

Smith v Extell W. 45th LLC

2023 NY Slip Op 33193(U)

September 15, 2023

Supreme Court, New York County

Docket Number: Index No. 160712/2013

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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DARRELL SMITH,

Plaintiff,

- v -

EXTELL WEST 45TH LLC, EXTELL DEVELOPMENT COMPANY, HHC TS REIT, LLC, HHC MCKINNEY INVESTMENT, INC., HYATT CORPORATION, HYATT HOTELS CORPORATION, LEND LEASE, LEND LEASE (US) CONSTRUCTION LMB, INC., KONE, INC.

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This action arises out of plaintiff's allegations that he was injured when he slipped on debris in a falling elevator at a construction site.

Defendants Extell West 45th LLC, Extell Development Company, HHC TS REIT LLC, Hyatt Corporation, Hyatt Hotels Corporation, Lend Lease (US) Construction LMB, Inc., KONE Inc. and Bovis Lend Lease LMB, Inc. move pursuant to CPLR § 3212 to dismiss plaintiff's complaint. Plaintiff opposes the instant motion. For the reasons set forth below, defendant's motion is granted in part.

Background

On October 22, 2023, the date of the incident, plaintiff was employed as a carpenter who was working on the Hyatt Hotel's construction at 135 West 45th Street, New York, New York. Plaintiff alleged that he was riding the subject elevator (the "PE-3") when it suddenly stopped,

shook and “abruptly descended approximately 15 floors”. In opposition to a previously filed motion to dismiss, plaintiff submitted an affidavit contending that “[w]hen the car suddenly jerked to a stop, it caused my right foot to move/jump. When my right foot landed it landed on debris which caused me to twist to my right. I immediately experienced low back pain.” See NYSCEF Doc. 226.

The Honorable Kathryn Freed granted the underlying motion to dismiss in part, specifically dismissing plaintiff’s Labor Law claims pursuant to the alleged violation Industrial Code (12 NYCRR) § 23-1.7(e), however, that decision was modified by the First Department and the claims relating to that Industrial Code were reinstated. See *Smith v Extell W. 45th St. LLC*, 143 AD3d 647 [1st Dept 2016].

Summary Judgment Standard

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Preliminarily, the Court finds that defendants have established its *prima facie* case that the elevator in question was not defective and did not malfunction, thus the doctrine of *res ipsa loquitur* is inapplicable. Plaintiff has failed to raise a triable issue of fact. Accordingly, plaintiff's claims as they relate to the alleged violation of 12 NYCRR § 23-7.3, entitled Temporary use of permanent elevators, are dismissed. However, defendants have not established that it was not on notice with respect to the alleged debris in the elevator. As such, without addressing the sufficiency of plaintiff's opposition papers, the Court finds that there is a question of fact as to the issue of debris in the elevator.

With respect to plaintiff's claims pursuant to the alleged violation 12 NYCRR § 23-1.7(e), this Court is constrained by the holding in the First Department. While Judge Freed found that 12 NYCRR § 23-1.7(e) was inapplicable based on both the location of the incident as well as the substance identified as the slipping hazard, the First Department held that because plaintiff alleged debris caused him to fall, his claims pursuant to Labor Law § 241(6) predicated on the alleged violation of 12 NYCRR § 23-1.7(e) were viable.

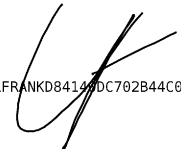
Although the issues were raised on a motion to dismiss, before discovery was complete, there has been no additional information or change in circumstances that would allow this Court to contradict the First Department’s finding on this issue. Accordingly, it is hereby

ORDERED that the portion of defendant’s motion that seeks dismissal of plaintiff’s Labor Law § 241(6) claims predicated on the alleged violation of 12 NYCRR § 23-7.3 is granted and those claims are dismissed; and it is further

ADJUDGED that defendant’s motion is otherwise denied.

9/15/2023

DATE



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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE