

Phillips v One E. 57th St., LLC
2021 NY Slip Op 31151(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 158112/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM

Justice

-----X

ROY PHILLIPS,

Plaintiff,

- v -

ONE EAST 57TH STREET, LLC, 743 FIFTH HOLDINGS,
LLC, SHAWMUT DESIGN & CONSTRUCTION,

Defendant.

-----X

ONE EAST 57TH STREET, LLC, SHAWMUT DESIGN &
CONSTRUCTION

Plaintiff,

-against-

ORANGE COUNTY IRONWORKS LLC, LONG ISLAND
CONCRETE INC., GABRIEL STEEL ERECTORS, INC.

Defendant.

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INDEX NO. 158112/2015
MOTION DATE 12/02/2020
MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

Third-Party
Index No. 595264/2016

The following e-filed documents, listed by NYSCEF document number (Motion 008) 360, 361, 362, 363,
364, 365, 366, 367, 368, 369, 370, 371

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

ORDERED that defendants' motion, pursuant to CPLR 2221 (d), for leave to reargue
plaintiff's motion for summary judgment is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order along with notice of
entry on all parties within twenty (20) days.

This is an action to recover damages for personal injuries allegedly sustained by a union ironworker on July 30, 2015, when, while working at a sub street-level construction site located at 743 Fifth Avenue, New York, New York (the Premises), he fell from an insufficiently secured ladder while climbing out of the sub street-level worksite.

In motion sequence number 008, defendants/third-party plaintiffs One East 57th Street, LLC (One East) and Shawmut Design & Construction (Shawmut) (together, defendants) move, pursuant to CPLR 2221 (d), for leave to reargue that part of this court's May 29, 2020 decision and order (the Prior Order), that granted plaintiff's motion (motion sequence number 004) for summary judgment in his favor on his Labor Law § 240 (1) claim and portions of his Labor Law § 241 (6) claim.¹

In the Prior Order, this court determined that plaintiff was properly protected by the Labor Law, and that he established his entitlement to judgment in his favor. For example, the court held that:

“Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants because the safety device, i.e. the Ladder, failed to protect him from falling while he performed his work. To that effect, the Ladder shifted and “kicked out” while he was climbing up, which caused him to fall to the floor below and become injured. Plaintiff's testimony that the ladder kicked out is supported by the GSE Report, Goodleaf's witness statement, and the Shawmut Report”

(notice of motion, exhibit 4, at 13-14 [the Prior Order]).

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221 [d])

¹ The court adopts herein its recitation of facts as set forth in the Prior Order.

[2]). A party may not use a motion to reargue as a vehicle to advance arguments different from those provided on the original application (*see Mariani v Dyer*, 193 AD2d 456, 458 [1st Dept 1993]), or to argue a new theory of law or raise new questions not previously advanced (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

Now, defendants argue that the court overlooked their argument that plaintiff was not protected by the Labor Law because “he was not performing an enumerated activity warranting” protection thereunder at the explicit moment of the accident (affirmation in support, ¶ 36).² Specifically, defendants argue that, because plaintiff had decided to take a coffee break and was exiting the work site – an approximately 12-foot deep excavated pit – he was not performing an enumerated activity at the time of the accident. Therefore, they argue, the Labor Law cannot apply to plaintiff’s accident.

As an initial matter, the court directly addressed this issue on page 15 of the Prior Order, with respect to an identical argument made by third-party defendant Orange County Ironworks, LLC (OCI). The court explicitly held the following:

“OCI’s argument that the Labor Law does not protect a worker if that worker is exiting the work site for a coffee break is . . . unpersuasive (*see, e.g. Beharry v Public Storage, Inc.*, 36 AD3d 574 [2d Dept 2007] [Labor Law 240 (1) applied to worker who, while returning to his job site from a coffee break, was injured while climbing the “functional equivalent of a ladder”]).

(notice of motion, exhibit 4, at 15 [the Prior Order]). Accordingly, the court did not overlook this issue.

Next, defendants argue that the court misapprehended the law. According to defendants, *Beharry* is inapplicable to the instant matter because it applies only to workers who are

² The enumerated activities referenced in Labor Law § 240 (1) include “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.”

“returning” to the jobsite from a coffee break, rather than those who are leaving the jobsite for a coffee break.

This argument raises a distinction without a difference. The First Department has addressed this very point. “[I]njuries sustained while a worker was on site, although entering or exiting the site, or on a break, come within the protections of Labor Law § 240 (1)” (*Hoyos v. NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 495 [1st Dept 2017]).

Here, it is uncontested that plaintiff was a worker who was (1) indisputably within the work site at the time of the accident, and (2) who was exiting the site itself at that time. Moreover, plaintiff was explicitly using an enumerated safety device (a ladder) to exit the 12-foot sub street-level work site, and that safety device failed to provide plaintiff protection from a gravity related risk. Accordingly, as this court originally stated, *Beharry* is applicable and the Labor Law applies to plaintiff’s accident (*id.*).

Defendants also argue that the court overlooked the case of *Prats v Port Auth. of N.Y. and N.J.* (100 NY2d 878 [2003]) and its progeny. This argument is misplaced, as *Prats* underscores and reinforces the Prior Order.

In *Prats*, the question before the Court was whether the Labor Law applies to a mechanic who was inspecting construction work. The Court of Appeals determined that the plaintiff, though he was merely an inspector (inspection is not an enumerated activity), was a protected worker because he was “a member of a team that undertook an enumerated activity under a construction contract” (*id.* at 882).

Specifically, the Court in *Prats* set forth a “confluence of factors” analysis to determine whether plaintiff’s activity fell within the ambit of the Labor Law. These factors include (1) whether the worker “routinely undertook an enumerated activity,” (2) whether the worker was

employed by a “company engaged under a contract to carry out an enumerated activity” and (3) whether the worker “participat[ed] in an enumerated activity during the specific project at the same site where the injury occurred” (*id.* at 883).

Using these factors, plaintiff’s activity fell well within the Labor Law’s scope. It is undisputed that plaintiff was a construction worker that undertook an enumerated activity – the erection of structural steel in the excavated pit at the Premises. It is also undisputed that plaintiff was employed by the company responsible, pursuant to a contract, for performing said enumerated activity at the Premises. Finally, it is undisputed that plaintiff participated in that very work at the work site where the injury occurred.

Accordingly, even under the “confluence of factors” analysis, plaintiff’s activities clearly fell within the scope of the Labor Law (*see also Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004] [“To myopically focus on . . . the plaintiff’s activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of [the Labor Law] which requires a liberal construction in order to accomplish its purpose of protecting workers”] [internal quotation marks and citation omitted]). Accordingly, plaintiff’s activities at the time of his accident were protected by the Labor Law.

Given the foregoing, defendants have not established that the court overlooked or misapprehended any law or fact. Thus, defendants are not entitled to reargument.

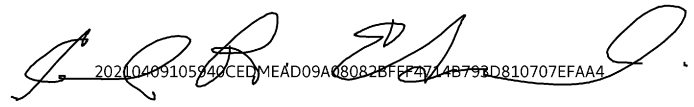
The remaining arguments have been considered and were equally unpersuasive.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants motion, pursuant to CPLR 2221 (d), for leave to reargue plaintiff's motion for summary judgment is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.


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4/9/2021
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE