Toussaint v Port Auth. of N.Y. & N.J.
2017 NY Slip Op 32240(U)
October 18, 2017
Supreme Court, New York County
Docket Number: 155016/2015
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CURBY TOUSSAINT

INDEX NO. 155016/2015

MOT. DATE

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MOT. SEQ. NO. 001

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 22-39
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 40-43
Replying Affidavits	NYSCEF DOC No(s). 44-47

In this action, plaintiff seeks to recover for personal injuries he sustained when he was "struck by a cement mud buggy" on October 24, 2014 (the "accident"). Defendants The Port Authority of New York and New Jersey ("Port Authority") and Granite Construction Northeast, Inc. ("GCN" and collectively "defendants") now move for summary judgment dismissing this action in its entirety (CPLR § 3212). Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are not in dispute. On the date of the accident, plaintiff was working at the World Trade Center construction site in lower Manhattan. According to his bill of particulars, plaintiff was employed by "Skanska-Granite, a joint venture" as a lather. His co-worker, James Melvin, was operating the "buggy" when he lost control of it. The buggy ultimately hit plaintiff, causing his injuries. At his deposition, plaintiff explained the accident as follows:

> I was bending steel for the wall. I was bending a steel called sticks. Sticks is the steel that you put in between the wall, so the wall don't open and close. It will stay firm. A guy named Pauly was playing with the concrete buggy. It wasn't really – it was like, you know, because it looked like he knew how to ride it, so he rode it, and brought it close to the machine. And there was another guy, when Pauly got off of it, and got on it and they was talking. Then, I glanced to see what was going on back there. I glanced to see that they was talking loud, joking and playing. And then, I went to go bend the stick. Next thing I heard, I heard everybody scream...

Pauly was also a laborer who worked for Skanska. It is also undisputed that Melvin was not trained to operate the buggy, and had not been instructed by his employer, to do so. After the accident, Melvin told plaintiff that he was "sorry" and "he didn't mean to do that." Melvin told plaintiff that "he was horse playing."

Dated: 10/18/17

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

At his non-party deposition, Melvin testified as follows. On the date of the accident, Melvin was assigned as an "oiler on a crane" at the Oculus project at the construction site. Melvin's supervisor was Tom Kelly. In a post-accident statement, Melvin said of the accident:

> Went to move the concrete buggy because it was in the middle of the road. Buggy was running; brake was pushed down; grabbed handle throttle, squeezed throttle and buggy took off.

Melvin admitted during his deposition that he was neither designated to operate nor trained to operate the buggy and that only laborers are assigned to operate buggies.

Defendants produced for deposition Michael Grieco, who worked as a Construction Site Fire Safety Management at the World Trade Center Transportation Hub for Port Authority. Grieco testified that only laborers were assigned by foremen to operate the buggies. Grieco further testified that Melvin was an operating engineer, not a laborer. Greico further explained that Port Authority provides general oversight on a project, but that the superintendent and foreman on the job at the time work is being done have ultimate control over the performance of the work.

Defendants have also provided a sworn affidavit by Greico, who states that Port Authority did not own or operate any concrete buggies at the construction site, but rather, the buggies are owned and operated by the contractors and/or subcontractors at the site. Further, Greico maintains that the Port Authority does not supervise, instruct or direct any construction workers employed by contractors and/or subcontractors. Finally, Grieco states that Port Authority did not have notice of any untrained or non-designated workers using buggies at the site.

Defendants have also provided the affidavit of John Kane, who was the Site Safety Manager for GCN, as part of the Skanska Granite Skanska Joint Venture ("SGS"). According to Kane, Skanska USA Civil Northeast Inc., GCN and Skanska USA Building, Inc. comprise the SGS and GCN is 12% of SGS. Kane claims that GCN did not have any craft laborers working in the field and did not perform any construction work at the site or supervise/instruct any of the workers. Rather, Kane maintains that GCN's only involvement at the construction site was as part of the SGS. Further, Kane claims that approximately 6-7 GCN employees worked at the construction site and they "all held management/office positions, and these employees only worked for the SGS..."

Defendants have also provided affidavits from SGS employees who represent that Melvin was never instructed to operate the buggy and that the buggy did not have any mechanical problems prior to the accident.

Parties' arguments

Defendants argue that they are entitled to summary judgment: [1] on the Labor Law § 200 claim since defendants neither controlled, directed or supervised Melvin nor was their notice of a dangerous condition; and [2] that the Labor Law § 241[6] claim must be dismissed because the industrial code provisions relied upon by plaintiff are not sufficiently specific. Alternatively, defendants argue that they have established as a matter of law that the Industrial Code § 23-9.9[a] must be dismissed and that plaintiff cannot recover from GCN, his employer, pursuant to Workers' Compensation law.

In opposition, plaintiff maintains that Industrial Code § 23-9.9[a] is sufficiently specific and that respondeat superior is inapplicable to the Labor Law § 241[6] cause of action. Plaintiff otherwise maintains that there are issues of fact precluding summary judgment on his Labor Law §200 claim. Finally, plaintiff contends that "[w]ith regard to [GCN], the existence or nonexistence of a joint venture is a question of fact..."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

However, where the dangerous or defective condition arises from the subcontractor's methods, and the owner exercised no supervisory control over the injury-producing work, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (*Comes v. New York State Elec. & Gas Corp.*, *supra*).

Defendants argue that the Labor Law § 200 claim must be dismissed because neither of them exercised supervisory control over the injury-producing work. Based upon this record, defendants have established entitlement to summary judgment. Defendants have come forward with admissible evidence that Port Authority merely provides general oversight of the construction project and that GCN's only involvement with the injury-producing work was being a member of SGS. In turn, plaintiff has failed to a raise a triable issue of fact on this point. Accordingly, the motion for summary judgment dismissing the Labor Law § 200 claim is granted.

Next, defendants have also shown that plaintiff is barred by the Workers' Compensation law from suing GCN, since it was part of SGS, which was plaintiff's employer on the date of the accident. Indeed, plaintiff admitted that he was employed in his bill of particulars and also testified that GCN is part of Skanska. Otherwise, plaintiff has failed to raise a triable issue of fact on this point and the motion dismissing all claims against GCN must be granted.

Finally, the court turns to the Labor Law § 241[6] claim. Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). In support of the Labor Law § 241[6] claim, plaintiff abandons all but Industrial Code § 23-9.9[a], which provides in pertinent part:

> Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy.

There is no dispute that all Industrial Code provisions other than §23-9.9[a] which plaintiff alleges were violated are insufficiently specific to support a Labor Law § 241[6] claim. Therefore, all claimed violations except § 23-9.9[a] are severed and dismissed. The court otherwise rejects defendants' argument that § 23-9.9[a] is too general (see i.e. *Scott v. Westmore Fuel Co.*, 96 AD3d 520 [1st Dept 2012]).

Here, movants have failed to demonstrate entitlement to judgment as a matter of law on the Labor Law § 241[6] claim predicated on a violation of Industrial Code § 23-9.9[a]. Indeed, it is undisputed that Melvin was a person not trained or competent to operate the buggy. Defendants argue that they cannot be held liable under a theory of respondeat superior because Melvin was acting outside the scope of his employment. However, there is a triable issue of fact on this point. Melvin may have told plaintiff that he was "horsing around", but he testified at his deposition that he moved the buggy because it was in the middle of the road. Whether plaintiff was acting to further his employer's interests when he went to move the buggy is a question of fact for a jury to consider. Accordingly, the motion dismissing this claim is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion is granted only to the following extent:

[1] the Labor Law § 200 claim is severed and dismissed; and

[2] all claims against GCN are severed and dismissed; and

[3] the Labor Law § 241[6] claims premised upon violations of the Industrial Code except § 23-9.9[a] are severed and dismissed;

And it is further

ORDERED that the motion is otherwise denied

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/18/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.