SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH **PART** IAS MOTION 29EFM

Justice

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MARIO AYARS,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, GEORGE WASHINGTON BRIDGE BUS STATION DEVELOPMENT VENTURE LLC, GWB DEVELOPMENT PARTNERS, LLC and TUTOR PERINI CORPORATION,

Defendants.

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INDEX NO. 158178/2017

MOTION DATE 06/12/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ORDERED that the instant motion by Defendant Port Authority of New York and New Jersey (hereinafter, "the Port Authority") to dismiss Plaintiff's causes of action, as against it, for violations of New York Labor Law §§ 240 and 241, pursuant to CPLR 3211 (a) (7), is denied for the reasons stated herein:

BACKGROUND

Plaintiff Mario Ayars brings the instant action to recover damages for injuries he allegedly sustained on January 9, 2017, when "his foot rolled into a small trench" in an area owned and operated by the Port Authority at the George Washing Bridge Bus Terminal in Manhattan (Moving Affirm., Ex. A [Notice of Claim].) Plaintiff was allegedly performing construction work at the time. Plaintiff seeks to recover damages based on, among other causes of action, violations of New York Labor Law §§ 240 and 241. (Id.)

The Port Authority moves to dismiss these causes of action, arguing that the Port Authority – an entity created by a congressionally approved compact between New York and New Jersey in 1921 – is not subject to New York Labor Law §§ 240 and 241. (Memo in Supp. at 4.)

ARGUMENTS

I. Written Arguments

The Port Authority argues that, under the "express intent" test, in order for New York Labor Law §§ 240 and 241 to be applicable to the Port Authority, these statutes must: "(1) expressly indicate that it is amending a certain portion of the compact or applies to the [Port

Authority] and (2) be concurred in by [New Jersey] through the enactment of parallel legislation." (Memo. in Supp. at 5.) The Port Authority further argues that applying the express intent test, it is clear that: (1) there is no express statement by the New York legislature that it intended for Labor Law §§ 240 and 241 to apply to the Port Authority; and (2) that New Jersey's legislature has not concurred in applying Labor Law §§ 240 and 241 to the Port Authority by enacting parallel New Jersey legislation. (Memo in Supp. at 6.)

In opposition, Plaintiff argues: (1) that there is in fact legislation in both New York and New Jersey broadly authorizing suits against the Port Authority; and (2) the Port Authority has effectively conceded any assertion of sovereign immunity related to New York Labor Law §§ 240 and 241 by litigating decades of claims brought against it pursuant to these statutes and never raising the sovereign immunity defense until now. Plaintiff further argues, that although courts have declined to apply state statutes that would regulate the internal operations of the Port Authority, these courts have held that New York and New Jersey each have "undoubted power to regulate the external conduct" of the Port Authority, and, as such, the Port Authority "is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public.'" (Affirm in Opp. ¶ 21, quoting *Agesen v Catherwood*, 26 N.Y.2d 521, 525 [1970].)

In reply, the Port Authority reiterates its prior arguments and further argues that Plaintiff conflates the waiver of sovereign immunity and the question of whether New York Labor Law §§ 240 and 241 applies to the Port Authority, arguing that "the States of New York and New Jersey have expressly waived the Port Authority's sovereign immunity, nonetheless the Port Authority is not subject to New York Labor Law §§ 240 (1) and 241(6) under the "express intent" test. (Memo in Reply at 6.) The Port Authority further argues that holding that New York Labor Law §§ 240 and 241 applies against the Port Authority would violate and render meaningless New York Unconsolidated Law § 6408—and its counter-part NJ Stat Ann 32:1-8—because New York would be unilaterally imposing "duties" on the Port Authority without concurrence from New Jersey. (Memo in Reply at 7-8.)

After briefing was submitted, the Port Authority submitted a letter advising the Court that a court in Queens County recently ruled against the Port Authority on this issue, reasoning as follows:

> "It is not disputed that Labor Law 240(1) and 241(6) are laws governing the Port Authority's external conduct, and that they bear on matters of public health and safety. The Port Authority asks this Court to be the first to carve out an exception to a health and safety statute based upon the Port Authority's status as a Compact Clause entity. The arguments set forth by the Port Authority have not convinced the Court to make new law to exempt the Port Authority from liability in these circumstances."

(*Granados v. The Port Authority of New York and New Jersey*, 2018 WL 2065436, at *2 [Sup Ct, Queens County 2018] [Butler, J.]; *see also Wortham v. The Port Authority of New York*, 2018 N.Y. Slip Op. 31104(U), at *4 [Sup Ct, NY County June 6, 2018] [Lebovits, J.] ["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 Port Authority

contends that the Court in Queens County ruled in error and states that it is appealing said decision. (April 16, 2018 Letter [NYSCEF Document No. 24].)

II. Oral Arguments

The parties appeared for oral argument on June 12, 2018, and largely reiterated the arguments made in their papers. The Court questioned the Port Authority as to why it had previously allowed, for several decades, judgments based on Labor Law §§ 240 and 241 to be rendered against it without raising this argument, and why those judgments applying Labor Law §§ 240 and 241 should not have stare decisis effect now. The Port Authority argued that the instant issue of whether Labor Law §§ 240 and 241 applies to the Port Authority – as a Compact Clause entity – had never been raised in those prior judgments, and as such, the instant motion involves an issue of first impression.

When asked how many other laws in New York would need to be amended to be applied to the Port Authority under the proposed "express intent" test, the Port Authority's counsel stated that he did not know the answer to this question and stated that the instant motion related only to the applicability of Labor Law §§ 240 and 241. Counsel for Plaintiff argued, however, that were the courts to adopt the "expressed intent" test, the Port Authority could reasonably argue that, for example, New York Vehicle and Traffic Law would not apply to an accident involving a vehicle driven by the Port Authority.

The Port Authority further argued that, even if the Court were to apply *Agesen*'s internal-external test, Labor Law §§ 240 and 241 are not laws meant to protect the public but rather laws to compensate construction workers working with the Port Authority pursuant to a contract. The Port Authority argued that these construction workers are not "the public"—as opposed to a patron at the George Washington Bridge bus terminal that would be considered part of "the public."

DISCUSSION

The Port Authority is a public entity, created in 1921 by a congressionally approved compact between New York and New Jersey, to establish "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York." (NJ Stat Ann 32:1-1; NY Unconsolidated Law § 6401; *see also* NJ Stat Ann 32:1-3 [fixing boundaries of the "Port of New York District"]; NY Unconsolidated Law § 6403 [same].) The Port Authority is financially self-reliant and draws its income from revenue generated by its various properties—not from tax revenue from New York or New Jersey. (*In re World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 432–33 [2011]; *see also Hess v Port Auth. Trans-Hudson Corp.*, 513 US 30, 36 [1994] ["Tolls, fees, and investment income account for the Authority's secure financial position."].)

The Port Authority is governed by twelve commissioners, with six selected by each state. (*See* NJ Stat Ann § 32:1–5; NY Unconsolidated Law § 6405. New York and New Jersey's legislatures, acting together, may delegate additional powers and duties to the Port Authority. (NJ Stat Ann 32:1-8; NY Unconsolidated Law § 6408.)

With regard to the Port Authority being subject to suit, New York and New Jersey have adopted the following provision:

> "Upon the concurrence of the state of New Jersey in accordance with section twelve hereof, **the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise** (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "port authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five, inclusive, hereof."

(NY Unconsolidated Law § 7101; NJ Stat Ann § 32:1-157 [emphasis added].)

New York and New Jersey have further adopted the following provision:

> "The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. **Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.**"

(NY Unconsolidated § 7106; NJ Stat Ann 32:1-162 [emphasis added].)

These two statutes make clear that the states of New York and New Jersey mutually consented to the Port Authority being broadly subject to "suits, actions or proceedings of any form or nature at law, in equity or otherwise." (*See also Port Auth. Trans-Hudson Corp. v Feeney*, 495 US 299, 306 [1990] ["New York and New Jersey have expressly consented to suit [against the Port Authority] in expansive terms."].)

The Court agrees with Plaintiff that the appropriate test, here, is not this "express intent" test as the Port Authority calls it, but rather the appropriate test is whether viewing Labor Law §§ 240 and 241 in the context of New York's Labor Law regime as a whole, these statutes seek to regulate the Port Authority's internal operations or whether the statutes seek to regulate the Port Authority's external conduct, particularly in matters of health and safety.

In *Agesen v. Catherwood*, (26 NY2d 521, 525 [1970]), the petitioners brought an article 78 proceeding to enforce "prevailing rate of wage legislation," under Labor Law 220, against their employer the Port Authority. The Court of Appeals held that Labor Law 220 was inapplicable to the Port Authority, and explained:

> "[T]he inapplicability of section 220 of the Labor Law results not from any express exclusion or inherent unworkability, but rather from a general intent, amply reflected in

> the compact, that the internal operations of the Authority be independent of the direct control of either State acting without the concurrence of the other. Section 220, enacted long before the creation of the Authority, should not be construed to impose a unilateral regulation of the wages of only a fraction of the Authority's employees, namely, those building and mechanical workers who, it is alleged, work solely on projects within the State of New York.
>
> **The distinction between the internal operations and conduct affecting external relations of the Authority is crucial in charting the areas permitting unilateral and requiring bilateral State action. 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 bistate, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public.**"

(*Agesen v Catherwood*, 26 NY2d 521, 525 [1970].) Roughly thirty years later, the Second Circuit held that the Port Authority employees were not protected by New York's anti-discrimination laws, reasoning that *Agesen* "teaches that internal operations of the Authority—**unlike its external conduct which is subject to each of the Compact State's health and safety laws**—are independent from the unilateral control of either State without the other's concurrence." (*Dezaio v Port Auth. of NY and NJ*, 205 F3d 62, 65 [2d Cir 2000] [emphasis added].)[1]

The Court agrees with the Port Authority that the interpretation of an interstate compact presents a question of federal law. (*Petty v Tennessee-Missouri Bridge Commn.*, 359 US 275, 279, 79 S Ct 785, 788, 3 L Ed 2d 804 [1959]; *Am. Sugar Ref. Co. of New York v Waterfront Commn. of New York Harbor*, 55 NY2d 11, 25 [1982].) However, the Court rejects the Port Authority's argument that there is a basis in federal law to upend *Agesen*'s internal-external test that has prevailed in this state for almost fifty years and has been utilized by the Second Circuit and other federal courts.

In so arguing, the Port Authority relies heavily on two Third Circuit cases: *Intl. Union of Operating Engineers, Local 542 v Delaware Riv. Joint Toll Bridge Com'n*, (311 F3d 273, 281 [3d Cir 2002]) and *Hip Heightened Indep. and Progress, Inc. v Port Auth. of New York and New Jersey*, (693 F3d 345, 357–58 [3d Cir 2012]). As the Third Circuit in *International Union* explained, the "express intent standard" has its origins in the New York Court of Appeals case of *Malverty v Waterfront Commission of New York Harbor*, (71 NY2d 977 [1988].) In *Malverty*, the Court of Appeals denied a petitioner's Article 78 challenge to the bistate compact Waterfront Commission's rejection of his employment application based on his criminal record, which the petitioner contended amounted to unlawful discrimination pursuant to NY Correction Law § 752.

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[1] This internal-external test is not limited to Port Authority but rather has been applied to other interstate compacts. (*See e.g. Mitskovski v Buffalo and Fort Erie Pub. Bridge Auth.*, 689 F Supp 2d 483, 490 [WDNY 2010] ["However, compact entities remain subject to regulation by the compacting states when their actions affect the health or welfare of the citizens of the state."], *affd in part, appeal dismissed in part*, 415 Fed Appx 264 [2d Cir 2011]; (*Brust v ACF Indus., LLC*, CIV.A. 11-4839, 2011 WL 6756921, at *4 [DNJ Dec. 21, 2011] ["On the other hand, claims that seek redress for tortious conduct or breach of contract often impact only the external operations of the DRPA without implicating the compact."].)

Similar to *Malverty*, *International Union* and *Hip Heightened* are inapposite to the instant case because the state statutes at issue there were laws governing the compact's internal operations—not statutes imposing tort liability for the compact's external conduct affecting health and safety. (*Hip Heightened Indep. and Progress, Inc. v Port Auth. of New York and New Jersey*, 693 F3d 345, 357–58 [3d Cir 2012] [holding that a New Jersey antidiscrimination statute sought to regulate the compact's internal operations and did not "relate to anything external to the Authority or to health or safety"]; *Intl. Union of Operating Engineers, Local 542 v Delaware Riv. Joint Toll Bridge Com'n*, 311 F3d 273, 281 [3d Cir 2002] [holding that the Delaware River Joint Toll Bridge Commission, a bi-state entity created pursuant to compact between New Jersey and Pennsylvania, was not subject to New Jersey's collective bargaining laws].)

The Court, of course, cannot ignore that the *Hip Heightened* court stated, in dicta, that "[t]here is no basis in Third Circuit precedent for the internal-external distinction, nor would such a distinction necessarily be well-founded." (693 F3d 345, 357–58 [3d Cir 2012].) Respectfully, however, this Court will follow the internal-external test as the precedent put forth by the Court of Appeals in *Agesen v Catherwood*, (26 NY2d 521, 525 [1970]), which was cited and discussed with approval by the Second Circuit in *Dezaio v Port Auth. of NY and NJ*, (205 F3d 62, 65 [2d Cir 2000]). Moreover, this Court finds *Agesen*'s internal-external distinction to be well-founded and sound policy. Whereas no one state should be allowed to fracture the internal operations of an interstate compact by, for example, creating a law that applies only to compact employees in that state, a state legislature need not get concurrence from its partner legislature whenever it seeks to hold a compact accountable for tortious acts affecting the health and safety of its public. This policy is particularly appropriate in light of the express intent of New York and New Jersey that "the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation." (NY Unconsolidated § 7106; NJ Stat Ann 32:1-162.)

In addition, this Court rejects the Port Authority's argument that holding it subject to Labor Law §§ 240 and 241 violates and renders meaningless New York Unconsolidated Law § 6408—and its counter-part NJ Stat Ann 32:1-8—because New York would be unilaterally imposing "duties" on the Port Authority without concurrence from New Jersey. (Memo in Reply at 7-8.) This specific provision is entitled "Additional powers; reports; pledging of credit" and reads in full:

> "The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof."

Reading this provision as a whole and in conjunction with the statement of the Port Authority's mission, as contained in the preamble, it is clear that this provision contemplates the

procedure for the legislatures of New York and New Jersey to add "powers and duties" affecting the Port Authority's mission to achieve "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York." (NJ Stat Ann 32:1-1; NY Unconsolidated Law § 6401.) New York's imposition of Labor Law §§ 240 and 241 on the Port Authority—with respect to its construction projects inside New York's borders—does not amount to adding "powers and duties" that relate to the Port Authority's mission as a Compact Clause entity. Rather, it merely amounts to permitting suits against the Port Authority "for tortious acts committed by it and its agents to the same extent as though it were a private corporation." (NY Unconsolidated § 7106; NJ Stat Ann 32:1-162.)

