

<b>Maltese v Port Auth. of N.Y. &amp; N.J.</b>
2020 NY Slip Op 31019(U)
March 10, 2020
Supreme Court, Bronx County
Docket Number: 0022496/2015E
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
IAS PART 7**

Index No. 0022496/2015E  
Motion Calendar No. 12  
Motion Date: 12/2/2019

ANTONIO MALTESE and LEYLA MALTESE,  
*Plaintiff(s),*

*-against-*

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,  
TISHMAN CONSTRUCTION CORPORATION, TURNER  
CONSTRUCTION COMPANY, AND TISHMAN/TURNER,  
A JOINT VENTURE

*Defendant(s).*

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,  
TISHMAN CONSTRUCTION CORPORATION, TURNER  
CONSTRUCTION COMPANY, AND TISHMAN/TURNER,  
A JOINT VENTURE,

*Third-Party Plaintiffs*

*-against-*

TECHNO CONSULT, INC.,

*Third-Party Defendant*

TECHNO CONSULT, INC.,

*Second Third-Party Plaintiff*

*-against-*

YONKERS CONTRACTING COMPANY, INC.,

*Second Third-Party Defendant*

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion.....	1
Notice of Cross Motion.....	2
Reply and Opposition Affirmation.....	3

*Upon the foregoing papers, the Decision/Order on this Motion is as follows:*

The plaintiff ANTONIO MALTESE (hereinafter referred to as "plaintiff") moves this court for an order pursuant to CPLR § 3212 granting a summary judgement on the issue of liability pursuant to New York State Labor Law § 240 (1), resulting in personal injuries sustained by plaintiff, against the defendant PORT AUTHORITY of NEW YORK AND NEW JERSEY (hereinafter referred to as "PA").

Defendant PA and defendants Tishman Constructing Corporation (hereinafter referred to as “Tishman”), Turner Construction Company (hereinafter referred to as “Turner”) and Tishman/Turner a Joint Venture (hereinafter referred to as “Tishman/Turner”) have submitted a cross motion requesting (1) a summary judgement pursuant to CPRL § 3212 dismissing plaintiff’s claims to Labor Laws § 200 and §241(6), and (2) a dismissal of all claims against defendants Tishman, Turner , and Tishman/Turner. Defendants have also submitted an opposition therein to the plaintiff’s request for summary judgement. Plaintiff has submitted a reply to the opposition and an opposition to defendant’s cross motion. After due deliberation, the court determines the motions as follows:

Standard of Review

The proponent of a motion for summary judgement must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgement as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and Winegrad v New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985). Summary judgement is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a motion for summary judgement is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept. 1989). It is well settled that issue finding is the key to summary judgement. Rose v DaEcib USA, 259 A.D. 258, 686 N.Y.S.2d 19 (1<sup>st</sup> Dept. 1999). Summary judgement will only be granted if there are no material triable issues of fact. Sillman v Twentieth Century-Fox Film Corp, 3 N.Y.2d 385, 144 N.E.2d 498 (NY 1957).

Plaintiff seeks damages as to the result of an accident which occurred on or about January 3, 2015, as a result of the defendants’ negligence. On the date of the accident, plaintiff was working at the World Trade Center North Tunnel E work site (hereinafter referred to as “premises”). This premises,

formally known as the World Trade Center Transportation Hub and PATH Center was owned by defendant PA. Tishman, Turner and Tisman/Turner were under contract with PA but were not the general contractors at this premises or on the date of plaintiff's accident.

Defendant PA was in contract with second third-party defendant Yonkers Contracting (hereinafter referred to as "Yonkers"), who was the general contractor and performed work and provided labor services to the premises. Third-party defendant Techno Consult, INC. (hereinafter referred to as "Techno"), was in contract with PA to oversee, manage, supervise and inspect the premises regarding safety concerns. On the date of plaintiff's accident, plaintiff was working as a journeyman Union Carpenter employed by Yonkers. Plaintiff arrived at the work site and began to set up for a work point approximately twelve (12) feet above the ground. Using a ladder provided at the site, plaintiff began scaling the ladder when the ladder slipped, and propelled the plaintiff approximately eight (8) feet below.

Plaintiff seeks relief in the form of summary judgement pursuant to CPLR § 3212 against defendant on the issue of liability pursuant to New York State Labor Law § 240(1) which provides:

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.

In support, plaintiff submitted the deposition of coworker, Jeff Cohill, (hereinafter referred to as "Cohill"), also employed by Yonkers Contracting. Cohill testified that the work site had no other ladder

plaintiff could have used, there was no scaffolding and, despite the availability of safety harnesses, there were no independent safety lines for the plaintiff to tie a safety harness thereto. Plaintiff also submitted the deposition of Gary Piscopo, safety supervisor for PATH. Piscopo testified that the ladder provided at the site was indeed defective and that the rubber pads on the bottom were missing on one side.

