SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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JAVIER JARAMILLO

Plaintiff

Index No. 154342/15

v

DECISION AND ORDER

WEST CHELSEA BUILDING LLC

Defendant.

(And a third-party action and fourth-party action)

MOT SEQ 002, 003, 004
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages for personal injuries under Labor Law §§ 200, 240(1), and 241(6), the defendant, West Chelsea Building, LLC (WCB), moves to vacate the note of issue, allow additional time to complete discovery related to the third-party action it commenced against RCN Telecom Services of New York, L.P., d/b/a RCN Business Services (RCN), and extend its time to move for summary judgment to 60 days following the completion of discovery (SEQ 002). The plaintiff opposes the motion. RCN moves to sever the third-party action and a fourth-party action it commenced against ASA Cabling Systems, Inc. (ASA) in order to enable the parties to complete discovery in those actions (SEQ 004). No opposition is submitted. Finally, by separate motion, WCB seeks summary judgment dismissing the plaintiff's claims

under Labor Law §§ 200, 240(1) and 240(6) (SEQ 003). The plaintiff opposes the motion and cross moves for leave to serve an amended Bill of Particulars (SEQ 003 X-MOT). WCB's motion to vacate the note of issue is granted in part, RCN's motion to sever is denied as moot, WCB's motion for summary judgment is denied, and the plaintiff's cross motion to amend the Bill of Particulars is granted.

II. BACKGROUND

The plaintiff in this action alleges that on September 24, 2013, at a building owned by WCB, he was injured when a metal object fell from the floor above him and hit his head. The plaintiff alleges that he sustained his injuries while working for a cable installation subcontractor at the building. He commenced this action against WCB, asserting that it violated Labor Law § 200 by failing to provide the plaintiff with a safe place to work, that it violated Labor Law § 240(1) by failing to provide him with proper protection from elevation-related injuries, and that it violated Labor Law 241(6) by failing to comply with unspecified provisions of the Industrial Code. Named as a third-party defendant is RCN, the general contractor that contracted with WCB to service the cable lines in WCB's building. Named as the fourth-party defendant is ASA, the subcontractor performing the cable work and the plaintiff's employer.

III. DISCUSSION

A. Vactur of Note of Issue and Severance

The court may vacate a Note of Issue where, as here, it appears that a material fact set forth therein, i.e. the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept 2006); Herbert v Sivaco Wire Corp., 1 AD3d 144 (1st Dept 2003). Further, CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy' (Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406 [1968])." Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue, 127 AD3d 554, 555 (1st Dept 2015).

WCB has demonstrated that there was material and necessary discovery outstanding at the time the Note of Issue was filed. Specifically, when the Note of Issue was filed, WCB had not yet provided a response to the plaintiff's discovery demands, as directed in the court's status conference order dated June 22, 2017. The order provided that WCB was to respond within 7 days, and that the note of issue deadline remained June 29, 2017, per

prior orders. The plaintiff filed the note of issue on June 28, 2017, indicating that no requests for discovery remained outstanding. Nonetheless, WCB did not provide a response until June 29, 2017, within the timeframe set by the court but one day after the plaintiff had filed the note of issue and certificate of readiness. WCB avers that in preparing its discovery response, it became cognizant that it needed to implead RCN. WCB therefore commenced a third-party action against RCN. It is undisputed that RCN has had no opportunity to conduct any discovery. Moreover, since WCB's filing of this motion, RCN has appeared and has commenced a fourth-party action against ASA, which likewise requires an opportunity for discovery. In light of the foregoing, the note of issue is vacated and the case is stricken from the trial calendar.

The branch of WCB's motion seeking an extension of time to file any dispositive motions is denied as academic as the parties' will have 60 days from the re-filing of the note of issue to make any such motions, in accordance with this court's part rules. RCN's motion to sever the third-party action and fourth-party action is denied as moot given the court's vacatur of the note of issue and the opportunity for the completion of discovery in those actions.

B. Summary Judgment

It is well settled that the movant on 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 issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992).

Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra. A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See id. "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" De Paris v Women's Natl. Republican Club, Inc., 148 AD3d 401, 403-404 (1st Dept. 2017); see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1st Dept.

1990). Thus, a moving defendant does not meet its burden of establishing entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense. See Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1st Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1st Dept. 2016).

WCB argues that it is entitled to summary judgment dismissing the plaintiff's claims because the plaintiff was not an "employee" as contemplated by the Labor Law. WCB bases this assertion on Public Service Law § 228(1), which requires landlords to refrain from interfering with the installation of cable television facilities upon their property or premises, except that a landlord may require any such installation to conform to reasonable conditions as are necessary to protect the safety, functioning, and appearance of the premises, and the convenience and well-being of other tenants. The Court of Appeals has stated that an owner cannot be charged with the duty of providing safe working conditions under the Labor Law for cable television repair people of whom it is "wholly unaware," and who were granted permission to access the premises based upon the mandatory access provision of Public Service Law § 228(1), rather than by reason of any action of the owner. Abbatiello v Lancaster Studio Associates, 3 NY3d 46, 52 (2004); see Wildman v Jensen, 59 AD3d 165 (1st Dept. 2009).

WCB's submissions, which include the plaintiff's Bill of Particulars, a transcript of the plaintiff's deposition, and a contract between WCB and RCN granting RCN the authority to perform cable work at its building, do not establish that WCB may avoid liability pursuant to the reasoning in Abbatiello. In Abbatiello, the Court of Appeals held that the mandatory access provision in Public Service Law § 228(1) neither imposed constructive notice on a building owner that a cable television technician would be on its premises nor subjected the owner to liability under Labor Law § 240(1). Abbatiello v Lancaster Studio Associates, supra. In that case, it was undisputed that the plaintiff cable technician had gone to the owner's building in response to the complaint of a tenant, that the owner "had no notice that plaintiff would be on its premises for any purpose," and that the owner did not authorize the plaintiff's presence. Id. at 49.

The circumstances presented in the instant matter are readily distinguishable. Here, the cable work plaintiff was hired to perform was governed by a contract between WCB and RCN. The contract contains provisions providing for unlimited access to the building for RCN, and payment to WCB of 5% of the fees paid to RCN by tenants for cable installation services. The contract also describes in detail the cabling work to be performed by RCN. WCB's own submissions thus show that, rather

than merely permitting the plaintiff access as a cable provider pursuant to Public Service Law § 228(1), WCB contracted for the cable installation services that the plaintiff was hired by RCN to perform. Accordingly, the cases cited by WCB are inapposite, and WCB has not shown that it is entitled to summary judgment based on Public Service Law § 228(1).

WCB next argues that the plaintiff's Labor Law § 240(1) claim must be dismissed because the plaintiff was not performing a construction-related activity covered by the statute. "In order to be entitled to the statutory protection, a worker must establish that he or she sustained injuries while engaged in the 'erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure.'" Rhodes-Evan v 111 Chelsea LLC, 44 AD3d 430, 432 (1st Dept. 2007) (citing Labor Law § 240[1]). The Court of Appeals has held that altering within the meaning of the statute "requires making a *significant* physical change to the configuration or composition of the building or structure." Panek v County of Albany, 99 NY2d 452, 457-58 (2003); see also Joblon v Solow, 91 NY2d 457 (1998). This includes alterations that significantly change the way an important component of the building functions. See Belding v Verizon New York, Inc., 14 NY3d 751 (2010); Mananghaya v Bronx-Lebanon Hospital Center, 2018 NY Slip Op 06061 (1st Dept. 2018). A change in structural integrity is not necessarily required to

obtain Labor Law § 240(1) coverage, and work that affects a crucial building system has been found to constitute a sufficient physical change even when it does not yield visible differences in the building. Mananghaya v Bronx-Lebanon Hospital Center, supra.WCB states that because the plaintiff testified that his work consisted of connecting cable lines by splicing them into nodes and into taps, replacing old taps, and running the cable lines through the building, the plaintiff was not engaged in construction-related activity. This argument fails. Based on the comprehensive contract between RCN and WCB and the plaintiff's own testimony there is, at the very least, an issue of fact as to whether the plaintiff's installation of new cables in the building constituted work that affects a crucial building system, namely the telephone communications and video systems, and the internet access system, of the entire building. Visible differences in the building are not required under Labor Law § 240(1). See Mananghaya v Bronx-Lebanon Hospital Center, supra. Moreover, the contract between the parties specifies that backboards, splice boxes, and video electronics were to be supplied and installed by RCN. WCB's invocation of the Appellate Division, First Department's decision in Rhodes-Evans v 111 Chelsea LLC, 44 A.D.3d 430 (1st Dept. 2007), is unavailing, as that case involved a technician injured in a fall while splicing fiber optic cable into an existing cable in a cable box located

in the parking garage to bring telephone service to a single new tenant in the building, rather than performing pursuant to a contract to bring telephone, video, and internet services to the entire building, within the building itself.

Finally, WCB argues that the plaintiff's Labor Law § 241(6) claim must be dismissed because the plaintiff was not working in an area in which construction, excavation, or demolition was being performed, and because the plaintiff has not alleged any violation of a specific regulation. As to the first branch of WCB's argument, Labor Law § 241(6) requires a plaintiff to demonstrate as a preliminary matter that the work giving rise to his injury was in connection with construction, excavation, or demolition. See Nagel v D & R Realty Corp., 99 NY2d 98 (2002). While stripping the insulation from a preexisting cable wire running from a telephone pole (Sarigul v New York Tel. Co., 4 AD3d 168 [1st Dept. 2004]), performing a two-year elevator test (Nagel v D & R Realty Corp., supra), changing a lightbulb (Guevera v Simon Property Group, Inc., 134 AD3d 899 [2nd Dept. 2015]) , delivering furniture (Martinez v Bauer, 121 AD3d 495 [1st Dept. 2014]), and removing and replacing damaged electrical cable, without more (Lavigne v Glens Falls Cement Co., 92 AD3d 1182 [3rd Dept. 2012]), have been found not to constitute construction, excavation, or demolition, within the meaning of the statute, the evidence in this cases creates a question as to

whether the plaintiff was engaged in a larger and more significant project that was meant to result in an alteration of the way the building functioned. Thus, the plaintiff's Labor Law § 241(6) claim may not be dismissed on this ground.

In addition, based on the discussion below with regard to the plaintiff's cross-motion to amend the bill of particulars, dismissal of the plaintiff's Labor Law § 241(6) cannot be predicated on the plaintiff's failure to allege a specific Industrial Code violation. See Walker v Metro-North Commuter R.R., 11 AD3d 339 (1st Dept. 2004).

C. Amendment of Bill of Particulars

In order to state a claim pursuant to Labor Law § 241(6), the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code. See Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993). However, a "failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim" (Jara v New York Racing Ass'n, Inc., 85 AD3d 1121, 1123 [2nd Dept. 2011] [quotation omitted]), and "in the absence of unfair surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed" (Walker v Metro-North Commuter R.R., supra at 341). See Gjeka v Iron Horse Transport, Inc., 151 AD3d 463 (1st Dept. 2017).

The plaintiff cross-moves pursuant to CPLR 3043(c) for leave to serve an amended bill of particulars pleading violations of 12 NYCRR §§ 23-1.7(a)(1), 23-1.7(a)(2), and 23-1.8(c)(1). In his initial bill of particulars, the plaintiff pled violations of "Rule 23 of the New York Industrial Code, New York City Building Code." The plaintiff's proposed amendment specifies that the plaintiff is pleading violations of the specific section of Rule 23 that relate to suitable overhead protection where employees are required to work or pass, suitable overhead protection where employees are lawfully passing but are not required to work or pass, and appropriate head protection, respectively.

Here, it is plain that the amendments sought by the plaintiff would result in no cognizable prejudice, particularly as the note of issue has been vacated. Accordingly, the plaintiff's cross-motion to amend the bill of particulars to plead particular violations of 12 NYCRR §§ 23-1.7(a)(1), 23-1.7(a)(2), and 23-1.8(c)(1) is granted. Since the plaintiff does not attach an amended bill of particulars to his motion papers, service of the amended bill of particulars must be completed within 20 days from the date of this order.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendant West Chelsea Building, LLC, to vacate the note of issue, allow additional time to complete discovery, and extend its time to move for summary judgment (SEQ 002), is granted to the extent that the note of issue is stricken, and the motion is otherwise denied; and it is further,

ORDERED that the motion of the third-party defendant RCN Telecom Services of New York, L.P., d/b/a RCN Business Services, to sever the third-party action and the fourth-party action to enable the parties to complete discovery (SEQ 004) is denied as moot; and it is further,

ORDERED that the motion of the defendant West Chelsea Building, LLC for summary judgment dismissing the plaintiff's claims under Labor Law §§ 200, 240(1) and 240(6) (SEQ 003) is denied; and it is further,

ORDERED that the cross-motion of the plaintiff Javier Jaramillo for leave to serve an amended bill of particulars (SEQ 003 X-MOT) is granted, and the plaintiff may amend his bill of particulars to plead violations of 12 NYCRR §§ 23-1.7(a)(1), 23-1.7(a)(2), and 23-1.8(c)(1), and shall serve such amended bill of particulars within 20 days of this order; and it is further,

ORDERED that the parties shall appear for a status conference on December 20, 2018 at 9:30 AM.

This constitutes the Decision and Order of the court.

Dated: October 4, 2018

ENTER: _____
J.S.C.

HON. NANCY M. BANNON