

Dombek v Skanska USA, Inc.
2021 NY Slip Op 32751(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 153149/2020
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM **PART 02M**

Justice

FRANK DOMBEK,

Plaintiff,

- v -

SKANSKA USA, INC., UNITED RENTALS, INC., UNITED
RENTALS (NORTH AMERICA), INC., SKANSKA
MOYNIHAN TRAIN HALL BUILDERS, A JOINT VENTURE,
MOYNIHAN INTERIM TENANT LLC, SKANSKA USA
BUILDING, INC., SKANSKA USA CIVIL NORTHEAST INC.

Defendant.

INDEX NO. 153149/2020
MOTION DATE 09/27/2021,
10/05/2021
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTIONS**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 103, 111, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

In the interest of justice and judicial economy, it is ORDERED that Motions Sequence Numbers 2 and 3 are considered together for the purpose of disposition.

Upon the foregoing papers it is ORDERED that the branch of Motion Sequence Number 2 by Plaintiff Frank Dombek (“Dombek”) for an order granting summary judgment against Defendants Skanska USA Inc., Skanska Moynihan Train Hall Builders a Joint Venture, Moynihan Interim Tenant LLC, Skanska USA Building, Inc. and Skanska USA Civil Northeast Inc., collectively (“the Skanska Defendants”) under Labor Law §240(1) is granted. It is also

ORDERED that the branch of Motion Sequence Number 2 by Plaintiff Dombek for an order granting summary judgment against the Skanska Defendants under Labor Law §241(6) is granted.

The cross motion by the Skanska Defendants for an order: (1) under CPLR §3212(a) granting them summary judgment dismissing the Complaint and all Cross Claims asserted against them is denied; and (2) in the event the Complaint is not dismissed in its entirety as against the Skanska Defendants, then an Order under CPLR §3212(a) granting summary judgment to the Skanska Defendants over and against Defendants United Rentals, Inc. and United Rentals (North America Inc., collectively (“United”) on the Skanska Defendants’ cross claims against United for common law indemnification is denied as procedurally defective (CPLR §2215).

It is further ORDERED that Motion Sequence Number 3 by the Skanska Defendants for an Order under 22 NYCRR §202.21 vacating the Note of Issue and striking the action from the calendar and other related relief for further discovery under CPLR §§ 3124 and 3126 is held in abeyance pending a further Status Conference with the Court by Microsoft Teams. The remaining branch of Sequence Number 3 seeking additional time to move for summary judgment is denied.

Background

Jason Blinn, Environmental Health and Safety Area Manager for Skanska USA Civil Northeast, Inc. testified at his deposition that for the job in question “Skanska the joint venture, Skanska USA Civil and Skanska USA Building were all one in the same” and Skanska was the general contractor on the job (NYSCEF Doc. No. 86, J. Blinn EBT transcript p. 20 lines 13-20).

He stated that Co-Defendant Component Assembly System (“Component”) was a subcontractor on the job (*Id* p. 23 lines 11-15). Mr. Blinn described that his role in relation to the subcontractors on the job was to “make sure that everyone is following our EHS manual” and his role focused upon compliance and safety with safety regulations such as OSHA (*Id* p. 24 lines 2-3 and 11-15). When asked to describe the job, Mr. Blinn stated that they demolished and rebuilt the old post office in the Moynihan Train Hall including installation of “skylights, new finishes, waiting areas, escalators, new platforms, new train tracks underneath, new equipment, it’s called MEP, mechanical, electrical and plumbing equipment throughout the building” (*Id* p. 23 lines 21-25 and p. 25 lines 2-3).

Mr. Blinn stated that on February 27, 2020, Plaintiff Frank Dombek (“Dombek”), a carpenter and an employee of subcontractor Component, was involved in an accident on the concourse level in the Amtrack ticketing waiting area (*Id* p. 35 lines 20-25 and p. 35 lines 2, and 10-12). He also testified that Component used Co-Defendant United as its vendor for mobile elevated work platforms (“MEWP”) (*Id*. p. 39 lines 11-15). On February 27, 2020, Dombek was working on a Skyjack 3219 scissor lift scaffold which was electrically powered and supplied by United (NYSCEF Doc. No. 90 United Rental’s Rental Agreement). Mr. Blinn testified that he was not aware of any other cause of the accident besides an electrical malfunction (*Id*. pp 63-71).

Plaintiff Dombek testified at his deposition that

I was up on a lift putting in studs. And the next thing I knew I was moving backwards. The lift just took off. I don’t know how it happened but I was going backwards. The lift got caught on a piece of Kindorf in the ceiling and the lift tipped over (NYSCEF Doc. No. 87 Dombek EBT transcript p. 35 lines 8-15).

At the time of the accident, the testimony shows that the scissor lift was moving while Plaintiff Dombek did not have his hands on the control panel’s joystick which is the device which controls the movement of the platform (*Id*. p. 37 lines 14-21). Mr. Dombek specifically

testified that:

You move the lift where you need to go. And then you elevate. Skanska's rule on the job was you can't be up in the air and moving the lift. So when you're elevated up in the air, Skanska did not want you driving the lift. So once you went up, you are where you are, that's it.

Mr. Dombek also testified that on the date of the accident, the Skanska Defendants specifically instructed him not to put an anchor into the ceiling as part of his tying in:

The only way you're supposed to always tie off to a scissor lift no matter what but if you have to climb out of the scissor lift onto something in the ceiling, you always have to put an anchor into the ceiling. But that day we were not doing that. But we did go over that with Skanska around 9:15 that morning and I remember that exactly because we were about to take coffee and I was upset that they wanted to discuss safety things right when we were taking break (*Id.* p. 122 lines 5-16).

Johnny Matesic, an employee of Component and an eyewitness to the accident submits an affidavit stating that:

I was the closest person to Frank Dombek when his accident happened. He was on a Skyjack lift properly secured to the lift by a retractable harness as instructed by Skanska. Frank was facing me and the others when, for some reason, the Skyjack lift started moving backward. The joystick which operates the movement of the Skyjack was behind Frank and either the joystick was stuck or something else. As the lift kept moving it must have gotten hooked onto something hanging from the ceiling. Possibly a kindoff pencil rod. The wheels kept on rolling and it continued to roll and flip over. We all shouted for Frank to hold on to something, which he did but, as the lift fell to the floor, it pulled him down with it. (NYSCEF Doc. No. 82, Matesic Affidavit).

Labor Law 240(1)

Labor Law § 240 (1) provides that:

[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect workers against elevation-related hazards (*see Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2d Dept 2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2d Dept 2009]). “To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813 [2d Dept 2018], quoting *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]; *see Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]). As the movants, plaintiffs must “make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The evidence in the record has established that Skanska was the contractor at the accident locus. The subcontract executed on December 15, 2017 is between Skanska Moynihan Train Hall Builders, a Joint Venture (“Contractor”) and Component (NYSCEF Doc. No. 34). Moreover, the Joint Venture Agreement dated December 1, 2016 is between Skanska USA Civil Northeast Inc. and Skanska USA Building Inc. and it concerns “the development, design and construction of the Train Hall Work and other related work as part of the conversion of the James A. Farley Post Office Building into a new train station (the “Project”) (NYSCEF Doc. No. 79).

The Skanska Defendants submit an affidavit from Leo Sinicin, Chief Financial Officer of Skanska USA Building Inc. and Skanska USA Inc. stating that “SKANSKA USA INC. did not enter into any contracts with regard to the construction/redevelopment of the James A. Farley

Post Office Building and annex located at 421 8th Avenue in Manhattan, nor did it perform any work, labor, or services in relation to this project” (NYSCEF Doc. No. 164 p. 1). This is contradicted by Mr. Blinn’s testimony that Skanska USA Building, Inc. and Skanska USA Civil Northeast Inc. are both subsidiary companies of Skanska USA Inc. (NYSCEF Doc. No. 86, J. Blinn EBT transcript pp 16-21).

