful death of Rudolph Meighn, a general contractor, on August 9, 2015 when, while overseeing the work of his employee at 412 West 145th Street, New York, New York (the premises), he allegedly fell through a defective metal grate into a window well, hitting his head.

In motion sequence 001, plaintiffs Shawn Meighn and Vantyne Meighan[1] as Co-

[1]This Court notes the discrepancy in the spelling of plaintiffs, Shawn Meighn, Ivy Meighn and Vantyne Mieghan, as well as the deceased, Rudolph Meighn.

Administrators of the Estate of Rudolph Meighn, deceased (the decedent), and Ivy Meighn, move pursuant to CPLR 3212, for partial summary judgment on the issue of liability on their Labor Law §§ 240 (1) and 241 (6) claims against defendant Willie K. Suggs. Defendant opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against her in its entirety, or, in the alternative, for summary judgment dismissing the wrongful death cause of action.

In motion sequence 002, defendant moves, pursuant to 22 NYCRR § 202.21(e), for an order vacating the note of issue and striking this action from the calendar or, in the alternative, pursuant to CPLR 3124 and CPLR 3126 (2), for an order directing plaintiffs to provide defendant with all outstanding discovery. After oral argument, and after review of the parties' papers and the relevant statutes and case law, the motions are decided as set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs commenced this action on August 26, 2016 by filing a summons and verified complaint against defendant asserting three causes of action: 1) violations of New York State Labor Law §§ 200, 240 (1) & 241(6); 2) a loss of consortium claim by the decedent's spouse, plaintiff Ivy Meighn; and 3) wrongful death (summons and verified complaint; NYSCEF Doc. No. 1, ¶ 24).

A supplemental summons was served on September 6, 2016 (NYSCEF Doc. No. 2).

Defendant served an answer containing various defenses (NYSCEF Doc. No. 4). Plaintiffs also served a verified bill of particulars and a supplemental bill of particulars (NYSCEF Doc. No. 20, 21). Depositions were conducted and, on September 20, 2018, plaintiffs filed a note of issue and certificate of readiness (NYSCEF Doc. No. 58). The parties then filed the instant motions.

On the day of the accident, defendant was the owner of the premises, an eight unit residential apartment building. Defendant hired the decedent[2] as the general contractor for certain labor and/or services to be performed at the premises (the project).

Deposition Testimony of Nonparty Witness Carlos Velazquez

Carlos Velazquez (Velazquez), the only eyewitness to the accident, testified that he had worked for the decedent for ten years, and that on the day of the accident, he was employed to perform certain interior construction at the premises. Velazquez further testified that he was changing a metal door at the rear of the premises when he saw decedent walking in the backyard. At that time, decedent was observing the work being performed on the door and was also "checking the rear, because he was going to change a couple of bricks in the rear" (Velazquez tr at 22). Velazquez claimed that he saw the decedent walk toward the window and fall through two metal plates that led into the basement. After Velazquez saw the decedent's glasses fall and break, and also saw blood coming from the decedent's head,

[2]It is undisputed that the parties entered into a verbal contract for the work performed at the premises on the date of the accident.

he yelled for help. Velazquez described the decedent's body as "hanging down below" (*id.* at 23). With the assistance of a co-worker, Velazquez pulled the decedent from the hole and sat him on a chair.

Velazquez stated that the accident occurred because "two plates were not well secured, because [the decedent] was standing there and the plate [tilted] and he fell face down and he hit his head" (*id.* at 25). Velazquez estimated that the metal grate was approximately two feet wide by eight feet long. Velazquez further testified that there was garbage covering the grate prior to the accident, and that there was nothing placed around the grate to prevent people from walking on it.

Velazquez testified as follows:

Q. "Now, did [the decedent] step on part of the grate?"

A. "Yes."

Q. "And what happened when he stepped on the grate?"

A. "The grate went like this and he fell?"

Q. "So the grate tilted?"

A. "Yes."

Q. "Did his feet and his lower body fall through the grate towards the basement?"

A. "He was hanging like sideways. Half was hanging and the other half was –that's when I pulled him out."

Q. "Was there any type of warning signs to warn people that they should not walk on or near the grate?"

A. "No, no. There was only garbage."

(Velazquez transcript at 27-32).

