Awad v Rodeo Dr. Realties, Inc.
2018 NY Slip Op 32542(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 151186/15
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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ASHRAF A. AWAD

Plaintiff

Index No. 151186/15

v

DECISION AND ORDER

RODEO DRIVE REALTIES, INC.

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

I. INTRODUCTION

In this action seeking damages for alleged personal injuries arising from a fall from a ladder while hanging a temporary banner on West 125th Street in Manhattan, the defendant moves to compel the plaintiff to appear for an additional independent medical examination (SEQ 003). By separate motion, the defendant, which was the owner of the building where the plaintiff was working, moves for summary judgment dismissing the complaint in its entirety (SEQ 004). The plaintiff opposes the defendant's motion to compel (SEQ 003) and the defendant's motion for summary judgment (SEQ 004), and cross-moves for partial summary judgment against the defendant pursuant to Labor Law § 240(1) (SEQ 004 X-MOT). The defendant's motion to compel is denied. The defendant's motion for summary judgment dismissing

the complaint in its entirety is granted, and the plaintiff's cross-motion is denied.

II. DISCUSSION

A. Motion to Compel IME

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action," and this language is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). The plaintiff appeared for an independent medical examination (IME) on November 14, 2016. As of that date, the plaintiff had served a Bill of Particulars and a Supplemental Bill of Particulars. Subsequently, the plaintiff served a Second Supplemental Bill of Particulars, amended to allege that the plaintiff suffers from a complex regional pain syndrome/ reflex sympathetic dystrophy (RSD) of the right upper extremity, among other things. The defendant avers that the plaintiff's Supplemental Bill of Particulars alleges a new injury, and that it is entitled to a further IME of the plaintiff addressed to his

RSD diagnosis. The court notes that a note of issue was filed in this action on August 2, 2017.

The plaintiff points out that his allegations with respect to RSD are the continuing consequences of the injuries described in the plaintiff's previous bills of particulars, rather than new injuries. Indeed, the plaintiff alleged a neuropathic component to his injuries at the outset. RSD is "not a 'new' injury, but a sequela of [the] plaintiff's original injury." Spiegel v Gingrich, 74 AD3d 425 (1st Dept. 2010). Thus, in Spiegel v Gingrich, supra, the Appellate Division, First Department held that a plaintiff was allowed to serve a supplemental bill of particulars alleging RSD 12 days before trial, and that the defendant could not seriously contend that he was prejudiced by the amendment.

Moreover, the November 14, 2016, IME report from the defendant's neurologist addressed the plaintiff's right wrist injury at length, in addition to the plaintiff's right shoulder, left knee, and left ankle injuries. The neurologist determined that the plaintiff "has no signs for R.S.D. and no objective neurological findings to substantiate his subjective findings." It is apparent that the neurologist was looking for symptoms of RSD and addressed that condition in his report. Accordingly, the defendant's motion to compel a further IME is denied.

B. Motions for Summary Judgment

As to the defendant's motion for summary judgment seeking dismissal of the plaintiff's Labor Law §§ 240(1), 241(6), and 200 claims, and the plaintiff's cross-motion for summary judgment on his Labor Law § 240(1) claim, 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.

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and

operated as to give proper protection to [construction workers employed on the premises]." The duty created by Labor Law § 240(1) is nondelegable, and an owner or contractor who breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 500 (1993); see Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004). Moreover, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense." Cahill v Triborough Bridge and Tunnel Authority, supra at 39.

The defendant contends 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 Joblon v Solow, 91 NY2d 457 (1998). In

determining whether a project falls within the meaning of "altering," the court must examine the totality of the work done to determine whether a significant physical change resulted. See Maes v 408 W. 39 LLC, 24 AD3d 298 (1st Dept. 2005); Aguilar v Henry Mar. Serv., 12 AD3d 542 (2nd Dept. 2004).

Here, the defendant submits proof in the form of the pleadings and bill of particulars, deposition testimony of the plaintiff and defendant, photos of the subject banner and storefront, an affidavit of the defendant's secretary, and an affidavit of the plaintiff's manager at the time of the incident, establishing that, at the time of his injury, the plaintiff was engaged in hanging a temporary vinyl banner advertising tuxedos to the exterior awning of a store called Porta Bella. The plaintiff was an employee of Porta Bella Payroll, LLC, and the defendant was the owner of the building. The plaintiff's hanging a temporary vinyl banner advertisement was "not part of a change in the configuration or composition of the building, and thus did not constitute a significant alteration of the building." Maes v 408 W. 39 LLC, supra at 300; see Della Croce v City of New York, 297 AD2d 257 (1st Dept. 2002); Cook v Parish Land Co., 239 AD2d 956 (4th Dept. 1997). The fact that the plaintiff had to drill holes into the awning in order to hang the banner does not alter this analysis. See Lannon v 356 West 44th Street Restaurant,

Inc., 136 AD3d 528 (1st Dept. 2016); Amendola v Rheedlen 125th Street, LLC, 105 AD3d 426 (1st Dept. 2013).

In an affidavit submitted in opposition to the defendant's summary judgment motion, the plaintiff avers, for the first time, that after he hung the temporary banner he was going to paint the façade of the store. The plaintiff states that he failed to disclose this information at his deposition because he was not asked what he was going to do after he hung the sign. A review of the plaintiff's deposition transcript reveals that the plaintiff testified that he was given instructions by his supervisor to go to a number of stores to hang signs and that he took with him the rolled up signs and tools to hang them with, but made no mention whatsoever about painting. Nonetheless, the plaintiff does not contend even now that any painting was actually done at this location or at any other store where he was sent to hang signs. Moreover, the plaintiff's supervisor, from whom the plaintiff states he received all of his work instructions, avers in an affidavit prepared in response to the plaintiff's moving papers that he never told the plaintiff to paint around the subject façade or anywhere the day of the plaintiff's accident, and that there is nothing to paint around the façade, in any event, because it is made of glass and steel.

In light of the foregoing, the plaintiff's novel contention that he was going to paint after hanging the temporary banner,

raised for the first time on a motion for summary judgment that follows substantial discovery including the deposition of the plaintiff, is insufficient to raise a triable issue of fact as to whether the plaintiff was engaged in work covered by Labor Law § 240(1). "Where a party submits an affidavit in opposition to a motion for summary judgment which is directly contrary to his or her deposition testimony, the affidavit will be rejected as a feigned attempt to avoid the consequences of an earlier admission." Gaddoniex v Lombardi, 277 AD2d 281 (2nd Dept. 2000); see Garten v Shearman & Sterling LLP, 102 AD3d 436 (1st Dept. 2013); Sosna v American Home Products, (298 AD2d 158 (1st Dept. 2002); Wright v Nassau Communities Hosp., 254 AD2d 277 (2nd Dept. 1998). Here, the plaintiff's affidavit is directly contrary to his deposition testimony, which described in detail the work he was instructed to do and did on the day of his accident, never mentioning anything about painting. Accordingly, the plaintiff's novel claim is rejected, his Labor Law § 240(1) claim is dismissed and the plaintiff's cross-motion for summary judgment on that claim is denied.

The defendant's motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim is likewise granted. Labor Law § 241(6) affords protection only to that class of workers engaged in "constructing or demolishing buildings" in "areas in which construction, excavation or demolition work is being

performed." See Acosta v. Banco Popular, 308 A.D.2d 48, 50 (1st Dept. 2003). "[T]he protections of Labor Law § 241(6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context." Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 99 (2002). Since plaintiff was not involved in construction, Labor Law § 241(6) does not apply. See Maes v 408 W. 39 LLC, supra.

Finally, the plaintiff's Labor Law § 200 claim must be dismissed. "Section 200 is a codification of the common-law duty of an owner or general contractor to provide a safe workplace. To sustain a claim under that section, there must be a finding that the party charged with that responsibility ha[s] the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." Maes v 408 W. 39 LLC, supra at 301, quoting Russin v Picciani & Son, 54 NY2d 311, 317 (1981). The record reflects that the plaintiff was employed by nonparty Porta Bella, that the ladder he used was owned and provided by Porta Bella, and that he received his work instructions from a Porta Bella employee. There is no evidence presented that the defendant supervised the plaintiff's work in any manner, or provided any of the tools or equipment used in the plaintiff's work. The defendant thus may not be held liable under any common-law theories of liability or Labor Law § 200. Id.

III. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendant's motion to compel the plaintiff to appear for a further independent medical examination is denied (SEQ 003); and it is further,

ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's complaint in its entirety is granted (SEQ 004); and it is further,

ORDERED that the plaintiff's cross-motion for summary judgment on its Labor Law § 240(1) claim is denied (SEQ 004 X-MOT); and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 9, 2018

ENTER: _____
J.S.C.
HON. NANCY M. BANNON