

Rush v Obodon Group, Inc.
2023 NY Slip Op 35208(U)
March 27, 2023
Supreme Court, Bronx County
Docket Number: Index No. 807980/2022E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 12

Mtn. Seq. # 2

HENRY RUSH,

Index No.: 807980/2022E

Plaintiff,

- against -

DECISION and ORDER

OBODON GROUP, INC., EXTREME REALTY
ASSOCIATES, INC., and MARCIA CAMPBELL,

Hon. Kim Adair Wilson, J.S.C.

Defendants.

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits, Affidavit of Service	NYSCEF Doc. No. 24-34
Defendant Obodon Group, Inc.'s January 26, 2023 Letter Requesting Extension of Time to Oppose	NYSCEF Doc. No. 36
Plaintiff's January 27, 2023 Letter in Response to Defendant Obodon Group, Inc.'s Letter Request for Extension of Time to Oppose	NYSCEF Doc. No. 37
Plaintiff's Reply Affirmation	NYSCEF Doc. No. 40

Upon the enumerated papers¹, and due deliberation had thereon, this Court finds:

The issue in Plaintiff's motion is whether he established his entitlement to summary judgment with respect to the Labor Law 241(6) claim against Defendant Obodon Group, Inc. ("Obodon"). This Court holds Plaintiff demonstrated his entitlement to judgment concerning liability as to the Labor Law 240(1) claim against Defendant Obodon.

According to Plaintiff, on the day of the accident, he was hired to perform demolition work at a premises owned by Defendant Obodon. At the time of the accident, several construction

¹ As an initial matter, the Court declines to consider Defendant Obodon's untimely opposition to Plaintiff's motion. CPLR 2214 prescribes the time of service requirements for opposition papers. [CPLR 2214[b]]. Here, although there is no apparent prejudice to Plaintiff, Defendant Obodon failed to present a valid excuse for the late service of its opposition papers. *See Nakollofski v Kingsway Props., LLC*, 157 AD3d 960 [2d Dept. 2018]; *see also Pittman v Maher*, 202 AD2d 172 [1st Dept. 1994].

Even if the Court granted Defendant Obodon's request, opposition was submitted and electronically filed beyond the period for which the extension was sought.

workers, including Plaintiff, were carrying a heavy radiator out of the property for garbage disposal when one of the workers allegedly dropped the radiator causing Plaintiff to sustain injuries to a finger on his right hand.

Pursuant to his sworn affidavit, John McCormick was hired by Marcia Campbell of Extreme Realty Associates, Inc. to perform construction work as part of the demolition and renovation of the subject property. Marcia Campbell, according to Mr. McCormick, served as general contractor for the construction project.

Plaintiff moves for summary judgment pursuant to CPLR 3212 alleging that Defendant Obodon violated Labor Law 241(6) on the grounds that 1) it is undisputed that Obodon is the owner of the premises; and 2) that Obodon violated Industrial Code 12 NYCRR §23-3.3, which provides that where demolition of any building or structure is performed by hand, debris and other materials must be removed by means of chutes, buckets, hoists, or through openings in the floors of a building or other structure.

It is well settled that the proponent of a motion for summary judgment, must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422 [1st Dept. 2022]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that *prima facie* showing. *See Bethlehem Steel Corp. v Solow*, 51 NY2d 870 [1980]. The Court's role in summary judgment is issue finding, not issue determination. *See Farias v Simon*, 122 AD3d 466 [1st Dept. 2014]. Courts will grant summary judgment only if there are no material, triable issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012] [citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]].

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 a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dept. Stores*, 211 AD2d 414 [1st Dept. 1995].

In support of his Labor Law 241(6) claim, Plaintiff cites Industrial Codes 12 NYCRR §23-3.3 (Demolition by hand), 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].

Specifically, Plaintiff cites to Industrial Code 12 NYCRR §23-3.3 governing “demolition by hand.” It provides, as follows:

- “(e) Methods of operation. Where the demolition of any building or other structure is being performed by hand, debris, bricks and any other materials shall be removed as follows:
- (1) By means of chutes constructed and installed in compliance with this Part (rule);
 - (2) By means of buckets and hoists; or
 - (3) Through openings in the floors of the building or other structure in compliance with this section.”

The Court finds that Plaintiff established his *prima facie* burden regarding his Labor Law 241(6) claim predicated upon 12 NYCRR §23-3.3 given the undisputed facts that Plaintiff, along with other workers, were attempting to remove the heavy radiator for disposal by hand during the course of demolition work at the subject premises without chutes, buckets, hoists, or removal

through openings in the floors of the building in compliance with this section of the Industrial Code. Defendant Obodon failed to raise a triable issue of fact.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested was not addressed by the Court, it is hereby denied.

Accordingly, it is

ORDERED, that Plaintiff's motion seeking summary judgment on liability against Defendant Obodon as to the Labor Law 241(6) claim, is granted, without opposition; and it is further

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: March 27, 2023

Hon. 

KIM ADAIR WILSON, J.S.C.

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