

Caba v 587-91 Third Owner, LLC
2022 NY Slip Op 30803(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 160171/2018
Judge: James d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES D'AUGUSTE PART 55

Justice

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CHRISTIAN BURGOS CABA,

Plaintiff,

INDEX NO. 160171/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

- v -

587-91 THIRD OWNER, LLC &, CM ASSOCIATES
CONSTRUCTION MANAGEMENT, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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587-91 THIRD OWNER, LLC &, CM ASSOCIATES
CONSTRUCTION MANAGEMENT, LLC

Third-Party
Index No. 595211/2019

Plaintiff,

-against-

OV PAINTING AND SUPPLY, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 41, 42, 44, 45, 47, 48, 49, 50, 54, 55, 58, 59, 60

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 43, 46, 51, 52, 53, 56

were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are hereby consolidated for disposition and resolved as follows.

In this action for damages following an injury at a construction site, plaintiff Christian Burgos Caba moves for partial summary judgment against defendants 587-91 Third Owner LLC (“subject building”) and CM & Associates Construction Management, LLC (“CM Construction”), arguing that the plaintiff has established violations of New York Labor Law §

240(1) as a matter of law. The subject building, defendant CM Construction, and third-party defendant OV Painting and Supply (“OV Painting”) oppose the motion. The motion is granted.

On February 1, 2018, the plaintiff was employed by OV Painting (under contract with CM Construction) and working as a painter’s assistant at the subject building. Under the direction and supervision of the foreman, Miguel Laguna (an OV Painting employee), he and Laguna were required to move a spray painter from the 10th to the 9th floor. The plaintiff testified that he and Laguna waited approximately 25 minutes for the elevator, and when the elevator did not arrive, Laguna instructed him to help carry the spray painter down the stairs. While walking backward down the stairs and carrying the spray painter, the plaintiff slipped and was injured.

New York Labor Law § 240(1) covers injuries sustained if a covered worker transports a heavy object up or down stairs without proper safety equipment. *See generally Runner v New York Stock Exch. Inc.*, 13 NY3d 599 [2009]; *see generally Conlon v. Carnegie Hall*, 159 AD3d 655 (1st Dept 2018). The parties do not dispute that the plaintiff was working at a construction site under the direction of the foreman; the primary factual issue is the weight of the spray painter that the plaintiff was carrying at the time of the accident. The defendants allege that the spray painter was approximately between 40lbs and 70lbs, so it was light enough to be carried by two construction employees without additional safety equipment. The plaintiff alleges that the spray painter was heavy enough to require the plaintiff to need safety equipment to transport it down a flight of stairs pursuant to New York Labor Law § 240(1). The plaintiff’s expert witness, Robert Fuchs, identified the model of spray painter that the plaintiff and the foreman were carrying at the time of the accident based on photographs (NYSCEF Doc. No. 60). Fuchs testified, based on the spray painter’s manual, that the spray painter weighs at least 105lbs.

Since the defendants have only provided un-verifiable estimates of the spray painter's weight, the Court accepts the expert testimony that the subject spray painter weighed at least 105lbs. The defendants admit that the machine required at least two people to carry up or down the stairs; the defendants state that the foreman required assistance to move the painter when the accident occurred. (Plaintiff's Aff. in Reply, NYSCEF Doc. No. 59, at 4-5 [internal citations omitted]).¹ Therefore, the plaintiff has demonstrated his entitlement to partial summary judgment for liability under New York Labor Law § 240(1). In view of the foregoing, for Motion Sequence 002, defendants 587-91 Third Owner LLC's and CM & Associates Construction Management, LLC's motion for summary judgment is denied. Finally, the apportionment of liability among the parties remains a question of fact, and therefore, ordering contractual indemnification is premature.

Accordingly, it is,

ORDERED that the plaintiff's motion for partial summary judgment against defendants 587-91 Third Owner LLC and CM & Associates Construction Management, LLC on the issue of liability is granted, and it is further,

ORDERED that defendants 587-91 Third Owner LLC's and CM & Associates Construction Management, LLC's motion for summary judgment is denied, and it is further,

ORDERED that defendants 587-91 Third Owner LLC's and CM & Associates Construction Management, LLC's motion for contractual indemnification is denied.

¹ The Court notes that the defendants' expert witness, Martin R. Bruno, CHST, states that construction workers are expected to be able to lift and carry up to 100lbs. He does not specify whether construction workers are expected to carry up to 100lbs alone or with the assistance of another worker. For example, Bruno states that construction workers carry 4 x 8 sheets of drywall; however, carrying an 8-foot-long piece of drywall would presumably require two construction workers. In addition, Bruno does not state what is the appropriate maximum weight that a construction worker must be able to carry when going up or down stairs; he states in a conclusory manner that 40-70lbs is light enough to not require an additional safety device. Since the plaintiff's expert identified the weight of the painter at 105lbs, the defendant's expert affidavit is insufficient to deny a motion for summary judgment under the New York Labor Law § 240.

This constitutes the decision and order of the Court.

3/10/2022
DATE


JAMES D'AUGUSTE, 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