Lind v Tishman Constr. Corp. of N.Y.
2018 NY Slip Op 32710(U)
October 19, 2018
Supreme Court, New York County
Docket Number: 154781/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE, *Justice* — **PART** IAS MOTION 12EFM

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EARL LIND JR. and DOROTHY LIND,

Plaintiffs,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 154781/2016

MOTION DATE

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 259, 260, 263, 264, 265, 266, 267, 268, 269, 270, 271

were read on this motion to dismiss.

Defendants move pursuant to CPLR 3211(a)(7) for an order dismissing this action solely to the extent of the portions of plaintiffs' cause of action alleging a violation of Labor Law § 241(6) based on alleged violations of Industrial Code §§ 23-1.5, 1.7(a)(2), 1.16, 1.17, 2.3, 2.4 and 6.1. They also seek an order enjoining plaintiffs from filing any more motions without prior court approval, and imposing sanctions in the form of their fees and costs for plaintiffs' frivolous litigation. Plaintiffs oppose.

I. CPLR 3211(a)(7)

A. Defendants

Defendants rely on plaintiff Earl Lind Jr.'s testimony at his examination before trial (EBT) in support of this motion, to wit: While working inside a parking garage, Lind began to drive an articulating boom lift in reverse and down a roadway; he was positioned inside the lift's basket approximately six feet off of the ground, facing the controls and manipulating a joystick. After reversing for a few feet, Lind felt the lift gaining momentum down the slope of the roadway and applied the brakes, causing the lift to skid several feet on sludge on the roadway, consisting of water, fireproofing, and other construction materials, and hit a curb. Lind was thrown side to side in the basket and hit its metal bars, but did not fall at any time, and was not hit by any object. (NYSCEF 242).

As Industrial Code § 23-1.5 sets forth general safety standards for employers, defendants assert that it is too general to support a cause of action for violating Labor Law § 241(6). As Lind testified that he was not hit by any falling objects at the time of his accident, defendants maintain

the requirements of Industrial Code §§ 23-1.7(a), that workers "normally exposed to falling material or objects" are to be provided with "suitable overhead protection," and that areas exposed to falling material or objects are to be barricaded or fenced or the equivalent, are inapplicable to the incident in issue here.

In light of Lind's testimony that he had not been provided with any safety equipment or personal protective equipment, defendants assert that plaintiffs state no cause of action under Industrial Code § 23-1.16, which sets forth standards for the use of safety bets, harness tail lines, and lifelines or Industrial Code § 23-1.17, which sets forth standards for life nets. Moreover, absent testimony that he had fallen, they maintain that the failure to provide plaintiff with such equipment could not have been the proximate cause of his accident. In any event, defendants observe that plaintiffs do not specify which subsections of the two statutes were violated.

Defendants maintain that as Industrial Code § 23-2.3 prohibits the release of loads from hoisting ropes until securely fastened in place, and that tag lines must be provided and used to prevent uncontrolled movement of steel panels or structural steel members while hoisted, it is inapplicable given Lind's testimony that he was working on light fixtures as an electrician when injured.

As a violation of Industrial Code § 23-2.4 pertains to the installation of permanent and temporary flooring, and as Lind testified that the articulating lift which he was driving skidded on sludge and thereby caused his accident, defendants argue that a violation of this provision cannot have proximately caused his accident. In any event, they complain that plaintiffs fail to specify the subsection on which they rely.

Given the exclusion of cranes, derricks and aerial baskets from the purview of Industrial Code 23-6.1, defendants contend that this provision is inapplicable given Lind's testimony that he was operating an articulated boom lift at the time of his alleged accident.

B. Plaintiffs

In opposition, plaintiffs reproduce their response to defendants' discovery demand for the specific Industrial Code rules violated, which reflect that neither Industrial Code §§ 23-2.3 nor 23-2.4 is listed. They complain that defendants offer no affidavit from anyone with personal knowledge of Lind's accident or an expert affidavit, and rely on CPLR 3211(d), reiterating their complaints about defendants' conduct with respect to discovery relating to motion sequence four, and contend that defendants' failure to provide them with discovery precludes them from opposing the instant motion. Plaintiffs otherwise argue that as the complaint must be accorded all possible inferences in their favor and be accepted as true, the motion must be denied. They offer excerpts of Lind's EBT relating to conditions at the worksite.

C. Defendants' reply

Defendants observe that plaintiffs offer no argument as to the legal sufficiency of the claims with respect to the specific Industrial Code sections alleged to have been violated. They

also complain that plaintiffs now offer new theories of liability and thus seek a further deposition of Lind.

D. Analysis

Defendants' excerpts of Lind's EBT testimony and plaintiffs' failure to offer argument as to the legal sufficiency of the claims underlying the specific Industrial Code sections sought to be dismissed by defendants warrant dismissal. Although the complaint contains the allegation that plaintiff fell while working at a height of 25 to 30 feet, plaintiffs do not dispute defendants' contention that Lind testified at his EBT that he did not fall and that he remained within the basket of the articulated lift.

Notwithstanding the absence of any pertinent opposition to this motion, I observe that Industrial Code § 23-1.5 is insufficiently specific to support a Labor Law violation (*see McLean v Tishman Constr. Corp*., 144 AD3d 534 [1st Dept 2016] [subsections (a) and (c)(1) and (2) of § 23-1.5 insufficient predicates for labor law liability as they set forth general standards of conduct only]; *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016] [dismissing subsection b claim as insufficient predicate]), especially as plaintiffs do not explain which of its subsections applies here (*McLean*, 144 at 535 [court properly deemed certain industrial code provisions to have been abandoned as plaintiff "failed to specify any particular subsection(s) and subdivision(s) of these provisions"]). To the extent that subsection (c)(3) is sufficiently particular (*Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666 [1st Dept 2018]), defendants demonstrate that it does not apply to the facts alleged here and plaintiffs do not demonstrate otherwise.

Industrial Code § 23-1.7 applies to protection from falling materials or objects in specific areas, neither of which plaintiffs show applies here. (*See e.g., Daly v City of New York*, 254 AD2d 214 [1st Dept 1998] [plaintiff presented no evidence that work he was engaged in was normally exposed to falling material or objects]; *see also Wright v Ellsworth Partners, LLC*, 143 AD3d 1116 [3d Dept 2016] [regulation does not apply to areas where employees required to work]).

As Lind does not claim to have been provided with any safety equipment prior to his accident, sections 23-1.16 and 1.17 are inapplicable. (*See Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578 [1st Dept 2012] [section 23-1.16 does not apply when safety devices not provided]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336 [1st Dept 2006] [same for section 23-1.17]).

As Industrial Code § 23-2.3 relates to structural steel assembly, and absent any evidence that plaintiff was assembling anything, this provision is inapplicable. (*See e.g., Letts v Globe Metallurgical, Inc*., 89 AD3d 1523 [4th Dept 2011] [work in which plaintiff was engaged at time of injury did not involve that at issue in regulation]). The same is true for the alleged violations under Industrial Code § 23-2.4 ("Flooring requirements in building construction"), and § 23-6.1, which applies to hoisting equipment except cranes, derricks, and aerial baskets.

As evidence of the legal sufficiency of plaintiffs' claims lies largely within Lind's knowledge, absent any other identified witness to the accident, plaintiffs' claim that they lack

discovery sufficient to oppose the motion, does not warrant denial of the motion, especially as plaintiffs do not specify what discovery they require. The portions of Lind's EBT that plaintiffs offer do not appear to relate to any of the Industrial Code violations cited by defendants as worthy of dismissal as a matter of law, and plaintiffs do not explain how, if at all, the excerpts relate. Moreover, defendants clearly state that they do not seek dismissal of all of plaintiffs' causes of action for a violation of Labor Law § 241(6), but only of those portions of the cause of action relating to the specific Industrial Code sections set forth above.

As defendants move to dismiss based on documentary evidence, namely Earl's deposition testimony, the standard of review is whether plaintiffs have a claim and not whether they have sufficiently stated one, and thus plaintiffs are not entitled to have their complaint read in the light most favorable to them. (*See Hyman v Schwartz*, 127 AD3d 1281 [3d Dept 2015] [liberal standard of pleading construction "will not save allegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence"]).

> A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.
>
> When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff has stated a cause of action to whether it has one." As alleged here, if the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate.

(*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014] [citations omitted]).

Thus, a Labor Law claim premised on an industrial code violation may be dismissed pursuant to CPLR 3211(a)(7) if the defendant demonstrates that the alleged violation does not apply to the facts of the case. (*See Enos v Werlatone, Inc.*, 68 AD3d 713 [2d Dept 2009] [court properly granted motion to dismiss Labor Law § 241(6) claim pursuant to CPLR 3211(a)(7) as provisions of statute inapplicable to facts of case]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 [2d Dept 2008] [claim for violation of Labor Law § 241(6) dismissed for failure to state claim as industrial code provisions cited by plaintiff did not apply to facts of case]; *McMahon v Durst*, 224 AD2d 324 [1st Dept 1996] [claim predicated on industrial code violation properly dismissed pursuant to CPLR 3211(a)(7) as regulation merely general safety standard]).

II. SANCTIONS

Defendants allege that plaintiffs' counsel has engaged in frivolous conduct and claim that plaintiffs' discovery demands are numerous, overbroad, burdensome, and seek irrelevant

information. They complain of having had to oppose two meritless motions to strike, having had to file motions to procure "the simplest of discovery, such as Plaintiffs' appearance at a designated IME," and to attend and adjourn discovery conferences due to plaintiff's unwillingness to engage in discovery. They also allege that plaintiffs' counsel has engaged in similar misconduct in two other matters.

Plaintiffs reiterate much of the arguments they advanced in earlier, already decided, motion sequences and accuse defense counsel of ethical violations.

While plaintiffs' counsel is occasionally obstreperous and fails to conduct herself professionally, I decline to impose sanctions and do not consider the two prior matters referenced by defendants. That plaintiffs have not prevailed in each motion they filed does not warrant enjoining them from interposing future motions without court approval.

Counsel's accusation that defense counsel has acted unethically is likewise not considered. In any event, absent any prayer for affirmative relief in that regard, it may only be inferred that her accusations are defensive only.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an ordering dismissing the first cause of action for a violation of Labor Law § 241(6) is granted solely to the extent of dismissing violations premised on Industrial Code §§ 23-1.5, 1.7(a)(2), 1.16, 1.17, 2.3, 2.4 and 6.1, and is otherwise denied; and it is further

ORDERED, that defendants' motion for an order imposing sanctions and an injunction is denied.

10/19/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE