Fernandes v City of New York
2018 NY Slip Op 31967(U)
August 13, 2018
Supreme Court, New York County
Docket Number: 160131/2013
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

JOSE PEIXOTO FERNANDES,

Plaintiff,

Index No.: 160131/2013

Motion Sequence No.: 001

- against -

DECISION/ORDER

CITY OF NEW YORK, WATERWORKS JV, JUDLAU CONTRACTING INC., and OHL USA, INC.,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Plaintiff Jose Peixoto Fernandes sustained injuries on December 13, 2012 while changing the bit on a helldog.[1] At the time, plaintiff worked for Waterworks, which OHL USA Group (OHL) and Judlau Contracting Inc. (Judlau) had formed. Waterworks was the general contractor, and the work was performed on behalf of the City of New York (the City). Plaintiff, an experienced laborer, had been a member of the Excavation Laborers' Union since around 1990 and obtained his safe track certification from Occupational Safety and Health Administration (OSHA) in 2011.[2]

On December 13, 2012, plaintiff commenced his work at the construction project located at Columbus Avenue between 60th and 61st Streets (the Project). Upon his arrival, Luis Costa, a Waterworks employee, instructed plaintiff to use to the helldog to break up and chip away rocks to widen the trench for sewer pipes. Plaintiff stated that although he had used helldogs for this type of work for Waterworks at another site, this was the first helldog he used with an external rather

[1] A helldog is a small pneumatic chipping gun, somewhat like a small jackhammer,
[2] At his 50-h hearing, plaintiff indicated that he allowed his OSHA certification to lapse.

than an internal trigger. The helldog weighed around twenty-five pounds. It was two feet long, and it was air-powered. Air for the helldog was supplied by an air compressor mounted to a truck; the compressor also provided the air for multiple helldogs. According to plaintiff, two other men were using the compressor at the time of his accident. At his 50-h hearing, plaintiff indicated that the air compressor was approximately twenty feet from the trench where he worked, and there was no emergency or other shutoff switch on or near the helldog itself. Therefore, to shut off the helldog's air supply, workers either had to turn off the air compressor or ask a nearby worker to do so. A properly functioning helldog bit will not fire, or cycle, unless the trigger is pressed.

The bit of a helldog hits and breaks up the concrete, rock, or other material, and after repeated use it gets dull and must be changed. At approximately 2:00 p.m. on the date of the injury, while the helldog was still connected to the air compressor, plaintiff began changing the bit. Plaintiff states that he stood while he attempted to change the bit, bracing the instrument against his lap and holding the helldog upside down – a choice which, according to movants, meant that the bit-end was aimed at and within striking distance of his face. Plaintiff asserts that when he inserted the new pin, the piston flew out and hit him in the face. He further indicated that he had followed this identical process earlier that day without incident. Movants state that plaintiff accidently pressed the helldog's trigger, which caused the piston to fire, striking plaintiff. Although the plaintiff was wearing the hard hat and safety glasses Waterworks had provided, he sustained injuries to his left eye and his nose. He received twenty stitches around his left eyebrow and nose, and he had surgery to repair his cornea and broken nose.

Plaintiff commenced this action, in which he asserts claims of common-law negligence as well as violations of Labor Law § 200 and Labor Law § 241 (1) - (6). Discovery is complete, and plaintiff has filed the note of issue. After the note of issue filing date, plaintiff discontinued against

defendants Waterworks and OHL. The remaining defendants, the City and Judlau, now move for summary judgment. Plaintiff opposes the motion. For the reasons below, the Court grants the motion in part and denies it in part.

DISCUSSION

For defendants to prevail on their summary judgment motion in this Labor Law case, they "must make 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" (*O'Brien v Port Auth. of New York & New Jersey*, 29 NY3d 27, 36-37 [2017] [citations and internal quotation marks omitted]). In light of the judiciary's desire to allow claims to proceed on their merits, courts only grant summary judgment where it is clear that no triable issues of fact exist (*id.* at 37). It is the moving parties' burden to make out a prima facie case showing its right to dismissal (*see Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017]). At that point, the burden shifts to the nonmoving party to raise a triable issue of fact (*id.*).

I. Sole Proximate Cause

Initially, movants argue that plaintiff was the sole proximate cause of his accident. Where a plaintiff is the sole proximate cause of his or her accident, neither a violation of Labor Law § 241 (6) nor any negligence by the defendants can be considered a proximate cause (*see Guaman v City of New York*, 158 AD3d 492, 493 [1st Dept 2018] [Labor Law § 241 (6)]; *Hill v Stahl*, 49 AD3d 438, 442-43 [1st Dept 2008] [denying summary judgment under Labor Law § 200 where issues relating to proximate cause remained]). If defendants were correct, therefore, this prong of their motion would result in the dismissal of plaintiff's complaint without further consideration.

Defendants argue that plaintiff was the sole proximate cause of his accident because he chose his own method of work and made the decisions that resulted in his accident (citing *Kerrigan*

v TDX Constr. Corp., 108 AD3d 468, 470 [1st Dept 2013]). In support, they additionally cite *Scoz v J&Y Electric & Intercom Co. Inc.* (137 AD3d 535, 535 [1st Dept 2016], *aff'g* 2014 WL 3870602, 2014 NY Slip Op. 32077 [U] [Sup Ct NY County 2014]), in which the court found that an independent contractor "who intentionally used the wrong tool for the job, and rigged it in a manner that he knew was unsafe, was the sole proximate cause of his accident."

In further support of their proximate cause argument, defendants rely on the affidavit of their expert, Eugenia Kennedy, CSP. Ms. Kennedy is a senior manager in Exponent's Mechanical Engineering Practice, with a Bachelor of Science and a Master of Science degree in mechanical engineering. In addition, she is a certified safety professional with experience evaluating worker, equipment, and construction safety. Ms. Kennedy states that plaintiff misused the tools and equipment when the accident occurred, and that with his experience and training he should have known not to turn the helldog's bit faceward or to brace the trigger against his lap. She states that the equipment complied with industry standards, and that the helldog functioned properly when it was used properly. Thus, movants contend, dismissal under the theory of sole proximate cause is appropriate (citing *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

In opposition, plaintiff alleges that defendants have not provided evidentiary support showing that his actions were the sole proximate cause of his injury. Plaintiff claims that where, as here, defendants have violated the Labor Law, they cannot argue sole proximate cause. Plaintiff state that the failure to provide him with a face shield constitutes a Labor Law violation which proximately caused his injury. Although he concedes that, as defendants contend, Waterworks provided him with safety goggles, he alleges that a face shield was also necessary to prevent injury from debris or equipment which might strike his face. Because of this alleged failure, plaintiff states, he was not the sole proximate cause of the accident.

Plaintiff also states that defendants did not provide him with sufficient instructions about the procedure for changing the helldog bit. Plaintiff alleges he was never instructed on how to operate the chipping guns or how to change the bit. He claims that he was never instructed at this or any previous job to disconnect the air compressor before he changed a helldog bit. Furthermore, he points out, neither the Health and Safety Program nor the safety orientation form provided by Judlau states that disconnection is required. Plaintiff states that no one at the Project site or at Judlau ever told him to get out of the trench and turn off the air compressor. Plaintiff maintains that, although other workers failed to disconnect the helldog while changing the bit, no one instructed these workers to turn off the air compressor during the process. Plaintiff adds that on the day of the accident, there was no one at street level to turn off the air compressor while plaintiff replaced the bit. Thus, plaintiff contends, he did not deviate from the directions he received, and therefore he is not responsible for the accident. Plaintiff also states that the subject helldog was not appropriate for the type of work plaintiff was assigned to do, as the external trigger could be accidently depressed, causing the gun to cycle, especially given the tight space in the trench.

The Court denies the prong of the motion seeking dismissal based on sole proximate cause. Although defendants submitted evidence in support of their position, plaintiff has successfully rebutted it. In a summary judgment motion, a plaintiff's allegation that he was not instructed in the use of the subject equipment raises issues of fact (*see Rapalo v MJRB Kings Highway Realty, LLC*, -- AD3d --, --, 2018 WL 3557236, at *1 [2nd Dept 2018]). In addition, plaintiff has stated that he was not properly trained as to the use of a helldog with an external trigger, and this raises questions as to Waterworks' negligence (*see Gallagher v New York Post*, 14 NY3d 83, 82 [2010]). Defendants' statements that training was not required or that plaintiff should have known how to operate the equipment safely raise triable issues but do not establish that the plaintiff was solely

responsible for the accident. Furthermore, as plaintiff points out, "[i]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003], *see Cevallos v Morning Dun Realty Corp.*, 78 AD3d 547, 548 [1st Dept 2010]). For the reasons which follow, the Court finds triable issues of fact as to some of plaintiff's statutory claims. Summary judgment is not appropriate for this reason as well.

II. Labor Law § 241 (6) Claims

Defendants also move for the dismissal of plaintiff's Labor Law § 241 (6) claims. "Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept], *lv dismissed*, 29 NY3d 1100 [2017]). To establish liability under Labor Law § 241 (6), plaintiffs must show that defendants violated a specific provision of the Industrial Code (*Misicki v Caradonna*, 12 NY3d 511, 517 [2009]) and that the alleged violation proximately caused the accident (*see Williams*, 145 AD3d at 590).

A. Industrial Code 23-1.8 (a)

Defendants challenge plaintiff's reliance on New York Industrial Code § 23-1.8 (a), which requires that "[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in . . . chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operations which may endanger the eyes." Defendants contend the provision is inapplicable because it intends to prevent eye damage due to airborne particles, not facial injuries due to direct impact from an excavation tool. Defendant alleges even if Industrial Code § 23-1.8 (a) applied, plaintiff had worn goggles to protect his eyes when then accident occurred. Thus, proximate cause is lacking. Plaintiff argues in

opposition[3] that defendants violated Industrial Code § 23-1.8 (a), governing personal protective equipment. Although plaintiff was wearing safety glasses, he states, he was not provided with a face shield. Therefore, he states, issues of fact exist as to whether a face shield should have been provided pursuant to Industrial Code § 23-1.8 (a).

Plaintiff has stated a valid cause of action as to this provision, and summary judgment is not appropriate. Section 23-1.8 (a) requires eye protection equipment "suitable for the hazard involved" (*McByrne v Ambassador Construction Co., Inc.*, 290 AD2d 243, 244 [1st Dept 2002] [quoting Industrial Code § 23-1.8 (a)]). Defendant's position that the rule only applies to airborne particles and not to the equipment itself is an overly restrictive interpretation which disregards the fact that the rules exist to protect laborers engaged in potentially hazardous activities (*see Galarza v Lincoln Center for the Performing Arts, Inc.*, 32 Misc 3d 1225 [A], 2011 NY Slip Op 51435 [U], *13 [Sup Ct NY County 2011] [noting that "this section has been interpreted by the courts as a broad safety requirement protecting employees"]).

Moreover, caselaw supports plaintiff's argument. In *McByrne*, for example, the First Department found an issue of fact "as to whether plaintiff's injury is attributable to a violation of [Industrial Code § 23-1.8 (a)]" where a cable swung and a wire at its tip struck the plaintiff in the eye (*McByrne*, 290 AD2d at 243-44; *see Brady v City of New York*, 52 AD3d 331, 332 [1st Dept 2008]). In addition, in *Paulino v Bradhurst Assoc., LLC* (144 AD3d 430, 430 [1st Dept 2016]), the plaintiff alleged that "a screw he was driving into Sheetrock using a power drill sprang back and struck him in the eye." The First Department denied summary judgment dismissing the plaintiff's Industrial Code 23-1.8 (a) claim because an issue of fact existed as to whether the plaintiff's work

[3] The Court does not discuss plaintiff's statements about the nondelegable nature of defendants' duties under Labor Law § 241(6), as defendants do not argue the duty was delegable.

endangered his eyes. These cases are analogous to the one at hand (*see also Buckley v Triborough Bridge & Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]). Based on this precedent and the general policy against restrictively interpreting the provision at issue, the Court concludes there is a factual issue as to whether plaintiff should have been provided with a face shield. Thus, summary judgment is improper.

B. Industrial Code 23-1.10 (b) (1)

Plaintiff also relies on New York Industrial Code § 23-1.10 (b) (1). That provision, which relates to hand tools, requires that "electrical and pneumatic hand tools shall be disconnected from power sources and the pressure in hose lines shall be released before any adjustments or repairs are made except for the replacement of bits in electric drills," and that the tool must "be equipped with a cut-off switch in easy reach of the operator" (*id.*).

In support of their motion to dismiss this claim, defendants allege that a cut-off switch would not have prevented plaintiff's injuries and therefore the element of proximate cause is lacking. Plaintiff stresses that his allegation relies on the first part of Industrial Code § 23-1.10 (b) (1), which required defendants to have electronic and pneumatic tools disconnected from power sources before any adjustments or repairs are made, and that defendants' focus on the cut-off switch requirement is not relevant. In response to plaintiff's opposition, defendants state that even if the court accepts the plaintiff's version of the incident there is no evidence that the helldog malfunctioned. According to the Kennedy affidavit, defendants state, the helldog complied with industry standards. The expert concluded that the chipping gun was in good repair and safe working condition, plaintiff states, yet she never inspected the subject chipping gun.

The Court denies dismissal of this claim. There are issues of fact as to whether defendants properly enforced this code rule or in any way notified plaintiff of the proper protocol. Defendants'

argument that the compressor should have been disconnected before plaintiff commenced this work is undercut by the facts that 1) plaintiff had changed the bit earlier that day without disconnecting the helldog from the compressor, and he did so without correction and without incident, and 2) other workers in the vicinity also left the helldog attached while changing the bit, and they also were not corrected. Defendants' claim that plaintiff should have known better than to leave the helldog connected merely raises a jury question.

As such, the Court additionally rejects defendants' argument, asserted in their reply papers, that the helldog contained a dead man's switch, and thus there is no liability under Industrial Code 23-1.10 (b) (1) (citing *Latchuk v Port Auth. Of New York and New Jersey*, 2009 NY Slip Op 31390 [U], 9, 2009 WL 2128451 [Sup Ct NY County 2009], *aff'd*, 71 AD3d 560 [1st Dept 2010] [in resolving appeal based on other claims]). First, their allegation that paragraph seven of the Kennedy affidavit, which states that "[t]he tool will not cycle if the trigger is depressed," shows that the equipment contained a dead man's switch, is incorrect. A dead man's switch deactivates a machine when the user becomes incapacitated, and there is no evidence that such a switch was part of this tool. The Kennedy affidavit simply states that the on/off switch had the capacity to turn off the trigger, not that it was a dead man's switch. Thus, the Court need not reach the applicability of *Latchuk*.

In addition, defendants argue that plaintiff's contentions must be disregarded because of conflicting testimony and evidence. This argument also is not persuasive. These purported inconsistencies go to the credibility and weight of the evidence. As such, they raise issues of fact reserved for the factfinder at trial (*see Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017]) and do not support the granting of summary judgment.

C. Industrial Code § 23-9.2

The Court dismisses plaintiff's claim under Industrial Code § 23-9.2 (a). This provision states that power-operated equipment must be kept "in good repair and proper operating condition at all times." As the Kennedy Affidavit asserts, hand tools such as helldogs are not heavy machinery within the meaning of Industrial Code § 23-9.2 (a). Plaintiff says in opposition that Industrial Code § 23-9.2 expressly applies to all "Power-Operated Equipment" and defendants have not established that only heavy machinery is included in this provision. This argument has no merit because Section § 23-9.1 of the subpart governing "power-operated equipment" sates that it applies "to power-operated heavy equipment or machinery." Therefore, the Court need not address the parties' additional arguments as to the provision's applicability and as to proximate cause.

Labor Law § 200 and Common Law Negligence

In addition, the City and Judlau argue, they are entitled to summary judgment on plaintiff's common-law negligence and Labor Law § 200 claims. Labor Law § 200 codifies the owner or general contractor's duty "to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). There is no viable cause of action under this provision or under common law negligence against the owner and general contractor if "the alleged defect or dangerous condition arises from the contractor's methods and the owner [or general contractor] exercises no supervisory control over the operation" (*id.*).

Here, defendants point out, this is a "means and methods" rather than a "dangerous worksite" case, and neither defendant exercised supervision or control over the work (citing, inter alia, *Willis v Plaza Construction Corp.*, 151 AD3d 568, 568 [1st Dept 2017]; *Foley v Consolidated Edison Co. of New York*, 84 AD3d 476, 477 [1st Dept 2011]). Therefore, they are not liable for

plaintiff's injuries. Moreover, defendants note that plaintiff was a Waterworks employee at the time of the accident, and that Waterworks provided the helldog to plaintiff (*see Williams v River Place II, LLC*, 145 AD3d 589, 590 [1st Dept 2016] [finding that owner, agent, and general contractor were not liable for defects in equipment which plaintiff's employer had supplied to him]). In addition, they state that they were not responsible for instructing plaintiff as to the manner and method in which to perform his work. They claim that they did not give plaintiff instructions about how to use the helldog, and that he had the discretion to determine the means and methods of its use.

In support of the above allegations, defendants point to plaintiff's own 50-H hearing and deposition testimony. In the testimony plaintiff states that Waterworks employed and instructed him as well as provided him with the helldog. This, defendants argue, is dispositive of these causes of action as against the City. In addition, they cite to the deposition testimony of Judlau, by Manuel Lado, which indicated that along with OHL, it created Waterworks, which then served as general contractor and direct supervisor of the project. Waterworks rather than Judlau and OHL, therefore, was in control of the project. Thus, defendants contend, plaintiff has not shown that they are liable under Labor Law § 200 or common law negligence (citing, inter alia, *Brown v George,* 138 AD3d 466, 466-67 [1st Dept 2016].

Plaintiff does not challenge these arguments insofar as they pertain to the City. He asserts, however, that Judlau has not established a prima facie entitlement to dismissal of plaintiff's Labor Law § 200 and common-law negligence claims against it. Plaintiff states that if Judlau provided the allegedly defective equipment to the laborer, it is liable if it "created the dangerous or defective condition or had constructive notice thereof" (relying on *Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2nd Dept 2008]; *see Jaycoxe v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept

2017]). He concedes that it was Waterworks which provided him with a helldog, but he argues that Judlau, as a part-owner of Waterworks, has not definitively established that it did not provide the helldog to Waterworks, that the chipping gun was not defective, or that they lacked notice of the alleged defect. Plaintiff states that Judlau has the burden, prima facie, of establishing that the helldog did not belong to it, that there was no defect, and that they lacked notice, and that in light of the above deficiencies the application to dismiss his Labor Law § 200 and common-law negligence claims must be denied.

After careful consideration, the Court grants this prong of the motion as it relates to the City but finds that an issue of fact exists as to whether Judlau retained sufficient control over the worksite to be liable under these claims. In support of their position, defendants cite the deposition and 50-h transcripts of plaintiff, who states that Waterworks was his employer and told him where to work and what tools to use. In addition, they cite to the testimony of Manuel Lado, an employee of Judlau. According to defendants, the fact that Lado worked at the site as a general superintendent rather than a supervisor establishes that he was not involved in supervising the work.

The Court has examined the deposition of Lado, however, and concludes that his role may have been more integral to the project than defendants suggest. Although unlike the foreman, he did not execute the work, he explained, he not only monitored the site but ran the project (*see* Lado Dep, at p 10, ll 15-16). Moreover, Lado was assigned specifically to the worksite where the accident occurred and had no other responsibilities. He further stated that he monitored what the workers were doing and explained what they had to do. He stated he was "bouncing, talking, interacting" to make sure the workers performed the work according to the plans (*id.*, at p 19, ll 19-21). Lado also suggested that he made sure the necessary materials, trucking, and equipment were on site, and he referred to the employees under his purview as Judlau employees rather than

as Waterworks employees (*see id.*, at p. 20, ll 4-16). Further, Lado described himself as having worked with plaintiff at the project in question and at an earlier joint venture (*see id.*, at p. 21, ll 13-20).

Lado later refers to plaintiff as an employee of the joint venture rather than of Judlau and, as defendants note, he explains that Waterworks was set up by Judlau and OHL to perform the project. This does not resolve the issue of Judlau's involvement with the work in question, however, especially as Judlau's presence at the site is inconsistent with its allegation that only Waterworks was involved in the project. Therefore, defendants have not satisfied their burden on this point, and the Court need not reach plaintiff's opposition (*see Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017]).

The cases on which plaintiff relies for his contention that defendants have the burden on this motion to show lack of notice are unpersuasive. For one thing, defendants have shown, prima facie, that they are not responsible under Labor Law § 200 or common law negligence. Therefore, they have satisfied their prima facie case and there is no need for analysis regarding notice. For another, the cases do not apply. For example, *Soto-Lopez v Board of Managers of Crescent Tower Condominium* (44 AD3d 846 [2nd Dept 2007]) and *Feldmus v Ryan Food Corp.* (29 AD3d 940 [2nd Dept 2006]) both involve situations in which the plaintiffs slipped and fell in a facility owned by the defendants – in *Soto-Lopez*, against the managing agent of a condominium for an injury allegedly sustained in its common area; and in *Feldmus*, in a grocery store run by the defendant. In slip-and-fall cases of this sort, to set forth a prima facie case the plaintiff contends that the owner of the store or warehouse knew or should have known that the slippery condition existed on its premises, and a motion to dismiss must satisfactorily rebut this presumption. That is not the situation here, where the owner and general contractor are not in control of the worksite. Therefore,

plaintiff cannot rely on these cases on the issue of notice, and the Court dismisses these causes of action.

Conclusion

The Court does not discuss Industrial Code §§ 23-1.5 (c) or plaintiff's Labor Law §§ 241 (1) – (5), as plaintiff does not oppose defendants' motion to dismiss these provisions. The Court has considered the parties' arguments in full, even if it does not address each one explicitly in this decision. For the reasons above, it is

ORDERED that the motion is denied insofar as it seeks to dismiss the complaint on the ground of sole proximate cause and to dismiss plaintiff's claim that defendants violated Industrial Code §§ 23-1.8 (a) and 23-1.10 (b) (1); and it is further

ORDERED that the Court grants the unopposed portion of the motion, and severs and dismisses plaintiff's Industrial Code § 23-1.5 and Labor Law §§ 241 (1) – (5) claims; and it is further

ORDERED that the motion also is granted insofar as it seeks to sever and dismiss plaintiff's Labor Law §200, common law negligence against the City but denied as against Judlau; and it is further

ORDERED that the motion is granted to the extent that it seeks to sever and dismiss the Industrial Code § 23-9.2 claims as against both parties.

Dated: August 13, 2018 ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.