SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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EUGENE CROSS,

Plaintiff,

-against-

NOBLE ELLENBURG WINDPARK LLC, THOMAS BELLEMARE, LTD, and NOBLE ELLENBERG CONSTRUCTORS, LLC,

Defendants.

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Index No.: 114988/07
Motion Seq. No. 012

DECISION and ORDER

DEBRA A. JAMES, J.S.C.:

In this Labor Law case involving an ironworker who fell from ladder rungs affixed to the side of a trailer, defendant Thomas Bellemare, LTD (Bellemare) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims as against it.

Defendants Noble Ellenburg Windpark LLC (Noble Windpark) and Noble Ellenberg Constructors, LLC (Noble Constructors) (together, the Noble defendants) move for summary judgment dismissing all claims and cross claims against them, but fashion their motion as a cross motion.

Plaintiff also cross-moves for summary judgment as to liability on his Labor Law § 240 (1) claim.

The preliminary conference order in this action, directs that dispositive motions must be made pursuant to CPLR 3212(a), which provides, in pertinent part, that "such motion shall be

made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." The note of issue in this case was filed on February 18, 2015, and therefore the deadline for service of motions for summary judgment was June 19, 2015. On that basis, plaintiff's cross motion for summary judgment in its favor and against the Noble defendants, having been served on July 31, 2015, is untimely. It is a well established rule that a late cross motion for dispositive relief may be entertained when the issues raised are "nearly identical" to those raised by a timely a motion (Guallpa v Leon D. DeMatteis Constr. Corp., 121 AD3d 416, 419 [1st Dept 2014] [internal quotation marks and citation omitted]). However, this rule does not apply to improperly labeled cross motions (see Kershaw v Hospital for Special Surgery, 114 AD3d 75, 88 [1st Dept 2013] [holding that "a cross motion is an improper vehicle for seeking relief from a nonmoving party"]).

Here, plaintiff cross-moves for summary judgment against the Noble defendants, and not for summary judgment in his favor against Bellemare. As plaintiff cross-moves for relief against a nonmoving party, and he offers no good cause for relief, his cross motion is untimely and must be denied on that procedural basis, without reaching the merits.

The motion for summary judgment of the Noble defendants was

served timely on May 26, 2016 and will be decided on the merits.

On October 1, 2007, the day of his accident, plaintiff Eugene Cross was working for nonparty Aristeo Rigging & Erectors (Aristeo) as an ironworker on the construction of a wind farm, Noble Ellenberg Windpark, located in Ellenberg, New York, which is in the state's most northeastern county, Clinton. Plaintiff was engaged in the process of unloading the base section of a wind turbine from the back of a trailer used to haul it to the cite. The trailer was manufactured by nonparty Temisko, a company that makes specialized vehicles for hauling large cargo, such as wind turbines. What the court has referred to as a trailer, plaintiff and the industry call a "snobble," which plaintiff defined as "[t]he back of the truck".
Plaintiff, along with other Aristeo workers, would remove a tarp from the turbine base, put dunnage beneath it, then affix three lifting lugs to it, one at the front and two at the back; then two cranes, each with hooks that fit into the lifting lugs, pull the turbine base off the snobble. In this instance, plaintiff, as he commonly did, used a ladder, consisting of metal rungs welded to the side of the truck, to get up into and down from the snobble. Immediately prior to his accident, plaintiff, along with his colleague, Jamie Norton (Norton), had finished attaching one of the lifting lugs to the turbine base. Plaintiff, who had

been standing on the top rung of the snobble ladder while performing the lifting-lug installation, began to descend the ladder backwards:

> I was going down. I had to reach down with my right leg because of the rungs. The rungs are not twelve inches apart. Every rung is usually twelve inches apart, so I had to reach down. As I was reaching down with my right leg, my foot caught on something. I don't know what it was. It felt like, maybe it was a chain, a rope, a cable, something. I don't know what it was. Before I knew it I was falling. I hit the ground. I fell about three feet down, landed on my butt, fell backward, slammed my head on the gravel. I was laying there, dazed, confused. I grab my head. It was bleeding. I wanted to see what the hell was going on, like what I fell on. I looked up and I seen a chain wrapped in one of the rungs that I fell from.

Plaintiff alleges that he suffered traumatic brain injury as a result of this fall. On November 8, 2007, plaintiff filed his complaint, alleging that defendants are liable for his injuries under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence.

Noble Ellenberg Windpark is owned by the eponymous Noble Windpark. Plaintiff alleges that Noble Constructors was the general contractor for the project and that Bellemare transported the turbine to the wind farm. Bellemare argues in its motion that another member of the Bellemare family of interrelated corporate entities actually owned the Temisko truck.

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (Brandy B. v Eden Cent. School Dist., 15 NY3d 297, 302 [2010], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008], quoting Alvarez, 68 NY2d at 324).

Bellemare seeks dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, as well as plaintiff's Labor Law § 200 and common-law negligence causes of action as against it. Bellemare argues that it is not a proper Labor Law defendant because it is not an owner or a general contractor, or an agent of either on the subject project, that it was not negligent, and that, in any event, plaintiff sued the wrong member of the Bellemare family of corporate entities. As the first two arguments are sufficient to entitle Bellemare to the relief it seeks, the court need not reach the third.

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the

> performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (Bland v Manocherian, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (Matter of East 51st St. Crane Collapse Litig., 89 AD3d 426, 428 [1st Dept 2011]).

The threshold question here is whether Bellemare was an owner, a general contractor, or a statutory agent for the purposes of scaffold law liability (see Walls v Turner Construction Company, 4 NY3d 861 [2005]). Here, as Bellemare is not an owner or general contractor, it must be determined as to

whether, as the alleged transporter of the turbine, Bellemare may be liable under Labor Law § 240 (1) as an agent of the owner. While

> a [subcontractor] at a work site is generally not responsible for injuries under Labor Law §§ 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the [subcontractor] had the ability to control the activity which brought about the injury"

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]).

> When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(Russin v Louis N. Picciano & Son, 54 NY2d at 318).

Bellemare argues that it was not the owner of either the trailer or wind farm, and did not supervise or direct plaintiff's work. However, there is evidence in the form of the deposition testimony of an employee truck driver of Bellemare, that Bellemare was engaged in the transport of the base components of the windmill turbines to Ellenberg, which were the components upon which plaintiff was working when he suffered injuries. However, there is no evidence that Bellemare had any responsibility as a coordinator or overall supervisor for any of

the work being performed on the job site (compare Walls, id. at p. 864.) Plaintiff produces no evidence that would create an issue of fact as to agency. Thus, as Bellemare was not an owner, a general contractor, or a statutory agent of either, the branch of its motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim as against it must be granted.

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (St. Louis v Town of N. Elba, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (Misicki v Caradonna, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (St. Louis, 16 NY3d at 416).

The threshold question is once again whether Bellemare was an owner, general contractor, or agent of either. As plaintiff cannot cross that threshold, as discussed above, the branch of Bellemare's motion seeking dismissal of plaintiff's Labor's Labor § 241 (6) claim as against it must be granted.

Labor Law § 200 "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" (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (Urban v No. 5 Times Sq. Dev., LLC, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (id.).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also Minorczyk v Dormitory Auth. of the State of N.Y., 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law §

200 and common-law negligence claims . . ." (Seda v Epstein, 72 AD3d 455, 455 [1st Dept 2010]).

As Bellemare is neither an owner nor a general contractor, regular principles of negligence apply to plaintiff's claims against Bellemare. Under Espinal v Melville Snow Constrs. a contractor does not owe a duty of care to a third party unless one of the following exceptions is applicable:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(98 NY2d 136, 140 [2002] [internal quotation marks and citations omitted]).

Here, none of these exceptions is applicable. The closest is the first, but Bellemare simply did not launch an instrument of harm under any version of the facts offered by the parties. Even if Bellemare had left a chain on the ladder rungs affixed to the truck, the first Espinal exception is not applicable because Bellemare's alleged negligence would be no different than one contractor on a construction site lending another contractor a defective ladder. If an injury ensued in this scenario, the general contractor and owner may have a duty to plaintiff under

Labor Law § 200, but with no evidence that the lending contractor directed or controlled the work, there would be no predicate for its liability (see Chowdury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]). That is because owners and general contractors have a general duty to keep construction sites safe, while subcontractors do not. As Bellemare had no duty to plaintiff here, the branch of its motion seeking dismissal of plaintiff's Labor Law § 200 and common-negligence claims as against it must be granted. Moreover, as that is plaintiff's last claim against it, the complaint must be dismissed as against Bellemare.

On their cross motion, the Noble defendants argue that the work that plaintiff was performing did not arise under Labor Law § 240(1) because he was engaged in unloading windmill base from a trailer, which task was not an elevation-related risk.

To the contrary, the deposition testimony of the plaintiff evinces that plaintiff and the his co-workers were engaged in the erection of a structure, i.e., the construction of a windmill, at the time of his accident. Likewise, this court concurs with plaintiff that his unloading of the turbine base from the trailer involved an elevation-related height risk with respect to which the Noble defendants, as owner and general contractor of the windfarm, have a nondelegable duty to provide safety devices necessary to protect workers from the risks inherent in that task

(see Naughton v City of New York, 94 AD3d 1 [1st Dept 2012]). Nor is it of any moment that plaintiff fell because the rung was not a ladder (see Narducci v Manhasset Bay Associates, 96 NY2d 259 [2001]), or because such rung was obstructed by a chain, since "the [rung] was not 'so constructed, placed and operated as to give proper protection' to claimant...'there is no view of the evidence here which could lead to the conclusion that the violation of Labor Law § 240(1) was not the proximate cause of the accident'" (Villeneuve v State, 274 AD2d 968 [4th Dept 2000] [citations omitted]). This court, pursuant to CPLR 3212(b) "has the authority to grant summary judgment in favor of a nonmoving party without the necessity of a cross motion'" (Dunham v Hilco Const. Co., Inc., 89 NY2d 425, 429 [1996]). Upon a search of the record pursuant to CPLR 3212(b), this court determines that plaintiff is entitled to partial summary judgment of liability on his Labor Law § 240(1) claim against the Noble defendants.[1]

The Noble defendants have established their prima facie entitlement to dismissal of the Labor Law §§ 241(6) and 200 claims. Plaintiff does not offer any evidence that raises any issue of fact with respect to the violation of any specific provisions of the Industrial Code. Nor does he come forward with

[1]The court notes that such search of the record renders the untimeliness of plaintiff's cross motion for such relief academic.

any evidence that the Noble defendants had any control or supervision over the means and methods of the work in which plaintiff was involved when he was injured as would subject the Noble defendants to common law liability under Labor Law § 200.

Accordingly, it is

ORDERED that the motion of defendant Thomas Bellemare, LTD's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendants Noble Ellenburg Windpark LLC and Noble Ellenberg Constructors, LLC's cross motion for summary judgment is granted with respect to the Labor Law §§ 241(6) and 200 claims, and such causes of action are dismissed; but the motion of Noble Ellenburg Windpark LLC and Noble Ellenberg Constructors, LLC to dismiss the Labor Law § 240(1), and upon a search of the record pursuant to CPLR 3212(b), partial summary judgment of liability on the Labor Law § 240(1) claim is granted in favor or plaintiff and against Noble Ellenburg Windpark LLC and Noble Ellenberg Constructors, LLC.

This constitutes the decision and order of the court.

Dated: May 17, 2017

ENTER:

DEBRA A. JAMES, J.S.C.

FILED

MAY 17 2017

COUNTY CLERKS OFFICE
NEW YORK