Loja v Muss Brooklyn Dev. Corp.
2013 NY Slip Op 32502(U)
September 27, 2013
Supreme Court, Queens County
Docket Number: 7372/11
Judge: James J. Golia

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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GUSTAVO LOJA, Index No: 7372/11

Plaintiff(s), Motion Date: 05/15/13

-- against -- Cal. No: 65

MUSS BROOKLYN DEVELOPMENT CORP. N/K/A MQDC, INC., TISHMAN CONSTRUCTION CORP. OF NEW YORK AND FLUSHING TOWN CENTER III, L.P., Sequence No. 1

Defendant(s).

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The following papers numbered 1 to 36 were read on this motion by defendants for summary judgment pursuant to CPLR 3212 dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 19
Cross Motion, Answering Affirmations, Affidavits and Exhibits.....	20 - 31
Answering Affirmation, Affidavits and Exhibits.....	32 - 34
Reply Affirmation and Affidavit.....	35 - 36

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a labor law claim in which plaintiff alleges common-law negligence and violations of Labor Law §§ 200 and 241(6) (plaintiff's claim based Labor Law § 240(1) has been withdrawn).

Defendants move for an order dismissing the complaint and granting summary judgment pursuant to CPLR 3212. Defendant's argue that there are no triable issues of fact as to defendants' common-law negligence claim; that defendants lacked sufficient control over plaintiff's work to be liable pursuant to Labor Law §200; and that defendants did not violate the industrial codes section alleged by the plaintiff. Plaintiff cross moves for an

order granting partial summary judgment on his claims pursuant to Labor Law §241(6).

At the time of the incident, January 11, 2011, plaintiff was an employee of non-party Steven Dubner Landscaping ("Dubner"), Dubner was a subcontractor of defendant Muss Brooklyn Development Corp. n/k/a MQDC, Inc. ("Muss"), a real estate development company retained by the building owner, Flushing Town Center III, L.P. ("Flushing"), to provide construction management services at 40-22 College Point Boulevard, Flushing, New York (the "Premises") for a project called Sky View Center. Defendant Muss subsequently contracted with defendant Tishman Construction Corp. of New York ("Tishman") to take over the construction management for the Sky View Center project.

It is undisputed that on the date of the incident plaintiff was a laborer for Dubner and was working at the Premises on the Sky View Center project. On that day, January 11, 2011 plaintiff was directed to use an electric pallet jack to move pallets of soil from one location to another. This assignment required plaintiff to traverse a ramp that was made by employees of Dubner. It is undisputed that the ramp was made with insulation board which was then covered with plywood and that the plywood was overlapped with an approximate ½ inch differential. Plaintiff claims that at the time of the incident he was moving an electric pallet jack with pallets of soil up the ramp and was walking backward. Plaintiff claims that he tripped over a piece of the overlapped plywood, fell and the machine went over his foot.

Defendants argue that there are no triable issues of fact with respect to plaintiff's negligence claims because defendants did not have control over the means and methods used by Dubner and therefore, they cannot be held liable.

If an injury is caused by the manner in which a subcontractor performs its work, an owner or general contractor will be liable pursuant to Labor Law §200 only if it had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]; *Cook v Orchard Park Estates, Inc.*, 2010 NY Slip Op 3822, 2 (3d Dep't 2010))

Where a worker's injuries result from an unsafe or dangerous condition existing at a work site, rather than from the manner in which the work is being performed, the liability of a general contractor, and of an allegedly negligent subcontractor, depends

upon whether they had notice of the dangerous condition and control of the place where the injury occurred. (*Wolfe v KLR Mech., Inc.*, 35 AD3d 916, 918, 826 N.Y.S.2d 458 [2006]).

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]). 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 in admissible form to eliminate any material issues of fact from the case (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).

Although it is undisputed that employees of non-party Dubner built the subject ramp on which plaintiff allegedly fell, on the record before the court defendants have failed to establish, as a matter of law, that they had no control over Dubner's work activities.

Michael Cinamon, a construction manager, testified on behalf of Muss and Jonathan Crowe, a superintendent for Tishman testified on behalf of Tishman. Both Mr. Cinnamon and Mr. Crowe testified that they had no control over the work activities of the Dubner employees. However, Mr. Cinamon also testified that he was aware of contracts between Muss and Flushing, Muss and Dubner, a Lender's Construction Agreement and the Tishman Contract, but he was unfamiliar with any of the terms of the contract. Mr. Cinamon further testified that he visited the Project site and walked across the ramp on a daily basis. Mr. Crowe, also testified that he knew of, but never saw the contract between Muss and Tishman. Mr. Crowe also testified that he too walked across the ramp on a daily basis and that he did not consider the overlapping plywood to be an unsafe condition. Defendants failed to provide copies of the contracts governing the relationships between and the testimony of Mr. Cinnamon and Mr. Crowe is insufficient, but itself, to establish, as a matter of law, that defendants did not have any supervisory control over the work activities of Dubner. Moreover, Mr. Crowe admits actual knowledge of the overlapping plywood. Therefore, on the record before the court issues of fact exists and defendants are not entitled to summary judgment on plaintiff's claims for common-law or statutory negligence.

With respect to the branch of defendants' motion seeking to dismiss the cause of action based on Labor Law §241(6), that section imposes a non-delegable duty on owners and contractors to

provide reasonable and adequate protection and safety to workers (see *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code.

In this action plaintiff alleges that defendant violated 12 NYCRR 23-1.5, 23-1.7(b)(d)(e)(f), 23-1.15, 23-1.16, 23-1.16(a)(b), 23-1.17, 23-1.21, and 23-1.22(b)(1-4)(c)(1,2).

Based on the record before the court, the branch of defendants' motion seeking to dismiss plaintiff's causes of action based on Labor Law §241(6) is granted only to the extent that plaintiff's claims alleging violations of 12 NYCRR §§ 23-1.5, 23-1.7(b)(d)(f), 23-1.15, 23-1.16, 23-1.16(a)(b), 23-1.17, 23-1.21 and 23-1.22(b)(2),(4)and(c)(1),(2) are dismissed.

A violation of 12 NYCRR 23-1.5 does not provide a basis for liability under Labor Law § 241(6), as the provision merely sets forth a general safety standard (see Ferreira v Unico Serv. Corp., 262 AD2d 524, 525, 692 NYS2d 445 [1999]; Vernieri v Empire Realty Co., 219 AD2d 593, 598, 631 NYS2d 378 [1995]). Furthermore, on the facts as alleged in this action, 12 NYCRR §§ 23-1.7(b)(d)(f), 23-1.15, 23-1.16, 23-1.17, 23-1.21 and 23-1.22(b)(2)(4) and(c)(1),(2) are not applicable.

However, defendants have failed to establish, as a matter of law, that there were no violations of 12 NYCRR §§ 23-1.7(e) and 23-1.22(b)(1)(3).

Therefore, defendants motion for summary judgment is granted only to the extent that plaintiff's Labor Law 241(6) claim alleging violations of 12 NYCRR §§ 23-1.5, 23-1.7(b)(d)(f), 23-1.15, 23-1.16, 23-1.17, 23-1.21 and 23-1.22(b)(2)(4) are dismissed, all other claims survive this motion.

Turning now to plaintiff's cross motion for summary judgment on his Labor Law §241(6) claims, as determined above, plaintiff's Labor Law §241(6) claim alleging violations of 12 NYCRR §§ 23-1.5, 23-1.7(b)(d)(f), 23-1.15, 23-1.16, 23-1.16(a)(b), 23-1.17, 23-1.21 and 23-1.22(b)(2)(4) and (c)(1),(2) are dismissed. The remaining claims, based on alleged violations of 12 NYCRR §§ 23-1.7(e) and 23-1.22(b)(1)(3) survived defendants summary judgment motion.

In order to support a cause of action under Labor Law § 241 (6), the plaintiff must demonstrate that his injuries were

proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (Ross, 81 NY2d 494; Ares v State, 80 NY2d 959, 960, 605 N.E.2d 361, 590 N.Y.S.2d 874 [1992]; see also Adams v Glass Fab, 212 AD2d 972, 973, 624 N.Y.S.2d 705 [1995]).

On the record before the court the testimony of the defendant representatives establishes that the ramp on which plaintiff alleges he fell, was not constructed in accordance with 12 NYCRR 23-1.22(b)(3) and in fact was constructed to have overlapping plywood which created a tripping or other hazard (12 NYCRR §§ 23-1.7(e)). However, issues of fact exist as to whether plaintiff fell on the ramp as alleged, or on the rooftop as testified to by two non-party witnesses, therefore plaintiff has failed to demonstrate that his alleged injuries were proximately caused by a violation of an Industrial Code provision.

Accordingly, defendants motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law 241(6) claims alleging violations of 12 NYCRR §§ 23-1.5, 23-1.7(b)(d)(f), 23-1.15, 23-1.16, 23-1.16(a)(b), 23-1.17, 23-1.21 and 23-1.22(b)(2)(4). Plaintiff's cross motion is denied.

This constitutes the Order of the Court.

Dated: September 27, 2013

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JAMES J. GOLIA, J.S.C.