SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21

Justice

Index Number : 108879/2011
ZUKOWSKI, RYSZARD
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 108879/11

MOTION DATE 3/14/14

MOTION SEQ. NO. 002

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

Notice of Motion—Affirmation — Exhibits A-F —Affirmation of Service	No(s). 1-3
Affirmation in Opposition — Exhibits 1-2 —Affidavit of Service	No(s). 4-5
Reply Affirmation —Affidavit of Service	No(s). 6-7

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant City of New York is decided in accordance with the annexed memorandum decision and order.

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

FILED HON. MICHAEL D. STALLMAN

MAY 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/6/14
New York, New York

, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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RYSZARD ZUKOWSKI,

Plaintiff,

- against -

Index No. 108879/2011

METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK, MTA NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, LIGHTON INDUSTRIES, INC., and LIGHTON ELECTRIC, INC.,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff, an electrician, alleges that on, March 11, 2011, he fell of a ladder while installing electrical conduits at the ceiling the Amsterdam Bus Depot. Defendant City of New York now moves for summary judgment dismissing the complaint as against it, on the ground that it did not owe a duty to plaintiff because City was an out of possession landlord that did not control or maintain the premises.

BACKGROUND

The background allegations of this action were more fully set forth in the Court's prior decision and order dated February 24, 2014. According to the notice of claim, plaintiff "came into contact with other previously installed electrical

conduits that were charged with errant, live electrical current, causing [plaintiff] to suffer severe electrical shock to his arms, hands, and body, and to be knocked off the A-frame ladder upon which he was elevated." (Marville Affirm., Ex A.) The complaint asserts three causes of action: (1) for violations of Labor Law § 240 (1); (2) for violations of Labor Law § 241 (6); and (3) for violations of Labor Law §200 and common-law negligence. (Marville Affirm., Ex B.)

DISCUSSION

Defendant City of New York argues that it did not owe a duty to plaintiff. The City appears to contend that defendant Metropolitan Transportation Authority was the owner of the Amsterdam Bus Depot. In addition, the City argues that, "[a]ssuming arguendo the City is deemed the fee owner of the Amsterdam Depot at the time of the occurrence," the City would not be liable because the City was an out of possession landlord that did not control or maintain the premises. (Marville Affirm. ¶12.)

Because the Court of Appeals has described the duty imposed under Labor Law §§ 240 and 241 as "absolute", and thus different from the duty imposed under Labor Law § 200 and common-law negligence, the City's liability, if any, under these statutes must be analyzed separately.

Labor Law §§ 240 (1) and 241 (6)

"Labor Law § 240(1) imposes liability on contractors and owners for the existence of certain elevation-related hazards and the failure to provide an adequate safety device of the kind enumerated in the statute." (*Keenan v Simon Property Group, Inc.*, 106 AD3d 586, 588 [1st Dept 2013] [internal citations omitted].) Liability under Labor Law § 240 is "'absolute' in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work." (*Blake v Neighborhood Hous. Serv. of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003].) Labor Law § 241 (6) similarly imposes an "absolute", nondelegable duty upon owners and contractors. (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998].)

Here, plaintiff alleges that the City the owner of the premises where plaintiff was injured while performing construction work. (Marville Affirm, Ex B [Complaint ¶ 37].) The City appears to contend that defendant Metropolitan Transportation Authority was the owner of the Amsterdam Depot, because it cites the deposition testimony of Keith Summa, a construction manager employed by defendant New York City Transit Authority (NYCTA) in the Department of Capital Program Management, who was involved in the project at the Amsterdam Bus Depot. (Marville Affirm., Ex E [Summa EBT].) When asked "Do you know who actually

owns the real estate?", Summa answered, "The MTA."

The City has not demonstrated, as a matter of law, that the City was not a fee owner of the premises where plaintiff was allegedly injured. In their answer, the Metropolitan Transportation Authority and the NYCTA denied allegations that they owned Amsterdam Depot. (*See* Marville Affirm., Ex D.) The City did not produce any title records on this motion indicating that another entity was the fee owner of the Amsterdam Depot.

