Cilento v City of New York
2015 NY Slip Op 31138(U)
July 6, 2015
Supreme Court, Queens County
Docket Number: 4894/2012
Judge: Allan B. Weiss
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

DOMINIC CILENTO, x

Plaintiff,

-against-

THE CITY OF NEW YORK, BROOKMAN FIVE BORO CONSTRUCTION, LLC, BROOKMAN CONSTRUCTION CO. INC., EIC ASSOCIATES, INC., AND J & SAFETY CONSULTANTS,

Defendants.
x

Index Number 4894 2012

Motion Date April 21, 2015

Motion Seq. Nos. 3 & 4

The following papers numbered 1 to 17 read on these motions by defendants, J&S Safety Consultants, LLC (Seq. #3) and The City of New York (Seq. #4), both seeking summary judgment dismissing the plaintiff's complaint and cross-claims, pursuant to CPLR 3212.

		Papers Numbered
Mot.Seq#3	Notice of Motion - Affidavits - Exhibits	1 - 4
Mot.Seq#4	Notice of Motion - Affidavits - Exhibits	5 - 8
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	Memorandum of Law.....	11 - 12
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	Reply Affidavit.....	16 - 17

Upon the foregoing papers, it is ordered that defendants, J&S Safety Consultants, LLC (J&S) and The City of New York's (City) motions, both for summary judgment seeking to dismiss the complaints against them, pursuant to CPLR 3212, are determined as follows:

Plaintiff, a dock builder employed by nonparty, Prismatic Development Corporation (Prismatic) allegedly sustained serious personal injuries while working at a renovation project at the North Shore Transfer Station, located at 120-16 31st Avenue, College Point, New York, on November 1, 2011. Defendant, City, was the owner of the premises, and defendant, J&S, was a subcontractor hired by Prismatic, the general contractor retained by City for the renovation project at the job site. Plaintiff alleges he was caused to trip and fall over a piece of

"rebar debris" left in an unlighted passageway at the job site, due to the negligence of defendants, F&S and the City. Moving defendants seek summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212, which complaint claims violations of Labor Law §§ 200 and 241, and common-law negligence.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*,, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

To establish liability for a violation of Labor Law § 200, which is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe place to work (*see Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 [1998]; *Nicoletti v Iracane*, 122 AD3d 811 [2014]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2013]), plaintiff-worker must establish either that defendants-owners/contractors had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Walls v Turner Const. Co.*, 4 NY3d 861 [2005]; *Klimowicz v Powell Cove Associates, LLC*, 111 AD3d 605 [2013]), or that the owner/general contractor created the condition or had actual or constructive notice of the dangerous condition in time to correct it and failed to do so (*see DiMaggio c Cataletto* 117 AD3d 974 [2014]; *Reyes v Arco Wentworth Management Corp.,* 83 AD3d 47 [2011]; *Ortega v*

Puccia, 57 AD3d 54 [2008]).

In the case at bar, defendant-owner, City, has failed to demonstrate *prima facie* that it did not have constructive notice of the conditions inside the passageway area where the accident occurred, or that it did not have the authority to enforce safety standards within said area, (*see Costa v Sterling Equipment, Inc.*, 123 AD3d 649 [2014]; *Baumann v Town of Islip*, 120 AD3d 603 [2014]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2013]; *Allan v DHL*, 99 AD3d 828 [2012]). The evidence presented showed that the City not only had the benefits of the daily safety reports, noting the dangerous conditions, which were prepared by J&S, and supplied to it by its general contractor, Prismatic, but the City's project manager, Antoine Cheiban, both visited the job site and reviewed such safety reports on a regular basis. Further, the City had the authority to control the work being performed at its premises, as, being the owner, it "bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). Movant, J&S, however, has demonstrated, *prima facie*, its right to dismissal of the cause of action based on liability under Labor Law § 200. J&S has shown that it did not control the work being performed or have the authority to demand that proper safety methods be practiced. J&S's limited duty to observe the work and report safety findings does not amount to control and supervision of the work being performed (*see Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]; *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828). "The right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations .. is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]; *see Torres v City of New York*, 127 AD3d 1163 [2015]).

Plaintiff's opposition herein failed to produce sufficient evidence to create a genuine issue of fact concerning whether defendant, J&S, had, or exercised, control over the plaintiff's work on the day of his accident, or had authority to rectify such allegedly defective condition. Absent such control, liability will not arise under Labor Law § 200 *(see Russin v. Picciano & Son*, supra; *Pope v Safety & Quality Plus, Inc.,* 111 AD3d 911 [2013]; *White v Village of Port Chester*, 92 AD3d 872 [2012]).

