Gordon v City of New York
2016 NY Slip Op 30604(U)
April 8, 2016
Supreme Court, New York County
Docket Number: 155715/2012
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7

GARY GORDON and VINESSA GORDON also known as VANESSA GORDON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, and LONG ISLAND RAILROAD,

Defendants.

Index No.: 155715/2012
DECISION/ORDER
Motion Seq. No. 002 and 003

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion for partial summary judgment, defendant Metropolitan Transportation Authority's ("MTA") cross-motion for partial summary judgment and the City of New York's ("City") and Long Island Rail Road's ("LIRR") motions for summary judgment.

Papers	**Numbered**
Plaintiffs' Notice of Motion	1
Defendant MTA's Notice of Cross-Motion	2
Defendants NYC's and LIRR's Notice of Motion	3
Plaintiffs' Affirmation in Opposition	4
Defendants' Affirmation in Reply	5

Segan, Nemerov, & Singer, P.C. (Jeffrey A. Nemerov of counsel), for plaintiffs.
Fabiani Cohen and Hall, LLP (William C. Lamboley of counsel), for defendants.

Gerald Lebovits, J.

These motions and the cross-motion, initially argued on April 1, 2015, before another judge, were assigned to this court in March 2016. Motion sequences 2 and 3 are consolidated for disposition.

Upon the foregoing papers, it is ordered that motion sequence 2 is denied and motion sequence 3 is granted.

Plaintiff Gary Gordon commenced this action against defendants seeking damages for injuries he suffered while working as an electrician on the East Side Access construction project. Gordon asserts violations of Labor Law § 200, Labor Law § 240 (1), and Labor Law § 241 (6). Vinessa Gordon, also known as Vanessa Gordon, asserts a claim for the deprivation of comfort, care, companionship, and society of her husband. Plaintiffs move for partial summary judgment

on their Labor Law § 240 claim. Defendant MTA cross-moves for partial summary judgment on the same claim. Defendants LIRR and City move for summary judgment.

Summary judgment is proper when no genuine issue of material fact is in dispute to require a trial. (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant has the burden to establish that no issues of material fact exist. (*Id.*) A party opposing summary judgment must demonstrate by admissible evidence that factual issues require a trial. (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 164 [1990].)

A. LIRR's and City's Motion for Summary Judgment

The court addresses defendants LIRR's and City's summary-judgment motion because it deals with a threshold issue and because it is dispositive of some of the issues.

The threshold question is whether the City and LIRR are proper Labor Law defendants.[1] The Labor Law places the responsibility for safety at construction sites on owners and general contractors. (*See Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006].) The City and LIRR can be liable under the Labor Law only if they were owners of the premises or had the right to control the work where Gordon was injured.

Defendant City submits the affidavit of Christopher Dickerson, Senior Insurance Claims Specialist with the New York City Law Department. (Aff of Dickerson at 1.) Dickerson states that the City was not the owner of the relevant premises on the date of Gordon's accident. (Aff of Dickerson at 1.) Dickerson also states that the City did not control the work that took place on those premises. (Aff of Dickerson at 2.) Defendant LIRR submits the affidavit of Roberta Pedersen, an LIRR attorney. (Aff of Pedersen at 1.) Pedersen states that LIRR was not the owner of the relevant premises on the date of Gordon's accident. (Aff of Pedersen at 1.) Pedersen also states that LIRR did not control the work that took place on those premises. (Aff of Pedersen at 2.)

In opposition, plaintiffs submit documents that they purport contest LIRR's ownership of the relevant premises and LIRR's right to control the work at the construction site. (Plaintiffs' Affirmation in Opposition, Exhibit 1, Contract CM019, at § 1160, ¶ 3.05 [A] [10]; Plaintiffs' Affirmation in Opposition, Exhibit 3, Revised Contract Modification No. 1, at 23 ¶ 12.) Plaintiffs refer to Exhibit 1 at § 1160 ¶ 3.05 [A] [10], which shows that LIRR has the right to control certain construction operations. Plaintiffs also refer to Exhibit 3, page 23, which defines LIRR as an owner under an insurance definition subsection.

On page 16 of their Affirmation in Opposition, plaintiffs state that their exhibits are "replete with references to Long Island Rail Road." Although the exhibits refer to LIRR, the exhibits do not contradict Pedersen's affidavit. Exhibits 1 and 3, referenced above, lack any context. And they consist of approximately 20 lines in two contracts, one of which exceeds a thousand pages. From these 20 lines, plaintiffs argue in a conclusory manner that these lines somehow establish ownership and control. Plaintiffs assert that because the 20 lines provide that

[1] MTA has not contested whether it is a proper Labor Law defendant.

"owner means LIRR," LIRR owns the property where Gordon was injured. But the exhibits do not define what property LIRR owns.

Furthermore, the court does not have a final or complete version of the contracts in the cited exhibits. The Exhibit 1 contract is book 3 of 5 and volume 1 of 2. The exhibits look like draft contracts and not final versions. They contain edits and strikeouts.

Pedersen states in her affidavit that LIRR does not own the relevant premises or control the work that took place there. Plaintiffs' best arguments on LIRR's ownership are conclusory and weakly supported by exhibits that lack context. The exhibits appear to be draft versions that are not final or complete. Thus, plaintiffs did not properly dispute LIRR's ownership, and LIRR's summary-judgment motion is granted.

Because plaintiffs did not contradict the City's evidence that it did not own the premises or control the work performed there, the City's summary-judgment motion is granted.

B. Plaintiffs' Motion for Summary Judgment and Defendant MTA's Cross-Motion for Summary Judgment

At Gordon's examination before trial ("EBT"), he testified that while working as an electrician he was injured when the ladder he was on fell as he was reaching for a light. (Defendant's Notice of Cross-Motion, Exhibit E, Gordon EBT transcript, at 108 ln 18-25, at 125 ln 3-9; Defendant's Notice of Cross-Motion, Exhibit E, Gordon EBT transcript, at 106 ln 10-11.) According to Uri, a worksite supervisor, the floor of the worksite was covered in "muck."[2] (Defendant's Notice of Cross-Motion, Exhibit G, Uri Transcript, at 38 ln 11-25.) According to Gordon, his co-worker might have been holding the ladder at the time the ladder fell. (Defendant's Cross-Motion, Exhibit E, Gordon Transcript, at 95 ln 21-25.) Gordon asserts that if the ladder were tied off at the top, he and the ladder would not have fallen. Defendant MTA concedes that ladder tie offs, which are safety devices, were not provided because they could not be fastened to the wall at this particular site. (Plaintiffs' Notice of Motion, Exhibit 3, Uri EBT transcript, at 55 ln 14-25.) The record indicates that rubber shoes, which are meant to prevent the ladder from slipping, might have been provided. (Plaintiffs' Notice of Motion, Exhibit 3, Uri EBT transcript, at 52 ln 8-11.)

Plaintiffs argue that because the ladder was placed in "muck" and because the ladder was not tied off, the ladder was placed improperly and caused Gordon's fall. MTA argues that Gordon's conduct was the sole proximate cause of his accident: Gordon placed the ladder in muck; the ladder was equipped with rubber shoes; the ladder was held by a co-worker; and Gordon reached for a light while on the ladder.

Neither party has met its burden of establishing its entitlement to summary judgment. Material issues of fact exist. Whether the ladder was properly placed and secured is unclear. The

[2] "Muck" is pulverized rock after it has been exploded, drilled, or removed by mechanical means. (Defendant's Notice of Cross-Motion, Exhibit G, Uri Transcript, at 38 ln 20-25.)

court cannot resolve the Labor Law § 240 issue as a matter of law at this summary-judgment phase based on the submitted evidence.

ORDERED that plaintiffs' CPLR 3212 motion to dismiss the Labor Law § 240 claim (motion sequence 2) is denied, and it is further,

ORDERED that defendant MTA's CPLR 3212 cross-motion to dismiss the Labor Law § 240 claim (motion sequence 2) is denied, and it is further,

ORDERED that defendant LIRR's CPLR 3212 motion for summary judgment (motion sequence 3) is granted. The complaint as to defendant LIRR is hereby dismissed, and it is further,

ORDERED that counsel for defendant LIRR is directed to serve a copy of this order with notice of entry upon the plaintiffs and the Clerk of the Court, who is directed to enter judgment accordingly, and it is further,

ORDERED that defendant City's CPLR 3212 motion for summary judgment (motion sequence 3) is granted. The complaint as to defendant City is hereby dismissed, and it is further,

ORDERED that counsel for defendant City is directed to serve a copy of this order with notice of entry upon the plaintiffs and the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: April 8, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.