Spencer v Term Fulton Realty Corp.
2018 NY Slip Op 32903(U)
November 14, 2018
Supreme Court, New York County
Docket Number: 154446/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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JHON SPENCER,

Plaintiff,

- v -

TERM FULTON REALTY CORP., 56 FULTON STREET LLC AND, BRAVO BUILDERS, LLC

Defendant.

INDEX NO. 154446/2016

MOTION DATE 10/30/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendants for summary judgment dismissing plaintiff's complaint is granted and the cross-motion by plaintiff for summary judgment on his Labor Law § 241(6) claim is denied.

Background

This Labor Law action arises out of plaintiff's work on a construction site located at 56 Fulton Street in Manhattan. Plaintiff alleges that he was hurt while pushing a cart full of metal jacks to access metal rods located underneath the cart. Plaintiff was instructed to eventually pass these metal rods to workers on the floors above.

Plaintiff pushed the cart while a colleague 'pulled' the cart while walking backwards. After moving the cart about five feet, the cart got stuck on the rods. Despite plaintiff's instructions to his colleague to stop, plaintiff's coworker pulled the cart which caused it to slam

into a metal jack. Unfortunately, plaintiff's hand was in the way and his left index finger was smashed between the jack and the cart.

Defendants move for summary judgment dismissing plaintiff's Labor Law § 200 claim and common law negligence claim on the ground that defendants had no supervisory control over plaintiff's work. Defendants emphasize that plaintiff took direction solely from his supervisor on site and that he worked for non-party Parkside Construction Builders Corp. ("Parkside"). Defendants argue that they had nothing to do with the rods on the ground that allegedly caused plaintiff's accident. Defendants also move to dismiss plaintiff's Labor Law § 241(6) claim.

In support of his cross-motion and in opposition to defendants' motion, plaintiff emphasizes that defendant Bravo Builders, LLC ("Bravo") was responsible for overseeing safety on the job site. Plaintiff points out that Bravo would do daily inspections for dangerous and hazardous conditions.

In reply, defendants insist that one of the Industrial Code sections cited by plaintiff (23-1.28) should be dismissed because it was raised for the first time in opposition to a motion for summary judgment. Defendants emphasize that plaintiff did not cross-move to amend his bill of particulars to add this code section.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 200

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska*

USA Bldg. Inc., 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*id.* at 144).

"Where an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Here, plaintiff testified that Juan (Parkside's foreman at the site) told him to bring up rods from the first floor to the third floor (NYSCEF Doc. No. 23 at 26). Plaintiff was moving the cart so he could get access to the rods underneath the cart (*id.* at 33). After moving the cart about five feet, the cart got stuck on the rods beneath (*id.* at 39). Plaintiff claimed that he saw these rods prior to pushing the cart over them and that the cart was on top of the rods (*id.* at 42).

Plaintiff added that "The cart got stuck because of the wheel. I told Castro [plaintiff's coworker] don't put [sic] any more because it's not going to move. It's stuck. We are making the intention – we are trying to take it out. I shout to him with calm – be calm. He pull and the wheel turned again. The cart moved again and slided the cart between the jack and the cart" (*id.* at 52). Plaintiff stated that Castro later claimed to not have heard plaintiff tell him to stop (*id.* at 53).

This testimony compels the Court to grant the branch of defendants' motion to dismiss the Labor Law § 200 claim. There is no basis to find that defendants were negligent. The fact is that plaintiff's foreman told him to perform a task and the alleged dangerous condition (the rods on the ground) was open and obvious. According to plaintiff, he decided to try and 'drive' a cart loaded with jacks over metal rods and the accident happened when his coworker tried to get the

cart's wheel unstuck despite plaintiff's request to stop. Defendants had no control over the task assigned to plaintiff or the way in which he tried to access the rods underneath the cart.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff's bill of particulars alleges the following Industrial Code Sections: 23-1.2(d), 1.5, 1.7(b)(1), 1.7(e), 1.7(f)(1), 1.7(f)(2), 1.22(b)(1)-(4), 23-1.33(a)(1)-(3), 1.33(b)(1) and 1.33(d)(1), 2.1(a)(1), 2.1(b), 2.2(2), 7.1 and 7.2(j). In his cross-motion and opposition, plaintiff only addresses 23-1.7(e)(1) and (2) and 1.28 (which was not in the bill of particulars). Therefore, plaintiff has abandoned the cited Industrial Codes except for the three identified in the preceding sentence.

1.28

Even if the Court were to consider a violation under Industrial Code 23-1.28 (which was raised for the first time in response to defendants' motion), the Court finds that this section is inapplicable. 1.28 requires "hand-propelled" vehicles to be kept in good repair and that the wheels should be "free-running." The allegation here is that the wheel got stuck on the rods it was riding on top of, not that there was something wrong with the wheel itself. Therefore, this section is severed and dismissed.

1.7(e)(1)

This Industrial Code section provides that "1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

The Court finds that this section is inapplicable because this accident did not occur due to dirt, debris or obstructions left on the ground. Instead, the cart got stuck on materials that plaintiff was trying to access and eventually help transport up to the third floor. Because the Court finds this section inapplicable, it need not make a finding about whether the location of the accident was a passageway.[1]

1.7(e)(2)

This section provides that "Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

The fact that plaintiff tripped over rods that were in the process of being installed to support the building's infrastructure compels this Court to dismiss this Industrial Code section (*Tucker v Tishman Constr. Corp of N.Y.*, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007] [finding that there was no liability under 1.7(e)(2) where "the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools and materials or a sharp

[1] The Court observes that plaintiff first testified that the accident happened in a hall and then claimed it occurred in a wide space, with metal jacks five feet apart (NYSCEF Doc. No. 23 at 36).

projection"]). The Court finds that the rods were an integral part of plaintiff's work because that is why plaintiff was moving the cart—to access the rods underneath.

Summary

Plaintiff's testimony about this incident demonstrates that his injuries were the result of an unfortunate accident. That accident occurred, according to plaintiff, because his coworker did not hear or listen to his instructions to stop trying to pull the cart. Plaintiff simply did not have a chance to get his hand out of the way when his coworker unexpectedly pulled the cart. Although plaintiff has presented uncontroverted proof that he was hurt, he is unable to raise an issue of fact because there is no evidence that defendants supervised or controlled his work or that there was a violation of an Industrial Code section.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment is granted, the cross-motion by plaintiff is denied and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

11.14.18

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE