Bodre v RZP Realty LLC

2023 NY Slip Op 34893(U)

May 10, 2023

Supreme Court, Bronx County

Docket Number: Index No. 25012/2018E

Judge: Adrian Armstrong

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This opinion is uncorrected and not selected for official publication.

C003

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 21

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ALEJANDRO BODRE, Index №. **25012/2018E**

Plaintiff,

-against- **Hon. ADRIAN N. ARMSTRONG**

RZP REALTY LLC,

Defendant.

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The following papers numbered were read on this motion (Seq. No. 003)
for Reargument noticed on May 4, 2023.

Notice of Motion – Cross Motion - Exhibits and Affidavits Annexed	No (s). 89-91
Answering Affidavit and Exhibits	No (s). 93-94
Replying Affidavit and Exhibits	No (s). 96-97

Upon the foregoing papers, the motion is decided in accordance with the annexed Decision and Order. r.

This constitutes the Decision and Order of the Court.

Dated: 5/10/2023

Hon. _____
ADRIAN N. ARMSTRONG, A.J.S.C.

Motion is Respectfully Referred to
Justice: _____
Dated:

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 21

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ALEJANDRO BODRE,

Plaintiff, DECISION and ORDER

-against- 25012/2018E

RZP REALTY LLC,

Defendant.

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Adrian Armstrong, J.

In this labor law action, the plaintiff moves to reargue this Court's decision, dated February 7, 2023, which denied plaintiff's motion for partial summary judgment on his §240(1) claim. Movant contends that reargument is warranted in that the Court misapprehended the facts and law in determining triable issues of law exist as to whether plaintiff was engaged in a protected repair activity under Labor Law §240(1) and misapprehended the facts and law in determining triable issues of law exist as to whether plaintiff was engaged in a protected alteration activity under Labor Law §240(1).

A motion for leave to reargue a prior motion pursuant to CPLR §2221 is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any

controlling principle of law (*Oparaji v. Yablon*, 159 A.D.3d 539, 70 N.Y S.3d 44 (1st Dept. 2018).

According to plaintiff, on the day of the accident, he was working for FB Boiler Inc. alongside his father, Julian Bodre ("Julian"). Plaintiff and Julian arrived at the basement boiler room in the subject residential apartment building, owned by defendant, to repair the boiler's hot water system by removing, reconfiguring, and replacing copper piping for the boiler and mixing valve. While performing the re-piping work, plaintiff and Julian needed to install a 9-foot section of copper pipe horizontally, below the ceiling, about 15 feet from the basement floor. Plaintiff testified that he used an A-frame ladder found in the building to accomplish this task. He claimed that he positioned the ladder on the boiler room floor in an A-frame position. Plaintiff then climbed to the top rung, stood on it with both feet, and was attempting to reach up and take hold of the 9-foot pipe with both hands when the ladder slid out from under him. He was caused to fall backwards off the ladder striking the wall and the ground and sustaining injury.

Before the accident occurred, plaintiff stated that the building ladder he was using was loose and shaking. He also indicated that no one was holding or securing the ladder he stood on and observed the boiler room floor to be wet with water from the pipes. Plaintiff testified that he did not receive instructions from anyone regarding where to place the ladder and that only he and Julian were present in the

boiler room at the time of the accident. Julian testified that no one from RZP Realty LLC instructed them on the performance of their work.

Plaintiff further relies on the building superintendent, Kadri Prelvukaj ("Mr. Kay") who testified at his deposition that he needed plaintiff and Julian to repair the hot water system because the building was, amongst other things, having a problem with "fluctuating" hot water temperatures while the water was running and needed to have this problem with the hot water fixed and repaired. Moreover, at his deposition, Mr. Kay also admitted F.B. Boiler's work in fixing the hot water system was not merely simple or routine maintenance, testifying instead that F.B. Boiler's work was part of the building's attempts to fix the hot water system problem through "trial and error … until we figure it out."

Labor Law 240(1) imposes absolute liability on owners, contractors and their agents for injuries to workers engaged in the repairing of a building or structure that results from falls from ladders or other similar devices that do not provide the intended protection against such falls (*see Orellano v 29 E. 37th St. Realty Corp.,* 292 AD2d 289, 290 [2002]). It does not however, apply to routine maintenance that is not performed in the context of construction or renovation. Replacement of parts that routinely wear out is considered maintenance, outside the purview of this section (*see Prats v Port Auth. Of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Where something has gone awry, however, requiring repair, section 240(1) is applicable

(*see Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202 [2002]). " '[A]ltering' within the meaning of Labor Law §240(1) requires making a significant physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]).

"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] [citations and quotations omitted].

Plaintiff moved for partial summary judgment on his §240(1) claim, setting forth plaintiff was performing both covered §240(1) repair and alteration work at the time of his accident. The Court agrees that it misapprehended the law in holding a question of fact existed as to whether plaintiff was doing a covered repair and alteration work at the time of his accident. The testimony and documentary evidence submitted in support and in opposition to the repair work issue show the building's hot water system was not working correctly and plaintiff was injured while trying to fix the hot water problem, which was not regular maintenance, but instead a longstanding problem that needed fixing.

The uncontroverted evidence submitted by plaintiff in the underlying motion

also showed plaintiff and Julian's repair was not merely a simple, routine, frequent, insignificant, cosmetic, or decorative activity, but rather constituted an "alteration: under the Labor Law. This evidence showed, in part, that plaintiff's work at the building consisted of installing new reconfigured copper piping that made up the boilers return system, for the mixing valve to the boiler, so the system could work correctly, during which the plaintiff used a Sawzall to cut and remove the existing pipes.

This Court finds that the work plaintiff and his father were performing affected the functioning of a crucial building-wide system at the subject location and was sufficiently significant to constitute an alteration because it significantly altered the configuration or composition of the budling by changing the way hot water was delivered to the entire building (*Concepcion v 333 Seventh LLC*, 162 AD3d 493 [1st Dept. 2018]).

While plaintiff made out his prima facie case for section 240(1) liability, defendant failed to raise a triable issue of fact as they offered no more than speculation as to whether the accident happened as plaintiff described. Here, no credible evidence was presented that the cause of the building's hot water problem was normal wear and tear and that only routine maintenance was required to fix it. Defendant admitted that plaintiff was repairing the fluctuating, undependable hot water system at the time of this accident and Mr. Kay also testified that F.B. Boiler

was retained to perform a "permanent repair" of a recurring problem with fluctuating hot water temperatures and not routine maintenance on the building's boiler system."

Accordingly, it is hereby

ORDERED, that plaintiff's motion to reargue is granted; and it is further

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim as against defendant RZP Realty, LLC is granted.

This constitutes the Decision and the Order of the Court.

Dated: May 10, 2023

Hon. Adrian Armstrong, A.J.S.C.