SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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MOHAMMAD HAFEEZ,

Plaintiff,

- against -

GIBBONS REALTY CORP. and ARTHUR GIBBONS,

Defendants.

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GIBBONS REALTY CORP. and ARTHUR GIBBONS,

Third-Party Plaintiffs,

- against -

ROCK SCAFFOLDING CORP., d/b/a R.S.C. OF NY CORP,

Third-Party Defendant.

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Index Number: 158286/2012

Motion Seq. Numbers: 005

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on (a) plaintiff's motion for partial summary judgment, and (b) defendants' cross-motion for summary judgment and to dismiss:

| | Papers Numbered: |
|---|---|
| Notice of Motion - Affirmation - Affidavit - Exhibits | 1 |
| Notice of Cross-Motion - Affirmation - Exhibits | 2 |
| Plaintiff's Affirmation in Opposition to Cross-Motion - Exhibits | 3 |
| Defendants' Reply Affirmation ti Cross-Motion | 4 |

**Background**

In this Labor Law action, plaintiff, Mohammad Hafeez, alleges that on September 16, 2010, he was injured while performing construction work at premises owned and managed by defendants, Gibbons Realty Corp. and Arthur Gibbons. The parties have been litigating this matter since 2012, and during the past four years, this Court has issued several discovery orders.

**The Instant Action**

On or about November 27, 2012, plaintiff commenced this action to recover for his personal injuries as a result of the accident. On or about December 20, 2013, defendants e-filed their answer. On July 14, 2016, defendants commenced a third-party action against Rock Scaffolding Corp. d/b/a R.S.C. of NY Corp ("Rock"), for common-law and contractual indemnification and contribution. On October 20, 2016, this Court granted defendants a default judgment against Rock, with an Inquest to be held at the of trial of plaintiff's main action. Following pre-trial proceedings and the completion of discovery, plaintiff filed a note of issue on September 20, 2016.

On February 11, 2016, at an order to show cause ("OSC") hearing, defendants requested this Court to adjudge non-party Haroon Hafeez, plaintiff's alleged employer and father, guilty of contempt for his misconduct in failing to obey the judicial subpoena served upon him on October 19, 2015 ("Subpoena") and failing to appear and provide certain documents. On March 31, 2016, this Court issued a Decision and Order finding that the matter was resolved pursuant to a discovery order dated March 30, 2016, directing Haroon to provides for the documents asked for in the Subpoena.

On September 23, 2016, defendants moved to vacate the Note of Issue on the grounds that two items of discovery were outstanding: (1) Haroon's deposition, and (2) plaintiff's orthopedic and neurological IMEs. Defendants also requested an extension of time to move for summary judgment until 120 days after the completion of discovery. By Decision and Order dated November 16, 2016, this Court denied defendants' request to vacate the Note of Issue, as Haroon's deposition and plaintiff's IMEs were scheduled to occur on November 30, 2016. However, the Court granted defendants' request for an extension of time to move for summary judgment.

On October 4, 2016, defendants moved to hold Haroon in contempt for failure to appear for his deposition, pursuant to a subpoena dated July 12, 2016. By Decision and Order dated October 20, 2016, this Court granted defendants' request.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment, pursuant to Labor Law § 240(1), against defendants, and to set this matter down for an immediate trial on the issue of damages. Defendants now cross-move, (1) pursuant to CPLR 3126, to dismiss plaintiff's complaint for failure to appear for his IMEs or, in the alternative, to preclude plaintiff from putting forward evidence of neurological injuries at trial, and to pay costs incurred as a result of his failure to appear; and (2) pursuant to CPLR 3212, to dismiss plaintiff's complaint with prejudice and direct that summary judgment be entered in their favor. In support of their cross-motion, defendants submit Gibbons' affidavit. In opposition, plaintiff argues that Gibbons' affidavit sould be denied, as he failed to appear for a deposition and is "aged and mentally incapacitated."

**Discussion**

As a preliminary matter, Arthur Gibbon's affidavit, submitted in support of defendants' cross-motion, will be considered on the merits. The Court, in its discretion, and in the interest of reaching the merits of the case, finds that neither party is prejudiced by considering the Gibbons affidavit on the merits (in any event, said affidavit is not dispositive as to today's decision). See CPLR 2004. Plaintiff's argument that Gibbons failed to appear for a deposition is unavailing; plaintiff waived his right to Gibbons's deposition when he filed the Note of Issue.

I. Cross-Motion to Dismiss Denied

Pursuant to CPLR 3126, this Court can, in its discretion, strike a party's pleadings for failure to comply with discovery with its disclosure obligations. However, in order to be entitled to the drastic relief of striking a defendant's answer or preclude it from offering evidence at trial, the movant must conclusively demonstrate that the non-compliant party's failure to comply with discovery demands was willful and contumacious. The burden then shifts to the non-compliant party to demonstrate a reasonable excuse for the noncompliance. See Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 (1st Dept 2004) ("A court may [dismiss an action] only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith."). The burden then shifts to the nonmoving party to demonstrate a reasonable excuse") (internal quotations omitted). Although the Court has the discretion to determine the nature and degree of the penalty to impose for failure to comply with discovery orders, it is well-settled that penalizing a noncompliant party by dismissing its action is drastic, and should only be levied in extreme circumstances. See generally Stathoudakes v Kelmar Contr. Corp., 147 AD2d 690 (2d Dept 1989) (noncompliant party's counsel "should be afforded another chance to provide the requested documentary information or, if they cannot, to supply a satisfactory explanation of their efforts to obtain that information").

Here, although Haroon Hafeez has been held in contempt for failing to appear for a deposition on multiple occasions, plaintiff is not responsible for non-party compliance. Moreover, it is unclear to the Court what evidence Haroon could offer at his deposition that would have any bearing on the instant action. This litigation has been ongoing for five years and Haroon has yet to comply with a discovery order; plaintiff is not responsible for making his relative appear.

Furthermore, on January 5, 2018, the Court held a telephone conference with the parties, wherein the parties confirmed that plaintiff attended his neurological IME with Dr. Bonomo. Therefore, defendants' cross-motion to dismiss the complaint is denied, solely as moot. Additionally, defendants' request for reimbursement of no-show fees is, in the Court's discretion, denied. See CPLR 2005.

Accordingly, defendants' cross-motion to dismiss is hereby denied.

II. Motion for Partial Summary Judgment on Labor Law § 240(1) Granted

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

In order for plaintiff to recover under Labor Law § 240(1), he must have been engaged in one of the statutorily enumerated activities, which are limited to the erecting, demolishing, repairing, altering, painting, cleaning, or pointing of a building or structure. See Panek v County of Albany, 99 NY2d 452, 457 (2003) ("The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'"). This section imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty that proximately causes plaintiff's injury. Id. ("the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves"). Liability under this statute is imposed only when plaintiff's injuries involve or result from an elevation-related hazard or risk. See Melber v 6333 Main St., Inc., 91 NY2d 759, 763 (1998) ("[Labor Law § 240(1) is] limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured").

Defendants' argument that plaintiff's inspection work is not afforded protection under Labor Law § 240(1) is unavailing. By virtue of their exposure to the risks inherent in an elevated work site and their involvement in the erection, etc., of a building or structure, inspectors of construction projects are workers on the job and, as such, are within the class of persons protected by the scaffold law. See Campisi v Epos Contracting Corp., 299 AD2d 4, 7 (1st Dept 2002) ("like the plaintiffs in *Reisch*, who inspected construction work in progress, plaintiff here performed work that was part of the construction project") (internal citations omitted). Moreover, plaintiff testified that his work included "brick pointing" and exterior painting. Defendants argue that plaintiff was merely inspecting work performed by others, which is not afforded protection under Labor Law § 240(1). The Court disagrees. Plaintiff's inspection of the project premises falls within the purview of the scaffold law, as the inspections were ongoing and contemporaneous with other work that formed part of a single construction contract. See Prats v Port Auth. of New York and N.J., 100 NY2d 878, 881 (2003) ("the work here did not fall into a separate phase easily distinguishable from other parts of the larger construction project. Plaintiff's inspection was not in anticipation of AWL's work, nor did it take place after the work was done. The inspections were ongoing and contemporaneous with the other work that formed part of a single contract"). Plaintiff need only allege and prove a failure to provide the required safety devices and that such failure was the proximate cause of his injuries.

Accordingly, plaintiff's request for partial summary judgment on Labor Law § 240(1) is hereby granted.

III. Cross-Motion for Summary Judgment on Labor Law § 241(6) Granted

Labor Law § 241(6) is meant to "protect workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition." See Nagel v D & R Realty Corp., 99 NY2d 98, 101 (2002). The complaint must be premised upon sufficiently specific New York State Industrial Code ("Industrial Code") sections in order to substantiate a finding of liability under the statute. See Ross v Curtis-Palmer Hydro-Elec. Co., supra at 502 ("plaintiff's Labor Law § 241(6) claim must fail because of the inadequacy of his allegations regarding the regulations defendants purportedly breached"); Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 851 (2d Dept 2006) ("plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards . . . In addition, the provision must be applicable to the facts of the case"). Furthermore, plaintiff's comparative negligence is a defense to a Labor Law § 241(6) claim. See Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 521 (1985) ("[Labor Law 241(6)] cannot rise to the level of negligence as a matter of law [because] contributory negligence was, and comparative negligence now is, a defense to [such] an action").

Defendants argue that the Industrial Code sections to which plaintiff cites are not sufficiently specific to give rise to a triable claim. The Court agrees. See Martinez v 342 Prop. LLC, 128 AD3d 408, 409 (1st Dept 2015) ("motion court properly granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action, because the provisions of the Industrial Code relied on by plaintiff . . . are either not sufficiently specific to give rise to a triable claim . . . or are inapplicable to the facts of this case"); see also Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343 (1998) (even if provision of Industrial Code is found to have been violated, such violation is not conclusive on question of negligence). For example, plaintiff alleges that defendants violated section 23-1.7 of the Industrial Code, but fails to specify which of the eight subsections was violated. Section 23-1.7 includes, inter alia, overhead hazards, failing hazards, slipping hazards, and tripping and other hazards. Even if the Court were to assume the subsection to which plaintiff refers, plaintiff specifically testified that his accident was not caused by slipping on the blue tarp, which makes most subsections of 23-1.7 inapplicable to the present case.

Plaintiff also alleges that defendants violated various OSHA regulations because they failed to provide a safe and healthful workplace. However, plaintiff's reliance upon any OSHA violations is misplaced, as its regulations and standards are not laws and cannot be used to establish a violation of the aforementioned statute. See Schiulaz v Arnell Constr. Corp., 261 AD2d 247, 248 (1st Dept 1999) ("The alleged violations of OSHA standards cited by plaintiffs do not provide a basis for liability under Labor Law 241(6)").

Accordingly, plaintiff's Labor Law § 241(6) claim is dismissed as a matter of law.

IV. Cross-Motion for Summary Judgment on Labor Law § 200 Denied

Labor Law § 200 is a "codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work," and such cases generally fall into two broad categories: namely, those where workers are injured as a result of the means and method in which the work is performed, and those resulting from dangerous or defective premise conditions at a work site. See Mitchell v New York Univ., 12 AD3d 200, 200 (1st Dept 2004). It is well-settled law that "where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." See Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143 (1st Dept 2012). Where the injury was caused by the means and method of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. See Lombardi v Stout, 80 NY2d 290, 295 (1992) ("where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law").

Questions of fact remain as to (1) whether defendants had actual or constructive notice of the allegedly dangerous condition that caused the accident; and (2) whether defendants controlled the means and methods of plaintiff's work. In the event that defendants are found to have had notice of the defect, a factfinder could reasonably conclude that defendants were negligent. As such, even if defendants did not supervise or control the manner in which plaintiff worked, defendants may still be liable to plaintiff if they had actual or constructive notice of the alleged defect.

Accordingly, questions of fact remain as to plaintiff's Labor Law § 200 claim, and cannot be dismissed by way of summary judgment.

**Conclusion**

Summary judgment motion granted to the extent that this Court finds defendants liable under the scaffold law; cross-motion to dismiss denied; cross-motion to dismiss Labor Law § 241(6) granted; cross-motion to dismiss Labor Law § 200 denied. The clerk is hereby directed to enter judgment accordingly.

Dated: January 9, 2018

Arthur F. Engoron, J.S.C.