

Rizzo v W2005/Hines W. Fifty-Third Realty LLC
2020 NY Slip Op 33960(U)
November 30, 2020
Supreme Court, New York County
Docket Number: 153758/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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PASQUALE RIZZO,

Plaintiff,

- v -

W2005/HINES WEST FIFTY-THIRD REALTY LLC, LEND
LEASE (US) CONSTRUCTION, LMB, INC

Defendant.

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INDEX NO. 153758/2016

MOTION DATE 10/30/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND).

In this action, plaintiff, Pasquale Rizzo, seeks to recover damages for injuries he alleges he sustained while working on a construction project for defendants. Plaintiff moves for partial summary judgment, pursuant to CPLR 3212, on his Labor Law §240(1) cause of action. Defendants cross-move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety.

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material

issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

The pertinent facts of this case are as follows. Defendant W2005/Hines West Fifty-Third Realty, LLC, owns the property located at Sixth Avenue between 53rd and 54th Streets, and hired defendant Lend Lease (US) Construction, LMB, Inc. (Lend Lease) to act as the general contractor on a project to build a 72-story residential tower on the property. Lend Lease, in turn, subcontracted plaintiff's employer, Sorbara Construction, to install the concrete superstructure for the project. The evidence submitted by the parties on their respective motions demonstrates that on January 14, 2016, plaintiff was crouching down on one knee erecting metal pipe scaffolding at the worksite, when a ten-foot metal beam, which was leaning against the scaffolding behind plaintiff, fell and struck him on the back.

Regarding plaintiff's motion for partial summary judgment, Labor Law §240(1) subjects owners and contractors to absolute liability for certain gravity-related injuries, as a matter of law, because workers "are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985] quoting *Koenig v Patrick Constr. Co.*, 298 NY313 [1948]). Thus, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*Sanatass v Consolidating Investing Co., Inc.*, 10 NY3d 333 [2008]; *Martinez v City of New York*, 93 NY2d 322 [1999]; see also *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 10 [2011]; *Marrero v 2075 Holding Co. LLC, et al.*, 106 AD 3d 408, 408-409 [2013]; *McCallister v 200 Park, LP, et al.*, 92 AD3d 927, 928-929 [2012]). The First Department has repeatedly upheld awards of summary judgment under Labor Law §240(1) when workers were struck by falling beams, or objects, that were neither braced nor secured (*See Metus v Ladies Mile, Inc.*, 51 AD3d 537 [2008]; *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 405-406 [2013]).

In light of the testimonial and documentary evidence submitted by plaintiff on his motion, and the “absolute liability” standard set forth by the statute, plaintiff is entitled to summary judgment on his Labor Law §240(1) cause of action, and his motion for partial summary judgment is granted.

Turning to defendants’ cross motion, defendants seek to summarily dismiss plaintiff’s Labor Law §241(6) cause of action. To recover under Labor Law §241(6), a plaintiff must plead and prove a violation of a concrete provision of the New York State Industrial Code containing “specific, positive commands,” rather than a provision reiterating common-law safety standards (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 503 [1993]).

In support of his Labor Law §241(6) claim, plaintiff’s bill of particulars alleges that defendants violated several sections of the Industrial Code including §§23-1.5(a)&(c), 23-1.7(a)(1)&(2), 23- 2.1(a)(1&2), 23-2.3(a)(1-3) & (c), 23-2.6(a)&(b). However, none of the Industrial Code sections cited by plaintiff can support his Labor Law §241(6) cause of action in this case. §23-1.5(a) and (c), have both been held to be insufficient to support a Labor Law §241(6) claim (*See Martinez v 342 Property LLC.*, 128 AD3d 408 [2015]; *Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207 [2002]). §23-1.7(a)(1)&(2), is inapplicable here as plaintiff has not submitted any evidence that the area where he was allegedly injured was an area where objects or materials would normally fall (*See Boyle v 42nd Street Development Project, Inc.*, 38 AD3d 404 [2007]). §23-2.1(a)(1&2), is also inapplicable as the incident did not occur in one of the areas enumerated by that provision (*see Guallpa v Leon D. DeMatteis Construction Coro.*, 121 AD3d 416 [2014]), and §23-2.3(a)(1-3) & (c) is not applicable as there was no structural steel assembly occurring at the time of the accident. Finally, §23-2.6(a)&(b), which deal with catch platforms required on the exterior face of walls, is also inapplicable to the facts here (*See Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207 [2002]).

As plaintiff has failed to set forth evidence of a violation of an applicable section of the New York State Industrial Code by defendants, the branch of defendants' motion which seeks to dismiss plaintiff's Labor Law §241(6) cause of action is granted, and that cause of action is dismissed.

The remaining branches of defendants' motion seek to dismiss plaintiff's Labor Law §200 and common law negligence causes of action. Summary judgment cannot be awarded on these claims at this time as material questions of fact remain to be answered, such as whether defendants had actual or constructive notice of a dangerous condition, before it can be determined whether defendants were in some way negligent in failing to secure the beam that injured plaintiff.

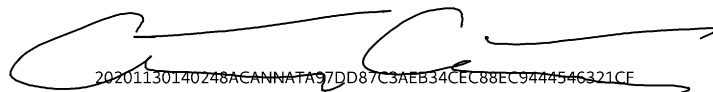
Accordingly, it is

ORDERED that plaintiff's motion seeking an award of partial summary judgment on his Labor Law §240(1) cause of action is granted; and it is further

ORDERED that the branch of defendants' cross-motion which seeks dismissal of plaintiff's Labor Law §241(6) cause of action is granted; and it is further

ORDERED the remaining portion of plaintiff's motion is denied; and it is further

ORDERED that defendants cross motion is otherwise denied, and the action shall continue as to the remaining causes of action; and counsel are directed to appear for a virtual status conference which parties are directed to schedule by calling chambers at (646) 386-5429.



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<u>11/30/2020</u>			
DATE		ANTHONY CANNATARO, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE