Pertillar v Amsterdam House Continuing Care Retirement Community, Inc.

2012 NY Slip Op 30422(U)

February 8, 2012

Supreme Court, Nassau County

Docket Number: 022391/09

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ALBERT L. PERTILLAR,

Plaintiff,

-against-

AMSTERDAM HOUSE CONTINUING CARE RETIREMENT COMMUNITY, INC., NASSAU COUNTY INDUSTRIAL DEVELOPMENT AGENCY, PIKE CONSTRUCTION COMPANY, INC. and MCGLONE TRUCKING, INC.,

Defendants.

Index No. 022691/09

ORIGINAL RETURN DATE: 11/15/11
SUBMISSION DATE: 12/12/12

MOTION SEQUENCE ## 001, 002, 003

The following papers read on this motion:

Notice of Motion / Order to Show Cause..... 1, 2
Notice of Cross Motion 3
Reply Affirmation and Opposition 4
Plaintiff's Memorandum of law..... 5

Defendants, Amsterdam House Continuing Care Retirement Community, Inc. ("Amsterdam House"), Nassau County Industrial Development Agency ("NCIDA") and Pike Construction Company, LLC ("Pike"), move pursuant to CPLR 3212, for an order dismissing plaintiff's complaint, together with any and all cross claims asserted against them.

Defendant, McGlone Trucking, Inc. (" McGlone"), moves pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint, together with any and all cross-claims asserted against it.

Plaintiff moves, pursuant to CPLR 3212 and Labor Law §240(1), for an order granting partial summary judgment against defendants.

On May 26, 2009, plaintiff, was allegedly injured while he was working at the site upon which Amsterdam House was being constructed (Ex. K p. 48). Defendant Pike was the general contractor on the project, which in turn hired Petillo, Inc. ("Petrillo"), plaintiff's employer and nonparty herein (*id.*). As recited in the deposition transcript, on the day of his accident, plaintiff was in the process of unloading cylindrical precast concrete cesspools, three to four feet in height, from a flatbed trailer (*id.* pp. 57, 61). The trailer was operated by defendant, McGlone, and was equipped with a boom (*id.* pp. 59, 60). In performing his assigned task, plaintiff utilized a 24-foot aluminum extension ladder, which he pulled up and onto the flatbed, and thereafter would "pull" it apart to get two equal sections, each with 12 rungs (*id.* pp. 72, 73, 74). Plaintiff stated that he would place the lower portion of the ladder "against the cesspool," ascend same and "when [he] got halfway up," would grab the upper portion of the ladder, place it over and inside the precast cesspool and climb in (*id.* pp. 74, 82, 123). After accessing the interior of the cesspool, the plaintiff would use his hammer to "knock holes on the inside" and then "grab [a hook], stick it through the hole that [he] made," after which the operator of the flatbed would use the boom to "move the cesspool toward the edge of the truck" (*id.* pp. 82, 87, 115, 116).

As to the particular circumstances surrounding his accident, plaintiff states that as he was descending that portion of the ladder positioned within the interior of the cesspool "the ladder shifted" to the left by "four inches" and as a consequence "he was scared" and "instead of falling with the ladder, [he] jumped off" (*id.* pp. 124, 133, 138, 140). After jumping off the ladder, plaintiff landed on his left foot and thereafter fell, whereupon his "buttocks and [his] back hit * * * the inside of the cesspool" (*id.* pp. 142, 143). Plaintiff further testified that after he let go of the ladder, it did not fall at all (*id.* p. 141). Plaintiff alleges in his Bill of Particulars that he sustained the following injuries: tear of the gastrocnemius muscle with resultant hematoma left calf and lower extremity; left ankle sprain; left knee sprain; and synovitis of the left ankle and foot." (Ex. F ¶¶ 13, 14).

The complaint sets forth causes of action predicated upon negligence, as well as upon Labor Law §§ 200, 240 and 241(6), the latter of which is based upon alleged violations of 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.21, 23-1.8, 23-6.1, 23-8.1 and 23-8.2 (Ex. A).

In support of the instant application, counsel for defendants, Amsterdam House, NCIDA and Pike, contends, *inter alia*, that inasmuch as plaintiff was unloading materials from a flatbed truck at the time of his accident, said accident was not gravity related and accordingly his claims predicated upon Labor Law §240 must be dismissed. Counsel further asserts that the record establishes that plaintiff was caused to fall as a result of his jumping off the ladder and not because the ladder provided was defective.

As to those claims predicated upon Labor Law §200, counsel posits that the record herein establishes neither NCIDA, Amsterdam House or Pike directed, supervised or controlled the work in which plaintiff was engaged and, as such, said claims must be dismissed. Counsel relies, in part, upon the deposition testimony of plaintiff, who testified that it was Roy Stuber, an employee of Petillo, who instructed him on how to offload the cesspools from the flatbed (Ex. K pp. 57, 62, 69, 70). Finally, as to those claims predicated upon Labor Law § 241(6), counsel argues that the sections of the industrial code cited by plaintiff are either too general or inapplicable to the subject accident.

In support of the application submitted by McGlone, counsel for said defendant argues that the unloading operation in which plaintiff was involved when he sustained his injuries is not the type of elevation related hazzard contemplated by Labor Law § 240 and accordingly the plaintiff's claims predicated thereon must be dismissed. Additionally, counsel contends that McGlone was neither an owner, a contractor nor an agent thereof and accordingly summary judgment should be awarded in its favor.

With particular respect to plaintiff's claims based upon Labor Law § 241(6), counsel posits that same should be dismissed as the industrial regulations cited by plaintiff are inapplicable to the subject accident (*id.* ¶¶ 62, 63, 66, 67-76). Finally, with respect to plaintiff's claims predicated upon common law negligence and Labor Law § 200, counsel argues that McGlone neither directed, controlled nor supervised the work in which plaintiff was engaged when he was injured and accordingly plaintiff's claims must be dismissed.

The applications interposed by all of the defendants are opposed by plaintiff, who also cross-moves for an order granting partial summary judgment as to the issue of liability on those claims based upon Labor Law § 240(1). In both opposing defendants' respective applications and in support of the cross motion for summary judgment, counsel initially argues that the unloading activities in which plaintiff was engaged were both necessary and integral to the overall construction project and, as such, plaintiff was a covered person within the purview of both Labor Law § 240(1) and § 241(6).

Counsel further argues that in failing to provide plaintiff with any safety devices beyond that of an unsecured aluminum extension ladder, defendants exposed plaintiff to a dangerous condition, the existence of which proximately caused him to fall at least three feet (*id.* pp. 35, 36). To this point, counsel particularly posits that defendants have violated the provisions of Labor Law § 240(1) in failing to provide a "precast" lifter, which would have enabled plaintiff to safely remove the cesspools from the flatbed. Further, and with

particular respect to defendant NCIDA, counsel asserts that said defendant was in fact the title owner of the subject premises and thus fully liable to plaintiff for the injuries sustained. Finally, counsel contends there are questions of fact as to whether or not plaintiff's injuries were proximately caused by violations of the New York State Industrial Code 12 NYCRR § 23-1.21(b)(4) (ii), (iv) and (v) and, accordingly, those branches of. defendants' applications seeking dismissal of plaintiff's claims based upon Labor Law § 241(6) should be denied.

In reply, counsel for Amsterdam House, NCIDA and Pike contends that the precast lifter referred to by plaintiff's counsel is not a safety device enumerated in the New York State Industrial Code and as such any arguments based thereon are without merit. Counsel for McClone argues that even assuming a precast lifter is a piece of safety equipment which is statutorily required, the responsibility for providing same would have resided with Amsterdam House, NCIDA and Pike.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation(CPLR 3212 (b); *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY3d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1988]). When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247[1980]).

Labor Law § 200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof a duty to provide workers with a safe environment in which to perform their assigned duties (*Lombardi v Stout,* 80

NY2d 290 [1992]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494[1993]; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept 2001]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008]). "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v Wenger Contracting Co.*, 91 NY2d 343 [1998] quoting *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]).

The Court has reviewed the record and finds that the moving defendants have established their entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Winegrad v New York University Med. Center*, 64 NY2d 851 [1985]). In the instant matter, the record establishes that neither of the moving defendants exercised any supervision or control over the work in which plaintiff was engaged when he was injured (*Rizzuto v Wenger Contracting Co.*, 91 NY2d 343 [1998]). Here, plaintiff specifically testified that the procedures he utilized in offloading the cesspools were given to him directly from Roy Stuber, an employee of Petillo (*Rizzuto v Wenger Contracting Co.*, 91 NY2d 343 [1998]). In opposition, plaintiff's counsel does not address the claims predicated upon Labor Law §200 and concedes that Mr. Pertillar took direction from Mr. Stuber. Thus, in opposing defendants' application, plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY3d 557 [1980]).

Therefore, based upon the foregoing, those branches of the applications respectively interposed by defendants Amsterdam House, NCIDA and Pike, as well as by defendant, McGlone, which seek an order granting summary judgment dismissing the plaintiff's claims predicated upon common law negligence and Labor Law § 200, are hereby granted.

Labor § 240(1) provides in relevant part that "[a]ll contractors and owners * * * shall furnish or erect, or cause to be furnished or erected * * * 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 construction workers who are employed on the subject premises. The duty imposed by the statutory provisions is nondelegable in nature, and an owner or contractor who breaches the duty may be held liable in damages caused thereby, irrespective of whether it has actually exercised supervision or control over the work (*Rocovich v Consolidated Edison Company*, 78 NY2d 509 [1991]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]).

In opining as to the scope of hazards which fall within the purview of the statute and which are therefore compensable thereunder, the Court of Appeals has held Labor Law §240(1) is applicable to ". . . such specific gravity-related accidents as falling from a height or

being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). While the statute is to be liberally construed so as to give effect to the purposes for which it was promulgated, in consideration of the strict liability imposed thereby, the statutory language therein contained should not be so contorted as to bring within its sphere that which the legislature did not intend to include (*Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657 [2d Dept 1994]).

In the matter *sub judice*, the Court has carefully reviewed the record and, upon said review, finds that plaintiff is accident was not gravity related as contemplated by the statute (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). Initially, plaintiff testified that he jumped off the ladder and not that he fell therefrom. Additionally, plaintiff repeatedly testified that he used the very same ladder at issue herein on multiple occasions without incident and just prior to his accident reinspected the ladder and found it to be "sturdy". Moreover, when asked if the ladder ended up falling at all, plaintiff unequivocally answered "no".

Thus, based upon the foregoing, those branches of the applications interposed by defendants, Amsterdam House, NCIDA and Pike, as well as by defendant, McGlone, which seek an order granting summary judgment dismissing plaintiff's claims based upon Labor Law §240(1), are hereby granted. In accordance therewith, plaintiff's cross motion for an order granting summary judgment as to the issue of liability against all of defendants herein as to those claims predicated upon Labor Law §240(1),is accordingly denied as moot.

Labor Law §241(6) imposes a nondelegable duty upon owners, general contractors and the agents thereof to "provide reasonable and adequate protection and safety" for workers employed in areas where construction, excavation or demolition work is being conducted and to comport with the safety rules and regulations issued by the Commissioner of the Department of Labor (*Rizzuto v Wenger Contracting Company, Inc.* 91 NY2d 343 [1998]; *Ross Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494[1993]). A violation of a regulation is merely some evidence of negligence; and, therefore, once a violation of a relevant concrete specification has been established, "it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused the plaintiff's injury" (*Rizzuto v Wegner*, 91 NY2d 343, 350 [1998]). If negligence is proven, the general contractor or owner is vicariously liable without regard to fault (*id.*).

To prevail under the statutory scheme, plaintiff must demonstrate that the regulation or regulations alleged to have been breached set forth a "specific, positive command" and do not merely contain a "reiteration of common-law standards" (*Parisi v Lowen Development*

of Wappinger Falls, LP, 5 AD3d 648 [2d Dept 2004]; *Ross Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). As noted above, plaintiff alleges that there exists material issues of fact as to whether either of the moving defendant, violated the following regulations*:

> 12 NYCRR § 23–1.21(b)(4)(ii) which provides: "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
>
> 12 NYCRR § 23-1.21(b)(4)(iv), which states the following, in relevant part: "When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side
>
> 12 NYCRR § 23-1.21(b)(4)(v), which provides the following: "The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder."

Having reviewed the record, including plaintiff's deposition testimony, the Court finds that, as to the claims based upon12 NYCRR § 23–1.21(b)(4)(ii), there is an absence of evidence with respect to the existence of any slippery surfaces present at the time of plaintiff's accident (*Rizzuto v Wegner*, 91 NY2d 343 [1998]). Moreover, plaintiff herein repeatedly testified that the ladder he utilized to carry out his assigned task was in good[1] condition and was in fact "sturdy". As to those claims based upon 12 NYCRR § 23-1.21(b)(4)(iv), this Court finds that said section is inapplicable to the facts as adduced herein. Here, plaintiff testified that prior to his accident, he was "four feet" from the bottom of the flatbed trailer. Thus, the record herein does not support the proposition that at the time of his accident he was working on ladder rungs, which were 6 to 10 feet above the ladder footing. Finally, as to those claims predicated upon 12 NYCRR § 23-1.21(b)(4)(v), the record establishes that the "upper end" of the subject ladder was leaning against the precast cesspool, which was comprised of cement. There is no evidence to even suggest that the upper portion of the ladder was leaning against a slippery surface.

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*The Court notes that while plaintiff alleges numerous violations of the New York State Industrial Code, he nonetheless confined his opposition arguments to 12 NYCRR §§ 23-1.21(b)(4) (ii), (iv) and (v) (*see* Plaintiff's Memorandum of Law).

suggest that the upper portion of the ladder was leaning against a slippery surface.

Based upon the foregoing, those branches of the applications interposed by defendants, Amsterdam House, NCIDA and Pike, as well as by defendant, McGlone, which seek an order granting summary judgment dismissing plaintiff's claims based upon Labor Law § 241(6), are hereby granted. In accordance with the foregoing, those branches of defendants' respective applications, which seek an order dismissing the cross-claims asserted against them, are granted.

All applications not specifically addressed herein are deemed denied.

This decision constitutes the order of the Court.

Dated: February 8, 2012

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

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