Benway v Melcara Corp.
2013 NY Slip Op 32194(U)
September 12, 2013
Supreme Court, New York County
Docket Number: 111113/09
Judge: George J. Silver
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[* 1] SCANNED ON 9/18/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

BENWAY, ALFRED

- v -

MELCARA CORP., PRISMA CONSTRUCTION, INC. and INDANZA CONSTRUCTION, INC.

INDEX NO. 111113-09

MOTION DATE

MOTION SEQ. NO. 005

The following papers, numbered 1 to 7, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion— Affirmation — Affidavit(s) —Exhibits	No(s). 3
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 4, 5
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 6,7

FILED
SEP 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

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

In an action to recover for personal injuries allegedly sustained during an accident on a construction site, Defendants Melcara Corp. ("Melcara") and Prisma Construction Inc. ("Prisma") move for an Order pursuant to CPLR §3212, granting Defendants summary judgment and dismissing Plaintiff Alfred Benway's ("Plaintiff") claims. Plaintiff opposes the motion and cross moves for leave to supplement his Bill of Particulars, which Defendants oppose.

On March 18, 2009, Plaintiff, an employee of Department of Housing, Preservation, and Development ("HPD"), was tasked with inspecting the fireproofing at various HPD job sites, including a project at 310 W. 122nd Street, New York, New York ("the building"). Melcara was hired as the construction manager of the renovation and rehabilitation project at the building. Melcara hired Prisma as its general contractor, who hired Indanza Construction Inc. ("Indanza") as a subcontractor to complete work on demolition, sheet rock, framing, window installation, and tile work. While Plaintiff was at the premises during an inspection, he walked down the stairs between the third and fourth floors of the building and tripped on the height difference between the metal nosing and unsecured sheetrock on the stairs. Plaintiff fell forward, sustaining injuries.

In support of its motion, Defendants Melcara and Prisma argue that all claims against it under Labor Law §240(1) and §241(6) should be dismissed. Defendants argue that Labor Law §240(1) was enacted to protect workers using inadequate scaffolding, ladders, and hoists, where the employers failed to provide the workers proper protection. Plaintiff did not fall from an unsafe elevated mechanism like a scaffold, ladder, or hoist while performing work on a project. Rather, he tripped and fell on a permanent staircase and as such, the claim under Labor Law §240(1) should be dismissed. Defendants also argue that Plaintiff's claim under Labor Law §241(6) should be dismissed. In order to have a claim under Labor Law §241(6), Plaintiff must allege specific violations of the Commissioners regulations in the Industrial Code. Defendants argue that 12 NYCRR 23-1.7(d), which involves slipping on foreign substances, is not applicable. Based upon Plaintiff's own testimony, he does not claim that he slipped

1. Check one: .... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

on anything but rather claims he tripped on the stairwell. Further, Defendants argue that 12 NYCRR 23-1.7(e)(1) and (2) are not applicable to this case. 12 NYCRR 23-1.7(e)(2) is inapplicable where Plaintiff does not allege that he tripped as a result of dirt, debris, or scattered tools in the work area. 12 NYCRR 23-1.7(e)(1) concerns passageways being kept free from dirt and debris accumulation that could cause tripping. The sheetrock upon which Plaintiff allegedly tripped is an "integral part" of the work being performed and Plaintiff testified that his boot got caught on the raised nosing of the stair, not on any materials or debris on the stair case. As such, Plaintiff cannot maintain a cause of action 12 NYCRR 23-1.7(e)(1) or (2). Defendants also argue that Plaintiff's amended complaint alleges violations of 12 NYCRR 23-1.5, 23-1.7(f), and 23-2.1(b). 12 NYCRR 23-1.5 alone lacks the specificity required to support a cause of action under Labor Law §241(6) where it only addresses the general responsibility of employers. NYCRR 23-1.7(f) addresses the need for vertical passages at work sites and the absence of such passages is a violation of the regulation. There is no allegation in this case of the absence of a stairwell, making this regulation inapplicable. Lastly, 12 NYCRR 23-2.1(b) addresses disposal of debris, which is never alleged in Plaintiff's claim or in his testimony.

Lastly, Defendants argue that all claims against Melcara should be dismissed where, as a construction manager, it should not be considered an "owner" within the meaning of the Labor Law statutes. Defendants argue that Melcara can be held vicariously liable only where it had the ability/authority to control or supervise any activities on the job site, which Melcara contends it did not. Melcara's representative Demitrio Acot testified that Melcara had no employees on site at the premises and only had a representative visit the site a few times per week for a few minutes each visit and there is no testimony or evidence that Melcara had any control over the injury producing work on site. Further, for the same reasons, Melcara argues it also cannot be held liable under Labor Law §200.

