

Rowe v Memorial Hosp. for Cancer & Allied Diseases

2020 NY Slip Op 35391(U)

October 28, 2020

Supreme Court, Kings County

Docket Number: Index No. 523892/17

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 28th day of October 2020

PRESENT:

HON. CAROLYN E. WADE,

Justice

JAMES ROWE,

Plaintiff,

Index No. 523892/17

leg 1, 2

-against-

DECISION/ORDER

MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES and TURNER CONSTRUCTION COMPANY,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's Motion and Defendants' Cross-Motion:

<u>Papers Numbered</u>	
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	2
Answering Affidavits/Affirmations.....	3, 4
Reply Affidavits/Affirmations.....	5
Memorandum of Law.....	6

Upon the foregoing cited papers, Plaintiff moves for Leave to Serve an Amended Verified Bill of Particulars, and for Summary Judgment Pursuant to Labor Law § 240(1) and § 241(6). Defendants Memorial Hospital for Cancer & Allied Diseases¹ and Turner Construction Company cross-move for Summary Judgment, dismissing Plaintiff's Complaint.

The underlying action was commenced by plaintiff James Rowe ("Plaintiff") to recover damages for serious injuries that he allegedly sustained on November 29, 2017, when a double baker scaffold fell on him. At the time of the accident, Plaintiff, a taper and drywall finisher, was lifting and moving the scaffold up a staircase with his co-worker. The construction and renovation site, located at 530 E. 74th Street in New York, NY, was owned by defendant Memorial Hospital for Cancer & Allied Disease ("Memorial"). Memorial hired co-defendant Turner Construction Company ("Turner") to act as the construction manager. Turner hired non-party Component Assembly System, who in turn retained Plaintiff's employer, non-party Zapata Construction, as the taper subcontractor.

Plaintiff's Motion for Summary Judgment

As a preliminary matter, the court notes that the defendants have not proffered a reasonable excuse for filing an untimely cross-motion. Thus, their application is being considered solely to the extent that it opposes Plaintiff's motion for summary judgment on his Labor Law 240(1), and 241(6) (Industrial Code §§ 12 NYCRR §§ 23-1.2(a), (e), and 23-5.18(h)) claims.

Turning to Plaintiff's Labor Law § 240(1) claim, the statute requires owners, contractors, and their agents to provide workers with proper safety devices to protect against "such gravity-

related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

In the instant case, the parties' submissions provide conflicting accounts as to how the accident occurred. Moreover, the divergent opinions of both parties' expert engineers, Douglas Miller, P.E. and Kelly Scott, P.E., establish that a triable issue of material exists as to whether mechanical means should have been provided to lift the scaffold up the stairwell. Therefore, the branch of Plaintiff's motion seeking summary judgment on his Labor Law 240(1) claim is denied.

"Labor Law 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable" (*Fusca v. A & S Construction, LLC*, 84 AD3d 1155 [2d Dept. 2011]).

Plaintiff herein asserts that the defendants violated Industrial Codes, 12 NYCRR §§ 23-1.2(a), (e), and 23-5.18(h). As noted by the defendants, 12 NYCRR §§ 23-1.2(a), (e) are in the "findings of fact" section of the Industrial Code, and have been found to be too general to support a Labor Law 241(6) claim (see *Narrow v. Crane-Hogan*, 202 AD2d 841, 842 [3d Dept 1994] ["we find that the regulations alleged, 12 NYCRR 12-1.2(e), 23-1.5(a) and subpart 23-6, relate to general safety standards and are not concrete specifications sufficient to impose a duty on defendant" (citations omitted)]; see also *Motkya v. Memorial Sloan Kettering Center*, 880 NYS2d 225 [Sup Ct, N.Y. Cty 2009]). Thus, the branch of Plaintiff's Labor Law 241(6) claim that is premised on the violation of 12 NYCRR §§ 23-1.2(a), and (e) is hereby dismissed.

Moreover, the branch of Plaintiff's Motion for Leave to Amend the Bill of Particulars is DENIED as moot, as it included a Labor Law 241(6) claim premised on the two Industrial Code sections.

12 NYCRR § 23-5.18(h) (Manually-propelled mobile scaffolds) provides, in pertinent part, as follows: "Provisions shall be made to prevent such scaffolds from tipping or falling during their movement from one location to another. Scaffolds shall be moved only on level floors or equivalent surfaces free from obstructions and openings [...]."

Here, the parties dispute whether the accident was caused by the tipping/falling of the accident or due to Plaintiff's strain from the sudden shifting of the weight of the scaffold. Consequently, a triable issue of material fact exists as to whether the defendants violated 12 NYCRR § 23-5.18(h).

Accordingly, based upon the above, Plaintiff's motion for summary judgment is **DENIED**. The branch of Plaintiff's Labor Law 241(6) claim that is premised on the violation of 12 NYCRR §§ 23-1.2(a), and (e) is hereby dismissed. Defendants' Cross-Motion is **DENIED**.

All remaining contentions have been meticulously examined, and are rendered meritless and/or moot.

This constitutes the Decision and Order of the court.



**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE
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ACTING SUPREME COURT JUSTICE**

KINGS COUNTY CLERK
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