

**Shewprasad v KSK Constr. Group, LLC**

2022 NY Slip Op 34496(U)

February 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 503176/2019

Judge: Delores J. Thomas

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At an I.A.S. Trial Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 17th day of February, 2022.

P R E S E N T :

**HON. DELORES J. THOMAS, J.S.C.**

-----X  
MELVIN SHEWPRASAD,

Plaintiff,

Index No.: 503176/2019

- against -

KSK CONSTRUCTION GROUP, LLC, 848  
DEVELOPMENT, LLC, and CORESTONE  
CONSTRUCTION CORP.,

Defendant.

**DECISION/ORDER**

Mot. Seq. # 6

-----X  
KSK CONSTRUCTION GROUP, LLC,

Third-Party Plaintiff,

- against -

OZ STEEL, INC.,

Third-Party Defendant.

-----X  
KSK CONSTRUCTION GROUP, LLC,

Second Third-Party Plaintiff,

- against -

CORESTONE CONSTRUCTION CORP.,

Second Third-Party Defendant.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion are as follows:

**Papers:**

**NYSCEF Document Nos.**

Notice of Motion and Affidavits (Affirmations) Annexed

NYSCEF Doc Nos. 177-188

Answering Affidavits (Affirmations) NYSCEF Doc Nos. 196-206;  
210-211  
Reply Affidavits (Affirmations) NYSCEF Doc Nos. 207-208;  
215-216

Plaintiff moved, in motion sequence number six, for an order, pursuant to section 3212(b) of the Civil Practice Law and Rules and all other applicable statutes, authorities and rules of law, granting partial summary judgment in plaintiff's favor, on the issue of liability under sections 240(1) and 421(6) of the Labor Law, against defendants KSK Construction Group, LLC ("KSK"), and 848 Development, LLC ("848"). KSK, 848, and the second third-party defendant, Corestone Construction Corp ("Corestone") opposed.

Plaintiff was at work on September 11, 2018, at 10:15 a.m., in Brooklyn, NY, when several guardrails fell on his leg. Plaintiff's ankle, tibia, and fibula were fractured. 848 owned the worksite and KSK was the general contractor.

Plaintiff commenced this action against KSK and 848 on February 13, 2019, alleging general negligence and violations of Labor Law §§ 200, 241(6), and 240(1). KSK commenced a third-party action against Oz Steel Inc., on November 13, 2019. On January 29, 2020, KSK commenced a second third-party action against Corestone Construction Corp.

In support of plaintiff's motion, plaintiff submitted deposition testimonies of plaintiff, Sabri Tuna, and Can Nuriogullari. Mr. Tuna and Mr. Nuriogullari are project managers employed by KSK. Plaintiff also submitted accident site photos, photos of the railings, the incident report, and the contract between 848 and KSK. In opposition, 848 and KSK collectively submitted a daily log and photos of the worksite.

Plaintiff contends he is entitled to summary judgment as to defendants' liability under Labor Law §§ 240(1) and 241(6).

“To prevail on a motion for summary judgment in a Labor Law § 240(1) ‘falling object’ case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking” (*Romero v 2200 Northern Steel, LLC*, 148 AD3d 1066, 1067 [2d Dept 2017]). “Labor Law § 240(1) ‘does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute’ ” (*Romero*, 148 AD3d 1066, 1067 quoting *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658 [2014]).

Plaintiff failed to show, prima facie, that this incident did involve an injury caused by the failure to provide a safety device to protect against an elevation-related risk, within the meaning of the statute. Under the undisputed facts, the guardrails were at the same level as plaintiff. Moreover, there is a question of fact as to what caused the guardrails to fall. Plaintiff submitted the incident report, in which it is alleged that a passerby employee transporting sheetrock may have caused the railings to fall. Accordingly, it is unclear whether plaintiff was exposed to the usual and ordinary dangers of a construction site and not the extraordinary elevations risks envisioned by Labor Law § 240(1) (*see Whitehead v City of New York*, 79 AD3d 858 [2d Dept 2010]).

“Labor Law § 241(6) imposes on owners and contractors a nondelegable 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’ ” (*Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015]). “As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commission of the Department of Labor in the Industrial Code” (*id.* at 1086). Plaintiff alleges

violations of Industrial Codes 23-1.7(e)(2) and 23-2.1(a)(1). Industrial Code 23-1.7(e)(2) states “[w]orking areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” Industrial Code Section 23-2.1(a)(1) provides that “all building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway, or other thoroughfare.”

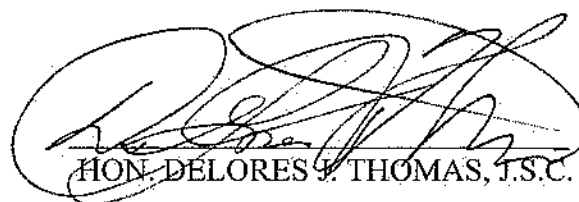
Plaintiff failed to establish, prima facie, that defendants are liable under Industrial Code 23-1.7(e)(2) since there is a question of fact as to, inter alia, the cause of accident. Moreover, there is no evidence that plaintiff tripped over the guardrails (*see Costa v State*, 123 Ad3d 648 [2d Dept 2022]). Additionally, the evidence submitted was insufficient to establish liability under Industrial Code 23-2.1(a)(1) because there is a question of fact as to whether the accident occurred in a passageway.

Accordingly, plaintiff’s motion is denied.

Any issue raised and not specifically addressed by this decision/order is denied.

This constitutes the decision and order of the Court.

ENTER :



HON. DELORES J. THOMAS, J.S.C.