In opposition, Plaintiff argues that there are issues of fact remaining in regards to Labor Law §241(6) and §200. Under his Labor Law §241(6) claim, Plaintiff argues that 12 NYCRR 23-1.7(e)(1) was violated where Plaintiff testified that he tripped on a height difference between the protective sheet rock placed on the stairs and a protruding metal nosing of nearly two inches. Additionally, the stair case was filled with loose and broken sheetrock and concrete stucco fragments. Further, since Prisma's witness William Douvas testified that the gap which caused the accident should not have been there, the gap cannot be said to have been integral to the work and as such, Defendants violated 12 NYCRR 23-1.7(e)(1). In further opposition, Plaintiff argues there are issues of fact as to who created the defect by placing the sheetrock on the stairs (between Indanza and Prisma) which caused Plaintiff's accident and as such, Defendants's motion for summary judgment on Labor Law §200 must be denied. Douvas, an employee of Primsa, testified that Indanza put down the sheetrock on the stairs. Jose Guzman, an employee of Indanza, denied this and testified that Prisma sent a former employee to place the sheetrock. Where each Defendant places blame on the other, neither claim should be dismissed by summary judgment. Plaintiff argues Melcara, as construction manager, should be found liable under Labor Law §200 where it had the power, pursuant to its contract with Prisma, to stop work in the event of a safety hazard. This authority is also exhibited in Melcara's contract with HPD. Lastly, Plaintiff argues Prisma, as general contractor, will be found liable under Labor Law §200 where it had the power to supervise or control all of the subcontractors, including the power to hire and fire.

Plaintiff cross moves for leave to amend its Bill of Particulars, where Plaintiff seeks to include a violation of 12 NYCRR 23-2.7(b) and (c) in its pleadings. Plaintiff alleges these sections were violated, where the raised nosing was a condition that caused tripping in a passageway. Further, Plaintiff argues that Defendants' use of sheet rock instead of temporary wooden treads on the stairs before they were filled with concrete could also cause tripping in a passageway and as such, is a violation of 12 NYCRR 23-2.7. Although this violation was not originally plead, it has been held repeatedly that failure to allege a specific violation of an Industrial Code is not necessarily fatal to the Labor Law §241(6) cause of action, especially where there is no unfair prejudice or surprise. Belated allegations of specific violations which involve no new factual allegations and raise no new theories of liability is allowable (*see generally*, *Kellier v. Supreme Industrial Park, LLC*, 293 A.D.2d 513 (2nd Dept. 2002); *Zuluga v.*

P.P.C. Const, LLC, 45 A.D.3d 479(1st Dept 2007)).

In opposition to Plaintiff's cross motion, Defendants argue that Plaintiff is seeking to amend/supplement its Bill of Particulars more than six months after the Note of Issue was filed and only in response to Defendants' Motion for Summary Judgment, with no explanation as to its delay. Defendants argue that the only time the Court will allow Plaintiff to amend its Bill of Particulars is when there is merit to the proposed amendment, which this application lacks. 12 NYCRR 23-2.7 concerns the placement and construction of temporary stairways but the stairway which Plaintiff allegedly tripped upon is permanent, albeit unfinished. Further, both William Douvas and Demitrio Acot testified that it is customary to use either sheetrock or plywood to temporarily fill the stairs before concrete is poured. Thus, Plaintiff's allegations that Defendants failed to use wooden treads is not in it of itself a violation of 12 NYCRR 23-2.7. Further, to the extent that Plaintiff seeks to include an OSHA violation, such a violation cannot serve as a predicate to liability under Labor Law §241(6).

Analysis

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) Defendants make their prima facie case for dismissal of Plaintiff's claim under Labor Law §240(1), where the statute, in relevant part, provides, "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." (*Howell v. Bethune W. Associates, LLC*, 33 Misc. 3d 1215(A), 941 N.Y.S.2d 538 (Sup. Ct. 2011)). "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" (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]) (*Id.*) Defendants provided evidence that the permanent stairwell which Plaintiff allegedly tripped is not covered under the statute, where the "Appellate Courts in this State have consistently held that a fall upon a permanently installed stairway does not fall under Labor Law § 240(1) even if the stairway is not yet completed." (*Lawrence v. HRH Const. Corp.*, 165 Misc. 2d 690, 693, 629 N.Y.S.2d 976, 978 (Sup. Ct. 1995))