Applying *Agesen*'s internal-external test, the Court finds that Labor Law §§ 240 and 241 does not seek to regulate the internal operations of the Port Authority, but rather seeks to regulate its external conduct affecting the public, in matters of health and safety, within New York's territorial borders. Unlike classical areas of internal operations like employment discrimination and collective bargaining—that affect the employee-employer relationship—Labor Law §§ 240 and 241 has no application to Port Authority employees. (*See Pagano v Colonial Sand & Gravel Co., Inc.*, 75 AD2d 578, 578 [2d Dept 1980] [holding that violation of Labor Law 240 was "subsumed into the employer's general liability under the Workers' Compensation Law, which is made 'exclusive and in place of any other liability whatsoever' by section 11 thereof"].) In addition, it is well-settled that the purpose of Labor Law §§ 240 and 241 is to protect the health and safety of construction workers in New York from the tortious acts of the owner and the general contractor. (*Sanatass v Consol. Inv. Co., Inc.*, 10 NY3d 333, 338 [2008] ["In broadening the protection afforded by the statute, the Legislature reemphasized that section 240 was enacted for the purpose of protecting workers."]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [holding that the "history underlying section 241, as amended, clearly manifests the legislative intent to place the 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor'" [quoting 1969 N.Y. Legis. Ann., at 407–408]].)[2]

This Court also rejects the Port Authority's oral argument that the construction workers protected by Labor Law §§ 240 and 241 are not members of "the public." As previously mentioned, Labor Law §§ 240 and 241 were enacted to protect construction workers—who represent a large industry of skilled and unskilled laborers—from various on-site hazards by placing the responsibility for their safety on the owner and general contractor. Simply because the employer of these workers may have a contractual relationship with the Port Authority is not a basis for finding that Labor Law §§ 240 and 241 are not health and safety laws affecting the public.

Moreover, federal and state courts have for decades applied Labor Law §§ 240 and 241 against the Port Authority, and the Port Authority has just now raised the instant argument. (e.g. Affirm in Opp. ¶ 14 [collecting cases]; *Granados v. The Port Authority of New York and New Jersey*, 2018 WL 2065436, at *2 [Sup Ct, Queens County 2018] [collecting cases]; *Nolan v Port Auth. of New York and New Jersey*, 2018 NY Slip Op 04293, at *1 [1st Dept June 12, 2018]

[2] Relatedly, it is generally understood that the construction industry is an area "where the State has traditionally exercised its reserved police powers to protect public health and safety." (*Steel Inst. of New York v City of New York*, 832 F Supp 2d 310, 331 [SDNY 2011], *affd*, 716 F3d 31 [2d Cir 2013].)

[affirming grant of summary judgment against Port Authority on Labor Law § 240 (1)].) Indeed, the Court of Appeals recently decided *O'Brien v. Port Authority of New York and New Jersey*, (29 N.Y.3d 27 [2017]), which found triable issues of fact concerning whether a staircase provided adequate protection, pursuant to Labor Law § 240 (1), to an allegedly injured construction worker. The staircase was present on premises owned by the Port Authority there, and the Court of Appeals allowed the issue of the Port Authority's liability under Labor Law § 240 (1) to go to trial. (*See also Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878, 879 [2003] [answering certified question in affirmative that New York Labor Law § 240 (1) applied to construction worker's ladder-related injury where the defendant Port Authority had contracted with the plaintiff's employer concerning the subject work].)

For this Court to rule that the Port Authority is not subject to New York Labor Law §§ 240 and 241, during construction work performed on its New York premises, it would effectively be overruling decades of decisions, including a recent decision from the New York Court of Appeals, applying these statutes to the Port Authority. The Court is unwilling to take such a step.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendant Port Authority of New York and New Jersey to dismiss Plaintiff's causes of action, as against it, for violations of New York Labor Law §§ 240 and 241, pursuant to CPLR 3211 (a) (7), is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on September 25, 2018 at 9:30 A.M.

The foregoing constitutes the decision and order of this Court.

6/21/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE