

Gjeka v Iron Horse Transp., Inc.
2016 NY Slip Op 31368(U)
June 21, 2016
Supreme Court, Bronx County
Docket Number: 304692/2012
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX IA 20 X
 MARTIN GJEKA and DRITE GJEKA

Index No: 304692/2012

Plaintiffs,

-against-

IRON HORSE TRANSPORT, INC., MICHAEL BUSCH,
 RE-STEEL SUPPLY COMPANY, INC. and 108-110 EAST
 116TH STREET LLC,

Defendants X

IRON HORSE TRANSPORT, INC., and MICHAEL
 BUSCH,

DECISION AND ORDER

Present:

HON. KENNETH L. THOMPSON, JR.

Third Party Index No: 83940/2013

Third -Party Plaintiffs,

-against-

108-110 EAST 116TH STREET LLC, RICKY & SONS
 CONSTRUCTION CORP., KULJIT KAUR and JUNIOR
 CARTHER MECHANICAL CORP.,

Third-Party Defendants

X

The following papers numbered 1 to 5 read on this motion for summary judgment

No	On Calendar of April 4, 2016	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1, 6	
Answering Affidavit and Exhibits-----	3, 4	
Replying Affidavit and Exhibits-----	5	
Affidavit-----		
Pleadings -- Exhibit-----		
Memorandum of Law-----	2	
Stipulation -- Referee's Report --Minutes-----		
Filed papers-----		

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant/third-party defendant, 108-110 East 116th Street LLC, (LLC), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and third-party complaint as against it. Plaintiffs move pursuant to CPLR 3212 for summary judgment on liability, pursuant to Labor Law 240(1) and 241(6) as against LLC, and moves to supplement their bill of particulars to include Industrial Code sections 12 NYCRR 23-1.7(b)(1) and 23-4.2(h).

Preliminarily, the cross-motion is timely. "A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion (*Fahrenholz v Security Mut. Ins. Co.*, 32 AD3d 1326, 1328 [2006]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2005]; see *Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [2006])." *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 [1st Dept 2006]).

This action arose as a result of personal injuries sustained by plaintiff, Martin Gjeka, (Gjeka), while employed by non-party Express Plumbing Inc. There is testimony that Gjeka was directing traffic around an open trench in which Express was installing plumbing, while the testimony of the truck driver, defendant, Michael Busch, identified a man standing close to the trench. Plaintiff testified that the open trench was being excavated at the time plaintiff was struck by a tractor trailer as he was running away from the truck. After being struck by the truck plaintiff fell into the open trench.

LABOR LAW 200/COMMON LAW NEGLIGENCE

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.

(*Comes v. New York State Electric and Gas Corp.*, 82 N.Y.2d 876, 877 [1993]) (citations omitted).

LLC established its *prima facie* entitlement for summary judgment, dismissing the Labor Law 200 claim as against them with the testimony of its representative at the site, Angel Perez, (Perez). Perez explicitly testified that he did not comment and was not allowed to comment on any safety issues with respect to the work performed in the roadway. (Transcript, p. 43-44). The

fact that Perez did intervene twice with respect to safety issues in the renovations performed in the building adjacent to the roadway, did not mean that LLC had any supervisory control over the work in the roadway. (*Artiga v Century Management Co.*, 303 AD2d 280 [1st Dept 2003]).

Accordingly, LLC's motion is granted to the extent that the Labor Law 200 and common law negligence claims are dismissed.

LABOR LAW 240(1)

Plaintiff submitted expert testimony that a protective barrier could have been placed on the west side of the trench since the dirt that was excavated from the trench was being placed on the east side of the trench. Under both versions of plaintiff's position prior to being struck by the truck, plaintiff stood to the west of the trench and therefore, it was possible to provide protection to plaintiff from falling into the trench without interfering with the work. The precedent cited by LLC, *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134 [2011], is inapposite. *Salazar* held that "it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete." *Id.* at 140. As stated above, in the case at bar, protection could have been provided without defeating the purpose of the work.

The facts of this case are similar to *Dias v. City of New York*, 110 A.D.3d 577 [1st Dept 2013], in which a worker fell into a trench while directing the movement of a truck. "Although plaintiff's coworker's affidavit stated that plaintiff was directing the backfill truck to the water main trench before he fell into the trench, section 240 (1) was violated under either version of the accident (see *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010])." *Dias v. City of New York*, 110 A.D.3d 577 [1st Dept 2013].

Accordingly, with respect to Labor Law 240(1) plaintiff's cross-motion is granted and LLC's motion is denied.

LABOR LAW 241(6)

Plaintiffs' cross-move to amend their bill of particulars to include two industrial code sections in support of their Labor Law 241(6) claims. The "plaintiff's belated identification of these [industrial code] sections entails no new factual allegations, raises no new theories of liability, and results in no prejudice to the defendant. Hence, leave to amend the bill of particulars should have been granted. (See *Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560 [2010].) " (*Harris v City of New York*, 83 A.D.3d 104, 111 [1st Dept 2011]).

[F]or purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the "[g]eneral descriptive terms" set forth and defined in 12NYCRR 12-1.4 (a). The former give rise to a nondelegable duty, while the latter do not. Since the regulation on which plaintiff relies falls into the latter category, he cannot benefit from the reduced burden of proof applicable to causes of action asserted under Labor Law § 241 (6).

Ross v Curtis-Palmer 8 NY 2d 494 (1994).

The proposed industrial code amendments to the bill of particulars provide as follows: Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(b)(1).

Any open excavation adjacent to a sidewalk, street, highway or other area lawfully frequented by any person shall be effectively guarded. Such guarding shall consist of a substantial fence or

barricade. As an alternative, such guarding may consist of an extension of the sheeting above the ground surface adjacent to the excavation to a height of at least 42 inches above such adjacent street, highway or other area lawfully frequented by any person. In lieu of such guarding, protection may be afforded by a substantial covering installed over such excavation. Such covering shall consist of planking at least two inches thick full size, properly supported exterior grade plywood at least three-quarters inch thick or material of equivalent strength. Where it is possible that the movement of vehicles or other heavy equipment will take place over such covering, the covering shall be of sufficient strength to withstand such loading without structural failure of the covering or of the support system.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-4.2(h).

Both of the proposed amendments to plaintiff's bill of particulars are specific and relevant to the facts of this action and therefore that branch of plaintiffs' motion that seeks to amend the bill of particulars is hereby granted.

As was noted in the above Labor Law 240(1) section of this decision, a protective barrier could have been placed on the west side of the trench since the dirt that was excavated from the trench was being placed on the east side of the trench. Under both versions of plaintiff's position prior to being struck by the truck, plaintiff stood to the west of the trench and therefore, it was possible to provide protection to plaintiff from falling into the trench without interfering with the work.

Accordingly, plaintiffs' cross-motion is granted to the extent that plaintiffs are granted leave to supplement their bill of particulars and LLC is liable to plaintiffs for violation of Labor Law 241(6). That branch of LLC's motion that seeks dismissal of the Labor Law 241(6) claim is

denied.

INDEMNIFICATION

Defendants, Iron Horse, (Horse), and Michael Busch, (Busch), seek, *inter alia*, indemnification from LLC in the third-party complaint.

To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d at 377-378; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]).

Naughton v. City of New York, 94 A.D.3d 1, 10 [1st Dept 2012]).

LLC was neither negligent nor actually supervised Gjeka's work in the roadway.

Accordingly, that branch of LLC's motion that seeks dismissal of the cause of action for indemnification in the third-party complaint is hereby granted.

CONCLUSION

That branch of LLC's motion that seeks dismissal of the Labor Law 200 and common law negligence claims is granted and that branch of LLC's motion that seeks dismissal of the cause of action for indemnification in the third-party complaint is hereby granted. Those branches of LLC's motion that seek dismissal of Labor Law 240(1) and Labor Law 241(6) are denied. Plaintiff's cross-motion is granted.

The foregoing shall constitute the decision and order of the Court.

Dated: JUN 21 2016


KENNETH L. THOMPSON JR. J.S.C.