Matthews v Forest City Ratner Cos., LLC
2021 NY Slip Op 32164(U)
October 19, 2021
Supreme Court, Kings County
Docket Number: Index Number 505091/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 505091/2016

Part 91

DONALD MATTHEWS,

Plaintiff,

against

FOREST CITY RATNER COMPANIES, LLC, FOREST CITY ENTERPRISES, FOREST CITY REALTY TRUST, INC., ATLANTIC YARDS B2 OWNER, LLC, FCRC MODULAR, LLC, SKANSKA USA BUILDING, SKANSKA AB, SKANSKA MODULAR, LLC, AND MG MCGRATH, INC.,

Defendants.

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2-3
Replying Affidavits.....	4
Exhibits.....	
Other	

Upon the foregoing papers, defendants'[1] motion for summary judgment (Seq. 004) and plaintiff's cross-motion[2] for summary judgment and to amend the bill of particulars (Seq. 005) are decided as follows:

KINGS COUNTY CLERK FILED

[1] The other defendant parties in the original complaint, Skanska USA Building, Skanska AB, Skanska Modular, LLC, and MG McGrath, LLC, have already been granted summary judgment dismissing the claims against them. Accordingly, all references to defendants in this decision are only to the remaining defendants.

[2] Section 202.8-b(a) of the Uniform Civil Rules for the Supreme Court states, "Unless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each; (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief." Section 202.8-b(c) states that parties must file a certificate that shows conformity with the word count limitation. Counsel's affirmation in support of Mr. Matthews' cross-motion and in opposition to defendants' motion does not contain such a certification and is 46 pages long. The court approximates the word count of this affirmation is 14,000 words, excluding the portions specified in Section 202.8-b(b). Pursuant to CPLR 2001, the court forgives counsel for this violation of the rules, as they were recently enacted. However, the court cautions counsel to adhere to these rules going forward.

Introduction

This action involves an alleged accident on a construction project owned and operated by certain Forest City Ratner entities. These entities, separately and in conjunction with other Skanska-related entities, owned and/or operated two construction sites that constructed modular apartments that were assembled into an apartment building. Plaintiff, Donald Matthews, asserts that, while performing his duties for constructing a modular apartment, he fell from a defective ladder. Mr. Matthews asserts claims of negligence and violation of Labor Law §§ 200, 240(1), and 241(6).

Factual Background

The Corporate Structures and Operation of the Construction Project

Information concerning the corporate relationships and operation of the construction project is found in the testimony of Robert Sanna, an employee of FC Employers LLC, formerly Forest City Ratner Companies, who is the senior vice present in charge of construction and development (Sanna EBT at 8-9). Additional information is found in the corporate documents, such as leases, limited liability company formation agreements, and construction management contracts.

Mr. Sanna testified that defendant Forest City Realty Trust is the successor company to defendant Forest City Enterprises, which took over operation of Forest City Enterprises, Inc. after June 11, 2015 (the date of the subject accident) (*id.* at 14). He describes both companies as "nationally-based development compan[ies]" (*id.* at 11-12). Mr. Sanna further testified that Forest City Ratner Companies, LLC is the New York office affiliate of Forest City Enterprises (*id.*).

Defendants also submit, albeit in opposition to Mr. Matthews' cross-motion, an affidavit by Michael Flowers, a former vice president of insurance and claims and compliance counsel of Forest City Realty Trust, Inc. Mr. Flowers explains that Forest City Ratner Companies, LLC was a wholly owned subsidiary of Forest City Enterprises (Flowers affidavit at ¶ 5).

Russell Johnson, an employee of former defendant Skanska USA Building Inc., also submitted an affidavit in support of Skanska USA Building's prior summary judgment motion.[3] In his affidavit, Mr. Johnson states that Forest City Ratner Companies, LLC was the developer of a construction project at 461 Dean Street, known as B2 BKLYN (Johnson Affidavit at ¶ 4). Mr. Johnson also states that Forest City Ratner Companies, LLC was an affiliate of defendant Atlantic Yards B2 Owner, LLC (*id.*). The Limited Liability Agreement for FC+Skanska Modular, LLC (FC+Skanska Modular LLC Agreement"), described below, states that Forest City Ratner Companies, LLC executed a capital contribution reimbursement guarantee to repay Skanska USA Building Inc. for the capital contributions it made should the agreement be terminated under certain conditions (FC+Skanska Modular, LLC Agreement at § 15.3).

Mr. Johnson further states that Atlantic Yards B2 Owner was the owner of "B2 BKLYN", which was the name of a 32-story high-rise residential tower that was being constructed at the Atlantic Yards Project near the Barclays Center (Johnson affidavit at ¶ 3). Mr. Sanna testified that this construction project involved actually two locations (Sanna EBT at 36–37). The first location, at Building 293 in the Brooklyn Navy Yard ("Building 293"), involved the initial assembly of the modular units (*id.*). Those units were then sent to 461 Dean Street where they

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[3] Although Mr. Johnson's affidavit was executed in New Jersey and does not have a certificate of conformity pursuant to CPLR 2309(c), the court will accept the affidavit (*U.S. Bank N.A. v Cope*, 175 AD3d 527 [2d Dept 2019]).

were completed (*id.*) Mr. Sanna testified that Atlantic Yards B2 Owner is the owner of 461 Dean Street (Sanna EBT at 14). Likewise, Russell Johnson states in his affidavit that the modules for the building were created offsite at the Brooklyn Navy Yard and then sent to the Atlantic Yards for completion (Johnson affidavit at ¶¶ 3–4).

Atlantic Yards B2 Owner, as owner, entered into a Construction Management Services Agreement ("Construction Agreement") with Skanska USA Building, as contractor. Mr. Sanna testified that, in this agreement, Atlantic Yards B2 Owner "engage[d] Skanska USA to . . . manage on-site construction" for the "B2 residential building which address is at 461 Dean Street" (Sanna EBT at 36). Article 3 of the Construction Agreement directs Skanska USA Building, as contractor, to perform all of the "Work", which the agreement generally describes as the erection of the B2 modules to form the B2 building (Construction Agreement at § 1.1). Article 3 further directs Skanska USA Building to obtain all permits, establish quality control procedures, perform site logistics, maintain site safety, and supervise work procedure. Article 4 of the agreement directs Atlantic Yards B2 Owner, as owner, to: facilitate the contractor's access to the site; obtain approvals and permits; obtain the financing required for the construction project and pay the contractor; and staff the project to fulfill the inspection and acceptance schedule.

The Construction Agreement also discusses "FC+Skanska Modular", which is the subcontractor tasked with fabricating the module units for the B2 project (Construction Agreement at § 1.1). FC+Skanska Modular, LLC was formed by the FC+Skanska Modular LLC Agreement. The agreement shows that FC+Skanska Modular, LLC was formed by defendant FCRC Modular, LLC and Skanska Modular, LLC. Mr. Sanna testified that FCRC Modular, LLC

was the "operating company of a fabricating facility located at Building 293 in the Brooklyn Navy Yard . . . that manufactured housing components that were delivered to . . . 461 Dean to be incorporated into the building" (Sanna EBT 16). Michael Flowers states that FCRC Modular, LLC was a wholly-owned subsidiary of Forest City Ratner Companies, LLC (Flowers affidavit at ¶ 6). Russell Johnson describes Skanska Modular as a subsidiary of Skanska USA Building (Johnson affidavit at ¶ 2).

Defendants submit property records and a lease that shows FC+Skanska Modular, LLC leased Building 293 from Brooklyn Navy Yard Development Corp., which leased the space from the City of New York. Neither Brooklyn Navy Yard Development Corp. nor the City of New York are parties to this action.

As Mr. Johnson describes in his affidavit, Skanska USA Building ultimately exited the project in 2014. He states that, on September 23, 2014, Skanska USA Building terminated the Construction Agreement and its subcontract agreement with FC+Skanska Modular (Johnson affidavit at ¶ 7). On November 17, 2014, Skanska Modular sold its membership interest in FC+Skanska Modular to FCRC Modular, as set forth in the Membership Interest Purchase and Sale Agreement ("Membership Purchase Agreement") (*id.*). It is not clear who became the general contractor for the project following Skanska USA Building's departure.

The Membership Purchase Agreement states that FCRC Modular purchased Skanska Modular's interest in FC+Skanska Modular, LLC (Membership Purchase Agreement at § 1). Simultaneous with this sale, FC+Skanska Modular, LLC changed its name to FC Modular, LLC, with FCRC Modular as its only member (id. at § 4.1 and Ex. D, the Amended and Restated Limited Liability Agreement).

David Berliner, as the senior vice president of FC+Skanska Modular, LLC, signed FC + Skanska Modular, LLC's lease with the Brooklyn Navy Yard Development Corp. Mr. Berliner also signed the Membership Interest Purchase and Sale Agreement as the senior vice president of FCRC Modular, LLC. In addition, he signed the FC+Skanska Modular, LLC Limited Liability Company Agreement as the senior vice president of both FCRC Modular LLC and Atlantic Yards B2 Owner. Finally, he signed the Construction Management Services Agreement as the senior vice president of Atlantic Yards B2 Owner. According to the FC+Skanska Modular, LLC Limited Liability Company Agreement, Mr. Berliner is the general counsel for Forest City Ratner Companies.

The Accident

Mr. Matthews testified that, on June 11, 2015, he was employed by FC Modular and was erecting modular apartment units at Building 293 (Matthews EBT at 18-19, 27). He further testified as follows: The modular apartment units constructed at Building 293 were taken to a separate worksite at 461 Dean Street and assembled into a single apartment building (*id.* at 26). On the day of the accident, he was standing on a 6-foot A-frame ladder to install brackets into the wall of a modular unit (*id.* at 27). The ladder became unstable and moved, causing him to fall off the ladder and injure himself (*id.* at 36, 51-52). After he fell, he saw that the ladder was missing a shoe from one of its legs (*id.* at 52).

Gregory Duncan states in an affidavit that he was working with Mr. Matthews on the day of the accident (Duncan affidavit at ¶¶ 1 and 2). He states that he was on a ladder approximately six feet from Mr. Matthews when Mr. Matthews became ill (*id.* at ¶ 2). He claims that he was on the only ladder in the area and that Mr. Matthews was not on a ladder, nor did Mr. Matthews

have an accident (*id.* at ¶¶ 3, 4, 6).

Analysis

Mr. Mathews' Request to Supplement the Bill of Particulars

Mr. Mathews seeks permission to supplement his bill of particulars to assert that defendants violated Industrial Code §§ 23-1.21(b)(3)(iv) and 23-1.21(b)(4)(ii). A court may grant leave to amend or supplement a bill of particulars to identify the applicable code provisions, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant (*Kelly v City of New York*, 134 AD3d 676, 678 [2d Dept 2015]).

Section 23-1.21(b)(3)(iv) prohibits the use of any ladder that "has any flaw or defect of material that may cause ladder failure". Section 23-1.21(b)(4)(ii) states that "[a]ll ladder footings shall be firm." There is no dispute that the ladder was missing a shoe from one of its legs. There is also no dispute that this missing shoe amounted to a defect in that ladder. Defendants suggest in their reply in further support of their motion for summary judgment that they intend to oppose Mr. Matthews' request to supplement his bill of particulars. However, in their affirmation in opposition to this motion, there is no such objection. Thus, defendants do not establish that they are prejudiced by Mr. Matthews' assertion of these additional code provisions that clarify the principles of defendants' alleged liability. Accordingly, Mr. Matthews' request to supplement his bill of particulars is granted.

The Motion and Cross-Motion for Summary Judgment

Defendants move for summary judgment to dismiss all of Mr. Matthews' claims against them. Mr. Matthews cross-moves for summary judgment only on his claim for violation of

Labor Law § 240(1). On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Defendants' Liability Under New York Labor Law

Mr. Matthews asserts that defendants violated Labor Law §§ 200, 240(1), and 241(6), which, generally speaking, set forth standards applicable to owners and general contractors on construction projects (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). Defendants argue that these sections of the Labor Law do not apply to them. The court will address each defendant in turn.

Forest City Enterprises and Forest City Realty Trust, Inc.

