Sikorjak v City of New York
2015 NY Slip Op 32270(U)
November 25, 2015
Supreme Court, Richmond County
Docket Number: 100582/12
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X	**Part C2**
GABRIEL SIKORJAK,	
	Present:
Plaintiff,	
-against-	**HON. THOMAS P. ALIOTTA**
THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONTI OF NEW YORK, LLC, and HAKS GROUP, INC.	**DECISION AND ORDER**
	Index No.100582/12
	Motion Nos. 1711-002
Defendants.	**2560-003**
----------X	**2710-004**

The following papers numbered 1 to 12 were fully submitted on the 12th day of September, 2015:

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant Haks Group, Inc. (Affirmation, Affidavit in Support) (Dated: May 1,)	1
Plaintiff's Affirmation in Opposition to Defendant Haks Motion for Summary Judgment (Affidavits, Memorandum of Law in Opposition) (Dated: July 2, 2105)	2
Plaintiff's Notice of Cross-Motion to Amend Complaint (Affirmation, Affidavits, Memorandum of Law in Support of Cross-Motion) (Dated: July 2, 2015)	3
Notice of Cross-Motion for Summary Judgment by Defendants City of New York, New York City Department of Transportation, Conti of New York, LLC (Affidavits, Affirmation in Support of Cross-Motion and in Partial Opposition to Haks' Motion) (Dated: July 17, 2015)	4
Haks' Affirmation in Reply and In Opposition to Plaintiff's Cross-Motion (Dated: July 28, 2015)	5
Haks' Affirmation in Reply and in Partial Opposition to Defendants' Cross-Motion	

Upon the foregoing papers, the above motion and cross motions have been consolidated and are decided as follows.

This matter arises out of a construction site accident which occurred on May 5, 2011, at the "Ramp A" job site of the St. George Staten Island Ferry Terminal Ramp Project, on Staten Island. Plaintiff, a laborer for non-party NASDI Inc., claims to have sustained extensive personal injuries when his left pants leg caught fire while he was using a gas powered demolition saw. Plaintiff instituted this action against each defendant alleging, *inter alia*, common-law negligence and violations of Labor Law §§200, 240(1) and 241(6).

In his August 9, 2012, Verified Bill of Particulars, plaintiff sets forth that he was "operating a Stihl Concrete Demolition Saw and cutting steel rebar that protruded up and out of an approximately five feet high concrete wall [when] gasoline and highly flammable and explosive gasoline fumes leaked from the saw." According to plaintiff and his expert, Stanley Fein, P.E. (*see* the July 1, 2015 affidavit of Stanley H. Fein, P.E.; Plaintiff's Exhibit 10), the "gasoline and its highly flammable and explosive fumes were permitted to escape from the saw's gasoline tank due to a badly worn, jagged and chipped gasoline cap, [a] worn, damaged and deteriorated (O) ring, and/or [a] damaged and deteriorated tank" (*see also* Plaintiff's Verified Bill of Particulars, para 18; Haks Exhibit A). At his June 19, 2013 deposition, plaintiff testified, in relevant part, that immediately prior to the accident "the entire area [of his left leg, from ankle to thigh] was soaked with gasoline" (*see* Haks Exhibit B, p. 95, ll 19-23). As a result, "the sparks generated by the saw cutting the rebar caused [a] fireball" to form, engulfing plaintiff's leg in the fire. Plaintiff's co-worker, who witnessed the incident, testified similarly in a sworn statement (*see* Stein affidavit, para 10; *see also* June 25, 2015

affidavit of plaintiff's co-worker, Trevor Burns; Plaintiffs Exhibits 10 and 8, respectively). In his testimony at both his General Municipal Law §50-h hearing and June 19, 2013 deposition, plaintiff was emphatic that: (1) no entity other than NASDI ever supervised him or supplied him with instructions or equipment, *i.e.*, the subject saw (*see* Haks Exhibit B, pp 45-46); (2) no fire extinguishing equipment was present in the area where plaintiff was working (*id.* at p 108, ll 21-25), and (3) no protective, *i.e.*, fire retardant apparel, had been supplied for plaintiff to wear at the site (*see* Verified Bill of Particulars, para 25, 26; Haks Exhibit A).

