

Benitez v New York City Hous. Auth.
2022 NY Slip Op 31009(U)
March 29, 2022
Supreme Court, New York County
Docket Number: Index No. 151064/2016
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK

PART 11M

Justice

-----X

MARIO BENITEZ,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, P & K
CONTRACTING INC.,

Defendant.

-----X

NEW YORK CITY HOUSING AUTHORITY

Plaintiff,

-against-

STV CONSTRUCTION, INC., CHAMPION ELECTRICAL
MECHANICAL BUILDER CORP.

Defendant.

-----X

P & K CONTRACTING INC.

Plaintiff,

-against-

CHAMPION ELECTRICAL MECHANICAL BUILDER CORP.

Defendant.

-----X

STV CONSTRUCTION, INC.

Plaintiff,

-against-

CHAMPION ELECTRICAL MECHANICAL BUILDER CORP.,
P&K CONTRACTING, INC.

Defendant.

-----X

INDEX NO. 151064/2016

MOTION DATE 12/22/2021

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595568/2016

Second Third-Party
Index No. 595715/2016

Third Third-Party
Index No. 595308/2017

The following e-filed documents, listed by NYSCEF document number (Motion 006) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, plaintiff's motion for summary judgment is granted in part and defendants', The New York City Housing Authority, P&K Contracting Inc. and STV Construction, Inc., cross-motion is denied as untimely¹.

Facts

On September 14, 2015, plaintiff, then an employee of defendant Champion Electrical Mechanical Builder Corp. (Champion), a sub-contractor retained by defendant P & K Contracting Inc. (P & K) to provide masonry work at a building owned by defendant New York City Housing Authority (NYCHA), was injured when he lost his balance and fell 12 feet to the ground while attempting to secure vertical netting along a chain link fence. Plaintiff further alleges that he sustained injuries to his back and lower extremities.

Labor Law § 240(1)

It is well established law that “an accident alone does not establish a Labor Law § 240 (1) violation or causation.” (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.* Plaintiff contends that although he asked for an A frame ladder to affix netting to a chain link fence, none was provided and that he was compelled to use an unsecure terrace as a scaffold to complete his task. Defendants respond that plaintiff was provided safety equipment in the form of a sidewalk bridge and that the terrace upon which plaintiff was

¹ The Court would like to thank Joyce D. Campbell Priveterre, Esq. for her assistance in this matter.

standing just before his fall did not fail because it was expected that the terrace would bend and move.

The record supports plaintiff's contention that a deficiency of safety equipment caused his accident. Defendant STV Construction Inc. (STV), who acted as NYCHA's project manager for the renovation work, investigated the incident and prepared a Daily Report which determined that improper supervision and the lack of employee training caused plaintiff's accident. Specifically, the investigation found that if plaintiff had been provided with proper tools, including personal full protection and/or a safe means to secure the netting, the accident would not have happened. *See* NYSCEF Doc. 203 at pages 2 and 3. Accordingly, with respect to Labor Law § 240 (1), the Court finds that there is no question of fact concerning what caused plaintiff's accident and plaintiff's summary judgment motion is granted as to NYCHA and P & K, the owner and general contractor, respectively.

However, the record demonstrates that defendant STV, in its role as project manager for NYCHA, had no authority to stop any work, even if performed unsafely. *See* NYSCEF Doc. 200 at page 22, lines 18-24. It is axiomatic that a construction manager without the authority to control the activity which brought about plaintiff's injury cannot be considered an agent of the owner under Labor Law § § 240(1). *See e.g., Myles v Claxton*, 981 NYS2d 447 [2d Dept 2014]. Accordingly, with respect to Labor Law § 240 (1), plaintiff's motion for summary judgment as to defendant STV is denied.

Labor Law § 241(6)

Although the deadline for moving for summary judgment was 60 days from the date of the filing of the note of issue, defendants instead cross-moved for summary judgment dismissal of plaintiff's Labor Law §§ 200 and 241(6) claims approximately four months after the note of issue

was filed. Defendants have the burden of establishing good cause for their delay. See CPLR 3212

(a). However, as their motion is bereft of any cause for consideration it must be denied as untimely.

See *Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013].

However, since this Court may nonetheless search the record and the Court notes that there is no opposition to the dismissal of the 241(6) cause of action as it relates to Industrial Code Sections 23-1.5, 23-1.7, 23-1.7(f), 23-1.15, 23-1.17, 23-1.21, 23- 1.21(b)(1), 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), 23-1.21(e), 23-5, 23-9.6, 29 CFR 1926 and ANSI-A10.8-200, those parts of the plaintiff’s case are dismissed.

ORDERED that plaintiff’s motion for summary judgment pursuant to Labor Law §240(1) is granted as to defendants NYCHA and P & K but denied as to defendant STV; and it is further

ORDERED that plaintiff’s claims pursuant to Industrial Code Sections 23-1.5, 23-1.7, 23-1.7(f), 23-1.15, 23-1.17, 23-1.21, 23- 1.21(b)(1), 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), 23-1.21(e), 23-5, 23-9.6, 29 CFR 1926 and ANSI-A10.8-200, are dismissed as unsupported by the record; and it is further

ORDERED that defendants’ cross-motion for summary judgment is otherwise denied as untimely.

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LYLE E. FRANK, J.S.C.

3/29/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: