

Reyes v Archbishop Stepinac High Sch.

2016 NY Slip Op 33174(U)

December 20, 2016

Supreme Court, Westchester County

Docket Number: Index No. 70145/14

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
JUAN REYES,

Plaintiff,

Index No. 70145/14

-against-

DECISION & ORDER

ARCHBISHOP STEPINAC HIGH SCHOOL and CATHOLIC
HIGH SCHOOL ASSOCIATION OF NEW YORK,
Defendants.

-----X
The following papers numbered 1 to 6 were read on defendants' motion for summary judgment dismissing the complaint.

Notice of Motion/Affidavits/Exhibits
Affirmation in Opposition/Exhibits
Reply Affirmation

PAPERS NUMBERED

1-3

4-5

6

Factual and Procedural Background

On August 14, 2013, plaintiff was a maintenance supervisor at ABM Janitorial Services ("ABM"). He was assigned to defendant Archbishop Stepinac High School along with two other maintenance workers and five custodians. The ABM employees were provided with an office, tool room, bathroom, and locker room in the basement of the high school.

In August 2013, plaintiff was working on converting the bathroom in the boys locker room into a stockroom at the request of the high school principal. In order to perform the conversion, the toilets, urinals and sinks had to be removed.

On August 14, 2013, plaintiff was removing a urinal using a grinder to cut the tail pipe. The grinder did not have a blade guard or handle. At the time of the accident, plaintiff had both hands on the body of the grinder, and he was cutting the tail pipe from the valve to the urinal. The grinder then hit a wall tile and kicked back and stuck his right hand and fingers, lacerating them.

Plaintiff commenced this personal injury action on November 21, 2014. Issue was joined on January 22, 2015.

Plaintiff now moves for summary judgment on the issue of liability asserting a Labor Law §241(6) claim against defendant Catholic High School Association of New York. In support of his motion plaintiff submits the affidavit of professional engineer Les Winter. In his affidavit, Mr. Winter states that the grinder used by plaintiff comes with a guard and a handle. He states that the guard protects against contact with the grinder and the handle stabilizes the tool to prevent lacerating injuries. Mr. Winter notes that at the time plaintiff was using the grinder it was missing both the guard and the handle in violation of 22 NYCRR 23-1.5(c)(3), which provides that "all safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." It is Mr. Winter's opinion to a reasonable degree of engineering certainty that had the handle and guard been present on the grinder at the time of the accident, plaintiff would have not been injured.

In opposition, defendants argue Labor Law § 241(6) imposes a non-delegable duty vicarious liability upon an owner for the negligent failure of contractors and subcontractors, their agents and employers to ensure that all areas in which “construction, excavation or demolition work is performed shall be so constructed, stored, 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.”

Catholic High School argues that plaintiff had used the grinder on three prior occasions with no incident. Further, at his deposition, plaintiff testified that he did not read the warning label on the grinder. Plaintiff also testified that he did not see a guard or handle on the grinder and did not know who had removed them. Moreover, plaintiff never complained about the grinder to any ABM or Stepinac personnel. Catholic High School argues that the violation of an industrial code such as 22 NYCRR § 23-1.5(c)(3) is merely some evidence for a fact finder to consider on the question of negligence. Therefore, even assuming it was negligent, the jury is free to consider plaintiff’s negligence in this accident.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). “Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, plaintiff established prima facie entitlement to summary judgment on his Labor Law §241(6) claim by submitting the affidavit of expert Les Winter who stated that the lack of a guard and handle caused plaintiff's injuries. In opposition defendant Catholic High School fails to raise an issue of fact precluding summary judgment in plaintiff's favor on this issue.

Accordingly, plaintiff's motion for partial summary judgment is GRANTED.

The parties are directed to appear in the Settlement Conference Part on January 31, 2017 room 1600 at 9:15 a.m. for further proceedings.

Dated: White Plains, New York
December 20, 2016



HON. WILLIAM J. GIACOMO, J.S.C.

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