

Stissi v Seagull Islandia, LLC

2012 NY Slip Op 32571(U)

October 3, 2012

Supreme Court, Suffolk County

Docket Number: 17107/2009

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Frank Stissi,

Plaintiff,

-against-

Seagull Islandia, LLC, Aresco Management Ltd.,
Essential Electric Corp., Ball Construction, LP
and Sav More Mechanical, Inc.,

Defendants.

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Motion Sequence No.: 005; MD

Motion Date: 6/1/12

Submitted: 7/23/12

Motion Sequence No.: 006; XMG

Motion Date: 7/2/12

Submitted: 7/23/12

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Clerk of the Court

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Upon the following papers numbered 1 to 28 read upon this motion for summary judgment and cross motion for leave to serve second supplemental bill of particulars: Notice of Motion and supporting papers, 1 - 15; Notice of Cross Motion and supporting papers, 19 - 24; Answering Affidavits and supporting papers, 16 - 18; 25 - 26; Replying Affidavits and supporting papers, 27 - 28; it is

ORDERED that this motion by defendants Seagull Islandia, L.L.C., Aresco Management Ltd. and Ball Construction, L.P. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3042 granting him leave to serve a second supplemental bill of particulars is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 5, 2009 during the course of his employment with non-party Cable Worx, the communications networking cable contractor, when he came in contact with exposed electrical wiring while standing on a ladder and was electrocuted and fell. The accident occurred in the second floor conference room of a building located at 2950 Expressway Drive South, Islandia, New York. The building is owned by defendant Seagull Islandia, L.L.C. (Seagull). Defendant Aresco Management Ltd. (Aresco) was the property manager for defendant Seagull. Non-party United Healthcare leased the second floor of the building from defendant Seagull. At the time of plaintiff's accident, United Healthcare was remodeling, or renovating, its leased space and had hired defendant Ball Construction, L.P. (Ball) as general contractor. Defendant Ball had hired defendant Essential Electric Corp. (Essential Electric) as an electrical subcontractor for the project. United Healthcare contracted directly with plaintiff's employer.

By his complaint, plaintiff alleges causes of action for common-law negligence and violations of Labor Law §§ 200, 240 and 241 (6). The Court's computerized records indicate that the note of issue in this action was filed on January 1, 2012.

Defendants Seagull, Aresco and Ball now move for summary judgment dismissing the complaint as against them on the grounds that they did not direct, supervise or control plaintiff's work and did not create or have any notice of any dangerous condition, and that plaintiff suffered a workplace hazard unrelated to plaintiff's need for a safety device under Labor Law § 240. They also argue that they are entitled to summary judgment inasmuch as Labor Law § 241 (6) is inapplicable to remodeling projects and, in any event, plaintiff cannot demonstrate that defendants violated any provision of the Industrial Code or that any such violation was a substantial factor in causing the subject accident. Their submissions in support of the motion include the pleadings, plaintiff's bills of particulars, the contract between United Healthcare and defendant Ball, the subcontract between defendant Ball and defendant Essential Electric, the discovery responses of defendant Essential Electric, the deposition transcripts of plaintiff, Craig Padover on behalf of defendant Aresco, Theodore F. Warren on behalf of defendant Ball, and Robert J. Kaufman on behalf of defendant Essential Electric, and a Ball incident report.

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In opposition to the motion, plaintiff contends that he was not provided with adequate safety devices under Labor Law § 240 to prevent him from falling after being electrocuted and that he has stated a claim under Labor Law § 241 (6) based on a violation of 12 NYCRR § 23-1.13 (b)(4) inasmuch as he was engaged in an “alteration” of the building being renovated. Plaintiff also contends that defendants had authority to control the manner of plaintiff’s work inasmuch as defendant Aresco visited the property and watched the progress of construction and defendant Ball coordinated when the trades would work and the work they would perform. Plaintiff further contends that defendants created and had notice of the dangerous condition of the exposed junction box and poor lighting conditions.

Plaintiff cross-moves for an order pursuant to CPLR 3042 granting him leave to serve a second supplemental bill of particulars adding the allegation that defendants violated 12 NYCRR § 23-1.13 (b)(4). Plaintiff maintains that said allegation was inadvertently omitted from his bill of particulars and supplemental bill of particulars, that the proposed second supplemental bill of particulars has merit, and that defendants will not be prejudiced by the new allegation as it does not raise a new theory of liability or new facts. Plaintiff submits his proposed second supplemental bill of particulars in support of his cross motion.

Defendant Essential Electric argues in opposition to the cross motion that the new allegations are inapplicable to it and defendants Seagull, Aresco and Ball argue in opposition that the new allegations constitute new theories and a prejudicial attempt at this late juncture to avoid dismissal on summary judgment. Defendants Seagull, Aresco and Ball contend that the new Industrial Code provision is completely different from the provisions plaintiff originally alleged and that defendants have had no opportunity to conduct discovery related to said new provision.

12 NYCRR § 1.13 (b) (4) provides:

Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.

Paragraph 4 of plaintiff’s original bills of particulars include allegations that defendants were negligent “in failing to shut down the electrical power while the plaintiff was working; in failing to secure all electrical boxes and/or junction boxes; in failing to properly cap any and all electrical wires; in allowing uncapped electrical wires to remain exposed.”

Plaintiff’s proposed second supplemental bill of particulars does not prejudice defendants inasmuch as it does not articulate a new theory of liability, but merely amplifies plaintiff’s Labor

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Law § 241(6) cause of action (*see Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 846 NYS2d 302 [2d Dept 2007]). Therefore, plaintiff's request for leave to serve a second supplemental bill of particulars in order to assert a violation of 12 NYCRR 23- 1.13 (b)(4) as a predicate for his Labor Law § 241 (6) cause of action is granted (*see id.*).

Plaintiff testified at his deposition on October 19, 2010 that on the date of the accident he was installing new cable wiring by running it through the dropped ceiling of the conference room. He indicated that he was standing on a step, second from the top, of an approximately eight-step, fiberglass, A-frame, Cable Worx ladder, that he described to be in good condition. He was alone in the conference room. Plaintiff explained his work as running a "cat six" cable through the dropped ceiling to a conduit, hollow pipe, through the wall and dropping the cable into a jem box in the wall. Plaintiff described the dropped ceiling as being approximately ten feet above the floor and the area above the dropped ceiling as approximately five feet in height. There were no ceiling tiles. In addition, plaintiff testified that when he looked into the space above the dropped ceiling to see where the cable was and where it was to run, he saw no wiring. Approximately five minutes after having entered the room he received an electrical shock to his left hand. He stated that he was not wearing any gloves and his hand was about a foot or foot-and-a-half above the dropped ceiling when he received an electrical shock. Plaintiff believed that the electrical shock came from a junction box in the ceiling above him which had no plate on it and had exposed wires. He did not observe the wire that gave him the electrical shock. No one else was in the room when the accident occurred. His testimony indicates that after the electrical shock he found himself crouched on metal studs three to three-and-a-half feet away from the ladder. He also testified that he did not know if the ladder was in the same location that it was prior to his fall.

According to plaintiff, after his fall, Ted Warren entered the room and asked him if he was alright and after plaintiff walked out of the room, Ted Warren called the electrician into the room and plaintiff overheard Warren asking the electrician if there was live electricity in the room and the electrician giggled and responded "of course there's live electricity in the room." Plaintiff further testified that he had never been in the conference room prior to the date of the accident, and that there were electricians working at the job site that day. Plaintiff also described that generally when working alongside electricians, the electricians entered the work site before the communication workers and notified the communications workers if there was running electricity in the work area. On the date of the accident none of the electricians notified plaintiff and he did not speak to any electricians prior to his accident.

Craig Padover testified at his deposition on March 16, 2011 that he is president of defendant Aresco, a commercial real estate management company, which manages the subject building owned by defendant Seagull. He testified that he visited the property two to three times a week prior to the subject incident, was present in the building on the date of the incident, and that as property manager he had no duties or responsibilities to oversee or monitor the project. Mr. Padover recalled another incident involving an Essential Electric electrician working at a panel on the north side of the building in which there was an explosion at the panel but he could not recall whether it was prior to or subsequent to plaintiff's incident. He also recalled an incident, subsequent to plaintiff's incident,

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in which a worker sustained a low voltage electric shock. He stated that if he had seen an unsafe condition prior to plaintiff's accident he would have notified Ted Warren, and that he did not recall making any such complaints.

The deposition testimony of Theodore F. Warren on March 16, 2011 reveals that he was a construction superintendent for defendant Ball, which began work on the renovation in mid-November 2008. Mr. Warren testified that he was the full-time superintendent of the subject project and that his duties involved coordinating the trades and keeping the client schedule and that he reported to a United Healthcare representative and to Craig Padover regarding any building related issues. He stated that he met regularly with Mr. Padover, who stopped at the building on a daily basis. Lou Ottranda was the project manager and Michael Cooney was the general supervisor. In addition, he testified that as the general contractor, defendant Ball hired the various trades working on the project, including Essential Electric. He also stated that Essential Electric had a supervisor or foreman present on a regular basis named Eddie Gomez and a project manager named Andrew Rabbi who was present approximately once a month. Mr. Warren explained that there would be weekly job site meetings with the trades and the trade foremen, including Mr. Gomez, that included the discussion of safety issues. He stated that generally the electricians work first and are still on the site when the cable contractor is working, and that there was no safety meeting regarding coordinating the electrical and communications and data wiring of the building prior to the subject accident. According to Mr. Warren, Essential Electric was present on the job site at the beginning of the project and Cable Worx started shortly before plaintiff's accident. There were weekly coordination meetings with the representative of the client, United Healthcare, and Mr. Padover, and during one such meeting he would have told the client representative that he was ready for the cable workers to come in and work with the other trades.

Mr. Warren also testified that plaintiff and his partner had reported to him on the morning of the incident and Mr. Warren showed them where the communications closet was located, two rooms away from the room where the incident occurred, but he did not take any steps to make sure that they were not working in the same area as the electricians. He further testified that he had finished a client meeting in a pantry area of the job site when he heard an atypical noise from another room and when he went to investigate he and plaintiff met at the door of the room plaintiff had been in. He described plaintiff as irate and when asked whether he was okay, plaintiff responded that he had just been electrocuted, that there was an open box that was live above the ceiling and that as he was pulling cable his hand hit the open box wires. Mr. Warren noted that prior to the meeting plaintiff had been working with another employee and he asked plaintiff after the incident where his partner was and plaintiff said that he had left. Mr. Warren believed that the lack of a partner contributed to plaintiff's accident and that it was not the responsibility of Ball to provide safety equipment.

Mr. Warren described the height of the grid ceiling as eight feet and the ceiling above as fourteen feet. There was an A-frame ladder in the room. Mr. Warren observed the junction box located in the room where plaintiff's accident occurred and saw that it was six inches by six inches, that the cover was held in the open position by one screw, and that approximately 10 wires were

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proper protection, and whether plaintiff should have been provided with additional safety devices (*see Gange v Tilles Inv. Co.*, *supra*; *see also Quackenbush v Gar-Ben Assocs.*, 2 AD3d 824, 769 NYS2d 387 [2d Dept 2003]). Therefore, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is denied.

Labor Law § 241 (6) provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, *supra*; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; *D'Elia v City of New York*, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]).

Labor Law § 241 (6) applies to the subject project because it involved alteration of a building or structure, which satisfies the definition of construction work (*see* 12 NYCRR 23-1.4 [b][13]; *McLean v 405 Webster Ave. Assocs.*, ___ AD3d___, 2012 NY Slip Op 06286 [2d Dept 2012]; *see also Joblon v Solow*, *supra*; *Schick v 200 Blydenburgh, LLC*, *supra*; *Becker v AND Design Corp.*, 51 AD3d 834, 837). Plaintiff's work involved running a cable into the wall (*see McLean v 405 Webster Ave. Assocs.*, *supra*). Defendants failed to demonstrate that plaintiff was not engaged in a covered activity when he was injured, that there was no violation of the relevant Industrial Code section, 12 NYCRR 23-1.13[b][4], and that such violation was not a proximate cause of his injury (*see Harris v Arnell Constr. Corp.*, 47 AD3d 768, 850 NYS2d 547 [2d Dept 2008]). Therefore, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is denied.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Rojas v Schwartz*, 74 AD3d 1046, 903 NYS2d 484 [2d Dept 2010]). Where a dangerous condition of premises is at issue, property owners may be held liable for a violation of Labor Law § 200 or based on common-law negligence if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the condition (*see Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, there can be no recovery against the owner or general contractor under Labor Law § 200 or 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 (*see id.*).

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There remain triable issues of fact as to whether defendants exercised sufficient direction and control over the performance of the work to impose liability under Labor Law § 200, and questions of fact with respect to notice and proximate cause (*see Bardouille v Structure-Tone, Inc.*, 282 AD2d 635, 724 NYS2d 751 [2d Dept 2001]). There is contradictory testimony as to whether the incident involving an electrical panel explosion occurred prior to or after plaintiff's incident, and if it did occur prior to plaintiff's incident, it is unclear whether it would have provided notice regarding plaintiff's incident. Therefore, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is denied.

Accordingly, the motion for summary judgment is denied and the cross motion for leave to serve a second supplemental bill of particulars is granted.

Dated: 10/3/12


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION