

Rojas v Wythe & Kent Realty LLC

2019 NY Slip Op 33541(U)

November 18, 2019

Supreme Court, Kings County

Docket Number: 502704/2017

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 18th day of November 2019

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X,
OSCAR ROJAS,

Plaintiff,

Index No.
502704/17

Seq 8

-against-

DECISION/ORDER

WYTHE & KENT REALTY LLC, W&K PHASE 2 LLC,
AND EXPRESS BUILDERS JB INC.

Defendants.

-----X
WYTHE & KENT REALTY LLC i/s/h/a WYTHE & KENT
REALTY LLC, W&K PHASE 2 LLC and EXPRESS
BUILDERS JB INC.,

Third-Party Plaintiffs,

-against-

VELOCITY FRAMERS USA INC., CLASSIC TOUCH USA
CORP. and MVP TAPING CORP. f/k/a MVP DRYWALL
AND TAPING CORP.,

Third-Party Defendants.
-----X

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KINGS COUNTY CLERK
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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers, and after oral argument, plaintiff OSCAR ROJAS moves for an Order granting him summary judgment on his Labor Law § 240(1) claim against defendants/third-party plaintiffs, WYTHE & KENT REALTY LLC ("Wythe"), W&K PHASE 2 LLC (W&K"), and EXPRESS BUILDERS JB INC. (collectively, "Defendants").

The underlying action was commenced by plaintiff Oscar Rojas ("Plaintiff"), who alleges that he was seriously injured when he fell from a two to three foot tall cylindrical container during his work on a construction project located at 19 South 11th Street, Brooklyn, New York ("Subject Premises"). Plaintiff claims that the alleged owners of the property, defendants/third-party plaintiffs WYTHE & KENT REALTY LLC, W&K PHASE 2 LLC; as well as the general contractor EXPRESS BUILDERS JB INC. ("Express Builders"), failed to provide appropriate fall safety protection equipment. Plaintiff was employed by the third-party defendant, MVP TAPING COURT f/k/a MVP DRYWALL AND TAPING CORP. ("MVP").

A party moving for summary judgment meets its prima facie showing of entitlement to judgment as a matter of law "by tendering sufficient evidence to eliminate any material issues of fact from the case (*St. Claire v. Empire Gen. Const. & Painting Corp.*, 33 AD3d 611 [2d.Dept 2006]) [citations omitted]). Once the movant makes its prima facie case, the burden shifts to the

opposing party “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Id.* (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of the instant motion, Plaintiff states that on January 27, 2017, he was tasked with installing a molding onto the frame near the ceiling of one of the apartments on the fourth floor of the building. Plaintiff, 5'3", states that the frame was approximately seven to eight feet high from the floor. According to Plaintiff, there were no ladders, scaffolds, or other safety devices available; thus, he had to stand on a container, which was two to three feet high, to perform his work. While putting pressure on the mold, he suddenly felt the container move, which caused him to fall.

Plaintiff notes that Joel Braver (“Braver”), Express Builders’ president, testified that his company was the general contractor of the project, and was responsible for making sure that the necessary safety procedures were followed by the workers (Exhibit “G” of Plaintiff’s motion). Yet, Express Builders did not supply any safety equipment at the work site. Plaintiff maintains that Express Builders as well as Wythe and W&K, the alleged owners of the Subject Premises, violated Labor Law § 240 by not providing statutorily required fall safety devices.

Defendants, in opposition, submit an affidavit from Marco Vera (“Vera”), the owner of MVP, Plaintiff’s employer (Exhibit “H” of Defendants’ motion). Vera avers that Plaintiff was instructed only to install the corner bits that he could reach. He also states that there was a ladder available to install the higher bits; however, another employee was directed to perform that task. Thus, they contend that Labor Law § 240 protections do not extend to a worker “who deliberately disregards and refuses to use readily available safety devices.”

In addition, Defendants argue that the branch of Plaintiff's motion, which seeks summary judgment against Wythe should be denied, as the entity did not own the Subject Premises on January 27, 2017- the day of the accident. As evidence, they produce a copy of a deed, which documents that on August 4, 2016, Wythe sold the property to W&K (Exhibit "K" of Defendants' motion). Defendants also submit W&K's Response to Plaintiff's Notice to Admit, which acknowledges that it owned the Subject Premises on January 27, 2017.

Plaintiff, in rebuttal, argues that Wythe is a proper Labor Law defendant, as it owned the property before the accident, and shares the same address as W&K. He also contends that Vera's affidavit is self-serving, and does not raise an issue of fact.

Labor Law §240(1), also known as the Scaffold Law, imposes absolute liability on an owner or general contractor for failing to provide safety devices to a worker engaged in an elevation-related risk, and the omission proximately causes his/her injuries (*DeGabriel v. Strong Place Realty, LLC*, 25 Misc3d 1212[A] [Sup Ct, Kings Cty. 2009]).

As a preliminary matter, this Court finds that Defendants have established by deed that Wythe is not a proper Labor Law defendant, as it did not own the Subject Premises on January 27, 2017- the day of the accident. Consequently, the branch of Plaintiff's application, which seeks summary judgment against Wythe is denied.

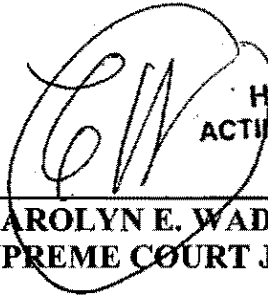
With respect to liability under Labor Law §240(1), the parties provide conflicting arguments as to whether Plaintiff was given the proper safety devices to perform his tasks. Specifically, Defendants argue that Plaintiff did not need a ladder to perform his tasks, as he was told to install the corner bits that he could reach. Thus, they maintain that he is the sole proximate cause of his injuries. On the other hand, Plaintiff contends that he was exposed to an

elevation related risk, and that Defendants did not provide him with the proper safety devices. Consequently, this Court determines that there are triable issues of material fact, including whether Plaintiff was provided proper safety devices; and was the sole proximate cause of his injuries.

Accordingly, based upon the above, Plaintiff's Motion for Summary Judgment is **denied** in its entirety. The Verified Complaint is hereby dismissed against Wythe, as it did not own the Subject Premises on the day of the accident.

This constitutes the Decision and Order of the court.

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HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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