

Roberts v Simon Prop. Group, Inc.

2013 NY Slip Op 33158(U)

December 6, 2013

Sup Ct, New York County

Docket Number: 111805/2009

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SEAN ROBERTS,
Plaintiff,

Index No.: 111805/2009

- v -

Motion Date: 05/17/2013

SIMON PROPERTY GROUP INC., J. CREW GROUP,
INC. and SHAMROCK DEVELOPMENT, INC., and
THE RETAIL PROPERTY TRUST,

Motion Seq. No.: 003

Defendants.

THE RETAIL PROPERTY TRUST,

Third Party Plaintiff,

TP Index No. 59108/2009

- v -

MADEWELL INC. and BLACK HAWK, INC.,

Third Party Defendants.

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SHAMROCK DEVELOPMENT, INC.,

Second Third Party Plaintiff,

- v -

MADEWELL, INC., BLACK HAWK, INC. and INDIAN HARBOR INSURANCE, 2 TP Index No. 5901114/2009

Second Third Party Defendants.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 5 were read on this motion to reargue.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1, 2
Answering Affidavits - Exhibits	No (s) .	3, 4
Replying Affidavits - Exhibits	No (s) .	5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion of plaintiff to reargue this Court's

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

order dated December 2, 2012 ("original order") is granted.

Upon reargument, the Court vacates its original order, denies defendants' motion and cross motion for summary judgment dismissing the Labor Law § 241(6) claims, reinstates the complaint as to such claims, and denies the cross motion of defendant J. Crew Group Inc, first and second third party defendants Madewell Inc and Black Hawk, Inc and defendant/first third party plaintiff The Retail Property Trust for summary judgment on their cross claims for common law and contractual indemnification against defendant Shamrock Development Inc and third party defendant Madewell, Inc are denied on the merits. As to plaintiff's cross motion for partial summary judgment of liability, there are issues of fact as to the circumstances of the offending wall demolition, and therefore the Court likewise otherwise adheres to its original decision.

Although plaintiff served its notice of motion two days late, i.e. on January 16, 2013, and its motion for reargument is therefore technically untimely under CPLR 2221(d), the court, in its discretion, reconsiders its prior ruling. Garcia v The Jesuits of Fordham, 6 AD3d 163, 165 (1st Dept 2004).

Upon reconsideration, the court finds that it overlooked precedent that establishes the principle that plaintiff's failure to identify the provision of the Industrial Code in the complaint or bill of particulars is not fatal to such claim (Ortega v

Everest Realty LLC, 84 AD3d 542 [1st Dept 2013]), where the belated allegations that the defendants violated Code provisions involve no new factual allegations, raise no new theories of liability, and caused no prejudice to the defendants. See Klimowicz v Powell Cove Associates, LLC, __ AD2d __, 2013 WL 59727551 (2d Dept 2013). The sole reason for this Court's summary dismissal of plaintiff's § 241(6) Labor Law claim was because his attorney cited a provision of an Industrial Code section, specifically § 23-3.3 (b)(3), which, except for the caption of such section, is identical to the provisions of § 23-3.4 (b), the section that is apparently applicable. It seems incongruous with the ruling in Ortega, supra that states that there is no requirement that plaintiff even cite a specific Industrial Code section in its complaint or bills of particulars, that plaintiff should be non suited for citing the precise language of the applicable Industrial Code section, but the wrong section, so the court reinstates plaintiff's Labor Law § 241(6) claims. However, for the reasons stated in its original decision, the court adheres the grant of defendants' motion for summary judgment dismissing the Labor Law § 240(1) claims. It also does not disturb its denial of plaintiff's cross motion for partial summary judgment of liability pursuant to Labor Law § 241(6), since plaintiff has not established prima facie that defendants violated Industrial Code § 23-3.4. Defendant Shamrock

Development, Inc. and third party defendant Madewell, Inc are also correct that co-defendants motion for summary judgment on their indemnification cross claims are premature as there has been no finding of negligence. Gomez v Sharon Baptist Board of Directors, 55 AD3d 446 (1st Dept 2008).

It is, therefore,

ORDERED that motion to reargue this Court's order dated December 2, 2012 of the plaintiff is granted and upon reargument the court vacates such decision; and it is further

ORDERED that upon vacatur this Court denies dismissal of the Labor Law Labor Law § 241(6) claim, reinstates the complaint to that extent and denies the cross motion for summary judgment dismissing the cross claims against the first and second third party defendants Shamrock Development, Inc and Blackwell, Inc interposed by defendant J. Crew, Group, Inc, first third party defendants Madewell, Inc and The Retail Property Trust; and it is further

ORDERED that the court otherwise adheres to its original order dated December 2, 2012, and it is further

ORDERED that the action is restored to the trial calendar and the parties shall appear in IAS Part 5 pre-trial conference on March 4, 2014, 2:30 PM.

Dated: December 6, 2013

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[Signature]
DEBRA A. JAMES

J.S.C.