Barreiros v Inter County Paving Assoc., LLC
2017 NY Slip Op 30481(U)
March 13, 2017
Supreme Court, Suffolk County
Docket Number: 11-30545
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX No. 11-30545
CAL. No. 15-00806MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-7-16 (008)
MOTION DATE 9-21-16 (009)
MOTION DATE 9-29-16 (010)
MOTION DATE 2-24-16 (011)
ADJ. DATE 10-06-16
Mot. Seq. # 008 - MG
009 - MotD
010 - MG
011 - MD

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FERNANDO BARREIROS,

Plaintiff,

- against -

INTER COUNTY PAVING ASSOCIATES, LLC, KINGS PARK ASPHALT CORP., and SAGE EQUIPMENT LEASING CORP.,

Defendants.

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INTER COUNTY PAVING ASSOCIATES, LLC,

Third-Party Plaintiff,

- against -

SWEET HOLLOW MANAGEMENT CORP.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 58 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 26; 27 - 43 ; Notice of Cross Motion and supporting papers 44 - 49 ; Answering Affidavits and supporting papers 50 - 51; 52 - 53 ; Replying Affidavits and supporting papers 54 - 56; 57 - 58 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#008) by defendant Sage Equipment Leasing Corp., the motion (#009) by defendant Kings Park Asphalt Corp., and the motion (#010) by defendant/third-party plaintiff Inter County Paving Associates are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Sage Equipment Leasing Corp. for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the motion by defendant Kings Park Asphalt Corp. for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the motion by defendant/third-party plaintiff Inter County Paving Associates for, inter alia, summary judgment dismissing the complaint against it is granted to the extent indicated below, and is otherwise denied; and it is

ORDERED that the cross motion by plaintiff for partial summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim is denied.

Plaintiff Fernando Barrieros commenced this action to recover damages for personal injuries he allegedly sustained on August 10, 2010, while working on a project to resurface a portion of the roadway near exit 61 of the Long Island Expressway. The accident allegedly occurred when a dump truck that plaintiff was operating overturned while he was disposing of asphalt millings at a premises located at 142 Townline Road in the Town of Smithtown. Plaintiff alleges, inter alia, that the dump truck overturned because the cargo was improperly loaded, causing the truck to be uneven. At the time of the accident, plaintiff was employed by third-party defendant Sweet Hollow Management Corp. ("Sweet Hollow"), which leased the dump truck that plaintiff was operating from defendant Sage Equipment Leasing Corp ("Sage Equipment"). The premises where the accident occurred allegedly was owned by defendant Kings Park Asphalt Corp. ("Kings Park Asphalt"), which entered into a real property rental agreement with defendant/third-party plaintiff Inter County Paving Associates ("Inter County Paving") allowing it to dispose of the debris from the roadway resurfacing project. By way of an amended complaint, plaintiff alleges causes of action against the defendants for common law negligence, and for violations of Labor Law §§ 200, 240 (1), and 241(6). By order dated March 1, 2016, the court (Rouse, J.) granted an unopposed motion by Inter County Paving for an order vacating the note of issue and removing the matter from the trial calendar. Thereafter, by order dated October 5, 2016, Justice Rouse disqualified himself from further participation in this matter and the action was randomly reassigned to the undersigned.

Sage Equipment now moves for summary judgment dismissing the complaint against it on the ground the dump truck it leased to plaintiff's employer was in good working condition at the time of the alleged accident, and that no evidence exists that the accident occurred as a result of any defect or malfunction with the vehicle. Additionally, Sage Equipment asserts that plaintiff was comparatively negligent for causing the accident, as he failed to ensure the asphalt millings were evenly loaded in the truck, and then chose to unload the truck while it was on sloped ground. Kings Park Asphalt likewise moves for summary judgment dismissing the complaint against it on the grounds that it was neither an owner nor a contractor for the purposes of the Labor Law at the time of the alleged accident, that it had no actual or constructive notice of any dangerous condition on the subject premises and did not have the authority to control or direct plaintiff's work, and that, in any event, such work did not expose plaintiff to the type of elevation-related risk that Labor Law § 240 (1) was meant to guard against. With respect to plaintiff's cause of action under Labor Law § 241 (6), Kings Park Asphalt asserts that it must be dismissed because plaintiff failed to identify a violation of any specific provision of the Industrial Code in support of the claim.

Inter County Paving also seeks summary judgment dismissing the complaint against it on a similar basis, arguing that plaintiff's conduct was the sole proximate cause of the alleged accident, that Labor Law § 240 (1) is inapplicable under the circumstances of this case, and that plaintiff failed to identify a violation of any specific provision of the Industrial Code in support of his Labor Law § 241 (6) claim. With respect to plaintiff's Labor Law § 200 claim, Inter County Paving asserts that the cause of action should be dismissed, as it neither provided plaintiff's equipment nor had any authority to control or direct his work, and that any alleged dangerous condition existing on the subject premises was open and obvious. Alternatively, Inter County Paving asserts that it should be granted conditional summary judgment on its third-party contractual indemnification claim against Sweet Hollow, as no triable issues exist as to whether the parties executed an agreement entitling it to such relief. Inter County Paving's submissions in support of the motion includes, among other things, copies of the pleadings, the transcripts of the parties' deposition transcripts, and an expert affidavit by Scott Turner.

Plaintiff opposes defendants' motions and cross-moves for partial summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim. Although plaintiff submitted photographs and affidavits, including an expert affidavit by Nicholas Bellizzi, in opposition to Inter County Paving's motion, he failed to submit any evidence substantiating his assertions that triable issues exist which preclude summary judgment in favor of Sage Equipment and Kings Park Asphalt.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Where the moving party fails to carry such burden, its motion should be denied without regard to the adequacy of the opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Furthermore, in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether such issues exist (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Therefore, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see* ***Bulger v Tri-Town Agency***, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

Initially, the court notes that Labor Law § 240 (1) is inapplicable under the circumstances of this case, as the overturning of the dump truck in question during the course of its unloading occurred at ground level and did not involve "an elevation-related risk of the kind that the safety devices listed in [Labor Law §] 240 (1) protect[s] against" (***Broggy v Rockefeller Group, Inc.***, 8 NY3d 675, 681, 839 NYS2d 714 [2007]; *see* ***Garcia v Market Assoc.***, 123 AD3d 661, 998 NYS2d 193 [2d Dept 2014] [Labor Law § 240 (1) held inapplicable because plaintiff was not was not exposed to any risk that the safety devices of the kind enumerated in the statute were meant to protect against where the water truck he was operating became upended]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010] [Labor Law § 240 (1) held inapplicable to accident involving overturned dump truck because its operation did not subject plaintiff to any risk the safety devices referenced in the statute would protect against, or the type of elevation differential it was meant to address]; ***Wynne v B. Anthony Constr. Corp.***, 53 AD3d 654, 862 NYS2d 379 [2d Dept 2008] [Labor Law § 240 (1) held inapplicable to accident involving overturned dump truck because plaintiff was not exposed to any risk that the safety devices referenced in the statute would have protected against, since he was working at ground level when he was injured]). Therefore, the branches of defendants' motions seeking summary judgment dismissing plaintiff's claim under Labor Law § 240 (1) are granted, and plaintiff's cross motion for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim is denied, as moot.

The branches of defendants' motions seeking dismissal of plaintiff's claims under Labor Law § 241 (6) also are granted, as plaintiff failed to allege, let alone establish, the violation of an Industrial Code provision which sets forth specific applicable safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 349, 670 NYS2d

816 [1998]; ***Shaw v RPA Assoc., LLC***, *supra* at 636-637; ***Cambizaca v New York City Tr. Auth.***, 57 AD3d 701, 702, 871 NYS2d 220 [2d Dept 2008]; *cf.* ***Galarraga v City of New York***, 54 AD3d 308, 310, 863 NYS2d 47 [2d Dept 2008]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]), and the rule or regulation alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

As to the branches of defendants' motions for summary judgment dismissing plaintiff's claims under the common law and Labor Law § 200, section 200 of the Labor Law statute 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 (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work or the provision of the alleged defective equipment (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]).

Moreover, "[t]o establish a prima facie case of common law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (***Solomon v New York***, 66 NY2d 1026, 1026, 499 NYS2d 392 [1985]). Proximate cause may be established where a defendant's act or failure to act "'was a substantial cause of the events which produced the injury'" (***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 562, 606 NYS2d 127 [1993]). Further, while breach of a contractual obligation standing alone is not ordinarily sufficient to impose tort liability upon a promisor in favor of third-parties, the promisor may be said to have assumed a duty of care, and thus be potentially liable in tort where: (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; (2) where the third-party detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced another party's duty to safely maintain its own premises (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002]; *see also* ***Verdi v Top Lift & Truck, Inc.***, 50 AD3d 574, 856 NYS2d 605 [1st Dept 2008]; ***Kerwin v Fusco***, 138 AD3d 1398, 30 NYS3d 419 [4th Dept 2016]; ***All Am. Moving & Stor., Inc. v Andrews***, 96 AD3d 674, 949 NYS2d 17 [1st Dept 2002]). A duty of care arising out a third-party's detrimental reliance exists where the contracting party's "inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury'" to the third-party (***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990], *citing* ***Moch Co. v Rensselaer Water Co.***, 247 NY 160, 167, 159 N E 896 [1928]).

Here, Sage Equipment, King Asphalt, and Inter County Paving all submitted evidence that they did not provide plaintiff with any allegedly defective equipment or have the authority to supervise or control his work at the time of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816; ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; ***Zupan v Irwin Contr., Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; ***Bennett v Hucke***, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]). Significantly, plaintiff testified that his work and the provision

of his equipment was exclusively controlled by Sweet Hollow, and that it was ultimately up to him where to unload the dump truck once he got to the dumpsite. Similarly, the testimony of Inter County Paving's safety officer indicates that its employees, including spotters who monitored the loading of the dump truck, and the dumpsite payload operator responsible moving and leveling the dumped asphalt millings, retained mere general supervisory control over plaintiff's work. As for Sage Equipment, insofar as it may purportedly be held liable for any defects with the dump truck it leased to plaintiff's employer, plaintiff's own testimony reveals that he personally inspected the vehicle prior to driving it and found no defects, that he was unaware of any complaints regarding its performance, and that he found it to be in good working order during four previous trips he made to the dumpsite on the same day of the accident.

