

Ruiz v Ewan
2024 NY Slip Op 35258(U)
June 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 600733/2022
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 600733/2022

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY*****P R E S E N T:*****HON. LINDA KEVINS**
*Justice of the Supreme Court*MOTION SUBMIT DATE: 05/07/24

MOT. SEQ. # 001 - MD

-----X
KENNETH RUIZ,

Plaintiff,

- against -

CHRISTOPHER EWAN, MICHELLE EWAN
and F.M. PERONI INC.,Defendants.
-----X-----X
F.M. PERONI INC.,

Third-Party Plaintiff,

- against -

RJ KOBUS, INC. and EAST END TRIMMERS,
LLC,Third-Party Defendants.
-----X

Upon the following papers e-filed (documents # 32 through # 63), it is,

ORDERED that the motion (seq. #001) by plaintiff for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability, is **DENIED**; and it is further**ORDERED** that the Court, on its own motion, amends the caption to remove as defendants Christopher Ewan and Michelle Ewan (see CPLR §1003), and plaintiff is directed to take all necessary steps to effectuate same; and it is further

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ORDERED that upon payment of any required fees, the Suffolk County Clerk shall amend the caption as stated below to effectuate this Court's Order; and it is further

ORDERED that the movant is directed to promptly serve upon the Suffolk County Clerk, notice pursuant to CPLR §8019 [c] together with a copy of this Order and payment of any required fees; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action to recover money damages as a result of alleged personal injuries sustained on August 5, 2021 as a result of an alleged fall when a ladder he was descending slid out from underneath him. Said ladder was allegedly owned by defendant/third-party plaintiff F.M. Peroni Inc., who is admittedly the general contractor of the subject construction discussed herein (e-filed document #44 lines 15-25, pg. 17, lines 2 -12, pg. 18). Further, plaintiff was allegedly working at the home of defendants Christopher Ewan and Michelle Ewan which was under construction at 88 Dune Road, Quogue, New York.

It is noteworthy that plaintiff's attorney and the attorneys for defendants Christopher Ewan and Michelle Ewan as well as the third parties and their attorneys entered into a stipulation of discontinuance with prejudice (e-filed document # 38) in compliance with CPLR 3217 (a), which removed the defendants Christopher Ewan and Michelle Ewan from this action. Now, plaintiff moves for partial summary judgment against defendant F.M. Peroni Inc.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, *supra*).

"Labor Law § 240 (1) imposes a nondelegable duty upon owners, contractors, or their agents to provide proper protection to a worker performing certain types of construction work" (*Kilmetis v Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1290, 904 NYS2d 495 [2d Dept 2010]; *see Aversano v JWH Contr., LLC*, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]). Specifically, Labor Law § 240 (1) requires that safety devices be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Moreover, an owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work

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giving rise to the injury (see **Ross v CurtisPalmer Hydro-Elec. Co.**, 81 NY2d 494, 601 NYS2d 49 [1993]; **Rocovich v Consolidated Edison Co.**, 78 NY2d 509, 577 NYS2d 219 [1991]).

Labor Law § 241 (6) requires compliance with the safety rules and regulations promulgated by the Commissioner of the Labor Department and found in the Industrial Code (see **Rizzuto v L.A. Wenger Constr. Co.**, 91 NY2d 343, 670 NYS2d 816 [1998]; **Ross v Curtis-Palmer Hydro-Electric Co.**, 81 NY2d 494, 601 NYS2d 49 *supra*). To sustain a cause of action under Labor Law § 241 (6), a plaintiff must allege a breach of an Industrial Code regulation which sets forth specific, concrete safety standards applicable to the circumstances of the accident (see **Ross v Curtis-Palmer Hydro-Elec. Co.**, 81 NY2d 494, 601 NYS2d 49 *supra*; **Keener v Cinalta Constr. Corp.**, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]). Plaintiff predicates this aspect of the motion on a violation of 12 NYCRR § 23-1.21(b)(4)(i), which reads, in relevant part, as follows:

(4) Installation and use. (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure *shall be nailed or otherwise securely fastened in place*. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise (emphasis added).

Here, there is a genuine triable issue of fact regarding the alleged breach of duty under Labor Law § 240 (1) and the alleged breach of an Industrial Code regulation under Labor Law § 241 (6). Specifically, there is a triable issue as to whether the ladder plaintiff was descending was nailed or otherwise securely fastened to the house or not nailed or otherwise securely fastened. Accordingly, the motion by plaintiff is denied. The caption is amended to read as follows:

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-----X	
KENNETH RUIZ,	
	Plaintiff,
- against -	
F.M. PERONI INC.,	
	Defendant.
-----X	
-----X	
F.M. PERONI INC.,	
	Third-Party Plaintiff,
- against -	
RJ KOBUS, INC. and EAST END TRIMMERS, LLC,	
	Third-Party Defendants.
-----X	

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



LINDA KEVINS, JSC

Dated: 6.18.24

____ FINAL DISPOSITION X NON-FINAL DISPOSITION