Insofar as it appears, non-party NASDI was a subcontractor hired by the general contractor, defendant Conti of New York, LLC (hereinafter "Conti"), while the City of New York's Department of Transportation (hereinafter the "City") had separately contracted with an entity calling itself "Haks Engineers and Land Surveyors, P.C." to provide "Resident Engineering Inspection Services" at the construction site (*see* July 10, 2008 Contract between City and Haks; Haks Exhibit C)[1].

[1]The first argument made by Haks for dismissal of the action is that plaintiff misidentified the Haks Group, Inc. as a party defendant. According to Haks, the foregoing entity never undertook to perform any work on the project, while the real party in interest, "Haks Engineers,

Architects and Land Surveyors, P.C." was never named as a defendant or served with process, and that the statute of limitations has now expired. According to plaintiff and this defendant, when Haks Group, LLC answered the complaint, it did not indicate that it was answering as "Haks Engineers, Architects and Land Surveyors, P.C. s/h/a Haks Group, LLC" nor was it so described in the summons and complaint. Nevertheless, it should be noted that "Haks" website only lists "HAKS" as the entity involved in the St. George Ferry Terminal Ramps Rehabilitation Project, a representation which is, at best, misleading.

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In Motion No. 1711-002, Haks moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, and for contractual and common-law indemnification against the general contractor, Conti.

In Motion No. 2560-003, plaintiff has cross-moved, pursuant to CPLR 1003, 1009 and 3013, for permission to file an amended complaint adding "Haks Engineers, Architects and Land Surveyors, P.C." as the named defendant in the place and stead of Haks Group, Inc.

In Motion No. 2710-004, defendants Conti and the City cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims asserted against them. In addition, Conti opposes Haks' motion for summary judgment on its claim for contractual indemnification as against it.

"[Inasmuch as] a summary judgment motion may resolve the entire case, obviously the timing of the motion is significant" (Brill v. City of New York, 2 NY3d 648, 651). "CPLR 3212(a) provides that the 'court may set a date after which no [dispositive] motion may be made', and '[i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on

good cause shown'" (Fofana v. 41 W. 34th St., LLC, 71 AD3d 445; 447-448; see Perini Corp. v. City of New York [Department of Envtl Protection], 16 AD3d 37, 39). The Court of Appeals subsequently reiterated the need for strict adherence to this rule in Miceli v. State Farm Mut. Auto. Ins. Co., (3 NY3d 725), stating "[a]s we made clear in *Brill*, and underscore here, statutory time frames - like court-ordered time frames - are not options, they are requirements to be taken seriously by the parties" (*id.* at 726). However, an untimely summary judgment motion will still be entertained by the Court if "it [seeks] relief on the same issues as were raised in [a] timely motion" (Conkin v. Triborough Bridge & Tunnel Auth., 49 AD3d 320, 321). Further, pursuant to the Rules of the Thirteenth Judicial District, all summary judgment motions must be made within 60 days of the filing of the Note of Issue.

In this case plaintiff filed his Note of Issue on March 3, 2015 (*see* Plaintiff's Affirmation in Opposition to City's cross-motion, Exhibit 1); Haks moved for summary judgment 59 days later, on or about May 1, 2015 but the City and Conti's "cross-motion" was not filed until 144 days later, on July 25, 2015. Nevertheless, since Haks' timely motion for summary judgment was still pending and made on grounds that are nearly identical to those raised by

Conti and the City in their (untimely) cross motion, it is properly before the Court for a determination on the merits *(see e.g.,* Giambona v. Hines, 104 AD3d 807, 870; Grando v. Petroy, 39 AD3d 590, 592).[2] Under these circumstances, both the motion and cross motion for summary judgment may be viewed as consolidated for ease of disposition.

The consolidated motion and cross motion for summary judgment by Haks, Conti and The City for dismissal of the complaint and all cross claims asserted against them (Motion Nos. 1711-002 and 2710-004) is **granted, in part, and denied, in part,** as herein provided.

Regarding the request for summary judgment dismissing plaintiff's cause of action for relief under Labor Law §240(1), both the motion and cross motion will be granted, as there is no evidence that plaintiff's injury was the result of any elevation-related hazard. To the contrary, although Labor Law §240(1) was designed to protect workers from the special hazards posed by the effects of gravity, *e.g.*, falling persons or falling objects, and has been held to warrant a liberal construction in order to accomplish its intended purpose (*see, e.g.*, Valensisi v. Greens at

[2]Although similarly late, plaintiff's motion is for leave to amend the complaint rather than for summary judgment (*cf.* CPLR 3212[a]).

Half Hollow, LLC, 33 AD3d 693, 695), even under the most liberal of constructions, this plaintiff's alleged injuries were neither sustained nor exacerbated by the effects of gravity.

A similar result awaits plaintiff's claim of injury under Labor Law §241(a), as this "section" does not exist. Moreover, to the extent that the complaint may contain a typographical error, and plaintiff may be seen as requesting relief for the purported violation of Labor Law §241-a, any such cause of action must also be dismissed, since §241-a addresses the protection of "workmen in or at elevator shafts, hatchways and stairwells," none of which apply in the case at bar. In all events, had plaintiff intended to plead a purported violation of Labor Law §241(6), that section will be discussed *infra*.

Likewise, Haks, Conti and The City are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law §200 causes of action.

As the Court of Appeals has stated, "[s]ection 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the

authority to control the activity bringing about the injury. Thus, where the alleged defect or dangerous condition arises from the contractor's methods and the owner [or contractor] exercises no supervisory control over the operation, no liability attaches ...under the common law or under Labor Law §200" (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [internal quotation marks and citations omitted]; *see* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 503-505). Moreover, it is well settled that for liability purposes, an owner or contractor's "general supervisory control is insufficient to impute liability ...[what is required] is actual supervisory control or input into how the work is performed" (*see* Hughes v. Tishman Constr. Corp., 40 AD3d 305, 311; Burkowski v. Structure Tone, Inc., 40 AD3d 378, 381).

Here, Haks' contract with the City expressly excludes its resident engineer from overseeing a subcontractor's means and methods of performance (*see* Haks Exhibit C, p. 29). As a result, Haks was neither authorized nor required to oversee the means and methods used by laborers who performed demolition and construction work under the aegis of a subcontractor. In this case, the uncontroverted deposition testimony revealed that Haks' engineers were present at the site during demolition for the sole purpose of

inspecting the quality of the concrete being poured and to control the dust generated during demolition. In point of fact, the only safety or supervisory responsibility assumed by this defendant was limited by contract to the development and implementation of overall health and safety plans for the work site. Thus, Haks' responsibility did not encompass plaintiff's alleged injury, which occurred solely as a result of the manner and methods specified by plaintiff's employer, NASDI (*see* Dalanna v. City of New York, 308 AD2d 400). It is undisputed that Haks did not own the saw; provide the saw to plaintiff; direct plaintiff on the use of the saw; or supervise, direct or control plaintiff while he was cutting the steel rebar. This work was performed under the exclusive direction and control of NASDI. In addition, Haks had no contractual authority to stop the work, and was obligated solely to notify the City of unsafe practices in general. The same or similar principles apply to both Conti and the City.

Accordingly, the moving and cross-moving defendants have demonstrated *prima facie*, their right to dismissal under Labor Law §200 and/or common-law negligence as a matter of law. In opposition, plaintiff has failed to raise a triable issue of fact. For example, plaintiff testified at his EBT that he had never heard

of Haks and was unaware of its presence on the job-site. As for Conti, plaintiff testified that he knew of that entity only because "[t]hat's [the] company which name is on my ID....but I don't know what [it] is" (*see* Haks' Exhibit B, p 46, ll 23-25).

In the absence of the right to exercise any degree of supervision and control over the means and methods of plaintiff's work, the causes of action predicated on **common-law negligence and/or the violation of Labor Law §200 as against these defendants must also be dismissed.**

Defendant Haks is likewise entitled to summary judgment dismissing plaintiff's causes of action under Labor Law §241(6).

Labor Law §241(6) "requires owners and contractors 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" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501-502). Accordingly, since section 241(6) imposes a nondelegable duty on owners and contractors, a plaintiff need not show that such defendants exercised supervision and control over the work site in order to establish a right of recovery (*see* St. Louis v. Town of N. Elba, 70 AD3d 1250, *affd* 16 NY3d 411). Here, since Haks was

never delegated the duty to oversee the work, it cannot be found to be the City's "statutory agent" for purposes of liability under Labor Law §241(6) and, thus, cannot be held liable, vicariously or otherwise, for plaintiff's injuries (*see* Walls v. Turner Constr. Co., 4 NY3d 861, 863-864; Smith v. McClier Corp., 22 AD3d 369).

In light of the foregoing, it is the opinion of this Court that Haks has established a *prima facie* showing of its entitlement to summary judgment on plaintiff's cause of action predicated on the violation of Labor Law §241(6). In opposition, plaintiff has failed to adduce admissible evidence of the existence of a triable issue of fact sufficient to defeat summary judgment (*see* Zuckerman v. City of New York, 49 NY2d 562). To the contrary, there is no credible evidence sufficient to raise any issue that Haks was acting as the City's "agent" at the job site.

Accordingly, **Haks is entitled to the dismissal of all of the causes of action and cross claims asserted against it.** As for Conti and The City, it is familiar law that in order to state a viable claim under Labor Law §241(6), a plaintiff must allege that the owner or contractor violated one or more of the regulations promulgated by the Commissioner of Labor that sets forth a specific standard of conduct, and not simply a recitation

of common-law safety principles(St. Louis v. Town of N. Elba, 16 NY3d at 414). Here, assuming *arguendo* that the moving and cross-moving defendants had been able to establish their right to dismissal as a matter of law, plaintiff has successfully raised and identified triable questions of fact pertaining to the possible violation of the following sections of the Industrial Code by said defendants: 23-10.3 (12 NYCRR 23-10.3 ["All internal combustion engines...shall be maintained free of leaks")]; 23-1.7(h) (12 NYCRR 23-1.7, ["Protective equipment for the use of corrosive substances and chemicals shall be provided by the employer"]); 23-1.8(c)(4) (12 NYCRR 23-1.8[c][4] ["Every employee required to use or handle corrosive substances or chemicals shall be provided with and shall be required to wear appropriate protective apparel...[and] approved eye protection")]; 23-1.5(c)(3) (12 NYCRR 23-1.5[c][3] ["All...equipment in use (*e.g.*, demolition saws) shall be kept sound and operable and shall be immediately repaired...or removed from job site if damaged)]; (12 NYCRR 12-1.8 ["There shall be provided one hand fire extinguisher approved for the control of flammable liquid fires...so located that a person shall not have to travel more than 50 feet to reach the nearest extinguisher"]).

Pertinent to the foregoing, it is the opinion of this Court

that plaintiff's deposition testimony, the affidavit of his eye-witness, Trevor Burns, and the affidavit of his engineering expert, Stanley Fein, P.E., are legally sufficient to raise an issue as to whether Conti and/or the City may have violated one or more of the foregoing Industrial Code provisions. In addition, plaintiff's claim that no fire extinguisher was present in the immediate area is rendered all the more likely with the concession that his clothing was extinguished only by his co-workers physically rolling him on the ground in an area of sand and clay. Thus, the **balance of the cross motion of defendants Conti and the City for summary judgment dismissing plaintiff's cause of action under Labor Law §241(6) is denied.**

Under these circumstances, that branch of Haks' motion which is for summary judgment on its claim for contractual indemnification against Conti is denied as premature.

In the absence of any prejudice, plaintiff's cross motion (No. 2560-003) for leave to amend the complaint is granted (*see* CPLR 3025[b]).

Accordingly, it is

ORDERED, that the motion and cross motion for summary judgment and dismissal of the complaint as against the moving and cross-

moving defendants predicated on common-law negligence and the violation of Labor Law §§200, 240(1), 241-a are granted, and said causes of action are severed and dismissed; and it is further

ORDERED, that the motion and cross motion of the foregoing defendants for summary judgment and dismissal of plaintiff's claim under Labor Law §241(6) is granted as to defendant Haks, and is otherwise denied; and it is further

ORDERED, that the above cause of action as against defendant Haks is severed and dismissed; and it is further

ORDERED, that plaintiff's motion for leave to amend the complaint is granted and deemed served; and it is further

ORDERED, that Haks motion for summary judgment on its claim for contractual indemnification is denied as premature; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: November 25, 2015

/s/

HON. THOMAS P. ALIOTTA,

J. S. C.