

Lopez v 106 LPA LLC
2022 NY Slip Op 35112(U)
July 29, 2022
Supreme Court, Bronx County
Docket Number: Index No. 300181/2016E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 4, 5

GERSSON LOPEZ,

Index No.: 300181/2016E

Plaintiff,

- against -

DECISION and ORDER

106 LPA LLC, HKS CONSTRUCTION CORP., LIANI
DEVELOPMENT, GROUP, LLC and RD2
CONSTRUCTION & DEMOLITION, LLC,

Defendants.

and Third-Party action.

	PAPERS NUMBERED
Third-Party Defendant Scalpel Contracting, Inc.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 4)	1, 2, 3, 4, 5
Defendants/Third-Party Plaintiffs 106 LPA LLC's and Liani Development Group, LLC's Notice of Motion, Affirmation in Support, Affirmation in Support of Cochav Shimon Liani, Statement of Material Facts, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 5)	6, 7, 8, 9, 10, 11
Plaintiff's Notice of Cross-Motion, Affirmation in Support/Opposition, Statement of Material Facts and Responses, Memorandum of Law, Exhibits (Mtn. Seqs. # 4, 5)	12, 13, 14, 15, 16
Third-Party Defendant Scalpel Contracting, Inc.'s Affirmation in Opposition/Reply, Response to Statement of Material Facts, Exhibits (Mtn. Seqs. # 4, 5)	17, 18, 19
Defendants/Third-Party Plaintiffs 106 LPA LLC's and Liani Development Group, LLC's Affirmation in Opposition/Reply, Response Statement of Material Facts, Memorandum of Law in Opposition/Support (Mtn. Seq. # 5)	20, 21, 22
Plaintiff's Reply Affirmation (Mtn. Seqs. # 4, 5)	23

Upon the enumerated papers; and due deliberation; this court finds:

The issue in Third-Party Defendant Scalpel Contracting, Inc.'s ("Scalpel") summary judgment motion (Mtn. Seq. # 4) is whether it made a *prima facie* showing for dismissal of the complaint. In addition, the issue in Defendants/Third-Party Plaintiffs 106 LPA LLC's and Liani Development Group, LLC's (collectively "Liani") summary judgment motion (Mtn. Seq. # 5) is whether they established their entitlement to dismissal of the complaint and the cross claims/counterclaims asserted against them or alternatively whether they established their

entitlement to judgment with respect to the third-party claims against Scalpel.¹ Lastly, the issue raised in Plaintiff's cross-motion (Mtn. Seq. # 5) is whether he demonstrated his entitlement to judgment as to liability with respect to the Labor Law §§240(1) and 241(6) claims and whether leave of court should be given to allow the bill of particulars to be amended to assert Industrial Codes 12 NYCRR §23-2.2(a)(d).

This court holds that Scalpel's summary judgment motion must be denied for its failure to demonstrate its *prima facie* burden for dismissal of the complaint. In addition, there are triable issues of fact as to the Labor Law §240(1) claim. Further, although Plaintiff should be given leave of court to amend the bill of particulars to assert Industrial Codes 12 NYCRR §23-2.2(a)(d), this court nonetheless finds Liani established their *prima facie* burden for dismissal of the Labor Law §241(6) claim, and Plaintiff failed to raise triable issues of fact to preclude the dismissal.

According to Plaintiff, on the day of the accident he was employed by Scalpel. Scalpel was retained by Liani to complete all cement work at the construction site. Plaintiff testified he was assigned by Scalpel to remove beams, rips, plywood, and tubes from the garage area of the construction site. Upon arriving to the garage area, Plaintiff observed that the garage area's center isle had wood and metal forms previously used for cement work leaning unsecured upon a wall. He claims the accident occurred as he was removing a post when a form weighing approximately 50 pounds, which was left unsecured and leaning against the garage wall fell over and struck his lower back and right knee resulting in injury.

¹ Plaintiff did not oppose the branch of Liani's summary judgment motion seeking dismissal of the Labor Law §200 claim, therefore, same will be dismissed, without opposition, and shall not be addressed herein. In addition, Scalpel did not oppose the branch of Liani's summary judgment motion seeking judgment on the third-party claims for contractual indemnification, common law indemnification, and contribution nor did it oppose Liani's application for dismissal of Scalpel's cross-claims/counter-claims. Therefore, those branches of Liani's summary judgment motion will be granted, without opposition, and shall not be addressed herein

This court finds Scalpel's summary judgment motion must be denied. Scalpel despite its status as a Third-Party Defendant sought dismissal of the Labor §§240(1), 241(6), 200, and common negligence claims asserted in the main action. However, since Scalpel is not a named Defendant in the main action it, therefore, cannot make out a *prima facie* showing for dismissal of claims that were never asserted against it. *See Winegrad v. NY Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985).

Furthermore, with respect to the Labor Law §240(1) claim there are triable issues of fact as to whether Plaintiff's injuries flowed directly from the application of the force of gravity to the form, whether the elevation differential was *de minimis*, and whether the weight of the form could generate a significant amount of force as it fell. *See Padilla v. Touro Coll. Univ. Sys.*, 204 A.D.3d 415, 166 N.Y.S.3d 152 (1st Dep't 2022); *see also Kuylen v. KPP 107th St., LLC*, 203 A.D.3d 465, 160 N.Y.S.3d 866 (1st Dep't 2022).

Moreover, this court finds Plaintiff should be freely granted leave to amend the bill of particulars to add Industrial Codes 12 NYCRR §23-2.2(a)(d) as the proposed amendment will not cause unfair surprise or prejudice as it entails no new factual allegations and raise no new theories of liability. *See Gjeka v. Iron Horse Transp., Inc.*, 151 A.D.3d 463, 56 N.Y.S.3d 304 (1st Dep't 2017); *see also Alarcon v. UCAN White Plains Hous. Dev. Fund Corp.*, 100 A.D.3d 431, 954 N.Y.S.2d 13 (1st Dep't 2012).

Therefore, Plaintiff cites Industrial Codes 12 NYCRR §§23-1.7(a), 23-2.1(a)(1), and 23-2.2(a)(d) in support of the Labor Law §241(6) claim abandoning all other predicates not raised in his legal arguments. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

This court finds the Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.7(a) must be dismissed as inapplicable because he failed to present any evidence that the work he was engaged in was “normally exposed to falling material or objects.” *See Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dep’t 2007). Likewise, the Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-2.1(a)(1) must be dismissed as inapplicable because there is no indication is that the forms were obstructing a passageway. *See Tucker v. Tishman Constr. Corp. of N.Y.*, 36 A.D.3d 417, 828 N.Y.S.2d 311 (1st Dep’t 2007).

Similarly, the Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-2.2(a) does not apply as said Industrial Code only applies during actual concrete work, not when the forms are being stored. *See Mueller v. PSEG Power NY, Inc.*, 83 A.D.3d 1274, 922 N.Y.S.2d 588 (3d Dep’t 2011). Lastly, the Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-2.2(d) does not apply as Plaintiff failed to establish that the forms left in the garage area came from stripping as he had no involvement with the prior form work completed in the garage area. *See Cody v. State of NY*, 82 A.D.3d 925, 919 N.Y.S.2d 55 (2d Dep’t 2011).

Accordingly, it is

ORDERED, that Scalpel’s summary judgment motion (Mtn. Seq. # 4) is denied; and it is further

ORDERED, that Plaintiff’s cross-motion is granted in part (Mtn. Seq. # 5) to the extent he sought leave of court to amend the bill of particulars to assert Industrial Codes 12 NYCRR §23-2.2(a)(d); and it is further

ORDERED, that Liani’s summary judgment motion (Mtn. Seq. # 5) is granted in part; and it is further

ORDERED, that the Labor Law §200 claim is dismissed, without oppostion; and it is further

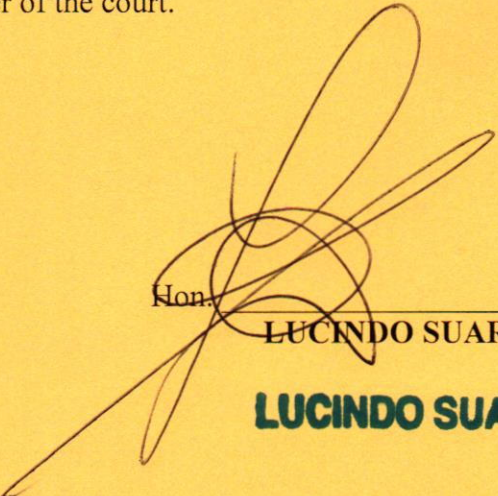
ORDERED, that Liani's application for judgment on the third-party claims for contractual indemnity, common law indemnity, and contribution against Scalpel is granted, without oppostion; and it is further

ORDERED, that Liani's application for dismissal of Scalpel's cross-claims/counter-claims is granted, without oppostion; and it is further

ORDERED, that the Labor Law §241(6) claim is dismissed.

This constitutes the decision and order of the court.

Dated: **7/29/2022**



Hon.

LUCINDO SUAREZ, J.S.C.

LUCINDO SUAREZ, J.S.C.