

<b>Zuniga v BRP Dev. Corp.</b>
2020 NY Slip Op 31495(U)
May 15, 2020
Supreme Court, New York County
Docket Number: 450926/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

-----X

MAGNO ZUNIGA,

Plaintiff,

- v -

BRP DEVELOPMENT CORPORATION, BRP MACEDONIA PLAZA DEVELOPERS, LLC, MACEDONIA PLAZA DEVELOPMENT LLC AND MACEDONIA PLAZA COMMUNITY DEVELOPMENT CORPORATION,

Defendants.

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INDEX NO. 450926/2016
MOTION DATE
MOTION SEQ. NO. 004, 005
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91-107, 123-137, 142-143; (Motion 005) 108-122, 142-146 were read on these motions for SUMMARY JUDGMENT

Plaintiff Magno Zuniga commenced this Labor Law action to recover for personal injuries he suffered on April 18, 2013, while using a hammer drill in the course of construction work at 37-08 Union Street, Flushing, Queens, New York. In his complaint, plaintiff asserts claims under Labor Law Sections 200, 240(1) and 241(6). In motion #004, plaintiff moves pursuant to CPLR 3212 for summary judgment on liability on his Labor Law 240(1) claim and on his Labor Law 241(6) claim insofar as it is premised on violations of Industrial Code Sections 23-9.2(a) and 23-1.5(c)(3). Plaintiff also moves for leave to file an Eighth Supplemental Bill of Particulars which adds allegations regarding the violation of these regulations. Defendants oppose plaintiff's motion and by way of motion #005, and move for an order (i) granting summary judgment to defendants and dismissing plaintiff's complaint; (ii) striking plaintiff's Eighth Supplemental Bill of Particulars as untimely served; and (iii) pursuant to CPLR 3116 striking plaintiff's errata sheet served in connection with his deposition as it improperly seeks to make substantive changes to

plaintiff's testimony without a sufficient explanation for these changes. The motions are consolidated for purposes of this decision.

Plaintiff testified that on the day of the accident, April 18, 2013, he was working for BRP Construction Corp. at a construction project located in Flushing, New York. Affirmation of Rachel E. Smith dated November 27, 2019, Exh. E (Plf Dep. Tr. 7, 36-37). He had worked at the project site for approximately four months prior to his accident, doing small repairs, which were to "replenish, to put fences, to make holes on the floor." Smith Aff., Exh. E (Plf Dep. Tr. 37-39). His work was overseen by Larry Ingram, project manager for the developer, BRP Construction Group. Smith Aff., Exh. E (Plf Dep. Tr. 31); Exh. H (Ingram Dep. Tr. 38-39, 222). On the day prior to the accident, plaintiff testified that Mr. Ingram told plaintiff to use a hammer drill to make holes in the floor. Smith Aff., Exh. E (Plf Dep. Tr. 44-45). Plaintiff testified that on that day, he had trouble turning on the hammer drill, that he informed Mr. Ingram about the issue, and that Mr. Ingram told plaintiff to "deal with it like that." Smith Aff., Exh. E (Plf Dep. Tr. 48-50).

On the day of the accident, plaintiff testified that Mr. Ingram again directed plaintiff to use the hammer drill to drill holes in the cement floor. Smith Aff., Exh. E (Plf Dep. Tr. 40, 44, 50). Plaintiff testified that he asked Mr. Ingram for a different drill but that Mr. Ingram instructed him to keep working with that one. Smith Aff., Exh. E (Plf Dep. Tr. 50). Plaintiff testified that he was having trouble turning on the drill and that while he was holding it and trying to turn it on, the drill suddenly started, causing plaintiff to fall backwards and striking plaintiff on his body and face. Smith Aff., Exh. E (Plf Dep. Tr. 53-57, 60-61). Plaintiff testified that he did not receive any training on how to use the drill. Smith Aff., Exh. E (Plf Dep. Tr. 51).

Mr. Ingram, plaintiff's supervisor and the project manager for BRP Construction Group, testified on behalf of defendants. Notably, Mr. Ingram testified that he did not recall instructing

plaintiff to use the hammer drill and he did not recall plaintiff making any complaints to him about the drill prior to the accident. Smith Aff., Exh. II (Ingram Dep. Tr. 77, 91-92). Rafael Collado, the director of construction at BRP Construction Group, also testified on behalf of defendants. Smith Aff., Exh. I (Collado Dep. Tr. 6). Mr. Collado testified that every tool at the job site that was not working would be taken out of service and that when a piece of equipment was not working, the labor foreman would take it to the shop to see if it could be fixed. Smith Aff., Exh. I (Collado Dep. Tr. 34, 66). If the tool could not be fixed, he would purchase new equipment for the site. Smith Aff., Exh. I (Collado Dep. Tr. 34).

In his motion, plaintiff seeks summary judgment on liability on his Labor Law Section 241(6) claim insofar as it is premised on defendants' alleged violation of Industrial Code Sections 23-9.2(a) and 23-1.5(c)(3), which pertain to the maintenance of equipment at the job site. However, these regulations were not included in plaintiff's complaint or any of his prior bills of particulars. Thus, as a preliminary matter, plaintiff argues that he properly served his Eighth Supplemental Bill of Particulars as of right under CPLR 3043(b), or, in the alternative, he seeks leave to serve the supplemental bill. In opposition and in support of their motion, defendants argue that the bill was improperly served after the filing of the note of issue and that it should be stricken.

Contrary to plaintiff's contention, the Eighth Supplemental Bill of Particulars cannot be served as of right under CPLR 3043(b) as plaintiff seeks to allege additional violations of the Industrial Code and is not merely seeking to supplement his allegations regarding special damages. Rather, the so-called Eighth Supplemental Bill of Particulars is really an amended bill of particulars and plaintiff must obtain leave to serve this bill under CPLR 3042 as the note of issue has already been filed. "Leave to amend a bill of particulars following the filing of a note of issue is ordinarily freely granted absent surprise or prejudice to the defendants." *Henchy v. VAS Exp.*

*Corp.*, 115 A.D.3d 478, 479 (1<sup>st</sup> Dep't 2014) (internal citations omitted). However, "where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied. *Id.* at 480. Here, plaintiff's proposed amended bill of particulars was served approximately one month after the filing of the note of issue and prior to the filing of any summary judgment motions, which is not an unreasonable delay. Further, defendants are not prejudiced by the amended bill as they are well-aware that plaintiff is alleging a dangerous work condition related to the hammer drill he used at the work site. *See Tuapante v. LG-39 LLC*, 151 A.D.3d 999, 1000 (2d Dep't 2017). There are no new facts or theories of liability involved in the proposed amendment to assert additional Industrial Code violations and thus plaintiff's motion for leave to serve the amended bill must be granted *nunc pro tunc*.

Turning to the merits, plaintiff argues in support of his motion that he is entitled to summary judgment on his Labor Law 241(6) claim insofar as it is premised on the violation of Industrial Code Sections 23-9.2(a) and 1.5(c)(3), which require that equipment on the job site be maintained in good repair and in proper operating condition. With regard to the alleged violation of Industrial Code Section 23-9.2(a), defendants correctly argue that the hammer drill which allegedly injured plaintiff was not "heavy equipment or machinery" as defined under 23-9.1 and thus this section is inapplicable. *Nicola v. United Veterans Mut. Hous. No. 2 Corp.*, 178 A.D.3d 937, 940 (2d Dep't 2019). With respect to the remaining section, plaintiff argues that defendants violated this as the hammer drill he was directed to use was not in proper operating condition and that plaintiff notified his supervisor of this condition, who nevertheless directed plaintiff to use the drill. However, Mr. Ingram, plaintiff's supervisor, testified that he did not recall plaintiff telling him that the drill was not working prior to the accident and Mr. Collado, the director of BRP Construction, testified that Mr. Collado testified that every tool at the job site that was not working

would be taken out of service and that when a piece of equipment was not working, the labor foreman would take it to the shop to see if it could be fixed. Smith Aff., Exh. I (Collado Dep. Tr. 34, 66). Thus, at the very least, there is a question of fact as to whether defendants had notice that the hammer drill was not working properly and summary judgment on this claim must be denied. *Nicola*, 178 A.D.3d at 940.

Defendants argue, in support of their motion and in opposition to plaintiff's motion, that plaintiff has abandoned reliance on the other Industrial Code provisions cited in his bill of particulars by failing to raise them in his motion for summary judgment. However, this case differs from the cases cited by defendants in support of their argument insofar as here it was plaintiff who moved for summary judgment. *See, e.g. Perez v. Folio House, Inc.*, 123 A.D.3d 519 (1<sup>st</sup> Dep't 2014). Contrary to defendants' contention, plaintiff's failure to move for summary judgment on these provisions does not constitute an abandonment of these claims. *Kempisty v. 246 Spring Street LLC*, 92 A.D.3d 474, 475 (1<sup>st</sup> Dep't 2012). Since this is the only basis for defendants' motion for summary judgment on these provisions, the motion must be denied.

With respect to the remaining claims, defendants correctly argue that plaintiff's Labor Law Section 240(1) claim must be dismissed as the uncontroverted evidence shows that plaintiff's accident was unrelated to the failure of any protective device to shield him from harm directly flowing from the force of gravity or the force of a falling object. *See O'Brien v. Port Auth. of N.Y. and N.J.*, 29 N.Y.3d 27, 33 (2017). Defendants also seek dismissal of plaintiff's Labor Law Section 200 claim based on a lack of actual or constructive notice of the alleged defect. However, as discussed above, there is an issue of fact with respect to notice and thus this claim will not be dismissed.

Finally, defendants seek to strike the errata sheet served in connection with plaintiff's deposition under CPLR 3116(a). Contrary to plaintiff's contention, the errata sheet seeks to make substantive changes to plaintiff's testimony, including with respect to the critical issue of notice. Compare Smith Aff., Exh. E (Plf Dep. Tr.) to Exh. F (errata sheet), 43:17, 59:5, 63:9. Plaintiff failed to provide a specific reason for each of these substantive changes and his broad assertion that there was an issue with the translation is vague and unsupported. *Cataudella v. 17 St. John St. Assoc.*, 140 A.D.3d 508, 508 (1<sup>st</sup> Dep't 2016); *Marzan v. Persaud*, 29 A.D.3d 652, 653 (2d Dep't 2006). Finally, the errata sheets were not accompanied by an affidavit from a Spanish translator. Thus, the errata sheet must be stricken. Accordingly, it is

ORDERED that plaintiff's motion is granted insofar as plaintiff is granted leave, *nunc pro tunc*, to serve the Eighth Supplemental Bill of Particulars, and is otherwise denied; and it is further

ORDERED that defendants' motion is granted as to plaintiff's Labor Law Section 241(6) claim to the extent it is predicated on a violation of Industrial Code Section 23-9.2(a) and plaintiff's Labor Law Section 240(1) claim, and those claims are dismissed; and the errata sheet served in connection with plaintiff's deposition and it is stricken, and defendants' motion is otherwise denied.

5/15/20  
DATE

  
PAUL A. GOETZ, J.S.G.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	