Further, Defendants make their prima facie case for dismissal of Plaintiff's causes of action under Labor Law §241(6). "To recover on a cause of action alleging a Labor Law § 241(6) violation, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards...and that the Industrial Code provision is applicable to the facts of the case." (*Keller v. Kruger*, 39 Misc. 3d 720, 732, 961 N.Y.S.2d 876, 886 (Sup. Ct. 2013)). Defendants make their prima facie case to the purported Industrial Code violations: 12 NYCRR 23-1.7(d), 23-1.7(e), 23-1.5, 23-1.7(f), and 23-2.1(b), proving that each is inapplicable to the facts of this case.

Lastly, Defendant Melcara made its prima facie case under Labor Law §200 which provides, in relevant part, "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section." (N.Y. Lab. Law § 200 (McKinney)). "It is well settled that an implicit precondition to th[e] duty [to maintain a safe construction site] is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition'...General supervisory authority is insufficient to constitute supervisory control; it must be

demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work,* i.e., how the injury-producing work was performed." (*Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 306, 836 N.Y.S.2d 86, 88-89 (2007)) Therefore, issues of fact remain as to Melcara's ability to control the injury producing work.

However, Plaintiff raises issues of fact under Labor Law §241(6), where Plaintiff establishes that issues remain as to the size and place of the gap, the sheetrock and stucco that was left at the work site which caused Plaintiff to fall, and the exposed nosing, all of which caused a tripping hazard (a violation of 12 NYCRR 23-1.7(e)(1)). Further, under Labor Law §200, there remain issues of fact about Melcara's supervisory and authoritative role at the work site. There is an "overarching principle that liability under Labor Law § 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work. (*Hughes v. Tishman Const. Corp.,* 40 A.D.3d 305, 309, 836 N.Y.S.2d 86, 91 (2007)). There remain issues of fact as to Melcara's specific role and control over Plaintiff's work and as such, this question must be presented to a jury.

Plaintiff did not raise an issue of fact as to Labor Law §240(1), where it did not oppose Defendants motion under that cause of action and where, as referenced above, this case does not involve Defendants' failure to provide Plaintiff with proper protection from a height related device. Further, Plaintiff did not raise an issue of fact as to NYCRR 23-1.7(d), NYCRR 23-1.5, NYCRR 23-1.7(f), and NYCRR 23-2.1(b) where Plaintiff did not respond to Defendants' arguments. "Where a defendant...moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section." (*Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 475, 938 N.Y.S.2d 288, 289 (2012)).

Additionally, "while it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise [citation omitted], it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions...." *(Heller v. Louis Provenzano, Inc.,* 303 A.D.2d 20, 25, 756 N.Y.S.2d 26, 30 (2003) *citing Zabas v. Kard,* 194 A.D.2d 784, 599 N.Y.S.2d 832). Defendants do not raise the issue of prejudice in their opposition, only objecting that the delay is without good cause. With the assertion of an additional Industrial Code violation, no new facts or theories of liability are being alleged which would prejudice Defendants. Further, Plaintiff only needs to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.,* 40 A.D.3d 363, 366, 836 N.Y.S.2d 68 [2007])." (*MBIA Ins. Corp. v. Greystone & Co., Inc.,* 74 A.D.3d 499, 500, 901 N.Y.S.2d 522 (2010)). Where the proposed amendment was supported by the attorney's affirmation and references to Plaintiff's deposition testimony, the Court will grant Plaintiff leave to amend its complaint. *(See generally, MBIA)* Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiff's claim under Labor Law §240(1) and Labor Law §241(6) (as to NYCRR 23-1.7(d), NYCRR 23-1.5, NYCRR 23-1.7(f), and NYCRR 23-2.1(b)) is granted; and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's claims under Labor Law §200 and Labor Law §241(6)(only as to 12 NYCRR 23-1.7(e)(1)) is denied; and it is further

ORDERED that Plaintiff's cross motion for leave to amend and serve its Bill of Particulars is granted and the amended Bill of Particulars in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all

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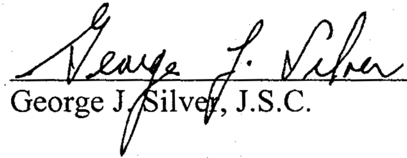
parties, within thirty (30) days of entry.

Dated: SEP 12 2013
New York County



George J. Silver, J.S.C.

GEORGE J. SILVER

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