

Gulyamov v 426 HBH LLC

2023 NY Slip Op 30074(U)

January 11, 2023

Supreme Court, New York County

Docket Number: Index No. 150183/2016

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 02TR

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IBRAGIM GULYAMOV Plaintiff, - v - 426 HBH LLC, Defendant.	<table border="0"> <tr> <td style="width: 30%;">INDEX NO.</td> <td style="border-bottom: 1px solid black;">150183/2016</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black;">10/13/2022, 10/13/2022</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black;">005 006</td> </tr> </table>	INDEX NO.	150183/2016	MOTION DATE	10/13/2022, 10/13/2022	MOTION SEQ. NO.	005 006
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MOTION SEQ. NO.	005 006						

**DECISION + ORDER ON
 MOTION**

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 112, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

In Motion Sequence 005 of this Labor Law action, plaintiff Ibragim Gulyamov (“Plaintiff”) moves for an order pursuant to CPLR 3212 granting summary judgment on its Labor Law § 240(1) cause of action. Defendant 426 HBH LLC (“Defendant”) opposes the motion and cross-moves for an order pursuant to CPLR 3212 dismissing Plaintiff’s complaint in its entirety or, in the alternative, for an order denying Plaintiff’s motion and, pursuant to CPLR §§ 3121 and 3124, compelling Plaintiff to comply with Defendant’s outstanding discovery demands. In Motion Sequence 006, Defendant moves for an order pursuant to 22 NYCRR § 202.21(e) vacating Plaintiff’s Note of Issue and striking Plaintiff’s Certificate of Readiness; an order pursuant to CPLR §§ 3121 and 3124, compelling Plaintiff to comply with Defendant’s

outstanding discovery demands; and for an order pursuant to CPLR 3212(a) extending Defendant's time to move for summary judgment until 60 days after all outstanding discovery has been completed. Plaintiff opposes this motion. The motions are hereby consolidated for disposition.

Plaintiff alleges that he was injured on August 5, 2015 when he fell from a scaffold while working on the exterior of a building owned by Defendant located at 426 East 126th Street, New York, New York ("the building"). Defendant had contracted with Plaintiff's employer, nonparty Safa Construction Corp. ("Safa"), to perform construction and renovation work on the building. According to Plaintiff, he was working on the fourth level of the scaffold demolishing the building's façade when one of the scaffold planks collapsed and caused him to fall approximately eight feet. Plaintiff's fall was stopped by his harness; however, he was left hanging and had to be cut down by a coworker. This caused Plaintiff to fall to the level below. Plaintiff states that he was injured because of this fall.

Plaintiff commenced this action on January 8, 2016 by filing a Summons and Verified Complaint alleging negligence and violations of Sections 200, 240(1), 241(6) of the Labor Law, Rule 23 of the Industrial Code, and Article 1926 of O.S.H.A. A Preliminary Conference was held on May 24, 2016, and depositions for Plaintiff and Defendant were scheduled for September 23 and September 30, 2016, respectively (NYSCEF Doc. No. 17, Preliminary Conference Order). The depositions did not take place as scheduled and were repeatedly adjourned due to successive discovery disputes attributable to both parties. Neither party has been deposed to date.

On December 30, 2021, Plaintiff filed a Note of Issue and Certificate of Readiness for Trial, in which he represented that physical examinations and certain discovery proceedings had

been waived. Plaintiff's counsel further represented that all discovery in this matter was complete or had been waived in the Affirmation affixed to the Note of Issue. Defendant denies that these discovery items were waived. Plaintiff filed his summary judgment motion on January 3, 2022 (NYSCEF Doc. No. 89). Defendant filed its motion to vacate the Note of Issue on January 18, 2022, and cross moved for summary judgment in its favor on February 11, 2022 (NYSCEF Doc. Nos. 102, 137).

Summary Judgment (Motion Sequence 005)

Plaintiff first moves for an order granting summary judgment on its Labor Law § 240(1) cause of action. Defendant cross-moves for summary judgment and dismissal of all of Plaintiff's causes of action. In a motion seeking summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opponent who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez*, 68 NY2d at 324). The court must view the facts in the light most favorable to the nonmoving party (*U.S. Bank Nat'l Ass'n v DLJ Mortg. Cap., Inc.*, 38 NY3d 169 [2022], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

Labor Law § 240(1) "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 (1st Dept 2016)). A defendant is liable under

Section 240(1) where a plaintiff's injury is proximately caused by a defendant's failure to properly construct and secure a scaffold and/or failure to provide the plaintiff with an adequate safety device (*see, e.g., Romanczuk v Metropolitan Ins. & Annuity co.*, 72 AD3d 592 [1st Dept 2010]). However, liability will not attach where a "plaintiff's actions [are] the sole proximate cause of his injuries" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]).

Plaintiff's motion for summary judgment is denied. Although it is undisputed that Plaintiff fell from a scaffold while working on Defendant's property, there are material issues of fact as to the proximate cause of Plaintiff's injuries. Defendant submits affidavits from two of Safa's foremen, Gregory Brown ("Brown") and Staurino Juarez ("Juarez"), stating that they witnessed Plaintiff erect the scaffold in question and that Brown saw Plaintiff use a broken wooden plank for the platform, which contradicted instructions both supervisors gave him to use OSHA-compliant planks (NYSCEF Doc. No. 144, Brown aff ¶¶ 3-6; NYSCEF Doc. No. 145, Juarez aff ¶¶ 3-6). Brown maintains that the broken plank used by Plaintiff gave way and caused Plaintiff to fall (Brown aff ¶ 7). Viewing the facts in the light most favorable to Defendant, and in the absence of discovery, the Court finds that Defendant has submitted sufficient proof to support the existence of a material issue of fact regarding whether Plaintiff was the sole proximate cause of his injuries.

The Court also denies the branch of Defendant's cross-motion seeking summary judgment. First, Plaintiff demonstrates the existence of a material issue of fact on his Labor Law § 240(1) claim. He raises a material issue of fact as to proximate causation under Section 240(1) by submitting an affidavit of a coworker, Sardor Yusufov ("Yusufov"), that states that Safa "always used planks that were previously used at other projects" and that Yusufov never heard Safa instruct workers to use new planks (NYSCEF Doc. No. 155, Yusufov aff ¶¶ 3, 6). Second,

Defendant fails to present any facts in support of its prima facie showing with respect to Plaintiff's Labor Law §§ 200 and 241(6) claims (*see, e.g., Winegrad*, 64 NY2d at 853).

Defendant does not present any information that meets its prima facie burden to show that it maintained a safe workplace in accordance with Labor Law § 200 or whether Defendant adhered to the pertinent regulations of the Industrial Code such that it could not be found liable for a violation of Labor Law § 241(6). Finally, as Defendant has failed to demonstrate the absence of material issues of fact for Plaintiff's Labor Law § 200 cause of action, the Court also denies the branch of Defendant's motion seeking summary judgment dismissing Plaintiff's common law negligence claims (*see, e.g., Widawski v 217 Elizabeth St. Corp.*, 40 AD3d 483, 485 [1st Dept 2007]).

Discovery (Motion Sequence 005 & 006)

In Motion Sequence 006, Defendant moves for an order pursuant to Rule 202.21(e) vacating Plaintiff's Note of Issue and striking Plaintiff's Certificate of Readiness. Defendant further moves, in its cross-motion in Motion Sequence 005 and in Motion Sequence 006, for an order pursuant to CPLR §§ 3121 and 3124 compelling Plaintiff to fully comply with Defendant's discovery demands, which include providing Plaintiff's tax returns from 2015 to the present and Plaintiff's appearance at a deposition and independent medical exam ("IME"). Defendant further moves in Motion Sequence 006 for an order pursuant to CPRL 3212(a) extending its time to move for summary judgment until 60 days after all outstanding discovery has been exchanged and completed. Defendant opposes these motions.

A party may move to vacate a note of issue within twenty days of service of the note of issue and certificate of readiness upon showing that there is outstanding discovery and the case is not ready for trial (22 NYCRR § 202.21[e]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st

Dept 2015]). Here, Defendant's timely motion establishes that discovery is incomplete as no depositions have taken place, no IME of Plaintiff has taken place, and discovery demands remain outstanding.

However, due to the age of this case and the lack of prejudice to the parties, the Court declines to vacate the Note of Issue and instead, in its discretion, will permit further discovery while the case is on the trial calendar (*see WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523 [1st Dept 2021]). The motion and cross motion are therefore granted to the extent that Plaintiff is instructed to respond to Defendant's outstanding discovery demands, that an IME of Plaintiff be held, and that depositions be scheduled and held. Defendant is further granted an extension to move for summary judgment 60 days after the close of discovery.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion for summary judgment (Motion Sequence 005) is denied; and it is further

ORDERED that the branch of Defendant's cross motion for summary judgment (Motion Sequence 005) is denied; and it is further

ORDERED that the branch of Defendant's cross motion to compel discovery (Motion Sequence 005) and the branch of Defendant's motion to compel discovery (Motion Sequence 006) are granted; and it is further

ORDERED that all discovery shall be complete by May 31, 2023, and that no adjournments shall be had without prior Court approval; and it is further

ORDERED that the Defendant shall file all dispositive motions by July 31, 2023; and it is further

ORDERED that counsel shall appear for a status conference on March 28, 2023 at 60
Centre St, Room 212, at 9:30 a.m.

1/11/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

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