Robert Sanna testified that Forest City Enterprises and its successor, Forest City Realty Trust, are/were "nationally-based development company[ies]" (Sanna EBT at 11-12, 14). He testified that neither Forest City Realty Trust nor Forest City Enterprises leased, owned, occupied, or had any contracts with Building 293 (*id.* at 12-14).

Mr. Matthews argues that Mr. Sanna's testimony is not credible based on gaps in Mr. Sanna's knowledge. For example, Mr. Sanna was not certain about the Forest City entity that formed FC+Skanska Modular, LLC (*id.* at 21) and he did not know the names of any people who worked at the construction site that was staffed by 300 people (*id.* at 40-41). Mr. Matthews also questions Mr. Sanna's testimony generally because he testified that Atlantic Yards B2 Owner,

LLC had no "involvement in the premises where the modules were being constructed". However, defendants alleged in their answers that "ATLANTIC YARDS B2 OWNER, LLC held a leasehold ownership agreement in the property," (see generally defendants' answers at ¶ 3). Defendants argue that the allegation's reference to the "property" was to 461 Dean Street and not Building 293. However, the allegation responds to an assertion in Mr. Matthews' complaint regarding Building 293 only (complaint at ¶ 84). While this discrepancy may raise a question of fact, it is not sufficient to discredit Mr. Sanna's entire testimony. Furthermore, as Mr. Matthews acknowledges (plaintiff's cross-motion affirmation at ¶ 39), courts generally do not make credibility determinations on summary judgment (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]).

Mr. Matthews also argues that the court cannot rely solely on Mr. Sanna's testimony because only defendants know their corporate relationship and structure, specifically with regard to the construction site. When a party testifies about information that is exclusively within its knowledge, the court should not grant summary judgment based on that information (*Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]). Rather, the trier of fact should be allowed to assess the credibility of that party to determine the veracity of that information (*id.*). However, in this case, the information at issue is not exclusively within defendants' knowledge. As the contracts and other documents that Mr. Matthews references bear out, Mr. Matthews has obtained discovery about defendants' corporate structure and the relationship between each defendant and the various work locations. Because this information is not exclusively within defendants' knowledge, this court may rely on it to adjudicate the parties' summary judgment motions.

Mr. Matthews also argues that Forest City Enterprises should be subject to the Labor Law because it is listed as the insured on a Workers' Compensation form titled "First Report of Injury" regarding his accident. Defendants do not respond to this issue or otherwise explain why Forest City Enterprises is listed as the insured on this report. As the insured, it would appear that Forest City Enterprises is not entirely unaffiliated with the subject project. Additionally, the parties do not address the issue of whether Forest City Realty Trust is liable as the successor to Forest City Enterprises. Accordingly, there are questions of fact concerning whether Forest City Enterprises and Forest City Realty Trust are liable for plaintiff's claims.

Forest City Ratner Companies, LLC

There is conflicting evidence about Forest City Ratner Companies, LLC's role in the B2 project. According to Michael Flowers, Forest City Ratner Companies, LLC is the subsidiary of Forest City Enterprises and the parent of FCRC Modular LLC (Flowers affidavit at ¶¶ 5–6). Mr. Sanna testified that Forest City Ratner Companies, LLC did not lease, own, occupy, or have any contracts with Building 293 (*id.* at ¶¶ 11–13). Conversely, Russell Johnson of Skanska USA Building Inc. states that Forest City Ratner Companies, LLC was the "developer" of the B2 BKLYN project (Johnson Affidavit at ¶ 4). Additionally, the Limited Liability Agreement for FC+Skanska Modular, LLC, the sublessee of Building 293, states that Forest City Ratner Companies provided a letter of credit as security for reimbursing Skanska Modular LLC for any "Capital Contributions" Skanska Modular LLC made to FC+Skanska Modular, LLC, should the FC+Skanska Modular LLC Agreement be terminated (FC+Skanska Modular LLC Agreement at § 15.3). Furthermore, it is not clear who hired plaintiff's employer, FC Modular LLC, once Skanska USA Building exited the project. Accordingly, neither party is entitled to summary

judgment on plaintiff's claims against Forest City Ratner Companies, LLC.

Atlantic Yards B2 Owner, LLC

Defendants assert that Atlantic Yards B2 Owner, LLC was not vicariously liable under Labor Law §§ 240(1) or 241(6) with regard to Mr. Matthews' accident because the accident occurred at Building 293, which was owned and operated by other entities 1.5 miles away from 461 Dean Street, which was the premises owned by Atlantic Yards B2 Owner, LLC.

Mr. Matthews contends that Atlantic Yards B2 Owner, LLC is liable for his accident under the Labor Law because the court (Silber, J.) previously held as such in *Isaac v Atlantic Yards B2 Owner, LLC* (65 Misc 3d 1229[A] [Sup Ct, Kings Cty, 2019]). The parties in *Isaac* ultimately settled that action and there was no final judgment in the case. Accordingly, collateral estoppel does not apply (*Berkshire Nursing Ctr., Inc. v Len Realty Co.*, 168 AD2d 475, 476 [2d Dept 1990]; *see also Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997] ["When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified"]). Nevertheless, like Justice Silber, I find that Atlantic Yards B2 Owner, LLC is subject to the Labor Law as an owner in this action.

Here, all of the companies involved, namely Atlantic Yards B2 Owner, LLC, FC Modular LLC and FCRC Modular LLC, are Forest City-related entities (Flowers affidavit at ¶¶ 3-6), with at least one Forest City senior officer, David Berliner, in common. These entities were not unrelated businesses that happened to form a business arrangement to construct a building. Rather, Forest City created these entities specifically for this project (Flowers affidavit at ¶ 6, Sanna EBT at 36).

The evidence shows that Atlantic Yards B2 Owner, LLC was the owner of the project

(Johnson Affidavit at ¶¶ 3-4) and the premises located at 461 Dean Street, which was one of the two construction locations (Sanna EBT at 14, 36-37). Atlantic Yards B2 Owner, LLC financed the project, hired the general contractor, paid the general contractor, and managed certain other project logistics such as obtaining permits (Construction Agreement generally and at Article 4; *see also* Sanna EBT at 36).

Labor Law § 241(6) requires owners and general contractors to keep "areas in which construction, excavation or demolition work" is being performed in a reasonably safe condition (*Llamas v Yu Yu Chen*, 195 AD3d 702 [2d Dept 2021]). In situations like ours, where different portions of the whole construction project are being performed in various locations by different subsidiaries of one company, the court does not view the project as separate sites, but rather one entire construction area (*Gerrish v 56 Leonard LLC*, 147 AD3d 511, 513-14 [1st Dept 2017], *affd*, 30 NY3d 1125 [2018]).

In *Gerrish*, the plaintiff tripped and fell on debris at a construction project (*Gerrish*, 147 AD3d at 511). At the time, plaintiff was working at a temporary site in the Bronx for a construction project in Manhattan (*id.* at 512). The defendant owner of the Manhattan site and its defendant agent moved to dismiss on the basis that they did not own the Bronx site (*id.*). The appellate court held that there was a sufficient nexus between the Manhattan site and the Bronx location to hold the Manhattan owners liable under Labor Law § 241(6) (*id.* at 513-15). Specifically, the court noted that the Manhattan owners had subcontracted with the plaintiff's employer to establish the temporary location in the Bronx for the purpose of completing work for the Manhattan site (*id.* at 513).

Defendants argue that Building 293 was owned by non-parties and leased by FC Modular,

LLC, a separate company. In his affidavit, Michael Flowers speculates that, after the B2 BKLYN project was completed, FC Modular could have continued to manufacture modular units and sell them to "B3" and "B4" projects (Flowers affidavit at ¶ 10). Even under Mr. Flowers' hypothetical future scenario, FC Modular is still selling modular units to Forest City-related projects. Indeed, like *Gerrish*, the Building 293 site was specifically established to manufacture and sell modular units to Atlantic Yards B2 Owner, LLC. Accordingly, there is a sufficient nexus between the factory at Building 293 and the construction site at 461 Dean to hold Atlantic Yards B2 Owner, LLC liable under section 241(6).

"Labor Law § 240(1) requires property owners and contractors to provide workers with '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 the workers" (*Bianchi v New York City Tr. Auth.*, 192 AD3d 745 [2d Dept 2021]). Like Labor Law § 241(6), courts interpreting Labor Law § 240(1) have not restricted the term "owner" to fee owners only. For purposes of the Labor Law, the "owner" can also be the party who has the right to hire or fire contractors and "to insist that proper safety practices are followed" (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011], *affd*, 20 NY3d 194 [2012]). Courts also have refused to allow out-of-possession owners to escape liability by insisting the owner had nothing to do with the work, which arose from actions of the owner's lessee (*Sanatass v Consol. Inv. Co., Inc.*, 10 NY3d 333, 342 [2008]).

Both the *Guryev* and *Sanatass* lines of cases are efforts by the court to hold parties liable for the roles they have assumed because of their involvement in a construction project. As the Court of Appeals in *Sanatass* recognized, an owner may not "insulate itself from liability by

contracting out of the Labor Law" (*Sanatass*, 10 NY3d at 342). Here, the various Forest City Ratner entities appear to have been created, and their responsibilities assigned, in part for the purpose of contracting themselves out of the Labor Law.

While not the owner of the Building 293 property, Atlantic Yards B2 Owner, LLC was the owner of the project as well as one of the two construction locations. It also assumed several traditional owner duties, such as financing, hiring and paying the general contractor, and managing project logistics. Holding Atlantic Yards B2 Owner, LLC liable under Labor Law § 240(1) is consistent with the purpose of the statute, which should be construed liberally to accomplish its purpose of "[protecting] workmen from injury" (Salazar v Novalex Contr. Corp., 18 NY3d 134, 143 [2011]) and placing "ultimate responsibility for safety practices at building construction jobs where such responsibility . . . belongs" (Dahar, 18 NY3d 521, 525 [2012] [alteration in original, citation omitted]). Accordingly, Atlantic Yards B2 Owner, LLC may be held liable for a violation of Labor Law § 240(1) in this case.

FCRC Modular, LLC

According to Mr. Sanna, FCRC Modular, LLC operated the factory that manufactured the units that were eventually delivered to 461 Dean Street for assembly into a building (Sanna EBT 16). FCRC Modular, LLC was also one of the two members of FC+Skanska Modular, LLC, the subcontractor that leased the space at Building 293 and that also was responsible for fabricating the modular units (FC+Skanska Modular LLC Agreement at seventh Whereas Clause; Construction Agreement at § 1.1).

Defendants argue that FCRC Modular, LLC is not liable pursuant to pursuant to Workers' Compensation Law §§ 11 and 29(6), which protects employers from lawsuits by employees for

workplace negligence (*Fung v Japan Airlines Co., Inc.*, 9 NY3d 351, 357-358 [2007]). Mr. Matthews testified that FC Modular, LLC—not FCRC Modular, LLC—was his employer (Matthews EBT at 23). However, defendants first argue that, following the departure of Skanska Building USA, FCRC Modular, LLC became FC Modular, LLC and, therefore, is entitled to protection under the Workers' Compensation Law.

As set forth in the Membership Interest Purchase and Sale Agreement, FCRC Modular purchased Skanska Modular's interest in the company (Membership Purchase Agreement at § 1). Simultaneous with this sale, FC + Skanska Modular, LLC changed its name to FC Modular, LLC, with FCRC Modular its only member (*id.* at § 4.1 and Ex. D, the Amended and Restated Limited Liability Agreement). The agreement does not state that FCRC Modular, LLC changed its name to FC Modular, LLC.

Additionally, the Amended and Restated Limited Liability Agreement for FC Modular, LLC does not support defendants' argument. In Article I, Section 1, the agreement states that the "Company was organized as a limited liability company under the name 'FC+Skanska Modular, LLC' . . . and since its formation has been governed by the Original Agreement." The section goes on to state that "as of the Effective Date, FCRC Modular, LLC became the sole member of the Company and the Company amended its Certificate of Formation to change its name to 'FC Modular, LLC'". The agreement does not state that FCRC Modular, LLC changed its name to FC Modular.

Furthermore, the Amended and Restated Limited Liability Agreement for FC Modular, LLC refers to "the Member", which is clearly FCRC Modular, LLC, and "the Company" as separate entities. For example, in Article 1, Section 2, the agreement states it, "is intended to

govern the relationship between the Company [FC Modular, LLC] and the Member [FCRC Modular, LLC]" [emphasis added]. The obvious separation of the two entities in the agreement establishes that FCRC Modular, LLC and FC Modular, LLC are two separate entities and, therefore, FCRC Modular, LLC is not exempt from liability.

In reply in further support of their own motion, and in opposition to Mr. Matthews' motion, defendants change their argument to contend that FCRC Modular, LLC and FC Modular, LLC are alter egos of each other. To the extent this argument is in reply to defendants' own motion, this court will not accept arguments introduced for the first time on reply (*Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1023 [2d Dept 2019]). Although it is notable that defendants did not make this argument in their moving papers, the court will consider it in opposition to Mr. Matthews' motion.

Mr. Flowers states in his affidavit that the board members of FCRC Modular, LLC and FC Modular, LLC were identical and the two companies shared the same address (Flowers affidavit at ¶ 8). He further stated that FCRC Modular had no purpose outside the business of FC Modular and that "FC Modular was the only subsidiary of FCRC Modular", although he likely meant the reverse (*id.*). Mr. Flowers' statement is not the best evidence of this corporate overlap. Furthermore, it is not clear whether defendants asserted this defense previously, such that Mr. Matthews would have had the opportunity to obtain discovery on it. Because defendants are the only ones with knowledge of this information, and because defendants are relying solely on assertions in an affidavit, the trier of fact must be allowed to determine the veracity of the information (*Quiroz*, 125 AD3d at 631).

Defendants also argue that FCRC Modular, LLC and FC Modular, LLC are the same

company because Article 9, Section 2 of the Amended and Restated Limited Liability Company Agreement of FC Modular, LLC, states that FC Modular was not to be treated as an association or corporation for tax purposes, but instead was to be disregarded as a separate entity. Defendants do not provide any legal support for the application of Workers' Compensation protection for companies that receive such tax treatment.

Separately, defendants submit a Workers' Compensation form titled "First Report of Injury" as evidence that FCRC Modular is Mr. Matthews' employer. This document is not admissible as part of defendant's case-in-chief (*Ingber v Martinez*, 191 AD3d 959, 961–62 [2d Dept 2021]). Conversely, although hearsay, plaintiff could rely on this document in opposition to defendants' motion, *supra* (*Zuilkowski v Sentry Ins.*, 114 AD2d 453, 454 [2d Dept 1985]).

For all of these reasons, this court finds that defendants have not shown that FCRC Modular, LLC is Mr. Matthews' employer. Notably, the parties do not discuss whether FCRC Modular, LLC is an "owner" or "general contractor" for the purposes of the Labor Law. Accordingly, this remains an open question of fact.

Defendants' Liability Based on the Accident

Separate from defendants' liability for the accident based on their roles is the question of whether defendants are liable for Mr. Matthews' claims based on how it occurred. The court will address each claim in turn.

Negligence and violation of Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law §

200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991-92 [2d Dept 2016], *lv to appeal denied*, 28 NY3d 911 [2016]).

Mr. Matthews alleged in his bill of particulars that defendants were negligent in this case by, among other things, exposing him to toxic fumes and/or gases and excessive heat, and by providing him with a defective ladder (bill of particulars at ¶ 4). At his deposition, Mr. Matthews testified that he fell when the ladder moved (Matthews EBT at 36). He testified that he did not feel dizzy or that he was going to black out prior to the accident (Matthews EBT at 52-53). He also testified that he did not tell a treating physician that he fainted because of the fumes (Matthews EBT at 79-80). Accordingly, the only evidence of a condition that caused the accident is the missing shoe from the ladder.

The accident here allegedly occurred due to dangerous equipment, not due to a dangerous condition of the premises, and so only the second theory of liability applies (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]; *compare DeFelice v Seakco Const. Co., LLC*, 150 AD3d 677, 678 [2d Dept 2017]). Mr. Matthews testified that only his employer, FC Modular, supervised him (Matthews EBT at 23, 32). There is no evidence that any of the other defendants supervised

plaintiff. Accordingly, Mr. Matthew's claims for negligence and violation of Labor Law § 200 are dismissed against all defendants.

Violation of Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). In order to receive protection under Labor Law § 240(1), plaintiff must prove that: (1) he was permitted or suffered to work on the construction project; and (2) he was hired by the owner, contractor or their agent to work at the site (*Gallagher v Resnick*, 107 AD3d 942, 944 [2d Dept 2013]). Plaintiff must also prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). Defendants are liable under Labor Law § 240(1) if the injured worker's "task creates an elevation related risk of the kind that the safety devices listed in section 240(1) protect against" (*id.*, quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

"The collapse of a scaffold or ladder for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the ladder or scaffold did not afford proper protection" (*Debennedetto v Chetrit*, 190 AD3d 933 [2d Dept 2021], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8, [2003]). Here, Mr. Matthews testified that his ladder was defective because it was missing a shoe from one of its legs.

In opposition, defendants submit the affidavit of Gregory Duncan, who states that he was present at the time of the incident (Duncan affidavit at ¶¶ 1-2). He further states that Mr. Matthews was not on a ladder at the time of the accident (*id.* at ¶¶ 3, 4, 6). Rather, Mr. Duncan

claims that Mr. Matthews merely became ill (*id.* at ¶ 2). Thus, defendants do not contest the defectiveness of the ladder (see defendants' moving affirmation at ¶ 60). The disputed issue of whether Mr. Matthews was on the ladder at the time of the accident is sufficient to deny summary judgment on this claim. Accordingly, that limited issue is preserved for trial with regard to section 240(1) liability.

Violation of Labor Law § 241(6)

Defendants also seek summary judgment to dismiss plaintiff's claim for violation of Labor Law § 241(6). Labor Law § 241(6) imposes on owners and contractors a non-delegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]) and that the violation was the cause of the accident (*Pereira v Hunt/Bovis Lend Lease All. II*, 193 AD3d 1085 [2d Dept 2021]).

Mr. Matthews asserts that defendants violated Industrial Code §§ 23-1.15, 23-1.16, 23-1.17, 23-1.19, and 23-1.22. These sections, respectively, concern the requirements for: safety railings (§ 23-1.15); safety belts, harnesses, tail lines and lifelines (§ 23-1.16); life nets (§ 23-1.17); catch platforms (§ 23-1.19); and runways, ramps, and platforms (§ 23-1.22). None of these safety devices were in use at the time of the accident and so their requirements for use, as set forth in these sections, are not applicable (*Forschner v Jucca Co.*, 63 AD3d 996, 998-99 [2d Dept 2009]). Mr. Matthews also asserts that defendants violated Industrial Code §

23-1.21(b)(4)(i), which provides requirements for portable ladders that are "used as a regular means of access between floors or other levels in any building or other structure". The ladder here was not used in this way. Accordingly, plaintiff's claim for violation of Labor Law § 241(6) based on these sections is dismissed.

Lastly, Mr. Matthews asserts that defendants violated Industrial Code §§ 23–1.21(b)(3)(iv) and 23–1.21(b)(4)(ii). As explained above, there are issues of fact concerning whether a defective ladder caused the accident. Accordingly, defendant is not entitled to summary judgment on this claim.

Conclusion

Defendants' motion is granted to the extent that Mr. Matthews' claims for negligence, violation of Labor Law § 200, and violation of Labor Law § 241(6) based on Industrial Code §§ 23-1.15, 23-1.16, 23-1.17, 23-1.19, and 23-1.22, are dismissed against all defendants. The remainder of the motion is denied.

Mr. Matthews' cross-motion is granted to the extent that he may serve the proposed supplemental bill of particulars. While the portion of his cross-motion seeking summary judgment on his claim for violation of Labor Law §240(1) is ultimately denied due to issues of fact about the accident itself, the court does find that defendant Atlantic Yards B2 Owner, LLC may be held liable under Labor Law §§ 240(1) and 241(6), and that FCRC Modular, LLC is not protected from suit pursuant to Workers' Compensation Law §§ 11 and 29(6).

This constitutes the decision and order of the court.

October 19, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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