Therefore, summary judgment dismissing the complaint as against the City of New York on the ground that the City was not the fee owner of the premises where plaintiff was allegedly injured is denied.

Turning to the City's alternative argument, the Court of Appeals has repeatedly rejected the argument an an out of possession owner may not be held liable under Labor Law §§ 240 (1) and 241 (6).

> "In a trio of cases, we examined the liability of out-of-possession owners under the Labor Law. . . our precedents make clear that so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive—this is precisely what is meant by absolute or strict liability in this context. We have made perfectly plain that even the lack of 'any ability' on the owner's part to ensure compliance with the statute is legally irrelevant."

(*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339 [2008] [internal citations omitted].)

Citing *Abbatiello v Lancaster Studio Assoc.* (3 NY3d 46 [2004]), the City argues that its alleged status as an out of possession fee owner would be an insufficient nexus with plaintiff to support absolute liability under Labor Law §§ 240 (1) and 241 (6).

In *Abbatiello*, the Court of Appeals stated, "Common . . . to all cases imposing Labor Law § 240(1) liability on an out-of-possession owner—is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." (*Abbatiello*, 3 NY3d at 51.) Citing *Abbatiello*, the Court of Appeals later stated,

> "[W]e have consistently held that ownership of the premises where the accident occurred—standing alone—is not enough to impose liability under Labor Law § 241(6) where the property owner did not contract for the work resulting in the plaintiff's injuries; that is, ownership is a necessary condition, but not a sufficient one. Rather, we have insisted on 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest.'"

(*Morton v State*, 15 NY3d 50, 56 [2010].)

However, the City's reliance upon *Abbatiello* and its progeny is misplaced. Here, as plaintiff indicates, the alleged nexus between the City, as the alleged fee owner, and the plaintiff is a 1953 lease agreement between the City of New York and the NYCTA. (*See* Maryille Affirm., Ex F). Summa testified at his deposition that Lighton Industries, Inc. was a general contractor for the project at the Amsterdam

Depot, and that Greenpoint was an electrical subcontractor. (Summa EBT, at 10.) At his deposition, Summa was shown an AIA Document A401-2007, an agreement which appeared to be between Lighton Industries, Inc. and Greenpoint Electric, Inc., and the MTA New York City Transit. (Summa EBT, at 11.)

Thus, assuming arguendo, that the Amsterdam Depot was a transit facility that the City of New York leased to the NYCTA, the reasonable inferences to be drawn from Summa's deposition testimony the AIA agreement and is that the NYCTA apparently hired Lighton Industries, Inc. as the general contractor, and that Lighton Industries, Inc. apparently hired Greenpoint Electric, Inc., plaintiff's employer, as a subcontractor to perform electrical work. Such circumstances, if proven, would establish the requisite nexus between the City of New York, as the alleged fee owner, and the plaintiff.

Therefore, summary judgment dismissing the causes of action under Labor Law §§ 240 and 241 is denied.

Labor Law § 200

Unlike Labor Law §§ 240 (1) and 241 (6), Labor Law § 200, which codifies the common-law duty imposed upon an owner or general contractor to maintain a safe construction site, "does not impose vicarious liability on owners and general contractors." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 145-146 [1st

Dept 2012].)

> "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work."

(*Id.* at 144.) Here, it is not clear from the record whether plaintiff's theory of recovery under Labor Law § 200 is premised on either an allegedly defective or dangerous condition of the premises, or the manner and means of the electrical work he is performing, or both.

It cannot be concluded, as a matter of law, that the City lacked actual or constructive notice of an allegedly defective or dangerous condition, or that City did not exercised supervisory control over the plaintiff's work, based solely on the contention that the City was an out of possession owner. As the movant, the City bore the burden of demonstrating either lack of notice or lack of supervisory control of the plaintiff's work, which the City did not meet. Therefore, summary judgment dismissing plaintiff's cause of action under Labor Law § 200 and common-law negligence is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant City of New York is denied.

Dated: May 7, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. [illegible]

FILED

MAY 14 2014

COUNTY CLERK'S OFFICE
NEW YORK