Additionally, King Asphalt submitted undisputed evidence that it did not own the premises where the asphalt millings were being dumped at the time of the alleged accident, and that, even if it could be held liable as an agent of the owner, it had no actual or constructive notice of any purported dangerous condition thereon (*see* ***Dasilva v Nussdorf***, *supra*; ***Banscher v Actus Lend Lease, LLC***, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]; ***Garcia v Market Assoc.***, *supra*; ***Wendel v Pillsbury Corp.***, 205 AD2d 527, 612 NYS2d 678 [2d Dept 1994]). In particular, King Asphalt's president, James Farino, testified that it did not own the dumpsite in question, that none of its employees were even present at the dumpsite on the day of the accident, and that its agreement with Inter County Paving did not require any of its employees to oversee the dumping. In opposition, plaintiff failed to raise any triable issue warranting denial of the branches of defendants' motions seeking dismissal of his Labor Law § 200 claims, as his papers contain no evidence gainsaying defendants' assertions that they did not provide him any equipment, that they lacked the authority to control his work, and that none of them, including King Asphalt or Inter County Paving, created or had actual or constructive notice of a dangerous condition at the dumpsite. Accordingly, the branches of defendants' motions seeking dismissal of plaintiff's Labor Law § 200 claims against them is granted.

The unopposed branches of the motions by King Asphalt and Sage Equipment for summary judgment dismissing the common law negligence claim against them also is granted, as they submitted undisputed evidence that they neither had the authority to control plaintiff's work, nor created or had actual or constructive notice of any dangerous condition on the subject premises (*see* ***Dasilva v Nussdorf***, *supra*; ***Garcia v Market Assoc.***, *supra*; ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]; ***Pfaffenbach v Nemec***, 78 AD3d 1488, 911 NYS2d 520 [4th Dept 2010]). Although Inter County Paving established that it neither had authority to control plaintiff's work nor possessed actual or constructive notice of any alleged dangerous condition on the subject premises, its own submissions, which include evidence that, in discharging its contractual obligations, it retained loading "spotters" and a dumpsite payload operator, on whom plaintiff relied for the loading of his dump truck, and the leveling of the dumpsite, it failed to eliminate significant triable issues warranting denial of this branch of its motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In particular, triable issues exist as to whether Inter County Paving owed plaintiff a duty of care because he detrimentally relied on its employees' continued performance of the abovementioned contractual obligations and, if so, whether any alleged failure by these employees was a proximate cause of the accident (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*; ***Verdi v Top Lift & Truck, Inc.***, *supra*; ***Kerwin v Fusco***, *supra*; ***Cabrera v Picker Int'l, Inc.***, 2 AD3d 308, 770 NYS2d 302 [1st Dept 2003]; ***All Am. Moving & Stor., Inc. v Andrews***, *supra*). Significantly, Inter County Paving's submissions include the transcript of plaintiff's deposition testimony wherein he testified that the spotters controlled the loading process, and that he relied on them to ensure the dump truck was evenly loaded before he proceeded to the dumpsite. Plaintiff further averred that it was the duty of the payload operator working at the dumpsite to ensure that the milling debris was spread evenly after it was dumped, and that the surface of the dumpsite remained level. Additionally, while Inter County Paving's own expert contends that these responsibilities exclusively rested with plaintiff, even the expert contends that the failure to ensure that the truck was evenly loaded and the surface of the dumpsite remained level, was the proximate cause of the accident. Therefore, the branch of Inter County Paving's motion seeking dismissal of plaintiff's common law negligence claim against it is denied without regard to the adequacy of plaintiff's opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Finally, the branch of Inter County Paving's motion for conditional summary judgment on its third-party contractual indemnification claim against Sweet Hollow is denied. A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 931, 878 NYS2d 164 [2d Dept 2009]; ***O'Brien v Key Bank***, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Tranchina v Sisters of Charity Health Care Sys. Nursing Home***, 294 AD2d 491, 493, 742 NYS2d 655 [2d Dept 2002]). However, where, as in this case, a triable issue of fact exists regarding the indemnitee's possible active negligence for the happening of the accident, a conditional order of summary judgment for contractual indemnification must be denied as premature (*see* ***Biscup v E.W. Howell, Co.***, 131 AD3d 996, 16 NYS3d 266 [2d Dept 2015]; ***Arriola v City of New York***, 128 AD3d 747, 9 NYS3d 344 [2d Dept 2015]; ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; ***George v Marshalls of MA, Inc.***, *supra*).

Dated: Riverhead, New York
March 13, 2017

ARTHUR G. PITTS, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION