

Tejada-Rodriguez v 76 Eleventh Ave. Prop. Owner LLC.
2023 NY Slip Op 35151(U)
June 23, 2023
Supreme Court, Bronx County
Docket Number: Index No. 29502/208E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 3

DANNY TEJADA-RODRIGUEZ,

Index No.: 29502/2018E

Plaintiff,

- against -

DECISION and ORDER

76 ELEVENTH AVENUE PROPERTY OWNER LLC.,
HFZ CAPITAL GROUP, and OMNIBUILD
CONSTRUCTION INC.,

Defendants.

and 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. 52-70
Defendants 76 Eleventh Avenue Property Owner LLC.'s, HFZ Capital Group's and Omnibuild Construction, Inc.'s Affirmation in Opposition, Counter Statement of Material Facts, Memorandum of Law in Opposition	NYSCEF Doc. No. 75-77
Plaintiff's Memorandum of Law in Reply	NYSCEF Doc. No. 79-81

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

This court holds Defendant Omnibuild Construction Inc. ("Omnibuild") is a proper defendant within the meaning of the Labor Law. Plaintiff established his *prima facie* burden of a Labor Law 240(1) violation, and Defendants failed to raise triable issues of fact to preclude summary judgment in Plaintiff's favor. Plaintiff has not establish he is entitled to judgment on his Labor Law 241(6) claim.

According to Plaintiff, on the day of the accident, he was employed as a laborer by non-party, SBF Construction Inc. ("SBF"). SBF was retained by Omnibuild Construction Inc. ("Omnibuild") to perform concrete superstructure work on the subject premises. Plaintiff testified that he was instructed by his foreman or supervisor, "DeBlack" to remove plywood from the ceiling or alternatively, "stripping the floor." Plaintiff performed this type of work throughout the

day until the accident occurred. While stripping temporary wood forms encasing concrete structures on the 32nd floor and picking up pieces of plywood, he was struck in the head by a wooden panel, measuring 18-feet long, 3-feet wide, weighing approximately 300 pounds. Plaintiff alleged the panel was not properly secured to the concrete beam above and dislodged causing it to fall on him. 76 Eleventh Avenue Property Owner LLC (“76 Eleventh”) and/or HFZ Capital Group (“HFZ”) owned the premises and Omnibuild was allegedly retained to serve as general contractor and/or construction manager. Omnibuild subcontracted superstructure work to Plaintiff’s employer, SBF. According to the Senior Project Manager for Omnibuild (Roy Galifi), Omnibuild was the construction manager that functioned like a general contractor that hired the subcontractors and performed general contractor responsibilities.

This Court finds Omnibuild is a proper defendant under the Labor Law. Omnibuild’s contentions that strict liability cannot be imposed under Labor Law 240(1) or 241(6) because it was a construction manager that did not exercise actual control or supervision over the injury-producing work is without merit. The label of “construction manager” does not necessarily bar the imposition of strict liability under Labor Law 240(1) or 241(6). *See Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]. The record evidence demonstrated that Omnibuild had the authority to supervise and control the injury-producing work as several Omnibuild employees were on site daily, possessed authority to stop the work as well as overall responsibility for overseeing SBF’s work. Therefore, whether Omnibuild actually exercised supervision and control over the injury-producing work is irrelevant. *See Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625 [1st Dept. 2012].

This Court further finds Plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as it was uncontroverted that his injuries resulted from being struck by a falling wooden

panel, in the absence of any overhead netting or other protective devices to shield him from a gravity-related injury. *See Mayorquin v. Carriage House Owner's Corp.*, 202 AD3d 541 [1st Dept. 2022]; *see also Gonzalez v Paramount Group, Inc.*, 157 AD3d 427 [1st Dept. 2018].

In opposition, the defendants' arguments failed to raise triable issues of fact. Any sole proximate cause argument must fail as Defendants' statutory violation served as a proximate cause for the accident, and therefore, Plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. Moreover, contrary to the defendants' contention, there is no requirement for Labor Law 240(1) purposes that Plaintiff know exactly the cause of his accident, or what caused the wooden panel to fall, where there is no dispute that safety devices were not provided to protect Plaintiff from being struck by a falling panel. *See Fuentes v YJL Broadway Hotel, LLC*, 2022 NY Slip Op 06636 [1st Dept. 2022]; *see also Diaz v Raveh Realty, LLC*, 182 AD3d 515 [1st Dept. 2020].

In addition, Plaintiff cites Industrial Code 12 NYCRR §23-1.7(a)(1) (overhead hazards) and 12 NYCRR §23-2.2(a), (c), and (d) (concrete work; Beams, floors and roofs; Stripping) to support his Labor Law 241(6) claim, therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent¹. *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].

This Court finds Industrial Code 12 NYCRR §23-1.7(a) to be a sufficient predicate to the applicable facts in this case. However, as to overhead hazards, there are triable issues of fact as to whether Plaintiff's assigned work area was "normally exposed to falling material or objects." *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 [1st Dept. 2007].

¹ To the extent that Plaintiff cited 12 NYCRR §23-2.1(a)(2) in his reply papers, the arguments set forth with respect to this regulation were improperly raised for the first time on reply, and will not be addressed by the Court herein.

12 NYCRR §23-2.2 provides in relevant part that forms, shores, and reshores as to concrete work must be “structurally safe and shall be properly braced or tied together” to maintain their position and shape. Although §23-2.2 is a sufficient predicate for a Labor Law 241(6) cause of action, “the interpretation of the regulation presents a question of law, [and] the meaning of specialized terms in such a regulation is a question” that cannot be determined without expert opinion. *See Morris v Pavarini Constr.*, 22 NY3d 668, 671 [2014]. In the absence of any expert opinion, Plaintiff did not establish his *prima facie* entitlement to judgment on his Labor Law 241(6) cause of action to the extent that it is premised upon an alleged violation of 12 NYCRR §23-2.2(a), (c), and (d).

Accordingly, it is

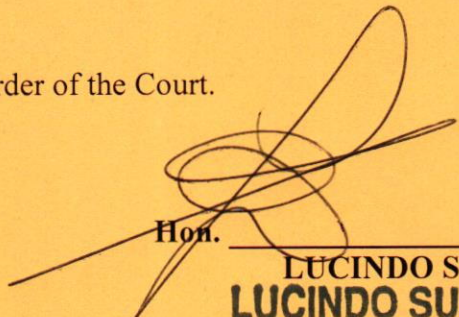
ORDERED, that Plaintiff’s summary judgment motion is granted in part; and it is further

ORDERED, that Plaintiff is awarded judgment as to liability with respect to the Labor Law 240(1) claim.

This constitutes the Decision and Order of the Court.

Dated: June 23, 2023

Hon.


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