Plaintiff alleges that the occurrence and resulting injuries sustained were caused wholly by the reason of negligence, carelessness and recklessness of the defendants and their contractors, agents and employees by failing to provide plaintiff with a ladder that was properly constructed and failure to provide safety lines and other safety devices to prevent a fall from an elevated surface.

In opposition, the defendants submitted the deposition of Giford Cross (hereinafter referred to as "Cross"), a foreman for Yonkers. Cross testified that plaintiff could have used one of the safety harnesses provided to him at the premises in order to ensure his safety, or he could have constructed a scaffold because all of the necessary materials were also present at the premises. Cross also concedes that there were, in fact, no safety tie-off lines present for the safety harness to be tethered to. Through Cross's deposition, defendants allege that plaintiff was a recalcitrant worker who disregarded the protection that certain safety measures provided and chose not to use them.

In reply to defendant's recalcitrant worker claim, plaintiff further alleges that, in order for defendant's claims to be complete, they needed to establish that plaintiff was (1) instructed to use the device, (2) that such device was readily available at the worksite, (3) that plaintiff knew where to find them and (4) that plaintiff elected to not use them for no good reason. The plaintiff further alleges that the claim that safety equipment was simply present at the site is not enough to clear the defendants of their liability.

There is "no evidence that plaintiff refused to use the safety harness, and the fact that safety harnesses may have been available at the work site is insufficient to allow defendants to

escape liability” Jane Depalma v Metropolitan Transportation Authority 3024 A.D. 2d 461 (1<sup>st</sup> Dept. 2003). Further, as *arguendo* since both parties do not refute the fact that the tie off lines for the safety harnesses were not present at the relevant premises, even if the plaintiff had decided to dress in the safety harness, it would not have prevented plaintiff from falling as he did.

Therefore, defendants have not successfully raised any issues of fact to prevent this court from granting the plaintiff’s motion for a summary judgement on the issue of liability pursuant to Labor Law § 240 (1).

Pursuant to defendants’ cross motion for summary judgement dismissing all of plaintiff’s claims of negligence against defendants pursuant to Labor Law § 200 and § 241(6), the alleged facts are as follows: In support of his claim of negligence against defendants in accordance with Labor Law §241(6), plaintiff claims that defendants violated NYS Industrial codes § 23-1.5; 23-1.7; 23-1.8; 23-1.15; 23-1.16; 23-1.21;23-2.1;23-5 and 23-6. In support for their motion for summary judgment, defendants allege that the following industrial codes are inapplicable and plaintiffs’ claims pursuant to them should be dismissed: § 1.5(c)(2) is inapplicable because it deals with load carrying equipment, which was not involved in the accident. All sections of §1.7 as they relate to falling objects, hazardous openings, bridge or highway overpass construction, drowning hazards, slipping and tripping, stairs, runways or ramps, contaminated or oxygen deficient air, and corrosive substances, none of which are applicable to this matter. § 1.8 in its entirety because it relates to issues of respirators, cleanliness of personal equipment, work performed in water or rain, corrosive substances, and head and eye protection, none of which were ever an issue connected to the accident. Defendants further allege that the following sections of industrial code § 1.21 are inapplicable; (a) as it relates to ladder length, (b) (1) as it relates to load sustainment, (b) (2) as it relates to opaque coverings, (b) (4) (i) as it relates to

ladders as a means of access between floors, (b) (4) (iii) as it relates to excessive sag on a leaning ladder, (b) (4) (iv) as it relates to a worker holding a ladder in place, (b) (4) (v) as it relates to ladders leaning on slippery surfaces, (b) (5) as it relates to wooden ladder rungs, (b) (6) as it relates to ladder splicing, (b) (7) as it relates to metal ladders in electrocution risk areas, (b) (8) as it relates to spreadable legs, (b) (9) as it relates to ladders placed in door openings, (b) (10) as it relates to prohibited ladder types, (c) as it relates to cleat type ladders, (d) as it relates to dimensions of extensions and sectional ladders, (e) as it relates to stepladders, and (f) as it relates to ladder ways, none of which were ever issues raised in the instant matter. Defendants further allege that §23-2.1 is inapplicable in its entirety as it deals with material and equipment being properly stored and debris being properly disposed of, which was also not an issue in the instant matter. Defendants also allege that § 23-6 is inapplicable as it deals with the hoisting of materials, which was not an issue raised in the instant matter.

Defendants also allege that the following industrial code violation claims made by plaintiff are inapplicable; § 1.15, § 1.5 (c) (3), § 1.21 (b) (3) and 1.21 (b) (4) (ii) and §23-5. Pursuant to § 1.15 defendants claim that it is inapplicable to the instant matter as it relates to the dimensions of either safety rails or of safety belts, harnesses, tail lines and lifelines. However, Piscopo, Cross, Cohill and plaintiff all testified to the presence of harnesses at the work site and the existence, or lack thereof, of harnesses and safety lines is a central issue of fact in this case. Pursuant to §23-1.5 (c) (3), defendants allege that the industrial code is inapplicable as it mandates that safety devices be kept sound and operable and claim that the record is void of any evidence that any applicable safety devices were unsound or inoperable at the time of use, further alleging that plaintiff determined the ladder safe for use prior to climbing it. However, deposition of Piscopo, raises an issue of fact as he testified to finding that the ladder was indeed

defective and missing a rubber bottom on one side. Further, Cohill testified that no other ladder was provided at the work site except for the one used by plaintiff, and that there were no safety lines or rope grab systems to tie off a safety harness to. Neither party refutes the fact that there were no tie off lines present at the scene of the accident in question that would have made safety harnesses operable, in accordance with industrial code §23-1.5 (c) (3). There exists an issue of fact regarding whether provided safety devises were sound or operable. Pursuant to § 1.21 (b) (3), defendants allege that this industrial code is inapplicable to the instant matter as it mandates that a ladder not be used if it is in disrepair, and claims that plaintiff decided to use the ladder. However, Piscopo testified that the ladder was “defective” and therefore, in disrepair. Further, Cohill testified that there was no other ladder present for plaintiff to have used. An issue of fact remains as to whether or not the ladder was in disrepair and should have been provided at the job site. Pursuant to § 1.21 (b) (4) (ii) which mandates that ladder footings be firm, defendants allege that there is no evidence that the footings on the ladder provided were not firm. However, Piscopo testified that “there was rubber pads on the bottom of the ladder that stabilize the ladder properly when you foot it. And one of those pads was missing.” There exists an issue of fact regarding the stability of the footings of the ladder in question. Finally, defendants claim that §23-5 is in applicable as it relates to provisions for all types of scaffolds and allege that scaffolds were never involved in the instant matter. However, Cross testified to the existence of the necessary materials to construct a scaffold at the work site and testified that plaintiff could have constructed a scaffold as a safety measure. Plaintiff has raised significant issues of fact with regards to defendants claims that industrial codes § 23-1.15, § 23-1.5 (c) (3), §23-1.21 (b) (3), §23-1.21 (b) (4) (ii) and §23-5 are inapplicable to the instant matter in order to deny the

defendants request for summary judgement to dismiss the plaintiff's claims of defendants' negligence pursuant to Labor Law §241(6).

In support for their motion for summary judgement dismissing all claims made by plaintiff pursuant to Labor Law § 200, defendants allege that they did not control the means and methods of plaintiff's work and did not cause, create or have notice of the condition. Defendants further allege that in order to be liable under labor law § 200, plaintiff would have to prove that defendants had the responsibility to supervise or control the activity that brought about the alleged injury and that it was plaintiff's employer, Yonkers Contracting, that instructed plaintiff on the means and method of his work. However, Piscopo testified that defendant PA had assigned an employee in charge by the name of Concordio Habijan (hereinafter referred to as "Habijan"), who worked for Techno consult, was present at the premises on the date in question as a representative of PA. Piscopo further testified that Habijan did have the authority to supervise according to safety conditions and stop work if he had noticed an unsafe condition. Further, Habijan, in his deposition, began by testifying that PA provided the safety training regarding track and train safety and then further testified that all employees were required by PA to take a class in OSHA safe training, which involved the safe use of ladders. Therefore, plaintiff has raised issues of fact with regards to defendant's liability pursuant to Labor Law § 200 enough to deny defendants request for summary judgement.

With regards to defendants' final request to dismiss all claims against Tishman, Turner and Tishman/Turner, although these entities are included in the original complaint by the plaintiff, the alleged contracts between all three of these defendants and PA are not included as exhibits. Further, in all depositions there is not testimony that a representative of Tishman, Turner or Tishman/Turner was ever present at the work site or during the accident. Finally,

plaintiff does not address this request in his opposition. Therefore, there is no sufficient issue of fact raised that would move this court to deny the defendants request.

Accordingly, it is,

ORDERED and ADJUDGED that plaintiff's motion for summary judgement against defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY pursuant to Labor Law § 240(1) is hereby granted in its entirety. And it is further

ORDERED and ADJUDGED that defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S motion for summary judgement dismissing plaintiff's claims pursuant to labor law § 241(6) is hereby denied. And it is further


ORDERED and ADJUDGED that defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S motion for summary judgement dismissing plaintiff's claims pursuant to labor laws § 200 is hereby denied. And it is further

ORDERED and ADJUGDED that defendants TISHMAN CONSTRUCTION CORPORATION, TURNER CONSTRUCTION COMPANY, AND TISHMAN/TURNER, A JOINT VENTURE motion for dismissal of all claims against them by plaintiff pursuant to labor laws §200, §240(1) and §241(6) is hereby granted. And it is further

ORDERED and ADJUDGED that plaintiff ANTONIO MALTESE serve a copy of this Order with Notice of Entry within thirty (30) days from the date of entry upon all parties herein and upon the clerk of the Court.

This constitutes the decision and order of the Court.

3/10/20  
DATE

  
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HON. WILMA GUZMAN  
J.S.C.