

Gomez-Coto v Win Glenmore Hous. Dev. Fund Corp.

2023 NY Slip Op 34870(U)

August 31, 2023

Supreme Court, Bronx County

Docket Number: Index No. 23608/2019E

Judge: Lucindo Suarez

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

Mtn. Seqs. # 3, 4

EDWARD GOMEZ-COTO,

Index No.: 23608/2019E

Plaintiff,

- against -

DECISION and ORDER

WIN GLENMORE HOUSING DEVELOPMENT FUND CORPORATION, WOMEN IN NEED, INC., GLENMORE HOUSING ASSOCIATES LLC, GLENMORE HOUSING GP LLC, WIN GLENMORE CORP., JUNIUS GLENMORE HOLDING LLC, CHEEVER DEVELOPMENT CORP., THE GLENMORE CONDOMINIUM and BOARD OF MANAGERS OF THE GLENMORE CONDOMINIUM,

Defendants.

and Third-Party actions.

	<u>PAPERS NUMBERED</u>
Plaintiff's Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 75-99
Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Win Glenmore Housing Development Fund Corporation's, Women In Need, Inc.'s, Glenmore Housing Associates LLC's, Glenmore Housing GP LLC's, Win Glenmore Corp.'s, and Cheever Development Corp's Affirmation in Opposition, Affirmation, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 100-105
Plaintiff's Reply Affirmation, Memorandum of Law in Reply, Exhibit (Mtn. Seq. # 3)	NYSCEF Doc. No. 107-110
Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Win Glenmore Housing Development Fund Corporation's, Women In Need, Inc.'s, Glenmore Housing Associates LLC's, Glenmore Housing GP LLC's, Win Glenmore Corp.'s, and Cheever Development Corp's Notice of Motion, Affirmation in Support, Exhibits (Mtn. Seq. # 4)	NYSCEF Doc. No. 111-122
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, Exhibits (Mtn. Seq. # 4)	NYSCEF Doc. No. 123-134
Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Win Glenmore Housing Development Fund Corporation's, Women In Need, Inc.'s, Glenmore Housing Associates LLC's, Glenmore Housing GP LLC's, Win Glenmore Corp.'s, and Cheever Development Corp's Reply Affirmation, Exhibit (Mtn. Seq. # 4)	NYSCEF Doc. No. 135-137

Upon the enumerated papers, and due deliberation, this Court finds:

The first issue in Plaintiff's motion is whether he established his entitlement to summary judgment with respect to the Labor Law 240(1) and 241(6) claims against Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Win Glenmore Housing Development Fund Corporation ("Win Glenmore"), Glenmore Housing Associates LLC ("Glenmore Housing"), and Cheever

Development Corp. (“Cheever”), and for an order dismissing any affirmative defenses relating to assumption of risk, comparative negligence, contributory negligence and/or culpable conduct. This Court holds that there are triable issues of fact concerning his Labor Law 240(1) and 241(6) claims, and for dismissal of the affirmative defenses sounding in comparative negligence, contributory negligence and/or culpable conduct precluding summary judgment in favor of Plaintiff.

The second issue in Plaintiff’s motion is whether he established his entitlement to leave to amend his Complaint and Bill of Particulars to allege the date of the accident as May 16, 2017 instead of May 23, 2017 and the location of the accident to be the fourth floor instead of the third floor of the building. This Court finds Plaintiff did not establish his entitlement to leave to amend his Complaint and Bill of Particulars as he failed to annex the proposed amended pleadings as required by CPLR 3025[b]. Without reviewing such pleadings, the Court is unable to determine whether the proposed amendments are palpably insufficient or patently devoid of merit. *See Dragon Head LLC v Elkman*, 102 AD3d 552 [1st Dept. 2013].

The issue in the summary judgment motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever is whether they established their entitlement to dismissal of Plaintiff’s Complaint with respect to Labor Law 240(1), 200, and 241(6) claims¹.

According to the record, Plaintiff on the day of the accident was working for Second Third-Party Defendant, The Best Wallcovering Corp. (“Best Wallcovering”), to perform plastering work at a building being erected at 91 Junius Street, Kings County. Best Wallcovering was hired to plaster walls and ceilings of the subject building. To perform the work, Best Wallcovering

¹ Plaintiff did not oppose the branch of the summary judgment motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever to dismiss the Labor Law 241-a claim. The record is also devoid of any allegations that Plaintiff was working in an elevator shaft at the time of the accident. Therefore, the branch of the summary judgment motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever to dismiss the Labor Law 241-a claim, is granted, and will not be further discussed herein.

assigned the scaffold for Plaintiff to use to perform his work. Plaintiff was in the midst of plastering a ceiling, while standing on a three-foot mobile scaffold, located on the third floor of the building when without warning, the scaffold tipped over causing him to fall over the safety railing to the ground below.

According to Plaintiff, Best Wallcovering provided the tools, scaffolds, ladder, and plaster for the work he performed each day. He testified that Best Wallcovering did not have safety harnesses on site. Best Wallcovering supervisor "Manuel" assigned Plaintiff the subject scaffold. Plaintiff testified that he assembled the scaffold and checked to ensure it was stable before adjusting the platform to a height of three feet. He alleges that he checked to ensure the ends of each side of the platform and the scaffold wheels were properly locked. Plaintiff also testified that he worked alone and that he worked for Best Wallcovering for two to three months before the incident occurred.

It is undisputed that Win Glenmore and Glenmore Housing were the property owners and Cheever was retained as the general contractor of the construction project.

Labor Law 240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result

from such failure since workers are scarcely in a position to protect themselves from accident.”
Cherry v Time Warner, Inc., 66 AD3d 233, 235 [1st Dept. 2009].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.”
Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001] [citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]].

The fact that Plaintiff’s accident was unwitnessed is of no moment and does not bar judgment in Plaintiff’s favor. *See Dyszkiewicz v City of NY*, 194 AD3d 444 [1st Dept. 2021]. Further, any sole proximate cause/recalcitrant worker argument fails if its statutory violation 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]. Nevertheless, with respect to the Labor Law 240(1), this Court finds there are triable issues of fact as to the date and location of the accident given Plaintiff’s attempt to amend his Bill of Particulars for the *fifth* time.

Labor Law 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "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. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See*

Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept. 2004] [citing *Gonzalez v Stern's Dept. Stores*, 211 AD2d 414 [1st Dept. 1995]].

In support of his Labor Law 241(6) claim, Plaintiff cites Industrial Code 12 NYCRR §23-5.18(g) (Scaffold footing), 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 §23-5.18(g) states in pertinent part that whenever a scaffold is in use and occupied by any person, the scaffold must rest upon “a stable footing,” the platform is leveled, and the scaffold “shall stand plumb.” Here, Plaintiff testified that he made sure that the wheels of the scaffold were locked before the incident occurred, which implied that the scaffold was on stable footing. Therefore, this Court must deny Plaintiff’s motion for partial summary judgment on the Labor Law 241(6) claim as it pertains to §23-5.18(g).

As for Plaintiff’s request to dismiss any affirmative defenses relating to comparative negligence, contributory negligence, and/or culpable conduct, the Court finds there are triable issues of fact as to whether Plaintiff caused or contributed to his injuries as he specifically testified to assembling the subject scaffold himself and checked to ensure the scaffold was flush and rested on the ground securely as well as checked that each side of the platform and the scaffold wheels were properly locked. The portion of Plaintiff’s summary judgment motion seeking dismissal of any affirmative defense of assumption of the risk is granted as that doctrine is generally limited to the risks that arise from voluntary participation in athletic and recreational activities. See *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010].

The branch of the motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever seeking to dismiss Plaintiff's Complaint on the basis of collateral estoppel is denied. "The doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a full and fair opportunity to litigate the issue" (*Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 [1st Dept. 2016]). Collateral estoppel precludes a plaintiff from litigating an issue previously raised before the Workers' Compensation Board. *See, e.g., Guaman v 1963 Realty Corp.*, 127 AD3d 454 [1st Dept. 2015]. Here, although the Workers' Compensation Board disallowed those claims relating to back injuries [NYSCEF Doc. No. 117], the Board panel's decision and the IME reports that the panel relied upon was based on purportedly the wrong date of accident [*i.e.*, May 23, 2017]. As there are triable issues of fact as to when and where Plaintiff's accident occurred, the Court cannot at this time dismiss any portion of Plaintiff's Complaint as couched on the doctrine of collateral estoppel.

Labor Law 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *See Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept. 2018]. Where an existing defect or dangerous condition causes injury, liability under Labor Law 200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *See id.* This Court finds there are triable issues of fact as to whether Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever caused or created the hazardous condition of construction debris left on the ground where the alleged scaffold was assembled that led to Plaintiff's injury and whether they had actual or constructive notice of same.

Accordingly, it is

ORDERED, that Plaintiff's motion (Mtn. Seq. # 3) is granted to the extent that, it is

ORDERED, that the branch of Plaintiff's summary judgment motion seeking judgment on his Labor Law 240(1) and 241(6) claims, is denied; and it is further

ORDERED, that the branch of Plaintiff's summary judgment motion seeking dismissal of any affirmative defenses sounding in assumption of risk, is granted; and it is further

ORDERED, that the branch of Plaintiff's motion seeking an order granting leave to amend the Complaint and Bill of Particulars, is denied; and it is further

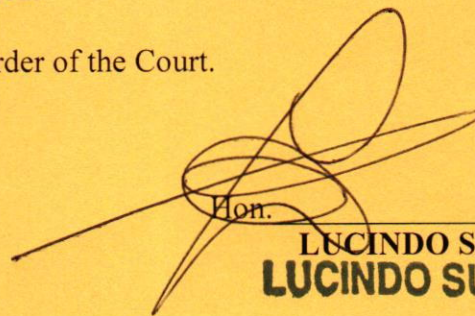
ORDERED, that the summary judgment motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever (Mtn. Seq. # 4), is granted to the extent that, it is

ORDERED, that the Labor Law 241-a claim is dismissed; and it is further

ORDERED, that the branch of the summary judgment motion by Defendants Win Glenmore, Glenmore Housing, Women In Need, Inc., and Cheever seeking dismissal of the Labor Law 240(1), 241(6), and 200 claims, is denied.

This constitutes the Decision and Order of the Court.

Dated: August 31, 2023



Hon.

**LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.**