NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

DEREK WORTHAM,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, SKANSKA USA INC., SKANSKA USA BUILDING INC.,

Defendants.

Index No.: 155687/2017
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant the Port Authority of New York and New Jersey's motion to dismiss.

Papers	**NYSCEF Doc. Numbers**
Defendant's Notice of Motion	5
Defendant's Affirmation in Support	6-8
Defendant's Memorandum of Law in Support	9
Plaintiff's Affirmation in Opposition	15
Defendant's Memorandum of Law in Reply	16
Defendant's Letters/Correspondence to Judge	19, 21

Stefano A. Filippazzo, Esq., New York, for plaintiff Derek Wortham.
The Port Authority of New York and New Jersey Law Department, New York (Allen F. Acosta of counsel), for defendant Port Authority of New York and New Jersey.

Gerald Lebovits, J.

Defendant Port Authority of New York and New Jersey (PA) moves pre-answer under CPLR 3211 (a) (7) to dismiss plaintiff Derek Wortham's causes of action predicated upon New York Labor Law §§ 240, 241, and 241-a against the PA on the alleged ground that the PA is not subject to unilaterally imposed state laws that directly regulate it.[1]

Plaintiff sued the PA, Skanska USA Inc., and Skanska USA Building Inc. alleging that he sustained injuries as a result of defendants' negligence and failure to comply with Labor Law §§

[1] Plaintiff and defendants Skanska USA Inc. and Skanska USA Building Inc. have submitted a stipulation of discontinuance without prejudice. Defendants Skanska USA Inc. and Skanska USA Building Inc. have raised no opposition to PANYNJ's motion.

200, 240, 241, and 241-a; 29 CFR Part 1910 and Part 1926; and New York Department of Labor Regulations (12 NYCRR) §§ 23-1.2; 1.5; 1.7; 1.8; 1.15-1.17; 1.21-1.22; 1.30; 2.1; and 5.1-5.19.

Plaintiff alleges that on July 18, 2016, while working at a construction site at One World Trade Center, New York, New York, he was injured when he fell from an eight-foot A-frame ladder on which he was standing. Plaintiff contends that he fell because the ladder shifted due to the accumulation of dirt, debris, and other obstructions and conditions in his work area. Plaintiff states that he sustained multiple bodily injuries, including injuries to his lower back, left hip, left leg, and the left side of his body. Plaintiff also states that the injuries caused him to incur medical expenses, be absent from employment, and lose enjoyment of life.

The PA's Arguments

The PA asks this court to be the first New York State court to find that as a Compact Clause entity, it need not comply with the New York Labor Law concerning New York public health and safety. The PA argues that plaintiff's causes of action predicated on New York Labor Law §§ 240 and 241 must be dismissed under what it argues are well-established principles of federal law. (*See* NYSCEF Doc. No. 9, Memorandum in Support of Motion to Dismiss, § I [A].) The PA reasons that as a Compact Clause entity, it is not subject to the member states' regulations. The PA notes that the Supreme Court held in *Cuyler v Adams* (499 US 433, 439-440 [1981]) that Congress maintains the ultimate supervisory power over cooperative state action. Because the Compact Clause's objective is to safeguard federal supremacy from state intrusion, the PA contends, the terms of an underlying congressionally sanctioned compact take precedence over conflicting state law. The PA argues that this is subject to federal law and not the New York State Labor Law. (NYSCEF Doc. No. 9, Memorandum of Law in Support, ¶¶ 2-5.)

The PA also urges that because state law may not directly regulate the PA unless federal law permits state regulation, whether state law can constrain the conduct of a federal Compact Clause entity is a quintessential federal law question. According to the PA, no federal law permits state law to regulate it. (NYSCEF Doc. No. 9, ¶ 4.)

The PA further argues that under federal law, the "express intent" test applies to a Compact Clause entity. (NYSCEF Doc. No. 9, § I [A], ¶ 6.) According to the PA, the "express intent" test requires that (1) the state legislation in question expressly indicate that it is amending a certain portion of the compact or is applying an amendment to the Compact Clause entity; and (2) the other compacting states must agree, by enacting parallel legislation, to the state legislation. (NYSCEF Doc. No. 9, § I [A], ¶ 8.) The PA states that under the express-intent standard, it is not subject to the New York's legislation because New York Labor Law §§ 240, 241, and 241-a contain no express New York Legislature rule that the Labor Law applies to the PA. (NYSCEF Doc. No. 9, § I [B], ¶ 2; NYSCEF Doc. No. 16, PA's Memorandum of Law in Reply, ¶4.)

The PA also contends that New York Labor Law §§ 240, 241, and 241-a do not meet the express-intent test's second prong. The New Jersey Legislature has not enacted for the PA any legislation parallel to the New York Labor Law through the enactment of any parallel New Jersey legislation. The PA argues, therefore, that Labor Law §§ 240, 241, and 241-a do not apply to it. (NYSCEF Doc. No. 9, Memo, § I [B], ¶ 3.)

