Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Pasquale Longo and Lorraine Longo,

Plaintiff,

-against-

Long Island Railroad,

Defendant.

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Index No.: 33073/09
Motion Date: 3/21/12
Motion Cal. No.: 21
Motion Seq. No.: 3

The following papers numbered 1 to 15 read on this motion for an order pursuant to CPLR 3212, granting the Defendant's summary judgment motion and dismissing plaintiff's Labor Law §200 claim; and pursuant to CPLR §3212, granting the Defendant's summary judgment motion and dismissing plaintiff's Labor Law §241(6) claims. Plaintiff cross-moves for leave to amend the Verified Complaint and Bill of Particulars to add Labor Law §240(1) and 12 NYCRR 23-2.1 as statutes and rules violated.

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Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant, Long Island Railroad ("LIRR") moves for an order pursuant to CPLR §3212 for summary judgment dismissing plaintiff's Labor Law §§200 and 241(6) claim. Plaintiff cross-moves for leave to amend the Verified Complaint and Bill of Particulars to add Labor Law §240(1) and 12

NYCRR 23-2.1 as statutes and rules violated.

Statement of Facts

Plaintiff, Pasquale Longo ("Longo") claims that on January 14, 2009, he was injured when his right hand was caught between a steel locker and the bucket of a front end loader, in which he was standing. At the time of the incident Longo was working for a non-party employer J-Track doing demolition work. Longo testified that "Luca" from J-Track would supervise him on the jobsite. Prior to the accident, Longo moved a set of lockers into a front end loader. Longo testified that after moving two or three lockers, Luca told the employees not to separate the lockers. Longo stepped into the bucket with the locker as directed by Luca. Longo's co-worker could not hold the weight of the locker and it "pushed" Longo's hand up against the back of the end loader bucket. LIRR was the owner of the building in which the incident took place.

Steven Migliore, an employee of the LIRR, testified at his deposition that the LIRR entered into a contract with J-Track to renovate the Maintenance of Way Repair Facility at the Upper Holban Yard in St. Albans, New York. Migliore testified that the terms of the contract provided that J-Track complete the job with their own equipment and with their own personnel. Migliore testified that while he managed the project from a financial perspective he had no control over the specific methods by which the contractor chose to utilize. Furthermore, no one from the LIRR was present at the site of the accident.

LIRR's motion for an order pursuant to CPLR §3212 for summary judgment dismissing plaintiff's Labor Law §§200 and 241(6) claim are granted and plaintiff's cross-motion for leave to amend the Verified Complaint and Bill of Particulars to add Labor Law §240(1) and 12 NYCRR 23-2.1 as statutes and rules violated is denied as more fully set forth below.

Discussion

I. Labor Law § 200

LIRR moves for an order pursuant to CPLR §3212 for summary judgment dismissing plaintiff's Labor Law §§200 claim. Labor Law § 200 has two standards for determining a property owner's liability. The first is the authority to supervise the work when a plaintiff's injury arises out of defects or dangers in the methods or materials of the work and the second standard is applicable to worker injuries arising out of the condition of the premises rather than the methods or manner of the work. (*Schultz v. Hi-Tech Const. & Management Services, Inc.*, 69 AD3d 701, 701 [2nd Dept 2010]; *See also*, *Bridges v. Wyandanch Community Development Corp.*, 66 AD3d 938 [2nd Dept. 2009]; *Chowdhury v. Rodriguez*, 57 AD3d 121 [2nd Dept 2008]).

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery ... cannot be had under Labor Law § 200 [and for common-law negligence] unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" *(Fernandez v. Abalene Oil Co., Inc.*, 91 A.D.3d 906, 909 [2nd Dept January 31, 2012] quoting *Ortega v. Puccia*, 57 A.D.3d 54 [2nd Dept 2008].) "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." (Id. at 909.) The LIRR attached the affidavit of Steve Migliore who stated that "{n]o one from LIRR supervised J-Track on how to do their work." Longo testified at his deposition that no one from LIRR instructed him on how load the locker into the front end loader.

To grant a motion of summary judgment, the movant must eliminate all issues of fact. (*New v. Stachowiak*, 84 A.D.3d 1326 [2nd Dept 2011].) Here, the defendant demonstrated its

prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence, "as they established that they neither possessed nor exercised any supervisory authority or control over the means and method of the plaintiff's work...". (*McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 930 [2nd Dept February 28, 2012].) The burden the shifts to the plaintiff to create an issue of fact for trial.

Plaintiff asserts that the defendant told Longo to remove the lockers in such a manner so as to not damage the lockers. Plaintiff also asserts that the LIRR oversaw the progress of the work. However, "[g]eneral supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability."(*Cabrera v. Revere Condominium*, 91 A.D.3d 695 [2nd Dept January 17, 2012].) Accordingly, plaintiff failed to raise a triable issue of fact as to Labor Law § 200. (*Hart v. Commack Hotel, LLC*, 85 A.D.3d 1117 [2nd Dept 2011].

II. **Labor Law §241(6)**

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. (*White v. Village of Port Chester*, 84 A.D.3d 946 [2nd Dept 2011].) "In order to prevail on a cause of action pursuant to Labor Law §241(6), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her injuries." *(Rakowicz v. Fashion Institute of Technology*, 56 A.D.3d 747 [2nd Dept 2008]; *Zimmer v. Chemung County*

Performing Arts, Inc., 65 N.Y.2d 513 [1985].)

To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision, which sets forth specific safety standards. (*Ferresro v. Best Modular Homes, Inc.*, 33 A.D.3d 847 [2nd Dept 2006].) "With respect to a claim pursuant to Labor Law § 241(6), the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code" (*D'Elia v. City of New York*, 81 A.D.3d 682, 684 (2nd Dept 2011]; see *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 [1993].)

In the within action, plaintiff has alleged a violation of three Industrial Code Provisions, 12 NYCRR 23-1.2, 12 NYCRR 23-1.3 and 12 NYCRR 23-1.16.

Section 23-2.1. "Maintenance and Housekeeping," provides:

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting

such area.

Section 23-2.1(a) lacks the specificity required to support a cause of action under Labor Law section 241(6). (*Parrales v Wonder Works Constr. Corp*., 55 A.D.3d 579 [2nd Dept 2008].) In addition, Section 23-2.1(b) is inapplicable in the within action as the plaintiff was not involved in the disposal of debris.

Plaintiff's cause of action under 12 NYCRR 23-1.3, a "General Provision", is likewise unable to support a cause of action under Labor Law 241(6). Provisions of the Industrial Code that are merely "General Provisions" of the Industrial Code are insufficient under Labor Law § 241(6). (*Gordineer v County of Orange*, 205 A.D.2d 584 [2nd Dept 1994]; see also *McGrath v Lake Tree Vil. Assoc.*, 216 A.D.2d 877 [4th Dept 1995][holding that 12 NYCRR 23-1.3 does not provide a basis for liability under Labor Law §241(6)].)

Finally, plaintiff's cause of action under 12 NYCRR 23-1.16 must also fail. 12 NYCRR 23-1.16, which set standards for safety belts, harnesses, tail lines and life lines, is inapplicable here because the plaintiff was not provided with any such devices. *(see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 A.D.3d 616 [2nd Dept 2008].)

Accordingly, defendant's motion for summary judgment dismissing plaintiff's Labor Law §241(6) claims under 12 NYCRR 23-1.2, 12 NYCRR 23-1.3 and 12 NYCRR 23-1.16 is granted.

III. Amend Complaint

Plaintiff cross-moves to amend its Verified Complaint to add a cause of action under Labor Law §240(1) and under 12 NYCRR 23-2.1. "In general, leave to amend a pleading may be granted at any time, including during trial, absent prejudice or surprise to the opposing party,

unless the proposed amendment is palpably insufficient or patently devoid of merit." (*Galarraga v. City of New York*, 54 A.D.3d 308, 310 [2nd Dept 2008]; *Morris v. Queens Long Island Medical Group, P.C.*, 49 A.D.3d 827 [2nd Dept 2008].) "However, where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious, and, where leave is sought on the eve of trial, judicial discretion should be exercised sparingly." (Id.) Furthermore, where there has been an inordinate delay in seeking leave the plaintiff must submit an affidavit setting forth the reasonable excuse for the delay, and submit an affidavit to establish the merits of the proposed amendment. (*Fuentes v. City of New York*, 3 A.D.3d 549 [2nd Dept 2004]; *Volpe v. Good Samaritan Hosp*., 213 A.D.2d 398 [2nd Dept 1995].)

Plaintiff's Complaint was filed December 8, 2009, the original Bill of Particulars was dated October 22, 2010 and the within motion is April 12, 2012, a mere 11 days prior to when the within action was scheduled on the Trial Scheduling Part for April 23, 2012. The court finds that there has been an inordinate delay in moving to amend, (original complaint dated December 8, 2009, cross motion to amend made April 12, 2012) especially in light of the fact that the application to amend has been made on the eve of trial (the within action was on the trial calendar Part for April 23, 2012) . Accordingly, plaintiff is required to submit both an affidavit setting forth a reasonable excuse for the delay and an affidavit of merits. Initially, the court notes plaintiff's cross-motion is defective as plaintiff failed to submit an affidavit setting forth a reasonable excuse or an affidavit of merit, rather, plaintiff merely attached an affirmation.

Furthermore, even if the court accepted plaintiff's attorney affirmation, the proffered reason for delay is not reasonable. Plaintiff contends that the recent Court of Appeals decision in

Wilinski v 334 East 92nd Housing Development Fund Corp, significantly expands worker's protection under Labor Law §240(1) and now gives rise to a cause of action for the plaintiff. In *Wilinski*, the Court of Appeals stated that plaintiff suffered a harm that "flow[ed] directly from the application of the force of gravity to the [pipes]." (*Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1, 10 [2011] quoting *Runner v. New York Stock Exch. Inc.,* 13 NY3d 599,604 [2009].) It is this court's opinion that *Wilinski* does not expand Labor Law §240(1) to encompass plaintiff's cause of action. *Wilinski* stands for the proposition that an elevation differential will not be considered de minimis, when the combined weight of the object and the force the object is able to generate, even if the fall is of a "relatively short descent", causes a harm based "directly from the application of the force of gravity" on the object. (*Id.*) The within action does not involve fall nor does it involve the operation of gravity. Longo testified at his deposition that the locker got *pushed* into his hand and that his hand was then stuck between the back of the "bucket" and the locker. Longo went on to testify that his hand became freed when the locker was "backed" up. From plaintiff's own testimony it does not appear that the locker fell from any elevation, rather it appears the locker simply moved forward and trapped plaintiff's hand between the locker and the back of the bucket. Accordingly, as the within action does not fall within Labor Law §240(1), plaintiff's cross-motion to amend the complaint to add Labor Law §240(1) is denied.

Plaintiff also cross-moves to amend its Verified Complaint to add a violation of 12 NYCRR 23-2.1(b) as it relates to a violation of Labor Law §241(6). However, "Section 23-2.1 (b) (Disposal of Debris) lacks the specificity required to qualify for predicate liability under Labor Law § 241 (6). (*See Salinas v Barney Skanska Constr. Co.*, 2 A.D.3d 619 [2nd Dept 2003]

citing *Fowler v CCS Queens Corp*., 279 A.D.2d 505 [2nd Dept 2001]; *Lynch v Abax, Inc*., 268 A.D.2d 366 [2nd Dept 2000].) Plaintiff's reliance on the Appellate Division, Fourth Department holding in *Dipalma v. State of New York,* 90 A.D.3d 1659 [4th Dept 2011] is misplaced, as the within action was brought in the County of Queens County, therefore the decisions of the Appellate Division, Second Department, even if inconsistent with other departments, are binding upon this court. (*cf. Mountain View Coach Lines, Inc., v. Storms*, 102 A.D.2nd 663 [2nd Dept 1984].)

Accordingly, plaintiff's cross-motion to amend the complaint is denied.

CONCLUSION

For the reasons set forth above, LIRR's motion for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Labor Law §§200 and 241(6) claim is granted. Plaintiff's cross-motion for leave to amend the Verified Complaint and Bill of Particulars to add Labor Law §240(1) and 12 NYCRR 23-2.1 as statutes and rules violated is denied.

Dated: June 12 , 2012

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Bernice D. Siegal, J. S. C.