

Marte v Tishman Constr. Corp.
2022 NY Slip Op 33869(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 154819/2017
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

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FRANCISCO GOMEZ MARTE,
Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION, MOINIAN
GROUP AND, MEZUYRON, LLC

Defendant.

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INDEX NO. 154819/2017

MOTION DATE 06/03/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44,
45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72,
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were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of an incident that occurred on March 3, 2017, when plaintiff
alleges he sustained injuries as a result of a fall through an opening in the rebar mat of an
unfinished second floor of a building being constructed at 572 11th Avenue, New York, NY.
Defendants, Tishman Construction Corporations, Moinian Group and Mezuyron LLC,
(collectively defendants) move for summary judgment. Plaintiff opposes the motion and cross-
moves for summary judgment, and for leave to amend his bill of particulars. For the reasons set
forth below, defendants' motion is granted in part and plaintiff's cross-motion is denied.

Background

Defendant Moinian Group owned the property at the subject location and Mezuyron,
LLC was the entity name used by Moinian Group to conduct business. Defendant Tishman
Construction Corporation was hired as the managing agent for the project. Plaintiff was
employed by RNC Industrial, the contractor that was hired to construct the concrete high-rise.

Plaintiff alleges that while walking on the rebar, carrying a metal rod, his foot slipped, and he fell. It is undisputed that the rebar did not move, and there was no debris, garbage, or moisture on the rebar that caused plaintiff to fall.

Discussion

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Labor Law §200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Moreover, "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for

common-law negligence and under Labor Law § 200." (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224, [2004], *lv denied*, 4 NY3d 702, 790 [2004]).

Defendants have established that they neither controlled the means or methods of plaintiff's injury causing conduct, that they neither caused or created a defective or dangerous condition or were on notice of any dangerous and defective condition. Plaintiff has failed to sufficiently rebut this prima facie showing. Accordingly, plaintiff's claims pursuant to common-law negligence and under Labor Law § 200 are dismissed as against the defendants.

Labor Law §241(6)

It is well settled law that for there to be liability pursuant to Labor Law Section 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

Here, defendants move for summary judgment on the grounds that plaintiff has failed to identify any Industrial Codes that defendants violated. Plaintiff cross-moves to amend its bill of particulars to include the following Industrial Code provisions; 12 NYCRR § 23-1.5(a), 12 NYCRR § 23-1.7(b)(1)(i), and 12 NYCRR § 23-1.22(c)(1). In opposition to the cross-motion, defendants contend that such an amendment would be futile and during oral argument averred that such amendment, at this juncture, would be prejudicial. The Court agrees. Plaintiff has failed to establish that defendants would not be prejudiced by the amendment at this point. The Court finds that plaintiff has failed to establish any reasonable excuse for the delay in seeking leave to amend the bill of particulars and finds that such an amendment is prejudicial to the defendants at this juncture since the Note of Issue was filed in March and the plaintiff seeks

leave in response to defendants' summary judgment motion. Accordingly, defendants' motion is granted and plaintiff's cross-motion to amend is denied.

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 planks or plywood should have been placed over hole openings. In opposition, defendants contend that placement of plywood would not have been logical as that is not common practice.

The Court finds that there is an issue of fact with respect to plaintiff's claims pursuant to Labor Law§240(1). Contrary to defendants' contentions that Court finds that the facts in *Brown* are analogous to the facts in the instant matter. *Brown v 44th St. Dev., LLC*, 48 Misc. 3d 234 (N.Y. Sup. Ct. 2015), *aff'd sub nom. Brown v 44 St. Dev., LLC*, 137 AD3d 703 [1st Dept 2016].

In *Brown*, plaintiff's accident occurred while he was walking on top of the rebar, because there was nothing else to walk on. *Id* at 236. Plaintiff's foot slipped through the opening between the rebar into a hole that was about 12 to 18 inches deep and fell through the opening. *Id.*

In affirming the trial court's decision, the First Department held that plaintiff's accident was result of plaintiff's exposure to an "elevation related hazard".(*Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]).

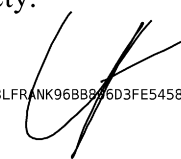
Defendants contend, that because it would have been illogical to place plywood on the rebar platform, this claim should be dismissed. This Court does not find that with respect to the

construction of buildings and pouring concrete it is in the position to determine what is logical and illogical, that is a question for a finder of fact and cannot be determined as a matter of law. As such, plaintiff's cross-motion as to this issue must also be denied due to this question of fact, Defendants also contend, without any legal support, that *Brown* is distinguishable from the instant matter because here the opening was not large enough for plaintiff's entire body to fit through. Defendants have not cited any authority to support the contention that LL 240(1) only applies when applies when the injury occurs as a result of the entire body falling through an opening. It is therefore,

ORDERED that defendants' motion is granted to the extent that plaintiff claims pursuant to Labor Law §200 and Labor Law §241(6) are dismissed; and it is further

ORDERED that defendants' motion is denied as to plaintiff's claims pursuant to Labor Law §240 (1); and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.


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LYLE E. FRANK, J.S.C.

11/16/2022
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE