Bianco v McGuire
2018 NY Slip Op 32032(U)
August 6, 2018
Supreme Court, Suffolk County
Docket Number: 15-1439
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 15-1439
CAL. No. 17-00657OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-15-17
ADJ. DATE 1-5-18
Mot. Seq. # 001 - MG

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ANTHONY BIANCO and JENNIFER BIANCO,

Plaintiffs,

- against -

DANIEL M. MCGUIRE and FOUR D LANDSCAPING, INC.,

Defendants.

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KEEGAN & KEEGAN ROSS & ROSNER
Attorney for Plaintiffs
147 North Ocean Avenue
Patchogue, New York 11772-0918

MULHOLLAND MINION
DAVEY McNIFF & BEYRER
Attorney for Defendant McGuire
374 Hillside Avenue
Williston Park, New York 11596

BELLO & LARKIN
Attorney for Defendant Four D Landscaping
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Daniel McGuire, dated August 2, 2017, and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by plaintiffs and defendant Four D Landscaping, Inc., dated November 24, 2017 and November 28, 2017 respectively; (4) Reply Affirmation by defendant Daniel McGuire, dated January 2, 2018, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Daniel McGuire for, inter alia, summary judgment dismissing the complaint against him is granted.

Plaintiff Anthony Bianco commenced this action to recover damages for personal injuries he allegedly sustained on October 12, 2013, while delivering woodchips to a premises located at 2 Saddle Lane Road, Head of Harbor, New York. The accident allegedly occurred after plaintiff was directed by an unidentified worker on the premises to unload the woodchips onto an uninhabited piece of land directly across the street. According to plaintiff, after reversing to the uninhabited piece of land, he exited the dump truck to ensure there were no trees that would block the bed of the truck as he raised it to dump the woodchips. Immediately after he re-entered the dump truck, it allegedly overturned. The premises where the woodchips allegedly were to be delivered was owned by defendant Daniel McGuire. McGuire, who had been making renovations to his home, had retained defendant Four D Landscaping, Inc., to perform landscaping services at the residence. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also asserts a derivative claim on behalf of plaintiff's wife for loss of services. Defendants joined issue asserting affirmative defenses and cross claims against each other. The note of issue was filed on April 17, 2017.

McGuire now moves for summary judgment dismissing the complaint and cross claims against him on the grounds plaintiffs failed to allege actionable claims under Labor Law §§ 240 and 241 (6), and that he would, in any event, be exempted from such claims, as the premises is a single-family dwelling and he neither directed nor controlled plaintiff's work. Additionally, McGuire argues that the common law negligence and Labor Law § 200 claims should be dismissed, because he did not control or direct plaintiff's work, he did not own, control, or possess the uninhabited piece of land where the accident occurred, and he had no notice of any dangerous condition thereon. Plaintiffs oppose the motion, arguing that McGuire failed to demonstrate his entitlement to the homeowners' exemption as he failed to eliminate material triable issues as to whether his premises was used solely for residential purposes, and whether he was responsible for directing that the woodchips be unloaded onto the uninhabited piece of land directly across from the subject premises. Plaintiffs submit an affidavit of Anthony Bianco with their opposition papers. The affidavit states, in pertinent part, that his boss directed him to deliver woodchips to the McGuire property, that he was informed by an individual working on the premises that he could not unload the woodchips in the driveway because people were working there, and that the same individual directed him to unload the woodchips onto the unoccupied land across the street. The affidavit further states that the accident in question would not have occurred had plaintiff been allowed to dump the woodchips in the roadway or driveway of the McGuire property.

The motion also is opposed by defendant Four D Landscaping, which argues triable issues exist as to whether McGuire, who previously hired plaintiff's employer to perform tree removal services at his property, personally requested that the woodchips be delivered to his home and, if so, whether an agent of McGuire directed plaintiff to dump the woodchips on the unoccupied piece of land for McGuire's benefit and convenience. Four D Landscaping submitted an affidavit by its president, Eric Dimech, which states, inter alia, that Four D Landscaping had finished its work on the McGuire property prior to plaintiff's arrival there, that Four D Landscaping was not slated to deliver or utilize woodchips at the premises on the day of the accident, and that it would be inconsistent with regular business practice for any employee of Four D Landscaping to have directed plaintiff where to unload the woodchips. The affidavit further states that Dimech previously observed plaintiff's employer remove trees from McGuire's property, that

McGuire owned a small tractor with a bucket capable of transporting woodchips, and that the vehicle would have been an appropriate piece of machinery for McGuire to transport the woodchips from the unoccupied piece of land to his own property. Finally, the affidavit states that it is Dimech's belief that plaintiff's own conduct, in failing to observe the conditions of the unpaved ground where he intended to park his truck and off-load the woodchips, was the sole proximate cause of the accident.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595[1980]).

Initially, the court notes that Labor Law § 240 (1) is inapplicable under the circumstances of this case, as the overturning of the dump truck in question during the course of its unloading occurred at ground level and did not involve an elevation-related risk of the kind the statute was meant to protect against (*see* ***Farruggia v Town of Penfield***, 119 AD3d 1320, 989 NYS2d 715 [4th Dept 2014][Labor Law § 240 (1) held inapplicable to accident involving a backhoe that overturned into a ravine]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010] [Labor Law § 240 (1) held inapplicable to accident involving a capsized dump truck]; ***Garcia v Market Assoc.***, 123 AD3d 661, 998 NYS2d 193 [2d Dept 2014] [Labor Law § 240 (1) held inapplicable to accident involving an upended water truck]; ***Wynne v B. Anthony Constr. Corp.***, 53 AD3d 654, 862 NYS2d 379 [2d Dept 2008] [Labor Law § 240 (1) held inapplicable to accident involving overturned dump truck]). Therefore, the branch of McGuire's motion for summary judgment dismissing plaintiff's claim under Labor Law § 240 (1) is granted.

The branch of McGuire's motion seeking dismissal of plaintiffs' claim under Labor Law § 241 (6) also is granted, as plaintiffs failed to allege, let alone establish, the violation of an Industrial Code provision which sets forth specific applicable safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 349, 670 NYS2d 816 [1998]; ***Shaw v RPA Assoc., LLC***, *supra* at 636-637; ***Cambizaca v New York City Tr. Auth.***, 57 AD3d 701, 702, 871 NYS2d 220 [2d Dept 2008]; *cf.* ***Galarraga v City of New York***, 54 AD3d 308, 310, 863 NYS2d 47 [2d Dept 2008]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]), and the rule or regulation

alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

As to the branch of McGuire's motion for summary judgment dismissing plaintiffs' claims under the common law and Labor Law § 200, "[c]ases involving that section of the statute fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, there can be no recovery unless it is shown that the party to be charged had the authority to control the performance of the work or the provision of the alleged defective equipment (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]).

Moreover, fundamental to a plaintiff's recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached that duty, and that the resulting injury was proximately caused by such breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the premises (*see* ***DePompo v Waldbaums Supermarket***, 291 AD2d 528, 737 NYS2d 646 [2d Dept 2002]; ***Wellwood v Association for Children with Down's Syndrome***, 248 AD2d 707, 670 NYS2d 556 [2d Dept 1998]). Where none of these elements are present, a party owes no duty of care and cannot be held liable for injury caused by a defective or dangerous premises condition (***Donatien v Long Is. Coll. Hosp.***, 153 AD3d 600, 57 NYS3d 422 [2d Dept 2017]; ***Farruggia v Town of Penfield***, *supra*; ***Shaw v RPA Assoc., LLC***, *supra*; ***Clifford v Woodlawn Volunteer Fire Co., Inc.***, 31 AD3d 1102, 1103, 818 NYS2d 715 [4th Dept 2006]; ***McGill v Caldors, Inc.***, 135 AD2d 1041, 1043, 522 NYS2d 976 [3d Dept 1987]).

Here, McGuire established his prima facie entitlement to summary judgment dismissing plaintiffs' common law negligence and Labor Law § 200 claims by demonstrating that he did not own, occupy, or make special use of the uninhabited piece of land in question, and that he neither controlled plaintiff's work nor supplied him with any defective equipment (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*; ***Donatien v Long Is. Coll. Hosp.***, *supra*; ***Farruggia v Town of Penfield***, *supra*; ***Shaw v RPA Assoc., LLC***, *supra*). Significantly, it is undisputed that McGuire never spoke with plaintiff or supplied him with any defective equipment prior to the accident. Additionally, McGuire testified that he did not give anyone instructions concerning where mulch or wood chips delivered to his residence should be dumped, that he only learned that plaintiff had been there to deliver something to his home after one of Four D Landscaping's employee informed him that plaintiff had been there earlier asking where he should unload his truck, and that he did not own or occupy the uninhabited piece of land where the truck overturned. Erik Mimech, the president of Four D Landscaping, further testified that he was unaware of McGuire giving any instructions as to where any mulch that was delivered to the residence should or should not be dumped, and that he did not know who owned the parcel of land where the accident took place. McGuire also submitted

an affidavit by land surveyor, Christopher Henn, which states, in pertinent part, that the accident in question occurred to the south of the boundary lines of McGuire's property. Henn also attached a map depicting that the uninhabited piece of land lay to the south of the boundary line of the McGuire residence.

In opposition, the speculatory assertions made by plaintiff and Four D Landscaping that McGuire may have directed the dumping of the woodchips onto the uninhabited piece of land through an agent working on his premises, and that McGuire's ownership of a small tractor capable of transporting the woodchips back to his premises made this more likely, is insufficient to raise a triable issue warranting denial of the motion (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Such assertions are based on inferences from circumstantial evidence, and neither Four D Landscaping nor plaintiff have identified which contractor, if any, could have been McGuire's agent for the purpose of directing the dumping of the woodchips. Indeed, Four D Landscaping has failed to identify another contractor who could have acted as McGuire's agent, and plaintiff himself testified that it was the landscapers who directed him to unload the woodchips. The court notes that "'[s]omething more than speculation is needed to defeat a motion for summary judgment'" (***Steinborn v Himmel***, 9 AD3d 531, 535, 780 NYS2d 412 [3d Dept 2004], quoting ***Oliveira v County of Broome***, 5 AD3d 898, 899, 772 NYS2d 883 [3d Dept 2004]), and while circumstantial evidence may in some instances be sufficient to defeat a plaintiff's prima facie showing, to do so the opponent must present evidence rendering the other possible causes of the alleged negligence sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence rather than speculation (*see* ***Eschenberg v Kohl's Dept. Stores, Inc.***, 31 AD3d 493, 817 NYS2d 531 [2d Dept 2006]; ***Webb v Tire & Brake Distrib.***, 13 AD3d 835, 786 NYS2d 636 [3d Dept 2004]; ***Thomas v New York City Transit Auth.***, 194 AD2d 663, 599 NYS2d 127 [2d Dept 1993]; ***Duprey v Drake***, 182 AD2d 1015, 582 NYS2d 829 [3d Dept 1992]). Accordingly, the motion by defendant Daniel McGuire for summary judgment dismissing the complaint and cross claims against him is granted.

Dated: August 6, 2018

PETER H. MAYER, J.S.C.