

Krupa v 10 Huron FS Condo LLC

2024 NY Slip Op 34373(U)

December 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 521822/2017

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 11th day of December , 2024.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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JAN KRUPA,

Plaintiff,

Index No. 521822/2017

-against-

10 HURON FS CONDO LLC, MACK REAL ESTATE CAPITAL GROUP LLC, MP 145 WS LESSEE LLC, MP 145 WS OWNER LLC, MP 145 WEST VENTURE LLC, NOBLE CONSTRUCTION GROUP, LLC, GANE SERVICES, INC. and MONOLITHIC CONTRACTING, INC.,

Defendants,

DECISION AND ORDER
MS # 15

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10 HURON FS CONDO LLC, MACK REAL ESTATE CAPITAL GROUP LLC, MP 145 WS LESSEE LLC, MP 145 WS OWNER LLC, MP 145 WEST VENTURE LLC, NOBLE CONSTRUCTION GROUP, LLC

Third-Party Plaintiffs,

-against-

POLMAR IRON WORKS, INC., MONOLITHIC CONTRACTING, INC, and GANE SERVICES,

Third-Party Defendants

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The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits

586-701

Cross-motions Affidavits (Affirmations)
and Exhibits

Answering Affidavit (Affirmation)

732-754, 824-831

Reply Affidavit (Affirmation)

755, 833-838

Supplemental Affidavit (Affirmation)

Plaintiff moves to renew the portion of the Order of this Court, dated December 23, 2023, which denied his motion for summary judgment on his claims pursuant to Labor Law §§ 240(1), 241(6), and 200.

Plaintiff was an employee of Third-Party Defendant POLMAR IRON WORKS, INC. (POLMAR). POLMAR was the ironwork subcontractor of Defendant NOBLE CONSTRUCTION GROUP (NOBLE) the general contractor of the project.

On the day of his accident, Plaintiff was supervising other POLMAR workers who were there to install steel dunnage on the 41st floor. Plaintiff alleges that he was injured when he stepped on unsecured plywood that was covering a hole cut in the 41st floor which shifted causing Plaintiff to fall through the hole to the 40th floor.

In opposition, Defendants cited the affidavit of William Flores, a worker from a different trade, in which he stated that on the morning of Plaintiff's accident, he observed ironworkers remove the plywood covering a hole cut in the floor to hoist materials through it.

The Court denied Plaintiff's motion for summary judgment as premature because depositions, including that of Flores, were outstanding, and because the Flores' affidavit provided some circumstantial evidence that Plaintiff may have been responsible for removing the covering over the opening in the floor.

Subsequent to the order, depositions of Flores as well as other Defendants were held. Flores' deposition allowed Plaintiff to question Flores about the basis for his statements in the affidavit. Flores admitted in his deposition that he did not have actual knowledge of the identity of the workers who he saw move the plywood cover and he did not in fact see the workers move materials through the uncovered hole.

The Flores deposition constitutes new information that is a sufficient basis to grant renewal of Plaintiff's motion for summary judgment. Having upon reconsideration the Court adheres to its original determination.

Plaintiff cites to admissions by Flores that he did not know who the men who he saw remove a plywood cover were, and that he did not see anyone move material through the hole in the floor as a basis to disregard his entire affidavit. Plaintiff argues that because Flores did not see Plaintiff's fall, he cannot state that the cover he saw removed was covering the hole that Plaintiff fell through. Plaintiff argues that these admissions demonstrate that the statements in Flores' affidavit are false and are not sufficient to raise a question of fact as to whether Plaintiff removed the plywood covering the hole.

Flores testified at his deposition that on the day of the accident, he saw two workers remove the plywood cover over a hole that was two feet by two feet square. He admitted that he did not know who the workers were and that he was "just guessing" that they were iron workers.

He also testified that he did not actually see any workers pass material through the hole in the floor, but he did see cables in the hole. He also testified that he did see a machine by the hole that he referred to as a spider, that is used to hoist or lower material.

Plaintiff testified in his deposition that the POLMAR workers did not move the dunnage from the 40th to the 41st floor through the hole, but hoisted it over the side of the building by use of a winch.

Mieczyslaw Oczkos, a POLMAR employee testified in his deposition that they hoisted the dunnage to the 41st floor through a space between the floor and the wall of the building with a winch.

Oczkos testified that he saw Plaintiff step on the plywood which twisted, and he saw Plaintiff fall through the hole. He also testified that POLMAR workers were the only workers working in the area by the hole on the day of the accident.

Robert Krupa, a POLMAR employee, and the son of the Plaintiff, testified that nobody from POLMAR moved the cover or transported beams through the hole that Plaintiff fell into.

The testimony of Plaintiff, Oczkos, and Robert Krupa, that they did not remove the cover and that they did not hoist the dunnage through the hole in the floor is sufficient to make out a prima facie case for summary judgement on Plaintiffs §240(1) and §241(6) claims.

However, Defendants have pointed to circumstantial evidence which raises questions of fact as to whether Plaintiff was the sole proximate cause of the accident.

The deposition testimony of Flores, Oczkos, and Robert Krupa taken together assert facts which if accepted by a trier of fact could support the conclusion that POLMAR workers moved the plywood cover at the direction or with the knowledge of the Plaintiff.

Flores testified that he saw workers remove the plywood cover on the date of the accident and that near the hole was a machine used to hoist material with cables that were in the hole. Also, Oczkos testified that only POLMAR workers were working in the area of the hole on the day of the accident. This testimony is sufficient to permit an inference that it was POLMAR workers that removed the plywood cover.

The fact that Plaintiff was supervising the POLMAR workers at the time, could support the further inference that the workers removed the cover at Plaintiff's direction.

The fact that there is no evidence that the POLMAR workers moved any material through the hole is not determinative because it is the removing of the plywood cover, and

not the moving of material through the hole, that would constitute a violation of Labor Law §§ 240(1) and 241(6).

The fact that Flores describes the hole as square while Plaintiff asserts that it was round indicates there is a question whether the hole Flores saw was the hole that Plaintiff fell through. However, it does not resolve that question. Flores' description of the workers and the machine with cables located by the hole is sufficient to allow an inference that it was the hole through which Plaintiff fell, without having to resort to speculation.

It is for a trier of fact to decide whether they accept the testimony of Flores and if they do so, whether they would further conclude that Plaintiff directed or knew that POLMAR workers removed the cover.

Also, as to Plaintiff's Labor Law §200 claim, he has not shown that Defendants had actual notice of the unsecured plywood cover, or that the condition existed for a sufficient length of time prior to the accident that would have permitted Defendants to discover and remedy it (*see Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Jack v. Weiner*, 200 AD3d 762 [2d Dept 2021]).

WHEREFORE, it is hereby ORDERED that that portion of Plaintiff's motion to renew is GRANTED; and upon renewal it is further,

ORDERED that Plaintiff's motion for partial summary judgment is DENIED.

This constitutes the decision and order of the Court.

ENTER:



J.S.C.