

Bolivar v Samaritan-Compass V Hous. Dev. Fund Corp.

2023 NY Slip Op 32918(U)

July 24, 2023

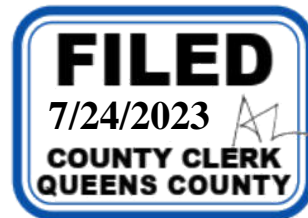
Supreme Court, Queens County

Docket Number: Index No. 718372/2018

Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14

Justice

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EDYASMIN BOLIVAR,
Plaintiff,

- v -

SAMARITAN-COMPASS V HOUSING DEVELOPMENT
FUND CORP., MONADNOCK CONSTRUCTION INC., 1903
WEST FARMS LLC, MONADNOCK COMPASS
CONSTRUCTION LLC,

Defendants.

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INDEX NO. 718372/2018
MOTION DATE 09/08/2022
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 83, 84, 86, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105

were read on this motion to/for SUMMARY JUDGMENT,

And were read on this cross-motion to/for SUMMARY JUDGMENT.

Upon the foregoing cited papers, it is ordered that this motion by Plaintiff and this cross-motion by Defendants for summary judgment are determined as follows:

Plaintiff Edyasmin Bolivar ("Plaintiff") commenced this action to recover for work-related injuries she allegedly sustained on May 17, 2018, while working on a construction job on real property known as 1903 West Farms Road, Bronx, NY 10460 ("Premises"). Plaintiff claims that she was injured while she was installing insulation behind a stack of sheetrock stored vertically against a wall, when same fell on top of her. Plaintiff alleges violations of Labor Law §§ 200, 240, and 241.

Defendants Samaritan-Compass V Housing Development Fund Corp. and 1903 West Farms LLC ("Owners") own the Premises. Owners hired Defendants Monadnock Construction Inc. and Monadnock Compass Construction LLC ("Monadnock Defendants") as the general contractors for the subject construction project. Monadnock Defendants hired nonparty B & V Contracting ("BVC") as the carpentry subcontractor. BVC hired nonparty EP & J to perform insulation and drywall installation. At the time of the accident, Plaintiff was employed by nonparty EP & J.

Now, Plaintiff moves for summary judgment under Labor Law § 240 (1). Owners and Monadnock Defendants (collectively "Defendants") oppose and cross-move to dismiss Plaintiff claim under Labor Law § 240 (1). Plaintiff opposes Defendants' cross-motion.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

“Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure” (*Jock v Fien*, 80 NY2d 965, 967-68 [1992]; *see* Labor Law § 240 [1]; *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 973 [2d Dept 2020]; *Holifield v Seraphim, LLC*, 92 AD3d 841, 842 [2d Dept 2012]).

“To prevail on a cause of action under Labor Law § 240 (1), a plaintiff must establish, among other things, that he or she was injured during the ‘erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure’” (*Stockton v H&E Biffer Enters. No. 2, LLC*, 196 AD3d 709, 710 [2d Dept 2021]; *see* *Nooney v Queensborough Pub. Lib.*, 212 AD3d 830, 832 [2d Dept 2023]). “While the reach of ... section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during’ one or more of these enumerated activities” (*Nooney*, 212 AD3d at 832, quoting *Quituzaca v Tucchiarone*, 115 AD3d 924, 926 [2d Dept 2014]).

Labor Law § 240 (1) “does not automatically apply simply because an object fell and injured a worker; ‘[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’” (*Carlton*, 161 AD3d at 932, quoting *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] [internal quotation marks omitted]).

“[F]alling 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 the plaintiff demonstrates that, at the time the object fell, it required securing for the purposes of the undertaking” (*Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018], quoting *Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *see* *Parrino v Rauert*, 208 AD3d 672, 674 [2d Dept 2022] [Labor Law § 240 [1] did not apply where the “plaintiff sustained injuries when 20 unsecured panels of sheetrock ... which were being stored in an upright position ... toppled and pinned him against the wall of the porch”]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016] [“the sheetrock, which was being stored against a wall, was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell [citation omitted], nor was it expected under the circumstances of [that] case, that the sheetrock would require securing for the purposes of the undertaking at the time it fell”]).

Plaintiff's Summary Judgment Motion

In support, Plaintiff submits, among other things, the transcript of her examination before trial ("EBT") (EF Doc 55), coupled with exhibits marked during same (EF Doc 56), the EBT transcript of Michael Sullivan, an employee of Monadnock Defendants ("Sullivan") (EF Doc 57), and an affidavit of an expert witness (EF Doc 51).

Plaintiff testified that she was injured while installing insulation behind a stack of approximately 13 pieces of sheetrock, when same fell on top of her. She stated that the sheetrock was being stored against the wall. Plaintiff stated that the height of the sheetrock was just above her lower ribs. She was not using a ladder at the time of the accident. Plaintiff testified that she was instructed to reach over the sheetrock and to never to touch the sheetrock. She further testified that she did not touch the sheetrock before the accident, and that she did not know what caused the sheetrock to fall.

Sullivan testified that he was the assistant superintendent of the subject project. He stated that, according to the accident report that he filled out after the accident, Plaintiff was attempting to move 11-12 pieces of sheetrock when it fell on top of her. Sullivan attested that the site safety medic translated Plaintiff's informal statements to English.

Based upon Plaintiff's submissions, it is undisputed that the sheetrock was *not* being hoisted or secured. Moreover, the Court finds that the affidavit of Plaintiff's expert was conclusory and speculative. Additionally, while an expert witness may testify to industry standards, an expert witness cannot testify as to the meaning and/or applicability of the law (*see Marquart v Yeshiva Machezikel Torah D'Chasidel Belz of N.Y.*, 53 AD2d 688, 689-90 [2d Dept 1976]; *Franco v Jay Cee of N.Y. Corp.*, 36 AD 3d 445, 448 [1st Dept 2007]). Regardless, the Court finds Plaintiff's submissions fail to eliminate any material issues of fact. Namely, (1) whether Plaintiff's alleged injuries were solely caused by Plaintiff's own conduct, and (2) whether the combined weight of the sheetrock could generate a significant amount of force as it fell, as to invoke Labor Law § 240 (1), or whether the height differential was de minimis. Therefore, Plaintiff's motion for summary judgment is denied.

Defendants' Cross-Motion for Summary Judgment

The Court denies Defendants' cross-motion for the same reasons stated above.

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff's summary judgment motion is denied; and it is further

ORDERED that Defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that Plaintiff shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Defendants, within ten (10) days of the date of entry.

This constitutes the Decision and Order of this Court.

Dated: July 24, 2023


PHILIP HOM, J.S.C.

