

**Miller v Carp Constr. Corp.**

2013 NY Slip Op 32179(U)

September 16, 2013

Sup Ct, New York County

Docket Number: 104439/08

Judge: Jeffrey K. Oing

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING  
J.S.C.

PART 48

Index Number : 104439/2008  
MILLER, KEVIN  
vs  
CARP CONSTRUCTION  
Sequence Number : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*Mtn decided in accordance of the accompanying memorandum decision/order of the court.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
SEP 17 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/16/13

JEFFREY K. OING, J.S.C.  
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

OSUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

-----x

KEVIN MILLER and DEBORAH MILLER,

Plaintiff,

Index No.: 104439/08

-against-

Mtn Seq. No. 004

CARP CONSTRUCTION CORP.,

DECISION AND ORDER

Defendant.

**FILED**

SEP 17 2013\*

JEFFREY K. OING, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant, Carp Construction Corp. ("Carp"), moves, pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's, Kevin Miller, claims predicated on Labor Law §§ 240[1], 241[6], 200, and common-law negligence; and (2) dismissing plaintiff's, Deborah Miller, derivative loss of consortium claim.

Plaintiff, Kevin Miller, cross-moves for an order granting him partial summary judgment on his claims, supra, and for an order granting him leave to serve an amended bill of particulars in the form annexed to the cross-motion as Exhibit 5.

**Background**

Defendant Carp is a general contractor that works mainly in the areas of water mains, sewers, and sidewalk and street renovations. In February 2006, Carp entered into a contract with the New York City Department of Design and Construction ("NYCDDC") for the installation of water mains for new construction through Kings and Richmond Counties (the "project"). Carp subcontracted the entire project to Clemente Brothers

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Contracting Corp. ("Clemente Brothers"). Joseph Walsh was an engineer with Carp, and the only Carp employee involved with this project.

Plaintiff, Kevin Miller, was employed by the Clemente Brothers as a laborer. On the date of plaintiff's accident, June 19, 2006, plaintiff was working at the Brooklyn intersection of Bleecker and St. Nicholas Avenue. He received daily direction on the tasks he had to perform from Jeff Clemente, a principal of the Clemente Brothers. On the date of plaintiff's accident, Jeff Clemente directed plaintiff to flag traffic. Plaintiff flagged traffic for approximately two hours, and then Jeff Clemente directed plaintiff to help install pipe into a trench. This work was not the first time plaintiff had helped install a pipe.

According to plaintiff's EBT testimony, his injury occurred while new pipe was being put into a trench. Plaintiff's work involved assisting in the cutting of the pipe to get it ready to put in the trench. In order to cut the pipe, it had to be placed on wooden skids. The pipe was moved to the side of the trench with an excavator. Plaintiff testified that most of the time the pipe would be lifted by an excavator or a payloader onto the skids, but on the date of his injury the pipe was lifted manually because both the excavator and the payloader were in use. Jeff Clemente directed plaintiff and his co-worker, Chris Banghart ("Chris"), to move the pipe onto the skids. The pipe plaintiff

was working with had already been cut down to approximately nine feet, but needed to be cut down further. Plaintiff testified that sometimes the workers could almost roll the pipe onto the skid which sat three inches above street level. Plaintiff claims that Jeff Clemente directed the workers to get the skid under the pipe. When plaintiff and Chris tried to move the pipe, "Chris slipped, and [plaintiff] had the pipe and the weight of the pipe was all on [plaintiff] and [his] back snapped twice" (Miller EBT Tr. at p. 59).

### Discussion

#### Timeliness of Cross-motion

As an initial matter, I find plaintiff's cross-motion timely because the motion and cross-motion seek relief with respect to the same claims (Filannino v Triborough Bridge and Tunnel Authority, 34 AD3d 280 [1<sup>st</sup> Dept 2006]).