Parenthetically, the Court finds that Skanska’s Responses to Plaintiff’s Statement of Material Facts are deficient and noncompliant with Rule 202.8-g. It is well settled that Plaintiff’s Statement of Material Facts are admitted where the opponent submitted a deficient response that is noncompliant with the rule (*Callisto Pharm. Inc. v Picker*, 174 AD3d 545 [1st Dept 2010]). In opposition to summary judgment relief, Defendant Skanska relies on the unsworn hearsay statement of Richard Sorrentino and the unsigned accident report containing impermissible hearsay. When unsworn statements and unverified documents are the only evidence proffered to challenge plaintiff’s description of the accident, such should not be considered (*Erkan v McDonald’s*, 146 AD3d 466 [1st Dept 2017]). Moreover, a party opposing summary judgment must submit evidence in admissible form to establish a triable issue of fact (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]).

Defendant Skanska argues in opposition to summary judgment that Plaintiff Dombek failed to perform a necessary pre-shift inspection and thus he was the sole proximate cause of his accident. This argument is contradicted by Skanska’s witness Mr. Blinn’s testimony that “a pre-shift inspection is a visual inspection. So if it was hidden in anything, if there was anything that would need to be opened mechanically then it would not be visible in this inspection” (NYSCEF Doc. No. 86 Blinn EBT Transcript p. 74 lines 7-11). A visual inspection would not have detected the alleged mechanical malfunction. The sole proximate cause defense does not “impose the

burden on the worker to guarantee his own safety by requiring that he construct, place or operate the equipment in a proper manner” (*Singh v Barrett*, 192 AD2d 378, 379-380 [1st Dept 1993]).

In *Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098 [2004], “Plaintiff met his initial burden on the motion that he was engaged in an activity included in the statute, the erection of a building or a structure, and that his accident involved an elevation-related hazard that the statute was intended to protect against” *citing Melber v 6333 Main St*, 91 NY2d 759, 762-763 [1998]). In *Ward v Cedar Key Assoc. L.P.*, the court further found that “Plaintiff further established the requisite causal link between his injuries and the violation of defendants’ nondelegable duty to ensure that the scissor lift was ‘so constructed, placed and operated as to give proper protection’ to plaintiff” (*citing Labor Law §240(1), Melber v 6333 Main St supra*). In *Ward v Cedar Key Assoc.*, the fact that the scissor lift tipped establishes that it was not so ‘placed...as to give proper protection’ to plaintiff” (*citing Labor Law § 240[1] other citations omitted*).

Based upon the record, including the relevant testimony and the facts of this case, this Court finds that Plaintiff Dombek has met his burden of establishing his entitlement to summary judgment under Labor Law §240(1). The Skanska Defendants have failed to raise a triable issue of fact.

Labor Law § 241(6)

Labor Law §241(6) imposes a non-delegable duty on owners and contractors to comply with applicable regulations (*Ross v Curtis-Palmer Hydro- Electric Co.* 81 NY2d 494 [1993]). Labor Law § 241(6) provides, in relevant part, “[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.” In the Second Amended

Verified Complaint, Plaintiff Dombek pleads that the Skanska Defendants violated Labor Law §241(6), Rule 23 of the Industrial Code of the State of New York, including but not limited to 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21.23-1.24, 23-1.30, 23-2.1, 23-2.2, 23-2.3, 23-2.4, 23-2.5, 23-2.6, 23-2.7, 23-4, 23-5, 23-6, 23-7, 23-8 and Article 1926 of O.S.H.A. (NYSCEF Doc. No. 36 ¶118).

In support of summary judgment relief under Labor Law §241(6) Plaintiff submits, among other things, the deposition transcript of Daniel Quiceno, a Road Technician for Defendant United (NYSCEF Doc. No. 89 p. 110). He testified that his job duties included inspection, maintenance and repair of scissor lifts at the Moynihan Hall Train construction site. He was present on the date of Dombek's accident, working next to Dombek repairing a genie single man lift (*Id.* p. 38 lines 11-18 and p. 39 lines 3-100). Mr. Quiceno also testified that about one month prior to Dombek's accident there was an incident report for the scaffold involved in the incident stating "complaint: reverse doesn't work. Cause: female connection bad connection, correction replaced, connector problem fix. Run functions all okay" (*Id.* p. 110 lines 4-7). He also stated that he inspected the same scaffold after the accident and the electrical short problem he had previously observed on January 20, 2020 was in the same location and in the same harness (*Id.* p. 110 lines 25 and p. 111 lines 2-5).

Plaintiff also submits two expert affidavits from licensed professional engineers, James Orosz (NYSCEF Doc. No. 84) and Alden P. Gaudreau (NYSCEF Doc. No. 85). Both experts describe with specificity the various violations of the Industrial Code and Federal OSHA regulations supporting the cause of action under Labor Law §241(6). For example, Mr. Gaudreau found that plaintiff's accident was caused by a malfunction in the scissor lift resulting from a defect in the damaged cable system. After reading the affidavits and deposition testimony of Mr.

Quiceno, this Court finds that Plaintiff has established his entitlement to summary judgment under Labor Law § 241(6). It is well settled that a scissor lift is a “device that is ‘functionally similar’ to a scaffold” and within the purview of the Industrial Code and subject to Labor Law §241(6) (*Brown v Ciminelli-Cowper, Inc.* 2 AD3d 1308 [4th Dept 2003]).

Thus, the Skanska Defendants’ argument that Labor Law §241(6) does not apply to the facts of this case is devoid of merit. As stated above, their own witness, Mr. Blinn testified that the defective wiring and the malfunctioning of the unit was the cause of Plaintiff’s accident. Moreover, the affidavit proffered by the Skanska Defendants’ expert, Engineer Dennis W. Eckstine fails to raise a triable issue of fact.

Accordingly, Plaintiff is awarded summary judgment under Labor Law §241(6).

Parenthetically parts of the submissions herein address Labor Law §200, common law negligence. However, the motion in chief only seeks summary judgment under Labor Law §§ 240 (1) and 241(6). As such this Court shall not address Labor Law §200.

Cross Motion

The Skanska Defendants cross move for an order: (1) under CPLR §3212(a) granting them summary judgment dismissing Plaintiff’s Second Amended Verified Complaint against them and all cross claims; and (2) in the event the cross claim is not dismissed in its entirety against the Skanska defendants, then an order under CPLR § 3212(a) granting summary judgment to the Skanska Defendants over and against Defendant United on the Skanska Defendants’ cross claims against United for common law indemnification.

In the first instance, the first branch of the Skanska Defendants' cross motion to dismiss Plaintiff Dombek's Amended Complaint and all cross claims is denied in accordance with this Court's order on the motion in chief stated above.

The second branch of the Skanska Defendants cross motion for summary judgment on their common law indemnification claims against Co-Defendant United is denied as procedurally defective (CPLR 2215; *Hennessey-Diaz v City of New York*, 146 AD3d 419 [1st Dept 2017]).

Motion Sequence Number 3 for Discovery

In the interest of justice and judicial economy, the Skanska Defendants' Motion Sequence Number 3 for an order vacating the Note of Issue and striking this matter from the calendar and other related relief for further discovery under CPLR §3124 and 3126 shall be held in abeyance pending a further Status Conference with the Court by Microsoft Teams on January 18, 2022. An invitation shall be sent to all parties under separate cover.

The final branch of the Skanska's motion sequence Number 3 seeking additional time to move for summary judgment is denied.

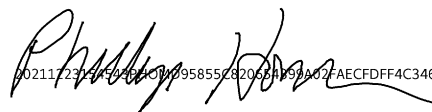
Conclusion

Accordingly, it is ORDERED that Plaintiff Dombek is awarded summary judgment under Labor Law §§240(1) and 241(6).

It is also ORDERED that the Skanska Defendants' cross motion for summary judgment dismissing the Complaint and all Cross Claims is denied in accordance with this decision. It is further ORDERED that the Skanska Defendants branch of the cross motion seeking an order

under CPLR §3212(a) granting summary judgment to them over and against Defendant United on the Cross Claims for common law indemnification is denied as procedurally defective.

The foregoing constitutes the Decision and Order of this Court.



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<u>12/23/2021</u>			<u>PHILLIP HOM, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE