White v 855 MRU LLC
2021 NY Slip Op 30089(U)
January 7, 2021
Supreme Court, Kings County
Docket Number: 508860/14
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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WAYNE WHITE and SHARICE WHITE,

Plaintiffs,

- against -

855 MRU LLC,
DURST FETNER RESIDENTIAL LLC, and
GOTHAM CONSTRUCTION COMPANY, LLC,

Defendants.

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DECISION AND ORDER
ON REARGUMENT

Index No. 508860/14

Mot. Seq. No. 5

The following e-filed papers read herein:	NYSCEF #:
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In this action to recover damages for personal injuries, defendants 855 MRU LLC (MRU), Durst Fetner Residential LLC (Durst), and Gotham Construction Company, LLC (Gotham; collectively with MRU and Durst, defendants) move in Seq. No. 5 for leave, pursuant to CPLR 2221 (d), to reargue their prior motion in Seq. No. 4 for summary judgment dismissing the complaint as against them (defendants' motion), as well as to reargue the prior motion of plaintiffs Wayne White (the injured plaintiff) and Sharice White (collectively with the injured plaintiff, plaintiffs) in Seq. No. 3 for partial summary judgment on liability on the injured plaintiff's Labor Law § 240 (1) claim as against MRU and Gotham (plaintiffs' motion); and, upon reargument, granting defendants' motion, denying plaintiffs' motion, and vacating the order of the Court (Baynes, J.), dated Feb. 8, 2019 (NYSCEF #84) (the prior order), which denied defendants' motion, granted plaintiffs' motion, and, in addition, granted, *sua sponte*, partial summary judgment on liability on the injured plaintiff's Labor Law § 241 (6) claim, as predicated on the alleged violation of Industrial Code

§ 23-1.7 (a) (1), as against MRU and Gotham (the prior order). Leave to reargue is *granted* and, upon reargument, the prior order is *vacated*, and the following is substituted in its place and stead:

BACKGROUND

On Sept. 18, 2014, at a building under construction at 885 Sixth Avenue in Manhattan, an approximately five-foot-long piece of lumber fell through the partially enclosed elevator-shaft opening in the eighth-floor deck and struck plaintiff, an ironworker, who was then engaged in construction next to the partially enclosed elevator-shaft opening in the 7-M floor immediately below. According to the injured plaintiff's coworker who witnessed the accident on the 7-M floor, "[o]ne of the carpenters working above us [*i.e.*, on the eighth floor] was cutting wood and the piece he was cutting fell through a hole [*i.e.*, the elevator-shaft opening] in the [eighth] floor above us and fell approximately seven feet and hit [the injured plaintiff] in the head [on the 7-M floor]."[1] As the eyewitness noted, "[t]here was no netting or any other protective devices [either on the eighth floor and the 7-M floor] to prevent any objects from falling [from the eighth floor] onto the [7-M] floor where [the injured plaintiff] and I were working at the time of the accident."[2] Both the eyewitness and the injured plaintiff who were then working on the 7-M floor, as well as the carpenters who were then working on the eighth floor (including the carpenter who was cutting the piece of lumber at issue at the time of the accident), were employed by nonparty Cross Country Construction LLC (Cross Country). Defendant MRU was the building owner. Defendant

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[1] *See* Sworn Affidavit of Marquiese Wrenn, dated Aug. 7, 2018 (NYSCEF #57).

[2] *Id.*

Gotham was MRU's construction manager. The role of the third defendant – Durst – in the project is unclear.

Approximately one week after the accident, the injured plaintiff and his wife, suing derivatively, commenced this action. Defendants interposed a joint answer. After plaintiffs filed a note of issue and certificate of readiness, the instant motions for summary judgment were timely served. A few preliminary points will simplify the Court's analysis. First, inasmuch as plaintiffs do not oppose defendants' motion insofar as it seeks dismissal of Durst from this action, the portion of defendants' motion insofar as it relates to Durst is granted. Second, although plaintiff alleged multiple violations of the Industrial Code, they do not oppose, with the exception of Industrial Code § 23-1.7 (a) (1), dismissal of the injured plaintiff's Labor Law § 241 (6) claim, as predicated on those sections, as against MRU and Gotham (collectively, the remaining defendants). Therefore, those Industrial Code sections, with the exception of Industrial Code § 23-1.7 (a) (1), have been abandoned as bases for the Labor Law § 241 (6) liability (*see e.g. Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). This leaves for the Court's consideration, under the summary judgment standard of review, the merits of the injured plaintiff's claims under Labor Law §§ 240 (1), 241 (6) as predicated on Industrial Code § 23-1.17 (a) (1), and 200/common-law negligence as against the remaining defendants.

DISCUSSION

Labor Law § 240 (1) Claim Against Remaining Defendants

Falling object liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured, but also where a plaintiff demonstrates that, at the time the object fell, it required securing for the purposes of the undertaking (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). Stated otherwise, Labor Law § 240 (1) "does not automatically apply simply because an object fell and injured a worker; [rather,] a plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" (*Fabrizi*, 22 NY3d at 663 [internal quotation marks and alterations omitted; italics in the original]). The requirement that a plaintiff demonstrate that the object was being hoisted or secured, or required securing for the purposes of the undertaking, was recently reaffirmed by the Second Judicial Department in *Henriquez v Clarence P. Grant Hous. Dev. Fund Co., Inc.*, 186 AD3d 577 (Aug. 12, 2020). In *Henriquez*, the Second Judicial Department held that the plaintiff therein failed to make a prima facie showing that a plank fell because of the absence or inadequacy of a safety device, given that the daily log submitted in support of the plaintiff's motion "showed simply that an object fell causing injury to [him]" (*id.* at 122 [internal quotation marks omitted]).

Here, plaintiffs have failed to make a prima facie showing of their entitlement to judgment as a matter of law on the issue of liability on the injured plaintiff's Labor Law § 240 (1) claim, whereas the remaining defendants have made a prima facie showing of their

entitlement to judgment as a matter of law dismissing that claim by demonstrating that the piece of lumber at issue was not a falling object within the meaning of the statute. More particularly, the remaining defendants have demonstrated that the piece of lumber at issue: (1) was not an object which required securing for the purposes of the undertaking; (2) did not fall because of the absence or inadequacy of an enumerated safety device; and (3) was being used by the injured plaintiff's coworker who was cutting it immediately before the accident (*see Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115-1116 [2d Dept 2016]; *see also Berman-Rey v Gomez*, 153 AD3d 653, 655 [2d Dept 2017]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]).

In opposition to defendants' prima facie showing, plaintiffs have failed to raise a triable issue of fact. Contrary to plaintiffs' contention, this case is on all fours with the *Millette*'s holding and analysis in the Labor Law § 240 (1) context. As is the case here, *Millette*'s eyewitness description of the accident, "in any event [*i.e.*, regardless of whether that description was sworn, or not], failed to demonstrate that the [object at issue] was required to be secured for the purposes of the undertaking" (*id.*, 144 AD3d at 1116).[3]

Plaintiffs' contention that Labor Law § 240 (1) should apply to this accident because no safety devices were available to protect the injured plaintiff from being struck by falling

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[3] *Compare Passos v Noble Constr. Group*, 169 AD3d 706, 707-708 (2d Dept 2019) (a worker who was struck by a plywood sheet approximately 30 minutes after his coworker had removed the vertical post supporting it, was entitled to summary judgment on the issue of liability under Labor Law § 240 [1]); *Cortes v Jing Jeng Hang*, 143 AD3d 854, 855 (2d Dept 2016) (a worker who was injured when an unsecured 45 pound concrete block struck his foot after it had fallen off the top of a five-foot-high scaffold, was granted summary judgment on the issue of liability under Labor Law § 240 [1]).

lumber, misses the point. Plaintiffs' contention ignores *Fabrizi*'s holding that, in the context of the falling object liability under Labor Law § 240 (1), an object must fall *because of* the absence or inadequacy of a statutorily enumerated safety device. The cases cited by plaintiffs on this point are unavailing insomuch as they are either factually inapplicable[4] or no longer represent a binding precedent in the context of the falling object liability under Labor Law § 240 (1) following the Court of Appeals' decision in *Fabrizi*.[5]

Accordingly, plaintiffs' motion in Seq. No. 3 for partial summary judgment on the issue of liability on the injured plaintiff's Labor Law § 240 (1) claim as against the remaining defendants is denied. Conversely, the branch of defendants' motion in Seq. No. 4 for summary judgment dismissing the injured plaintiff's Labor Law § 240 (1) claim as against them is granted.

Labor Law § 241 (6) Claim Against Remaining Defendants

As noted, Industrial Code § 23-1.7 (a) (1) is the only surviving predicate for the injured plaintiff's Labor Law § 241 (6) claim. Industrial Code 23-1.7 (a) (1) ("Protection from general hazards"; "Overhead hazards") provides, in relevant part, that "[e]very place

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[4] *See Outar v City of New York*, 5 NY3d 731 (2005) (an unsecured dolly fell on the worker from the top of the bench wall); *Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089 (2d Dept 2015) (a piece of concrete hit a cross-beam and flew through a hole in a defective safety netting); *Hill v Acies Group, LLC*, 122 AD3d 428, 429 (1st Dept 2014) (a brick fell on the worker while he was stationed on a particular side of the building which lacked the safety netting which had been installed on its other sides).

[5] *See Humphrey v Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558, 558-559 (1st Dept 2014) (*Humphrey* was handed down approximately one month before the Court of Appeals issued its decision in *Fabrizi*); *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 576-577 (1st Dept 2013); *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 (1st Dept 2013); *Santos v Sure Iron Work*, 166 AD2d 571, 572-573 (2d Dept 1990).

where persons are required to work or pass that is *normally exposed to falling material or objects* shall be provided with suitable overhead protection" (italics supplied). This provision constitutes a specific Industrial Code mandate, sufficient to sustain a Labor Law § 241 (6) claim (*see Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]).

With respect to Labor Law § 241 (6), the remaining defendants have failed to establish, prima facie, that the area where the accident happened was not "normally exposed to falling material or objects," and that Industrial Code § 23-1.7 (a) (1) was thus rendered inapplicable (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 843 [2d Dept 2014]; *Gonzalez v TJM Const. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]).[6] Although lack of compliance with an Industrial Code provision may be excused when compliance is not feasible in light of the work performed (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1094 [2d Dept 2012]), that is not the case here. Rather, defendants contend that compliance with Industrial Code § 23-1.7 (a) (1) would have precluded vertical access between floors 7-M and eight. In that case, however, the requisite work could still proceed if another method of access from the 7-M floor to the eighth floor was constructed. Accordingly, the branch of defendants' motion for summary judgment dismissing, as against them, the injured plaintiff's Labor Law § 241 (6), as predicated on the alleged violation of

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[6] *Compare Millette*, 144 AD3d at 1115 ("As to the Labor Law § 241 [6] cause of action, which was predicated upon a violation of [Industrial Code] 23-1.7 [a] [1], . . . the defendants established their prima facie entitlement to judgment as a matter of law based upon the plaintiff's supervisor's affidavit, in which he averred that the area where the plaintiff was working was not normally exposed to falling material or objects").

Industrial Code § 23-1.7 (a) (1), is denied without regard to the sufficiency of plaintiffs' opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 952 [1985]).

Labor Law § 200/Common-Law Negligence Claim Against Remaining Defendants

"Labor Law § 200 is a codification of the common-law duty to provide workers with a safe work environment" (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008]). "There are two main types of liability under Labor Law § 200: injuries caused by dangerous or defective conditions, and injuries caused by dangerous or defective equipment at the jobsite" (*Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 853 [2d Dept 2019]). Here, plaintiffs' complaint, as amplified by their bill of particulars, may be properly construed as asserting that the remaining defendants had actual or constructive notice of the allegedly dangerous condition; namely, the inadequately protected elevator-shaft openings in each of the eighth and 7-M floors (collectively, the dangerous condition).[7] Each of the remaining defendants is required to establish, prima facie, that such defendant lacked actual or constructive notice of the dangerous condition.[8] The evidence submitted in support of defendants' motion, which includes a deposition

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[7] *See* Bill of Particulars, dated Dec. 1, 2014, ¶¶ 5, 8, 10-12, 13-14, 35-39 (NYSCEF #91). *See also* Defendants' Exhibit C (post-accident photograph of the eighth floor) and Defendants' Exhibits A-B (post-accident photographs of the 7-M floor) (NYSCEF #93). Defendants' Exhibits A through C were marked for identification at the injured plaintiff's Mar. 29, 2016 deposition (page 33, line 18 to page 34, line 2) (NYSCEF #91).

[8] "The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections, and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact" (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093-1094 [2d Dept 2012] [internal quotation marks and citations omitted]). "This duty extends to general contractors with control over the work site" (*id.* at 1094).

transcript of Gotham's site-safety manager, Richard Agresta, fails to demonstrate, prima facie, that either MRU or Gotham, or both, lacked either actual or constructive notice of the dangerous condition.[9] Inasmuch as the remaining defendants have failed to make a prima facie showing that they lacked actual or constructive notice of the existence of the dangerous condition, the branch of their motion which is for summary judgment dismissing the injured plaintiff's Labor Law § 200 and common-law negligence claims as against them is denied without regard to the sufficiency of plaintiffs' opposition papers (*see Gurewitz v City of New York*, 175 AD3d 658, 664 [2d Dept 2019]; *Berman-Rey*, 153 AD3d at 654-655).

CONCLUSION

Based on the foregoing, it is

ORDERED that in Seq. No. 5, leave to reargue is *granted* and, upon reargument: (1) the prior order of the Court (Baynes, J.), dated Feb. 8, 2019 (NYSCEF #84), is *vacated*; (2) plaintiffs' motion in Seq. No. 3 for partial summary judgment on the issue of liability on the injured plaintiff's Labor Law § 240 (1) claim is *denied*; and defendants' motion in Seq. No. 4 for summary judgment dismissing plaintiffs' claims is *granted to the extent* that:

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[9] *See* Agresta (Gotham) EBT tr at page 18, line 8 to page 19, line 2 (testifying that a named representative from MRU "walked the job site" either with or without Mr. Agresta); page 20, line 16 to page 22, line 3 (testifying that he "walked the job site on a daily basis," including the floors on which Cross Country's employees worked); page 35, lines 5-14 (acknowledging a potential for a fall hazard from the use of construction materials within six feet of a floor opening); page 53, lines 3-19 (testifying that the railing on the *north* side of the eighth-floor elevator-shaft opening was intended, as relevant herein, to "protect from objects falling down the [opening] . . . [d]epending on what the object [was]"); page 56, lines 9-16 (testifying that shortly after the accident he observed the injured plaintiff sitting in the *southeast* corner of the elevator-shaft opening in the 7-M floor); page 80, lines 20-24 (acknowledging "a potential for a worker to get injured who is working below [the eighth-floor elevator-shaft] opening where there is active work being performed above [*i.e.*, on the eighth floor]").

(a) plaintiffs' claims against defendant Durst are *dismissed without opposition*;

(b) the injured plaintiff's Labor Law § 241 (6) claim, as predicated on the alleged violations of the Industrial Code provisions, with the exception of Industrial Code § 27-1.7 (a) (1), is *dismissed as abandoned*;

(c) the injured plaintiff's Labor Law § 240 (1) claim is *dismissed as against the remaining defendants*; and

(d) the balance of defendants' motion is *denied*; and it is further

ORDERED that for the avoidance of doubt, this action shall proceed, as against the remaining defendants, on: (1) the injured plaintiff's Labor Law § 241 (6) claim, as predicated on the alleged violation of Industrial Code § 23-1.7 (a) (1); (2) the injured plaintiff's Labor Law § 200/common-law negligence claim as predicated on the alleged dangerous premises condition; and (3) the spousal derivative claim; and it is further

ORDERED that to reflect the unopposed dismissal of defendant Durst from this action, the caption is amended to read as follows:

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WAYNE WHITE and SHARICE WHITE,

Plaintiffs,

- against - Index No. 508860/14

855 MRU LLC and
GOTHAM CONSTRUCTION COMPANY, LLC,

Defendants.
----------X

; and it is further

ORDERED that defendants' counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiffs' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.