Deposition Testimony and Affidavit of the Defendant

At her deposition, the defendant testified that she purchased the premises in 1985 and that the certificate of occupancy for the premises indicated that it consisted of eight (8) residential units. At the time of the purchase, the premises had five (5) occupied rental apartments and three (3) vacant apartments. Defendant explained that, as the apartments in the building became vacant, she did not re-let them, but rather used the newly unoccupied spaces to enlarge her office. At the time of the accident, the premises was vacant of all tenancies and the defendant used the entire building as her office. The building also contained a conference room and office space for her real estate agents. Although defendant occasionally slept at the premises for a few hours, nobody stayed there overnight.[3]

The defendant further testified that the project consisted of painting, some plastering, and updating the kitchen and a bathroom. Defendant did not instruct any of the workers, but rather instructed the decedent on the work that was to be completed. Defendant asserted that the premises was being renovated "because it needed it. You have an office, you want it to look nice and it didn't look nice, so we had to fix it" (defendant's tr at 33). Defendant did not re-rent any apartments because she needed the entire space for her office. Defendant

[3]Although the defendant also testified that she sometimes stayed overnight at the premises, she could not articulate any date(s) or time frame(s) during which she used the premises as a residence.

further testified that the renovations were ongoing and that, when a tenant left and an apartment became vacant, it was painted.

In her affidavit submitted in support of her cross motion, defendant represented that, at the time of the accident, she was using the premises as a one-family dwelling with a home office for her real estate business.

LEGAL CONCLUSIONS

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiffs' Motion for Partial Summary Judgment on Liability (motion sequence 001)

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendant.[4] Defendant cross-moves to dismiss the entire complaint against her, arguing, among other things, that she cannot be liable under the Labor Law pursuant to the homeowner's exemption, as she is the owner of a single-family residential home with an office.

Pursuant to Labor Law §§ 240 (1) and 241(6), owners of one-family and two-family dwellings who contract for, but do not direct or control the work, are specifically exempted from liability thereunder (*Hannan v Freeman*, 169 AD3d 1016, 1017 [2d Dept 2019]; *Diaz v Trevisani*, 164 AD3d 750 [2d Dept 2018]). Known as the homeowner's exemption, this law "was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability imposed" by Labor Law §§ 240 and 241 (*Lombardi v Stout*, 80 NY2d 290, 296 [1992]). The legislative intent of this exemption was to make the law fairer and more reflective of the practical realities governing the relationship between homeowners and the individuals they hire to perform construction work on their homes (*Cannon v Putnam*, 76 NY2d 644, 649 [1990]).

In order for a defendant to receive the protection of the homeowner's exemption, the

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[4]While plaintiffs allege a violation of Labor Law § 200 in their verified complaint, they do not move for summary judgment on this claim. Defendant, however, cross-moves for summary judgment dismissing plaintiffs' Labor Law § 200 claim for failing to state a cause of action.

defendant must show that 1) the premises consisted of a one or two family residence, and 2) the owner did not direct or control the work being performed (see *Marquez v Mascioscia*, 165 AD3d 912, 913–14 [2d Dept 2018]); *Abdou v Rampaul*, 147 AD3d 885, 882 [2d Dept 2017]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept 2008]; *Ortega v Puccia*, 57 AD3d 54, 57–58 [2d Dept 2008]).

The Legislature did not define the terms "one- or two-family dwellings" when it enacted the homeowner's exemption (*Van Amerogen v Donnini*, 78 NY2d 880 [1991]; *Cannon v Putnam*, 76 NY2d 644). In applying the exemption, courts have held that it is not an owner's residential status that determines whether a homeowner is entitled to the exemption, but rather, the residential nature of "'the site and purpose of the work'" that must also be taken into consideration (*Sheehan v Gong*, 2 AD3d 166, 169 [1st Dept 2003], quoting *Khela v Neiger*, 85 NY2d 333, 337 [1995]).

Here, in support of her cross motion to dismiss the Labor Law claims on this ground, defendant argues that she purchased the premises, which consisted of a building containing eight (8) separate residential units, in 1985. Although she claims that she used it as her primary residence, she failed to prove this fact. As noted previously, five of the eight separate units at the premises were used to generate rental income during the time that she owned the premises. In fact, the premises had always been used by defendant as an income-producing rental property and/or an office. Therefore, she has failed to meet her prima facie burden of establishing that the homeowner's exemption applies to her, as she is

not within "the class of persons the Legislature sought to exempt from the strict liability provisions of Labor Law §§ 240 and 241" (*Van Amerogen v Donnini*, 78 NY2d at 882–83).

Plaintiff's Labor Law § 240 (1) Claim (motion sequence 001)

Labor Law § 240 (1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]).

Labor Law § 240 (1), provides, in pertinent part, as follows:

> "1. 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, 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."

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"(*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][emphasis added]). Defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability (*Ortega v City of New York*, 95 AD3d 125,

128–29 [2012]; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011].

Here, plaintiffs have demonstrated liability under Labor Law § 240 (1). As noted previously, decedent was injured when the metal grate that he was standing on split into two pieces, causing him to fall into the window well. Therefore, decedent's injuries were clearly related to the effects of gravity.

In addition, there is sufficient evidence which would establish that the metal grate was not in good working order and was not properly secured prior to the time of the accident, such that it was foreseeable that safety devices would be needed. In her own affidavit, defendant states that "prior to the date of the accident, I had discussed the replacement of a grate over a window well in the backyard" (defendant's aff at 1-2, ¶ 4). Defendant also states that she "observed [that the decedent] had taken measurements of the grate and had observed the grate" (*id.*). Defendant also acknowledged that "while there was a hairline crack in the grate, there was no other indication that it would break" (*id.*). Defendant also stated that the decedent was going to replace the grate at some point and that decedent had, in fact, ordered the grate before the accident. Defendant was therefore aware of the subject defect in the metal grate, but failed to provide an appropriate safety device so as to prevent decedent's accident.

Thus, plaintiffs are entitled to partial summary judgment in their favor on the issue of liability on the Labor Law §240 (1) claim against defendant, and defendant is not entitled to dismissal of said claim against her.

Plaintiffs' Labor Law § 241 (6) Claim (motion sequence 001)

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against defendant. Defendant cross moves for dismissal of said claim.

In view of the foregoing determination that a breach of Labor Law § 240 (1) establishes absolute liability against a defendant, that branch of plaintiff's motion seeking summary judgment on their Labor Law § 241 (6) claim is rendered academic (*Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]). However, if this Court were to address plaintiffs' Labor Law § 241 (6) claim, it would make the determination set forth below.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . 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 construed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that defendant violated a specific, applicable, implementing

regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id. Ross* at 503-505).

Although plaintiffs allege multiple violations of the Industrial Code in this action, only section 12 NYCRR § 23-1.7 (b) (1) (i) is addressed in their opposition papers to defendant's motion. Therefore, violations allegedly arising from any other sections are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003][where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 [3d Dept 2003]).

Thus, defendant is entitled to summary judgment dismissing those parts of the Labor Law § 241 (6) claims predicated on those abandoned provisions.

Industrial Code 12 NYCRR 1.7 (b) (1) (i)

Initially, Industrial Code sections 23-1.7 (b) (1) (i), which governs hazardous openings at a construction site, is sufficiently concrete in its specifications to support plaintiffs' Labor Law § 241 (6) claim (*see Lopez v Fahs Constr. Group, Inc.*, 129 AD3d 1478, 1479 [4th Dept 2015]; *Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [2d Dept 2005]).

Sections 23-1.7 (b) (1) (i), provides, in pertinent part, as follows:

"(b) Falling hazards

(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with the Part (rule)."

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole - particularly the safety measures delineated therein-it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'"(*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003], quoting *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422-423 [2d Dept 2001] ["hazardous openings" regulation did not apply where the 12-inch by 16-inch hole that worker fell into was too small for him to fall through]; *Urban v No. 5 Times Sq. Dev., LLC* 62 AD3d 553, 556 [1st Dept 2009] [a 10-to 12-inch gap was not a hazardous opening]).

Since the decedent's body fell entirely through the opening of the window well, the window well constituted a "hazardous opening" within the mneaning of 12 NYCRR § 23-1.7 (b) (1) (i). In addition, it is undisputed that the opening was not "guarded by a substantial cover...or by a safety railing...." Thus, section 23-1.7 (b) (1) (i) applies to the facts of this case, plaintiffs are entitled to summary judgment in their favor as to liability on that part of their Labor Law § 241 (6) claim which is predicated on an alleged violation of section 23-1.7 (b) (1) (i), and defendant is not entitled to dismissal of that part of the section 241(6)

claim predicated upon the said Industrial Code section.

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims

Defendant cross-moves for summary judgment dismissing the plaintiffs' common-law negligence and Labor Law § 200 claims against her. Since plaintiffs do not oppose the dismissal of these claims, that portion of defendant's cross motion for summary judgment dismissing the same is granted and the said claims are dismissed. *See Kempisty v 246 Spring St.*, LLC, 92 AD3d 474, 475 (1st Dept 2012).

Defendant's Cross Motion for Summary Judgment Dismissing the Wrongful Death Claim (motion sequence 001)

Defendant seeks summary judgment dismissing the plaintiffs' wrongful death cause of action. Plaintiffs do not specifically oppose this branch of defendant's cross motion, but they address the issue of pecuniary damages and their specific related claims in opposition to defendant's motion to vacate the note of issue (motion sequence 002).

Defendant argues that plaintiffs, in their written response to discovery demands, voluntarily withdrew their pecuniary loss claim (NYSCEF Doc. No. 67). Therefore, defendant claims there are no damages available on the wrongful death claim. Defendant further argues that plaintiffs, by withdrawing their claim for loss of financial support, have likewise waived any recovery for funeral bills and burial expenses.

In New York, there is no common law right to sue for wrongful death and the Court of Appeals has refused to "create" a common law counterpart to the statutory wrongful death

cause of action (*Arrow Elecs., v Stouffer Corp.*, 117 Misc 2d 554, 555 [Sup Ct, NY County 1982]); see *Carrick v Central Gen. Hosp.*, 51 NY2d 242 [1980]; *Liff v Schildkrout*, 49 NY2d 622 [1980]. The statute governing wrongful death actions is EPTL § 5-4.1, which provides that a wrongful death action may be brought by the personal representative decedent who is survived by distributees. EPTL § 5-4.3, entitled, "Amount of recovery", reads, in pertinent part, as follows:

> "(a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded."

Damages in a wrongful death action are, by statute, limited to "pecuniary injuries" suffered by the distributees of decedent's estate (EPTL § 5-4.3). Such damages are limited to loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death (*Parilis v Feinstein*, 49 NY2d 984, 985 [1980]), but do not include those damages which could have been recovered in a personal injury action had the decedent survived (*Liff v Schildkrout*, 49 NY2d at 633).

In their third cause of action, plaintiffs allege that the decedent's wrongful death

on October 14, 2015, was the result of defendant's negligence and violations of the Labor Law (NYSCEF Doc. No. 24, verified complaint, at 7, ¶ 39). Plaintiffs further allege that decedent left surviving him next of kin and distributees and that the estate thus became liable for, and spent money on, funeral and other expenses. As a result of decedent's wrongful death, his next of kin and distributees are seeking pecuniary damages for lost services, income, affection, consortium and support.

Defendant relies on a written statements in plaintiffs' supplemental response to a supplemental notice for discovery and inspection dated February 2, 2018 (NYSCEF Doc. No. 67). However, plaintiffs cannot be said to have waived their entire cause of action based upon these statements, which pertain solely to the withdrawal of the claim for loss of financial support. In addition to the claim for loss of financial support, plaintiffs are seeking additional pecuniary damages, such as loss of services and assistance, guidance and advice *id.*; see *Lee v Chatham Green Inc.*, 2016 NY Slip Op 31307[U]).

Defendant's argument, based upon plaintiffs withdrawing that part of their claim for pecuniary damages based on loss of financial support, that plaintiffs assertions of other pecuniary loss, including funeral and burial expenses, have been withdrawn, is misplaced. Rather, the evidence submitted reflects that issues of fact exist, such as whether, and to what extent, the decedent provided his next of kin with affection and/or support. Therefore, that portion of defendant's cross motion seeking summary judgment dismissing the third cause of action for wrongful death is denied.

Defendant's Motion to Vacate the Note of Issue (motion sequence 002)

Defendant moves for an order, pursuant to 22 NYCRR § 202.21 (e), for an order vacating the note of issue and striking the captioned action from the trial calendar. Defendant argues that 1) plaintiffs filed the note of issue prematurely; 2) authorizations requested in a post-deposition demand dated May 11, 2017 remain outstanding; and 3) the certificate of readiness is incorrect in that all discovery has not been completed.

In addressing this motion, this Court considers the following:1) a supplemental summons was served on September 6, 2016 (NYSCEF Doc. No. 2); 2) defendant served an answer containing various defenses (NYSCEF Doc. No. 4); 3) plaintiffs served a verified bill of particulars and a supplemental bill of particulars (NYSCEF Doc. No. 20, 21); 4) depositions were conducted; and 5) a note of issue and certificate of readiness were filed on September 20, 2018 (NYSCEF Doc. No. 58).

22 NYCRR § 202.21(e) provides, in pertinent part, that, within 20 days after service of a note of issue and certificate of readiness, a court may grant a party's motion to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial" and if "the certificate of readiness fails to comply with the requirements of this section in some material respect." Although plaintiffs filed the note of issue and certificate of readiness on September 20, 2018, defendant did not file the motion to strike the same until November 16, 2018. Although the motion thus appears to be untimely, this Court notes that the

parties participated in court conferences regarding outstanding discovery and, on October 2, 2018, this Court granted the defendant permission to make the instant motion. Thus, this Court deems the motion to be timely.

This action was brought to recover damages for severe and permanent personal injuries sustained by the decedent which include:

- death
- conscious pain and suffering
- blunt force injury of spinal cord
- traumatic cervical spinal cord injury
- traumatic thoracic spinal cord injury
- traumatic lumbosacral spinal cord injury
- C3-5 Decompressive Laminectomies and Instrumented Fusion with Styker Oasys System And Autologous Bone Graft
- Quadriplegia
- Sacral Decubitus Ulcer Stage IV
- Bronchopneumonia
- Inability to perform activities of daily living
- Total dependence on others for basic needs
- Inability to eat
- Inability to move
- Weight loss
- Need for pain medication
- Need for rehabilitative therapy
- Bowel incontinence
- Failure to thrive
- Anaerobic sepsis
- Aspiration Pneumonitis
- Dyspnea on exertion

The instant motion involves defendant's demand for the production of authorizations for the release of the decedent's medical records. Defendant argues that plaintiffs made "broad claims for damages" and that she is entitled to an opportunity to obtain all medical

and collateral source records. In addition to the medical records, defendant seeks income tax and business records, allegedly maintained by the decedent's son, to "determine whether or not plaintiff was in good condition before the accident." Plaintiffs oppose the motion, inter alia, on grounds that include the physician-patient privilege.

Decedent's waiver of his physician-patient privilege is limited in scope to "those conditions affirmatively placed in controversy" (*Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]). Plaintiffs herein did not place decedent's entire medical condition at issue, but, rather, sued to recover for limited damages for those injuries set forth above which plaintiffs claim are the direct result of the acute trauma decedent suffered in the accident (*Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 573–74 [2014]).

Defendant seeks unrestricted authorizations of all medical providers who treated or consulted with decedent before his death, including his primary care doctor, Dr. Patel. However, plaintiffs do not allege an aggravation or exacerbation of any pre-existing medical conditions. Defendant has not satisfied her burden of establishing that decedent's medical history and/or any prescribed medications are material or relevant to the injuries allegedly sustained as a result of the accident at the premises.

Moreover, defendant's request for income tax and business records is denied. Plaintiffs have withdrawn the derivative claim and that portion of their claim seeking monetary damages for loss of financial support. To that effect, defendant's argument that business records are relevant to issue of the work being performed at the premises and

whether decedent was in good health is without merit.

Accordingly, defendant's motion for an order vacating the note of issue and certificate of readiness, and her request for a court order directing plaintiffs to comply with outstanding discovery demands are denied. Finally, plaintiffs' request for sanctions and costs is denied insofar as they did not seek the same by way of formal motion, but rather requested this relief in their opposition to defendant's motion to vacate the note of issue.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiffs' motion (motion sequence 001), pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 23-1.7 (b) (1) (i), against defendant are granted, and the motion is otherwise denied; it is further

ORDERED that the branch of defendant's cross motion (motion sequence 001), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against her, is granted and those claims are dismissed as unopposed; and it is further

ORDERED that the branch of defendant's cross motion (motion sequence 001), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 241(6) is denied to the extent that the said cause of action is predicated upon Industrial Code section 23-1.7 (b) (1) (i), and is otherwise granted; and it is further

ORDERED that the branch of defendant's cross motion (motion sequence 001), pursuant to CPLR 3212, for summary judgment dismissing the wrongful death cause of action is denied; and it is further

ORDERED that the branch of defendant's motion (motion sequence 002), pursuant to 22 NYCRR § 202.21(e) for an order vacating the note of issue and striking this matter from the trial calendar is denied; and it is further

ORDERED that the part of defendant's motion (motion sequence 002), pursuant to CPLR 3124 and CPLR 3126 (2), for an order directing plaintiffs to comply with outstanding discovery is denied; and it is further

ORDERED that plaintiffs' request for costs and sanctions, set forth in their opposition to defendant's motion (motion sequence 002), is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision with notice of entry on defendant and on the Office of the County Clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: October 8, 2019

ENTER:

HON. KATHRYN E. FREED, J.S.C.