#### Leave to Amend Bill of Particulars

Plaintiffs commenced this action in March 2008. Plaintiffs served their verified bill of particulars on May 26, 2009, a supplemental verified bill of particulars on July 30, 2009, a second supplemental verified bill of particulars on August 3, 2009, and a third supplemental verified bill of particulars on January 6, 2010. Kevin Miller appeared for an EBT on January 14, 2010. Plaintiffs filed the note of issue and certificate of

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readiness on January 31, 2012. Plaintiffs now move for leave to serve an amended verified bill of particulars.

The proposed amended verified bill of particulars provides that defendant was negligent "in permitting hazardous and dangerous slipping hazards (hydraulic oil) on the job site; in failing to eliminate hazardous and dangerous slipping hazards (hydraulic oil) on the job site"; and seeks to add a claim under 12 NYCRR § 23-1.7(d) ("Slipping hazard") (Cross-motion, Ex. 5, ¶¶ 6, 7). Further, plaintiffs seek to amend paragraph 13 of the original bill of particulars by adding the following highlighted language: "[t]he accident occurred while plaintiff and co-worker were attempting to lift ductile iron pipe which was inadequately secured or supported, and started to drop, due to defendant's failure to provide proper equipment" and "started to drop **when plaintiff's co-worker slipped**, due to defendant's failure to provide proper equipment **and eliminate slipping hazards**" (Id., ¶ 13).

In his affidavit submitted in opposition to defendant's motion for summary judgment, plaintiff claims that he looked at the area where his co-worker was standing when he slipped and he saw that the street in that area was covered with hydraulic oil (Miller Aff., ¶ 34). Plaintiff goes on to assert in his affidavit that there was an excavator, backhoe, and pay loader at the project, and that the excavator had developed a bad leak that

leaked hydraulic oil all over the street when they started working at that location (Miller Aff., ¶ 10). Plaintiff claims that it created a serious slipping hazard while they were working in that area (Id.).

That branch of plaintiffs' motion for leave to amend the bill of particulars is denied. Plaintiffs' counsel claims that prior to filing the note of issue counsel's office inadvertently omitted referencing section 23-1.7(d) in the bill of particulars (Edwards Affirm., ¶ 57). Plaintiffs' explanation for failing to assert a claim pursuant to section 23-1.7(d) at this juncture in the litigation is unpersuasive. Plaintiffs waited four months after filing the note of issue and certificate of readiness, and over four years after commencing this action to move to amend the bill of particulars, which plaintiff has supplemented several times already. Furthermore, and interestingly, the cross-motion to amend to assert this section was made in response to defendant's summary judgment motion.

More importantly, the amendment plaintiffs are seeking constitutes a substantive change by adding a theory to case (see Cintron v New York City Transit Authority, 77 AD3d 410 [1<sup>st</sup> Dept 2010]). When there has been no mention of a hydraulic oil leak causing a dangerous condition at the site where plaintiff's accident occurred throughout the history of this litigation, to

now claim that such a dangerous condition existed would severely prejudice defendant in its defense of this action.

Additionally noteworthy is that at his EBT, plaintiff provided two different versions of how his accident occurred. At one point during his EBT, plaintiff testified as follows:

So they threw the pipe on top of the street. So we had to get a skid under the pipe and me and Chris went to lift the pipe and that's when it slipped from Chris.

(Miller EBT Tr., pp. 53-54 [emphasis added]). Later on, plaintiff testified:

Chris slipped, and I had the pipe and the weight of the pipe was all on me and my back snapped twice. I heard it.

(Id. at p. 58 [emphasis added]). Conspicuously absent from the record is Chris' EBT or his affidavit corroborating plaintiff's new factual allegations.

Accordingly, plaintiffs' cross-motion to amend the bill of particulars is denied.

#### **Labor Law § 240[1]**

To begin, in Kevin Miller's affidavit submitted in opposition to the motion and in support of the cross-motion, he newly claims that when his co-worker's feet slipped and he dropped the pipe to the ground, plaintiff's end of the pipe was caused to move to his right so that he was at the edge of where the trenches met (Miller Aff., ¶ 33). Further, plaintiff newly claims he had to jerk hard to his left to keep himself from



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falling into the trench and down onto the pipe at the bottom of the trenches (Id.). Such new factual allegations set forth in plaintiff's affidavit, and nowhere testified to at his EBT, to oppose defendant's summary judgment motion are insufficient to raise a factual issue, particularly given the absence of any corroborating EBT testimony or statement in affidavit form from Chris.

In any event, in looking at the events leading to plaintiff's injury as he testified to at his EBT, plaintiff's claim does not fall within the purview of Labor Law § 240[1]. Plaintiff was at ground level attempting to manually lift a heavy object, i.e., the pipe, to place the pipe on top of a skid that was three inches above ground level when he injured his back. Simply because plaintiff's injury was caused by the effects of gravity on the pipe, however, does not necessarily implicate the protections of section 240[1] (DeRosa v Bovis Lend Lease LMB, Inc., 96 AD3d 652 [1<sup>st</sup> Dept 2012]). In Runner v New York Stock Exchange, Inc., the Court of Appeals concluded that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (13 NY3d 599 [2009]). The facts of this case, however, do not involve a physically significant elevation differential.

Runner can further be distinguished by the fact that the Court of Appeals found that the injury in that case flowed directly from the effect of gravity on the object as it descended (13 NY3d 599, 604 [emphasis added]). In fact, the Court of Appeals in Runner emphasized that "the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path" (Id.).

Here, plaintiff was not injured while engaging in an act whereby the pipe was descending, or in the process of being lowered by plaintiff and his coworker. As such, contrary to plaintiff's argument, the events in this case leading to plaintiff's injury are simply not analogous to the facts of Runner.

Accordingly, plaintiff's claim does not fall within the purview of Labor Law § 240[1].

**Labor Law § 241[6]**

In the original verified bill of particulars, plaintiff alleged that defendant violated Industrial Code 12 NYCRR § 23-2.3(a) and (c). Section 23-2.3(a) involves "Placing of structural members" and section 23-2.3 (c) involves "Tag lines." Defendant argues that these provisions do not apply to this case because plaintiff was not dealing with structural steel assembly and was not attempting to hoist structural steel.

Plaintiffs not only fail to address defendant's arguments regarding the inapplicability of section 23-2.3(a) and (c), but also fail to address in any way their claim under this section. Accordingly, the Labor Law § 241[6] claim is dismissed.

**Labor Law § 200 and Common-Law Negligence**

Under section 200 and common-law negligence, a defendant can only be held liable for plaintiff's injury where the defendant exercised control or supervision over the work, and had actual or constructive notice of the purportedly unsafe condition (Alonzo v Safe Harbors of the Hudson Housing Development Fund Company, Inc., 104 AD3d 446 [1<sup>st</sup> Dept 2013]).

Here, nothing in this record indicates that defendant exercised any control or supervision over plaintiff's work, and plaintiff has not raised a factual issue in that regard. Plaintiff testified at his EBT that Jeff Clemente, plaintiff's employer, would tell all the workers what they were going to be doing on any given day, and other than an exchange of pleasantries, plaintiff never had any other conversation with Joseph Walsh, defendant's only personnel present at this project (Miller EBT Tr. at pp. 31, 40). On the day of plaintiff's injury Jeff Clemente directed plaintiff in his work concerning the pipe (Id., pp. 38-39, 41, 57). Further, Joseph Walsh testified at his EBT that Carp did not provide any supervision to Clemente

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Brothers, and that he never attended any of Clemente Brother's safety meetings (Walsh EBT Tr. at pp. 50, 59, 64).

Accordingly, it is

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that defendant's motion is granted in its entirety and the complaint is dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/16/13



HON. JEFFREY K. OING, J.S.C.

**FILED**  
SEP 17 2013  
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