Both motions also seek dismissal of plaintiff's causes of action based on Labor Law § 241 (6), which imposes a nondelegable duty of reasonable care on owners, contractors and their agents to maintain the actual construction site, and the passageways workers must traverse to get to the construction site, in safe condition (*see Linkowski v City of New York,* 33 AD3d 971 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626 [2005]). In the case at bar, to prevail under this section, plaintiff must establish that defendants' violation of a "specific, positive command" of the Industrial Code was a proximate cause of plaintiff's accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504 [1993]). The sections, 23-1.7(d) and (e), 23-1.30, and 23-2.1(b), set forth specific, rather than general, safety standards, and are sufficient to support a Labor Law § 241 (6) claim (*see Doto v Astoria Energy II, LLC*, --- N.Y.S---, 2015 WL 3480876 9 [N.Y.A.D. 2015]). The ultimate responsibility for safety

practices at building construction jobs lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). Thus, the City, being the owner of the subject property, has a nondelegable duty toward safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of the City (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]). The City's contention that a claim under 12 NYCRR 23-1.7 (d) and/or (e) is improper herein because the "rebar debris", which allegedly caused plaintiff's accident, was an "integral part of the work" being performed, is unavailing. To qualify as being "an integral part of the work," the material that caused the accident must have been used and left there as a result of plaintiff's work (*see Salinas v Barney Skanska Const. Co.*, 2 AD3d 619 [2003] "the plaintiff testified that he tripped over demolition debris created by him and his coworkers" [at 622]; *Kowalik v Lipschutz*, 81 AD3d 782 [2011]; *Lech v Castle Village Owners Corp.*, 79 AD3d 819 [2010]). The evidence herein does not support that factual circumstance.

Defendant, City, submitted an affidavit of a mechanical engineer "specializing in construction and workplace safety" in support of the branch of the instant motion seeking to dismiss the alleged violations of Labor Law § 241 (6) with regard to Industrial Code § 23-1.30 and certain OSHA sections, all pertaining to workplace lighting conditions. The name of such expert was not exchanged pursuant to plaintiff's CPLR 3101 demand, or prior to the filing of the note of issue in this matter. The failure to disclose expert information prior to the filing of the note of issue, and revealing such expert for the first time in support of a summary judgment motion, warrants preclusion of such report for the purpose of the motion, if no good cause is demonstrated for the failure to disclose, and the other party is prejudiced by the late disclosure (*see Koslowski v Oana,* 102 AD3d 751 [2013]; *Rivers v Birnbaum*, 102 AD3d 26 [2012]; *Kopeloff v Arctic Cat, Inc.*, 84 AD3d 890 [2011]). Plaintiff objects to the report on those grounds. Consequently, the expert report of Brian L. Mills, sworn to on February 5, 2015, will be precluded, and will not be considered on this motion.

With regard to defendant, J&S, the evidence presented established that J&S, a subcontractor, did not exercise control over plaintiff's work and did not have the authority to make changes in the work production or in correcting conditions in the workplace in the name of safety. Consequently, J&S has shown, *prima facie*, it was not an agent of the City under the Labor Law, and owed no duty to plaintiff (*see Walls v Turner Const. Co.*, 4 NY3d 861; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796 [2014]). Plaintiff, in opposition, has failed to raise a triable issue of fact. As such, the branch of J&S's motion seeking summary judgment dismissing the cause of action asserted against it based upon violation of Labor Law § 241 (6) is granted.

The branches of J&S's motion seeking to dismiss the breach of contract and indemnity claims against it are granted. The indemnification language of the purchase order contemplates indemnification only if plaintiff's accident was caused by any act or breach of a statutory duty by J&S, or arose from the work performed by J&S according to the purchase order. No party has demonstrated that anything J&S did, or failed to do, caused, or contributed to, plaintiff's

accident, so no obligation to indemnify is present here. Further, the breach of contract claim against J&S for failing to procure insurance must fall, as the subject purchase order fails to mention additional insurance coverage, so no breach could have occurred (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840 [2014]; *Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964 [2012]; *140 Broadway Property v Schindler Elevator Co.*, 73 AD3d 717 [2010]).

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the motion by defendant, City, for summary judgment dismissing plaintiff's claims, pursuant to Labor Law §§ 241 (6), 200 and common-law negligence, is denied.

The motion by defendant, J&S, seeking summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against it , is granted in its entirety.

Dated: July 6, 2015

J.S.C.