Balliu v 627 Greenwich Owner LLC
2020 NY Slip Op 33897(U)
November 23, 2020
Supreme Court, Kings County
Docket Number: 504114/17
Judge: Bruce M. Balter
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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 320 Jay Street, Brooklyn, New York, on the 23rd day of November, 2020.

PRESENT:

HON. BRUCE M. BALTER,
Justice.

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RAMADAN BALLIU and FLORIJE BALLIU,

Plaintiffs,

- against -

627 GREENWICH OWNER LLC n/k/a 90 MORTON OWNER LLC, BRACK CAPITAL REAL ESTATE, LTD, 8885 3RD AVENUE REALTY OWNER LLC, BCRE SERVICES LLC, INTEGRITY CONSULTING SERVICES, ECOSAFETY CONSULTANTS, INC., and B&D RESTORATION CORP.,

Defendants.

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627 GREENWICH OWNER LLC n/k/a 90 MORTON OWNER LLC, BRACK CAPITAL REAL ESTATE, LTD, and BCRE SERVICES LLC,

Third-Party Plaintiffs,

- against -

B&D RESTORATION CORP. and IBF CONSTRUCTION CORP.,

Third-Party Defendants.

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DECISION AND ORDER

Index No. 504114/17

Mot. Seq.: 10 (motion date 7/7/20)
12 (motion date 8/28/20)

The following e-filed papers read herein: NYSCEF#:

Notice of Motion/Cross Motion, Affirmations (Affidavits), Memoranda of Law, and Exhibits Annexed	299-319, 321; 333-347
Affirmations in Opposition and Exhibits Annexed	444-451; 452-457
Reply Affirmations and Exhibits Annexed	460-461; 463-464; 465

In this action to recover damages for personal injuries, plaintiff RAMADAN BALLIU (plaintiff or injured plaintiff) and his wife, FLORIJE BALLIU, suing derivatively (collectively, plaintiffs), move for partial summary judgment on the issue of liability on:

[1] The caption reflects its amendment under the Consolidation Order, dated Sept. 22, 2020 (NYSCEF #467).

(1) his Labor Law § 240 (1) claim, and (2) his Labor Law § 241 (6) claim to the extent predicated on the alleged violations of Industrial Code §§ 23-3.3 (c) and (h), as against defendants/third-party plaintiffs 627 GREENWICH OWNER LLC, now known as 90 MORTONOWNER LLC (Morton), and BCRE SERVICES, LLC (BCRE; collectively with Morton, defendants). Defendants oppose plaintiffs' motion. In addition, defendant ECOSAFETY CONSULTANTS, INC. (EcoSafety) cross-moves for summary judgment dismissing plaintiffs' complaint, together with any and all cross claims, as against it. Plaintiffs and defendants separately oppose EcoSafety's cross motion.

On Dec. 28, 2016, plaintiff, an employee of a third-party defendant subcontractor, was injured at a construction work site when, during his participation in the demolition of the interior steel columns, one of those columns estimated to weigh at least 1000 pounds fell on him as his coworkers, using ropes, were lowering it from its initial standing position to its intended horizontal position resting on the floor. Morton was the property owner, BCRE was the general contractor, and EcoSafety was the safety consultant, at the construction project. On Mar. 1, 2017, plaintiffs commenced this action against Morton, BCRE, and EcoSafety, among others.[2]

After careful consideration of the parties' submissions, including each of the exhibits, the Court determines that plaintiffs, regardless of whether their expert's affidavit can properly be considered, have nonetheless made a prima facie showing of the injured plaintiff's entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim as against defendants. Although the base of the column remained at the same level as the injured plaintiff (*i.e.*, on the floor), the weight and the force which the column was able to generate during its fall to the floor from its nine-foot-high vertical position mandated that it be secured in compliance with Labor Law § 240 (1) (*see*

[2] Plaintiffs have discontinued all of their claims against one of the remaining defendants, INTEGRITY CONSULTING SERVICES, by order, dated Nov. 18, 2019 (NYSCEF #328).

Encarnacion v 3361 Third Ave. Hous. Dev Fund Corp., 176 AD3d 627, 628-629 [1st Dept 2019]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *Ray v City of New York*, 62 AD3d 591, 591-592 [1st Dept 2009]). The coworkers' use of ropes as a safety device in lowering the column from its vertical to its horizontal position was insufficient "to provide safety without the use of additional precautionary devices or measures" (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 925 [2d Dept 2017] [internal quotation marks omitted]). In opposition, the defendants have failed to raise a triable issue of fact as to the absence of a statutory violation, as to whether the injured plaintiff's own conduct was the sole proximate cause of the accident, and as to whether the outstanding depositions could change the outcome insofar as defendants were concerned (*see McCallister*, 92 AD3d at 929). Defendants' contention that an award of summary judgment on the Labor Law § 240 (1) claim as against them is premature because of outstanding disclosure, is without merit. Defendants have failed to demonstrate that discovery might lead to relevant evidence insofar as they are concerned, or that the facts essential to justify their opposition to plaintiffs' motion are exclusively within the latter's knowledge and control (*see Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1092-1093 [2d Dept 2015]).[3]

The Court further determines that there are triable issues of fact as to whether Industrial Code §§ 23-3.3 (c) and/or (h) were violated. Industrial Code § 23-3.3 (c) "requires continuing inspections against hazards which are created by the progress of the demolition work itself, rather than inspections of how demolition would be performed" (*see Smith v New York City Hous. Auth.*, 71 AD3d 985, 987 [2d Dept 2010] [internal quotation marks omitted]; *compare Campoverde v Bruckner Plaza Assoc., L.P.*, 50 AD3d 836, 837 [2d Dept 2008], *with Balladares v Southgate Owners Corp.*, 40 AD3d 667, 670 [2d Dept 2007]). Industrial

[3] Defendants' contention that "it would have been illogical to have prevented the column from falling because it was the very goal of the work that was being performed in this area" (Affirmation in Opposition, ¶ 39 (NYSCEF #444), misses the point. Labor Law § 240 (1) was violated precisely because the coworkers' ropes were not adequate to lower carefully the column to the ground.

Code § 23-3.3 (h) provides that "[e]very structural member which is being dismembered . . . shall be chained or lashed in place to prevent its uncontrolled swinging or dropping." A finding that defendants violated Industrial Code § 23-3.3 (h) as a matter of law is not supported by the record.

Lastly, EcoSafety's cross motion is denied as premature because there is an outstanding deposition of its witness, Luis Enchauntegui, as directed by order, dated Sept. 28, 2020 (Knipel, J.) (NYSCEF #443) (*see e.g. Angelo Capobianco, Inc. v Brentwood Union Free School Dist.*, 53 AD3d 634, 636 [2d Dept 2008]). Mr. Enchauntegui's testimony is expected to shed light regarding EcoSafety's inspection of the work site on, and shortly before, the date of the accident.

Accordingly, it is **ORDERED** plaintiffs' motion for partial summary judgment on the issue of liability is GRANTED with respect to the injured plaintiff's Labor Law § 240 (1) claim as against defendants and is DENIED with respect to the injured plaintiff's Labor Law § 241 (6) claim, as predicated on the alleged violations of Industrial Code §§ 23-3.3 (c) and (h), as against defendants; and it is further

ORDERED that EcoSafety's motion for summary judgment is DENIED WITH LEAVE TO RENEW, if it be so advised, within 30 days after completion of Luis Enchauntegui's deposition.

This constitutes the decision and order of the Court.

ENTER,

J. S. C.