

Berrones v 130 E. 18 Owners Corp.

2024 NY Slip Op 32029(U)

June 13, 2024

Supreme Court, New York County

Docket Number: Index No. 159487/2019

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MARCOS BERRONES,

Plaintiff,

- v -

130 E. 18 OWNERS CORP., INTER RENOVATION INC.,

Defendant.

INDEX NO. 159487/2019

11/03/2023,
11/06/2023,
11/06/2023,

MOTION DATE 11/06/2023

**MOTION SEQ. NO. 003 004 005
006**

**DECISION + ORDER ON
MOTION**

-----X

INTER RENOVATION INC.

Plaintiff,

-against-

UNIBUD RESTORATION CORP., BRENMAC CORP., RKZ
RESTORATION CORP.

Defendant.

Third-Party
Index No. 595362/2020

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 185, 186, 187, 191, 265, 266, 267, 268, 278, 292

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 183, 184, 188, 192, 211, 212, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 269, 270, 271, 272, 294, 295, 296, 297, 298, 299, 300, 301

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 189, 193, 213, 273, 274, 275, 276, 277, 293, 305, 306, 307

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 190, 194, 214, 215, 216, 217,

218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 302, 303, 304

were read on this motion to/for

JUDGMENT - SUMMARY

Background

This action involves personal injuries allegedly sustained by plaintiff Marc Berrones (“plaintiff”) while working on a construction project located at 130 East 18th Street, New York, NY, owned by defendant 130 E. 18 Owners Corp (“130 E. 18 Owners Corp”). Plaintiff alleges that on September 23, 2019, he was performing bricklaying work on the subject project site, when he fell through an unprotected opening on the sidewalk bridge/scaffold. Specifically, plaintiff alleges that while on the sidewalk bridge/scaffold, he stepped on an area covered by black plastic. Plaintiff alleges that the underneath there was a gap, causing plaintiff to fall through the opening. Plaintiff avers that while he was eventually helped up through the hole and did not completely fall through the hole to the courtyard below, he nevertheless sustained serious injuries as a result.

On September 30, 2019, plaintiff commenced this action against defendants 130 E.18 Owners Corp. and the general contractor, Inter Renovation Inc. (“Inter”) alleging violations of Labor Law § 240, 241(6) and 200. Subsequently, Inter filed a third party action against subcontractors Brenmac Corp (“Brenmac”), RKZ Restoration Corp (“RKZ”), and Unibud Construction Corp (“Unibud”) seeking indemnification from plaintiff’s claims.

Standard of Review

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 (1st Dept 1989). As

such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

Motion Sequence 006

Plaintiff seeks partial summary judgment on his Labor Law § 240(1) claim. Defendants oppose. For the reasons set forth below, plaintiff's motion for partial summary judgment is granted.

Labor Law § 240(1) provides,

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.

While New York Courts apply Labor 240(1) liberally, it is well established that an accident alone does not establish a Labor Law § 240 (1) violation or causation.” *Stoneham v. Joseph Barsuk, Inc.*, 41 NY3d 217 (2023); see also *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 (2003). Rather, plaintiff must show that they were not provided a safety mechanism or that safety mechanism failed in order to establish liability pursuant to

Section 240(1). *Id.* Thus, if adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under section 240 (1) does not attach. *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 (2006); *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004).

Plaintiff contends he was not provided with proper safety protection at the time of the accident as no were there any barricades or covers to protect workers from falling through the opening/gap on the sidewalk bridge. In opposition, Defendants contend plaintiff was provided with a harness and a lifeline, which plaintiff was required to wear at all times, and plaintiff caused his own accident through his failure to properly utilize such devices.

The Court finds plaintiff has established entitlement to summary judgment as to Labor Law § 240(1) and defendants have failed to raise a triable issue of fact. The record reflects that although plaintiff was wearing a safety harness at the time of his accident, he was not provided with an adequate lifeline. Plaintiff testified that while he was wearing his safety harness at the time of the accident, he could not utilize the harness because he was only provided with a rope approximately three feet long, and his worked required him to be at a distance of fifteen to twenty feet. Still, defendants' proffer that plaintiff could have utilized the lifeline safety mechanism provided to him, but chose not to, and thus is the proximate cause of his own accident. The Court finds this contention is unsupported by the record.

Moreover, under Labor Law § 240(1), defendants can still be liable where plaintiff is provided with a safety device. The explicit text of Labor Law § 240(1) not only requires plaintiff have access to a safety device, but that such safety device be proper. In other words, the safety device must be adequate for the work provided. See *Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446 (1st Dept 2013); *Lombardi v. Stout*, 80 N.Y.2d 290 (1992);

Burke v. Hilton Resorts Corp., 85 A.D.3d 419 (1st Dept 2011). This is consistent with the legislature's intent. See *Rocovich v. Con Edison Co.*, 78 NY2d 509, 577 (1991). Moreover, to support a defense that plaintiff is at fault because he failed to utilize the safety device(s), defendants must show that "refused" to use the safety devices that were provided. *Stolt v. General Foods Corp.*, 81 NY2d 918 (1993). Here, plaintiff's deposition testimony supports his contention that the safety device provided was insufficient as it was far to short for plaintiff to utilize to perform his required duties.

