Jedrysiak v City of New York
2014 NY Slip Op 33384(U)
December 1, 2014
Supreme Court, Queens County
Docket Number: 16843/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

SEBASTIAN JEDRYSIAK,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

Index No. 16843/12

Motion
Date September 17, 2014

Motion
Cal. No. 62

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant, The City of New York for summary judgment dismissing the plaintiff's Complaint against it pursuant to CPLR 3212 is hereby granted.

Plaintiff, Sebastian Jedrysiak, maintains that: on December 19, 2011, he was contracted by the defendant to install sidewalks in the area of Tyler Ave. and 59th Street, Queens, New York and he was at the site where wooden forms were being cut, and concrete was being poured for new sidewalks; he was cutting holes in the wooden forms to allow supporting rebar to be installed inside the forms before the actual concrete was poured into the forms; and when he was standing on the rebar cutting the holes, he slipped and fell on his back because the "rebar is very slippery." Plaintiff further maintains that he was caused to sustain serious personal injuries as a result of defendant's negligence. Plaintiff commenced this action alleging liability against defendant pursuant to Labor Law §§ 200, 240(1), and 241(6) and common law negligence.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate

as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]).

Plaintiff's Labor Law §240(1) claim.

Defendant established a prima facie case that plaintiff's claim under Labor Law § 240(1) must be granted as there are no triable issues of fact regarding this section. Labor Law §240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; see, Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Gasques v. State of New York, 59 AD3d 666 [2009]; Rau v. Bagels N Brunch, Inc., 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Ortega v. Puccia, 57 AD3d 54 [2008]; Riccio v. NHT Owners, LLC, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, Chlebowski v. Esber, 58 AD3d 662 [2009]; Rakowicz v. Fashion Inst. of Tech., 56 AD3d 747 [2008]; Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured" (Orner v. Port Authority, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (Salinas v. Barney Skansa Construction Co., 2 AD3d 619 [2d Dept 2003]).

Defendant maintains that plaintiff cannot prove that he was working at an elevated-height differential such that Labor Law § 240(1) would apply in this case. Defendant presents, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testified inter alia that he was standing with both feet on a rebar grid when he slipped on the rebar and fell onto the rebar grid, he did not fall to the ground, and he was a foot and a half above ground on the grid. Defendant established that the accident occurred on the same level at which plaintiff was working, and as such, Labor Law 240(1) was not implicated (see, Orner, supra; Salinas, supra).

In opposition, plaintiff "concedes that there is no supporting evidence to support a claim under Labor Law section 24(1)."

As the Court finds that there are no triable issues of fact as to whether defendant is liable under Labor Law § 240(1), summary judgment is granted to defendant on this branch of the motion.

Plaintiff's Labor Law § 200 and Common Law Negligence claim.

It is well settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see, Pirotta v. EklecCo., 292 AD2d 362 [2002]; Kobeszko v. Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v. Chemical Bank, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Damiani v. Federated Department Stores, Inc., 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work (Id.).

Defendant established a prima facie case that the plaintiff's claims under Labor Law § 200 must be dismissed. Defendant presents, inter alia, the examination before trial transcript testimony of the witness on behalf of defendant, project director, Kaushik Patel, who testified, inter alia, that:

his responsibilities on behalf of the defendant involved the general supervision of the site and general safety protocol. Accordingly, defendant established that the accident arose out of the means and methods of the work being performed by plaintiff and there is no evidence that it gave plaintiff any safety directives or directed, supervised, or controlled the injury producing work.

In opposition, plaintiff fails to raise a triable issue of fact. In opposition, plaintiff presents, inter alia, the examination before trial transcript testimony of Kaushik Patel, who testified, inter alia, that: he was on site every day or every other day, if he saw something unusual happening or some activity that was unsafe or failed to comply with safety protocols he would make sure the correct safety protocols were followed, and the contractor decides the means and methods. "Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. A defendant had the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (Ortega v. Puccia, 57 AD3d 54 [2d Dept 2008] [internal citations omitted]). In the instant case, there is insufficient proof to establish that defendant had the authority to control the manner or method by which plaintiff performed his work (see, Picchione v. Sweet Construction Corp., et al., 60 AD3d 510 [1st Dept 2009][wherein the Court held that "the fact that their employee had walked the construction site to monitor compliance with their alteration specifications, which contained virtually no directives regarding safety, constitutes general supervision insufficient to establish liability against an owner"].

Accordingly, that branch of defendant's motion for summary judgment dismissing the plaintiff's claims predicated upon common-law negligence and Labor Law § 200 is granted.

Plaintiff's Labor Law § 241(6) claim.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [NY 2005]; Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc., 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged

to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards", but rather must establish "concrete specifications" (see, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4th Dept 1996]).

Defendant has established a prima facie case that there are no triable issues of fact regarding a violation of Labor Law § 241(6). Defendant has established a prima facie case that there was no violation of § 23-2.2 or § 23-1.7 in the instant case, the two sections pled by plaintiff. Defendant established that § 23-2.2 involves the structural integrity and bracing of forms, shores and reshores, so as to maintain the position and shape of the forms during the placement of concrete. Defendant established that plaintiff's accident had nothing to do with the bracing of forms, shores, or reshores and the plaintiff did not allege that he was injured by the form. Defendant has also established a prima facie case that there was no violation of § 23-1.7. Defendant established that sections a, c, e, f, and g, and have no applicability in the instant case in that such sections deal with overhead hazards, falling hazards, drowning hazards, tripping hazards, vertical passage, air contaminated or oxygen deficient work areas, or corrosive substances. Additionally, defendant established that section 23-1.7[d] does not apply because this section only pertains to "slipping hazards caused by a 'foreign' substance' that makes a surface slippery" (Volchik v. Metropolitan Dev. Partners II, LLC, 2012 NY Slip Op 30179[U][Supt Ct., NY County 2012]) and the plaintiff testified that no foreign substance on the rebar grid caused him to fall and that it was the condition of the rebar itself that caused him to fall.

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff states that the only section that applies is 23-1.7[d]. Section 23-1.7[d] states in its entirety: "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing". Plaintiff testified that the rebar was very slippery, and that he fell because of the slippery condition of the rebar itself, not a foreign substance on the rebar. As

plaintiff did not fall due to a foreign substance, plaintiff has failed to raise a triable issue of fact.

Accordingly, defendant's motion for summary judgment on plaintiff's Labor Law § 241(6) claim is granted.

Accordingly, plaintiff's Complaint is dismissed in its entirety. As such, this Court need not rule on the discovery branches of the motion.

This constitutes the decision and order of the Court.

Dated: December 1, 2014

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Howard G. Lane, J.S.C.