

Guaraca v West 25th St. Hous. Dev. Fund Corp.

2023 NY Slip Op 31923(U)

April 28, 2023

Supreme Court, Bronx County

Docket Number: Index No. 24945/2017E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

SEGUNDO JUAN GUARACA,

Index No.: 24945/2017E

Plaintiff,

- against -

DECISION and ORDER

WEST 25TH STREET HOUSING DEVELOPMENT FUND CORPORATION, BRC LANDING ROAD I HOUSING DEVELOPMENT FUND CORPORATION, BRC LANDING ROAD II LP, THE LANDING ROAD CONDOMINIUM, THE J. PILLA GROUP LTD AND THE PILLA GROUP LTD.,

Defendants.

And a Third-Party Action.

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, Exhibits	NYSCEF Doc. No. 53-77
Defendants West 25 th Street Housing Development Fund Corporation's, BRC Landing Road I Housing Development Fund Corporation's, BRC Landing Road II LP's, and The J. Pilla Group LTD's Notice of Cross-Motion, Affirmation in Opposition/in Support of Cross-Motion, Statement of Material Facts, Response to Plaintiff's Statement of Material Facts	NYSCEF Doc. No. 86-90
Third-Party Defendant Mourne Construction, LLC's Affirmation in Opposition, Response to Statement of Material Facts	NYSCEF Doc. No. 79-80
Defendants The J. Pilla Group's and The Pilla Group LTD's Affirmation in Opposition, Counter Statement of Material Facts, Exhibits, Memorandum of Law in Opposition	NYSCEF Doc. No. 81-85
Plaintiff's Reply Affirmation and Affirmation in Opposition to Cross-Motion	NYSCEF Doc. 93

Upon the enumerated papers, and due deliberation:

Plaintiff's summary judgment motion is GRANTED. Plaintiff demonstrated his entitlement to judgment with respect to liability under the Labor Law 240(1) and 241(6) claims against Defendants West 25th Street Housing Development Fund Corporation ("West 25th Street"), BRC Landing Road I Housing Development Fund Corporation ("BRC I"), BRC Landing Road II LP ("BRC II"), and The J. Pilla Group LTD ("J. Pilla") and Defendants failed to raise triable issues of fact to preclude summary judgment in Plaintiff's favor.

Plaintiff's summary judgment motion with respect to liability under the Labor Law 200 claim against Defendant J. Pilla is DENIED, as triable issues of fact precluding summary judgment and Defendant J. Pilla cross-motion for summary judgment is DENIED.

Defendants West 25th Street, BRC I, and BRC II's cross-motion for summary judgment for dismissal of the Labor Law 200 and cross-claims are granted in the absence of opposition.¹

According to Plaintiff, on the day of the accident, he was employed by Third-Party Defendant Mourne Construction, LLC as a masonry worker to install block and brick as part of the construction of a building located at 233 Landing Road. On the date of the accident, after lunch, Plaintiff was instructed by his foreman to begin building a wall around a trash chute on the second floor of the subject premises. Plaintiff placed the first layer of block around three or four sides of the trash chute, which was situated next to an air conditioning duct hole covered with plywood. In order to place block on the fourth side of the trash chute, Plaintiff stood on a plywood covering the air conditioning duct. Plaintiff testified that the plywood measured about three to four feet by two feet and was neither secured nor barricaded in the area where the plywood was located. As Plaintiff stepped on the plywood to install block, the plywood broke under his feet, and he allegedly fell through the broken plywood causing him to fall two stories down to the cellar of the building and sustaining injury.

It is undisputed that West 25th Street, BRC I, and BRC II were owners of the premises. West 25th Street, BRC I, and BRC II hired J. Pilla to serve as general contractor. J. Pilla hired Plaintiff's employer, Mourne Construction, LLC as the masonry subcontractor to install block and

¹ Although Defendants West 25th Street, BRC I and BRC II cross-moved for an order pursuant to CPLR 3211 and 3212, a review of the papers indicate that said defendants fashioned their papers as one for summary judgment and not for CPLR 3211 dismissal of Plaintiff's complaint as against them and will be addressed as such herein. In their cross-motion Defendants West 25th Street, BRC I and BRC II also moved for summary judgment to dismiss all cross claims. There being no opposition, the branch of the cross-motion by Defendants West 25th Street, BRC I and BRC II for summary judgment to dismiss all crossclaims and will not be further discussed herein.

brick in connection with the construction of a homeless shelter and affordable housing at the subject premises.

This Court finds Plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as it was uncontroverted that his injuries resulted from the failure to provide safety devices to shield Plaintiff from a gravity-related fall. *See Gomez v Trinity Ctr. Llc*, 195 AD3d 502 [1st Dept. 2021]; *see also Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478 [1st Dept. 2019]. In opposition, any sole proximate cause/recalcitrant worker arguments fail as the statutory violation by Defendants West 25th Street, BRC I, BRC II, and J. Pilla served as a proximate cause for the accident, thus, Plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. To the extent that Defendants West 25th Street, BRC I, BRC II, J. Pilla and Third-Party Defendant Mourné Construction, LLC argue that Plaintiff was performing work in contravention of instructions from his supervisors, such actions only amount to comparative negligence, which is not a defense to a Labor Law 240(1) claim. *Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541 [1st Dept. 2022]. Moreover, the recalcitrant worker defense requires a showing that the injured worker refused to use safety devices provided by the owner or employer, and where, as here, no adequate safety devices were provided to protect Plaintiff from a gravity-related fall, such defense has no application. *See Plaku v 1622 Van Buren LLC*, 198 AD3d 431 [1st Dept. 2021].

As to the Labor Law 241(6) claim, Plaintiff cites Industrial Code 12 NYCRR §23-1.7(b)(1)(i) (Falling hazards; Hazardous openings), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept. 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept. 2014].

Industrial Code 12 NYCRR §23-1.7(b)(1)(i) (Falling hazards; Hazardous openings) provides: “Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).”

This Court finds insofar as the Labor Law 241(6) claim is predicated on a violation of 12 NYCRR §23-1.7(b)(1)(i), this provision is sufficiently specific to warrant imposition of liability. *See Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept. 2013]. The record demonstrated that the Industrial Code was violated, as the opening into which Plaintiff fell was hazardous and unguarded. In opposition, Defendants West 25th Street, BRC I, BRC II, J. Pilla and Third-Party Defendant Mourné Construction, LLC failed to raise triable issues of fact regarding the applicability of this Industrial Code or that this provision of the Industrial Code was not violated.

As to the Labor Law 200 and common-law negligence claims, Defendants West 25th Street, BRC I, and BRC II failed to make a *prima facie* showing that they lacked constructive notice of a hazardous condition that caused Plaintiff’s injury. *See Romano v New York City Tr. Auth.*, 213 AD3d 506 [1st Dept. 2023]. Said Defendants cannot meet this burden by merely pointing to gaps in Plaintiff’s showing of proof. *See Pereira v New. Sch.*, 148 AD3d 410 [1st Dept. 2017]; *see also McCullough v One Bryan Park*, 132 AD3d 491 [1st Dept. 2015].

Furthermore, as to the Labor Law 200 and common-law negligence claim as against Defendant J. Pilla, this Court finds there are triable issues of fact as to whether Plaintiff’s injury arose out of the work performed by J. Pilla, and whether it directly supervised and controlled the injury-producing work, beyond general stop work and corrective authority. *See Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075 [1st Dept. 2022]. Moreover, the Court finds there is a triable issue

of fact as to whether Defendant J. Pilla was on notice of a potential hazard of unsecured openings where the record showed that J. Pilla was present at the site on a daily basis. *See Cackett v Gladden Props., LLC*, 183 AD3d 419 [1st Dept. 2020]; *see also Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept. 2018].

Accordingly, it is

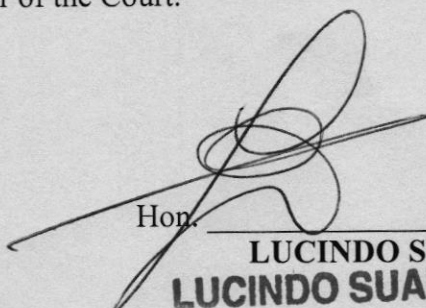
ORDERED, that Plaintiff's summary judgment motion, is granted in part; and it is further ORDERED, that Plaintiff is awarded judgment as to liability with respect to the Labor Law 240(1) and 241(6) claims against Defendants West 25th Street, BRC I, BRC II, and J. Pilla; and it is further

ORDERED, that the cross-motion by Defendants West 25th Street, BRC I, and BRC II for summary judgment seeking dismissal of the Labor Law 200 claim and any cross claims, is granted in part; and it is further

ORDERED, that any cross claims against Defendants West 25th Street, BRC I, and BRC II, are dismissed.

This constitutes the Decision and Order of the Court.

Dated: **April 28, 2023**

Hon. 
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.