Regardless, in order to avoid liability under Labor Law § 240(1), defendant must show that plaintiff was the *sole* proximate cause of his accident, not just that plaintiff may bear partial responsibility of his own injuries. See *Blake* 1 NY3d 280; *Barreto v. Metropolitan Transp. Auth.*, 25 NY3d 426 (2015); *Zimmer v. Chemung County Performing Arts, Inc.*, 65 NY2d 513 (1985). Here, defendants contend plaintiff was the sole proximate cause of his accident, as he failed to inquire to his coworkers about the plastic sheeting nor did he request a longer lifeline from defendants. However, the record does not support defendants' arguments. Here, even if now in hindsight, defendants can identify actions plaintiff could have taken to avoid his accident or reduce the possibility of the accident, this is insufficient to defeat liability. *Id.* Defendants have not established plaintiff was the sole proximate cause of his accident on the basis that there is a chance he could have avoided injury even where there was inadequate protection under Labor Law § 240(1). Here, the Court finds that plaintiff has established as a matter of law that defendants' failure to provide proper safety devices was a proximate cause of plaintiff's accident.

Next, defendants argue summary judgment of plaintiff's 240(1) claim should also be denied on the basis that there is a triable issue of fact as to how plaintiff sustained his alleged injuries. Specifically, Brenmac argues plaintiff events where plaintiff tripped and fell, which

caused his injuries, not a fall through the unprotected opening. However, the Court rejects this argument. Brenmac's only evidentiary support for this proposition is inadmissible hearsay. First, Brenmac offers hospital notes allegedly created during plaintiff's trip to the hospital immediately following his accident. Brenmac points to hospital staff notes which state plaintiff told hospital staff he sustained his injuries from a trip and fall. The hospital record offered by Brenmac is unverified, and therefore insufficient to raise a triable issue of fact pursuant to CPLR 4158(c); see *Gomez v Kitchen & Bath by Linda Burkhardt, Inc.*, 170 AD3d 967 (2nd Dept 2019). Nonetheless, even if the records were verified, no translator was provided to plaintiff at the hospital, and thus the Court finds the statement unreliable as to its exact characterization of plaintiff's accident.

Additionally, the Court finds Brenmac's argument that the deposition testimony of Roman Jimielity is insufficient to defeat plaintiff's motion for summary judgment. It is undisputed that Jimielity did not witness plaintiff's accident. Therefore, while Jimielity's hearsay statements may be considered in opposition to plaintiff's summary judgment motion, on its own it is insufficient to rebut plaintiff's claims. See *Garcia v. 122-130 E. 23rd St. LLC*, 197 NYS3d 499 (1st Dept 2023).

As explained above, the Court finds Plaintiff's accident falls squarely into that of the type of accident intended to be covered by Labor Law § 240(1). Thus, plaintiff's motion for partial summary judgment as to Labor Law § 240(1) claim is granted.

Motion Sequence 004

Inter moves for summary judgment seeking dismissal of plaintiff's complaint in its entirety as well as summary judgment granting its third-party complaint against Unibud Restoration Corp and Brenmac Corp.

Labor Law § 240(1)

First, as the Court has granted Plaintiff's motion for partial summary judgment as to its Labor Law § 240(1) claim, Defendant Inter's motion is denied with respect to that claim.

Labor Law § 241(6)

Labor Law § 241(6) provides,

"All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Here, Plaintiff rests his 241(6) claim on Industrial Code Sections: 23-1.5(c)(3), 23-1.7(b)(1)(i)(ii) and (iii) as well as 23-5.1(b), 5.1(e), 5.1(f), 5.1(j), 5.3(f) and 5.3(g). Primarily, defendants contend plaintiff failed to cite to these subsections in their complaint, and therefore cannot sustain his Labor Law 241(6) claim by relying on said subsections. The Court finds that plaintiff's reference to Rule 23 of the Industrial Code "and all subsections contained therein" is sufficient to provide notice to defendants of all relevant sections of the code that plaintiff would rely on to his support his claim.

Section 23-1.5(c)(3) requires that all safety devices, safeguards, and equipment must be kept "sound and operable" and immediately repaired or restored or immediately removed from

the job site if damaged. With respect to Section 23-1.5(c)(3), the Court finds that even provided will all favorable inferences, plaintiff has failed to sufficiently allege a violation of Section 23-1.5(c)(3). Here, plaintiff alleges the safety device provided was inadequate, however plaintiff has neither argued neither put forth evidence that the safety device was not sound and operable nor was it damaged.

As to Section 23-1.7, Inter avers that plaintiff cannot demonstrate a violation of this section of the Industrial Code as plaintiff was not required to access the alleged plastic sheeting to perform his work and because the sidewalk bridge/scaffold at issue was equipped with a safety railing. The Court disagrees. Here, plaintiff has sufficiently alleged a potential violation of Section 23-1.7(b). Granting plaintiff all favorable inferences, the condition alleged, namely gap covered with plastic and no flooring underneath at an elevated scaffold falls within the purview of Section 23.17(b)(1) "hazardous openings." As such, Inter's motion to dismiss plaintiff's Labor Law § 241(6) claim is denied.