Plaintiff's Arguments

Plaintiff urges this court to follow the *Agesen* holding that the PA is subject to New York public health and safety laws. *(See Agesen v Catherwood*, 6 NY2d, 521, 525[1970].)

Plaintiff also argues that the New York courts have consistently followed *Agesen* to find that New York and New Jersey may regulate the PA's external conduct. (NYSCEF Doc. No. 15, Plaintiff's Affirmation in Opposition, at 1-2, ¶¶ 2-4.) Plaintiff further states that because Labor Law §§ 240 (1), 240 (6), and 200 are health-and-safety statutes, New York courts have held the PA liable under these statutes. (NYSCEF Doc. No. 15, at 2, ¶ 4.) Citing *Agesen*, plaintiff contends that even though the PA is a bi-state entity, it is subject to "New York's law involving health and safety" because New York has a paramount interest in ensuring workers safety. (NYSCEF Doc. No. 15 at 3, § I.) Plaintiff then contends that because the issue at bar falls within the scope of New York Labor Law, a health-and-safety law, and because New York has a paramount interest in ensuing the worker safety within the state, this court should find that the New York Labor Law applies to the PA. (NYSCEF Doc. No. 15, at 6, § I, ¶ 12.)

DISCUSSION

Both plaintiff and the PA ardently argued their points.

In *Agesen*, the Court of Appeals affirmed the Appellate Division in an action that the PA's employees brought to annul the Industrial Commissioner's determination rejecting the allegation that the PA was paying wages lower than prevailing rate. (6 NY2d at 524.) The Court of Appeals wrote that "New York and New Jersey have each undoubted power to regulate the external conduct of the Authority, and it may hardly be gainsaid that the Authority, albeit bi-state, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public." (*Id.* at 525.)

Since *Agesen*, New York courts have continually and consistently followed the Court of Appeals' determination that New York public health and safety laws apply to the PA. In *O'Brien v Port Auth. of New York & New Jersey* (29 NY3d 27, 33 [2017]), the Court held that liability may be imposed under Labor Law § 240(1) only if a property owner's failure to provide adequate protection directly causes a plaintiff's injuries. In *Jerez v Tishman Const. Corp. of New York* (118 AD3d 617, 617 [1st Dept 2014]), the First Department found a plaintiff is entitled to summary judgment when the plaintiff's evidence shows that he was injured at a World Trade Center building because a brace to which the plaintiff was secured gave way and caused his fall. In *Sferrazza v Port Auth. of New York & New Jersey* (8 AD3d 53, 54 [1st Dept 2004]), the First Department affirmed Supreme Court's decision denying the PA's motion for summary judgment under Labor Law § 240(1) because the PA owns the World Trade Center and its duty to provide safe working conditions is nondelegable regardless whether it controls an independent contractor's performance at the PA's property. In *DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 554 [1st Dept 2011], the First Department affirmed Supreme Court's holding that when a New York company's worker is injured in New York while performing work for the PA, New York Labor Law applies. In *Portney v Port Auth. of New York & New Jersey*, 2009 NY Slip Op 31401 [U], *1, n 1, 2009 WL 1905152, at *1, n 1 [Sup Ct, NY County, 2009], Supreme Court found in footnote that New York Public Health Law applies to the PA because the statute's requirement that patient records be made available affects the public and implicates New York's interest in affording its residents access to their own health-care records.

The PA has not persuaded this court to deviate from *Agesen* to set a new precedent to release the PA from its obligation to comply with New York Labor law §§ 240, 241, and 241-a. The PA is a Compact Clause entity. Labor Law §§ 240, 241, and 241-a are public health-and-safety statutes. The PA's alleged negligence and failure to comply with Labor Law §§ 240, 241, and 241-a fall within the PA's external operation. (*See O'Brien*, 29 NY3d at 33.) Although the United States Supreme Court has held that Compact Clause bi-state entities created by a compact are not subject to any one of the compact state's unilateral control (*Hess v Port Auth. Trans-Hudson Corp.*, 513 US 30, at 42 [1994]), this court is bound by New York Court of Appeals precedent on matters of state law. The Court of Appeals' determination in *Agesen* is clear. (*See* 6 NY2d at 525.) The Court of Appeals has not reversed itself on the issue that the PA is subject to New York's public health and safety regulations. Even if the *Agesen* language is dictum, as PA contends, this court is still bound by the holding of the Appellate Division, First Department, in *Sferrazza* that the PA is liable under Labor Law § 240(1) because it has a nondelegable duty to provide safe working conditions. (*See* 8 AD3d at 54.)

Accordingly, it is hereby

ORDERED that the Port Authority of New York and New Jersey's CPLR 3211 (a) (7) motion to dismiss is denied; and it is further

ORDERED that the Port Authority of New York and New Jersey has 20 days from service of this order with notice of entry to file its answer; and it is further

ORDERED that the parties appear for a preliminary conference on October 3, 2018, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: May 30, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.