

Harris v 170 E. End Ave., LLC
2009 NY Slip Op 33361(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 107649/06
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DAVID HARRIS,
Plaintiff,

Index No.: 107649/06

Motion Date: 0617/08

- v -

Motion Seq. No.: 001

170 EAST END AVENUE, LLC, PLAZA
CONSTRUCTION CORP., HIGHRISE HOISTING &
SCAFFOLDING, INC.,

Motion Cal. No.: 40

Defendants.

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IAS MOTION SUPPORT OFFICE
NY SUPREME COURT - CIVIL

The following papers, numbered 1 to 4_ were read on this motion and cross motion for summary judgment _____

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/ Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____
Sur Replying Affirmation _____

PAPERS NUMBERED

1
2
3
4

Cross-Motion: Yes No

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JAN 29 2009
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NEW YORK

Upon the foregoing papers,

the motion of plaintiff for partial summary judgment of liability pursuant to Labor Law § 240 shall be GRANTED and the cross motion of defendants to dismiss the complaint shall be DENIED except as to Labor Law §§ 200 and 241(6) and common law negligence, such cross motion shall be GRANTED and such causes of action shall be DISMISSED.

Defendants admit that the load of stringers was an object that required securing for the purposes of the undertaking of the work

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MTW

being carried out at the construction site. The defendants' witnesses aver that they followed the industry custom and practice of securing the stringer loads via the "chocking" rule; however such deponents lacked personal knowledge of how the particular bundle that fell on plaintiff was secured. In any event, defendants' contentions about industry practices are immaterial with respect to claimed violations of Labor Law § 240(1) (hereinafter "scaffold law"). Zimmer v Elcon Contractors, Inc., 65 NY2d 513 (1985). As there was a significant risk inherent in the four story difference between the elevation level where plaintiff was positioned and the higher level of the load of stringers being secured, Labor Law § 240(1) applies to the facts at bar. Since defendants fail to rebut plaintiff's testimony that there was no safety device to protect plaintiff from the falling stringers, they are liable for plaintiff's injury as a matter of law pursuant to the scaffold law. Outar v City of New York, 5 NY3d 731 (2005).

With respect to Labor Law § 200 and common law negligence, plaintiff has not established a prima facie case that any of the defendants had anything other than general supervisory authority over the worksite and the crane operation by plaintiff's co-workers who placed the steel beams where they struck the load of stringers. See Singh v Black Diamonds LLC, 24 AD3d 138, 140 (1st Dept 2005). Turning to Labor Law § 241(6), plaintiff was derelict in failing not only to raise violations of

the Industrial Code until his reply papers (Lumbermens Mutual Casualty Company v Morse Shoe Company, 218 AD2d 624 [1st Dept 1995]) but also to append a copy of even his original bill of particulars to its motion papers. That he would serve a supplemental bill of particulars alleging such violations only upon opposing defendants' cross moved for summary judgment is patently prejudicial and will not be countenanced.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment as to liability pursuant to Labor Law § 240(1) is GRANTED; and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is DENIED, except that defendants' cross motion as to the first, second, fourth and fifth causes of the complaint is GRANTED, and such causes of action are severed and DISMISSED; and it is further

ORDERED that the parties and their counsel are directed to attend a mediation conference before Part Mediation-1 on March 3, 2009, at 10:30 A.M. If the case does not settle in Part Mediation-1, the parties' counsel are directed to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on May 19, 2009, at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: January 23, 2009

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

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