Furthermore, Section 23-1.16: "Safety belts, harnesses, tail lines and lifelines" sets forth safety standards for safety belts, harnesses, and lifelines. Subsections (a) and (b) provide: (a) Approval required. Safety belts, harnesses, and all special devices for attachment to hanging lifelines shall be approved (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work. Under this section, such approved safety belt or harness shall be properly attached. As discussed above, plaintiff alleges that although he was provided with a safety harness with an attached lifeline, the lifeline provided was inadequate and unusable for the subject work.

As such, plaintiff has sufficiently alleged a violation of Labor Law 241(6) predicated upon Section 23-1.7(b) and 23-1.16 of the New York State Industrial Code.

Labor Law § 200

Next, Inter moves to dismiss plaintiff's Labor Law § 200 and common law negligence claim on the basis that did not supervise, or control plaintiffs work at the subject premises and did not create the alleged defective condition nor have actual or constructive notice of the allegedly defective condition.

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311(1981); *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 (1998); *Singleton v Citmalta Constr. Corp.*, 291 AD2d 393, 394 (2002). Moreover, "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200." *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 (2004).

The Court finds there is a triable issue of fact as to whether Inter had notice of the defective condition and/or the ability to control the activity which caused the condition. In support of dismissal, Inter contends that the deposition testimony of Inter's representative Roman Jemieliity, rebuts any contention that Inter had notice or control over the defective condition. Specifically, Inter points to Jimieliity's testimony that that he did not observe any problems/issues at the scaffolding or sidewalk bridge/shed and that plaintiff's foreman, Vladimir

Gutierrez never raised any issues or concerns about them of any nature. Inter argues that no negligence can be imputed to Inter as Jimielity testified he never observed any plastic sheeting at the subject premises matching the description testified to by plaintiff but did recall that unibud would cover its materials with plastic to protect against moisture intrusion. Jimielity's testimony that he did not observe the condition, is insufficient to dismiss plaintiff's allegations. However, Jimielity's testimony is not an unequivocal denial of the condition. Granting plaintiff all favorable inferences, Jimielity's presence at the site lends credence to plaintiff's argument that Inter had control over the subject site and may support rather than defeat plaintiff's labor law 200 and common law negligence claim against Inter.

Therefore, with respect to plaintiff's Labor Law § 200 and common negligence claims, the Court finds there is a triable issue of fact and summary judgment dismissing plaintiff's claims is inappropriate at this juncture.

Indemnification

In addition to summary judgment dismissing plaintiff's claims, defendant and third-party plaintiff Inter seeks summary judgment awarding indemnification against third party defendants Brenmac and Unibud.

The relevant indemnification provision in Inter's agreement with Unibud reads,

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor...from and against claims...arising out of or resulting from performance of the Subcontractor's Work under this Subcontract...but only to the extent caused by the negligent acts or omissions of the Subcontractor...

Similarly, the Inter's agreement with Brenmac states,

Brenmac Corp. agrees to indemnify, defend and hold the customer...harmless from and against all claims...caused directly or solely by Brenmac Corp., its employees or other persons under the direct and immediate control of Brenmac Corp.

Accordingly, both indemnification provisions at issue require negligence on behalf of subcontractor to trigger indemnification.

Here, Defendant Inter has failed to establish at this stage whether either Defendant's negligence was the cause of plaintiff's accident. The Court finds there is a question of fact as to whether Defendant Inter is entitled to indemnification by Defendants Brenmac and Unibud. At this stage, there is conflicting testimony as to whether Plaintiff was standing on the sidewalk bridge erected by Brenmac or the hanging pipe scaffold erected by Unibud. The record reflects that in plaintiff's depositions he used the terms "scaffold" and "sidewalk bridge" interchangeably and at various points in his deposition stated that his accident occurred on the "sidewalk bridge" and on the "scaffold."

Therefore, indemnification as a matter of law is inappropriate at this stage.

Motion 003

For the reasons set forth above, Brenmac's motion for summary judgment dismissing third party plaintiff Inter's claims for indemnification is denied.

Motion 005

Pursuant to the aforementioned, Unibud's motion to dismiss plaintiff's claims and third-party plaintiff's claims are denied.

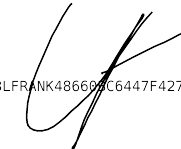
Accordingly it is hereby,

ORDERED that summary judgment is granted in favor of plaintiff as to as to Labor Law Section 240(1); and it is further

ADJUDGED that defendant and third-party plaintiff Inter Renovation Inc.’s motion for summary judgment is denied; and it is further

ADJUDGED that third-party defendant Brenmac Corp.’s motion to dismiss is denied; and it is further

ADJUDGED that third-party defendant Unibud Restoration Corp’s motion to dismiss is denied

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LYLE E. FRANK, J.S.C.

6/13/2024
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE