Murphy v D&H Excavating, Inc.
2018 NY Slip Op 34403(U)
January 4, 2018
Supreme Court, Erie County
Docket Number: Index No. 806282/2015
Judge: E. Jeannette Ogden

At a Special Term of the Supreme Court, Part 35 thereof, held in the County of Erie and City of Buffalo, N.Y. on the 24th day of October, 2017.

STATE OF NEW YORK
SUPREME COUNTY : COUNTY OF ERIE

PATRICK G. MURPHY

PLAINTIFF

vs.

DECISION AND ORDER

D&H EXCAVATING, INC. and MALLARE ENTERPRISES, INC.

Index No. 806282/2015

DEFENDANTS

APPEARANCES:

Anne M. Wheeler, Esq. & Edward T. Mazzu, Esq.
for Plaintiff, Patrick G. Murphy

Elizabeth M. Bergen, Esq.
for Defendant, D&H Excavating, Inc.

Elise L. Cassar, Esq.
for Defendant, Mallare Enterprises, Inc.

PLEADINGS REVIEWED:

The following pleadings, NYCEF document numbers 13 to 74 were read on these motions.

	Document Number
Notice of Motion (Seq. No. 001), Affirmation and Exhibits A-M	13
Notice of Cross-Motion (Seq. No. 002), Affidavit or Affirmation with Exhibits A-U and Memorandum of Law	28
Notice of Motion (Seq. No. 003), Affirmation in support of Motion, Exhibits A-K, Affidavit in Support with Exhibits A-D and Memorandum of Law in Support	54

Affidavit or Affirmation in Opposition to Cross Motion and in Further Support of Motion (Motion #002)	73
Affirmation or Affidavit in Reply	74

Upon the foregoing pleadings, it is ordered that the motions are decided as follows:

FACTS AND PROCEDURAL HISTORY

Plaintiff commenced this action against Defendants D & H Excavating, Inc. (D & H) and Mallare Enterprises, Inc. (Mallare) to recover for personal injuries to his left knee and low back sustained while working as a truck driver for non-party Dirt Fill Trucking, Inc. (Dirt Fill) at a job site on August 7, 2012. Plaintiff slipped and fell while attempting to tarp a load of millings to take to the quarry while standing in the bed of his dump truck as he used a hand crank to tarp the load because the mechanical tarp system on the truck was broken.

Defendant, D & H was the general contractor on a job arising from a contract with the NYS Department of Transportation to perform asphalt concrete resurfacing on Clinton Street in the Town of West Seneca, New York (the job site). The project entailed removing milling on existing roadway and repaving the road. Defendant, D & H subcontracted with Defendant, Mallare, to provide dump trucks and drivers to haul millings away from the job site to a nearby dump site and to deliver asphalt from Buffalo Crushed Stone to the job site. Defendant, Mallare, entered into an agreement with Dirt Fill, Plaintiff's employer, to provide a portion of the trucking services to transport blacktop, millings and asphalt.

There was no written contract between Defendant, Mallare, and Dirt Fill. Joseph Mallare was the owner of Dirt Fill and brother of the owner of Defendant, Mallare.

Plaintiff's complaint asserts causes of action for common-law negligence and violations

of Labor Law §§200, 240(1) and 241(6) predicated on violations of Industrial Code 12 NYCRR §§23-1.7(d) and (e), 23-2.1(b), 23-9.2(a), 23-9.7(c) and (f). Plaintiff concedes that he does not have a viable cause of action under Labor Law §§200 and 240(1) and subsequently withdrew the causes of action based thereon.

Following discovery and after depositions were conducted, Defendant, Mallare, in motion sequence # 001 moves, pursuant to CPLR §3212, for partial summary judgment as to liability on Plaintiff's Labor Law §241(6) cause of action.

In motion sequence # 002, Plaintiff opposes Defendant, Mallare's motion and cross moves, pursuant to CPLR 3212, for an order granting him partial summary judgment as to liability on his Labor Law §241(6) claim.

In motion sequence # 003, Defendant, D & H, opposes Plaintiff's motion and moves, pursuant to CPLR §3212, for an order granting it partial summary judgment dismissing Plaintiff's Labor Law §241(6) claim.

Defendant, Mallare Enterprises, Inc.'s motion, pursuant to CPLR §3212, for an order granting partial summary judgment on the issue of liability is DENIED; Plaintiff's cross motion, pursuant to CPLR §3212, for an order granting him summary judgment on his cause of action based upon Labor Law §241(6) is DENIED and Defendant, D& H Excavating's cross motion, pursuant to CPLR §3212, for an order granting it partial summary judgment on the issue of liability is DENIED, for the reasons hereinafter set forth.

DEFENDANT, MALLARE'S, MOTION FOR SUMMARY JUDGMENT

Defendant, Mallare, avers that Defendant, D & H, was the general contractor on the job with a superintendent and foreman at the job site who were responsible for the supervision and control of the work. It was only a subcontractor that provided truck drivers to pick up and deliver

materials to and from the job site. It did not have notice that the mechanical tarp system did not work; did not have employees at the job site in a supervisory capacity; is not an owner or general contractor and did not have the requisite supervisory authority over the job site to invoke the provisions of Labor Law §241(6).

In addition, Defendant, Mallare, avers that insofar as the cause of action pursuant to Labor Law §241(6) is premised upon violations of regulations promulgated under Industrial Code §§23-1.7(d) and (e), 23-2.1(b), 23-9.2(a), 23-9.7(c) and (f), said provisions are inapplicable to the facts of this case because the hand cranked tarp system does not fall within the definition of power operated equipment required to establish a violation of Industrial Code Regulation 12 NYCRR §23-9.2(a); the lot where the accident occurred was located several blocks away from the construction area and was used to store materials, thus Plaintiff' was not working in a construction area within the meaning of Labor Law §241(6) and Plaintiff was not performing covered work. Therefore, Plaintiff's cause of action based on Labor Law §241(6) must be denied.

Plaintiff opposes, asserting that Defendant, Mallare did possess the requisite supervisory authority over the job site as evidenced by the fact that it was authorized to contact the subcontractor directly to see if another truck could be sent to the worksite, had the authority to enforce safety rules and the authority to remove Dirt Fill employees from the construction project.

Plaintiff also argues that it does not matter if Defendant, Mallare, exercised no authority over the job site because liability is predicated on the defective tarp system and the Labor Law requirement regarding functionality of the equipment applies to the scope of the work that was contracted to be performed. The work being performed herein was covered work because an

integral part of the scope of the truck driver's work was to have an operating tarp system to tarp the loads before the loads could be driven to their destination, pursuant to Department of Transportation Rules and Regulations.

Plaintiff was injured as a result of the defective tarp system which required him to climb up into the truck bed and stand on unstable and uneven debris and/or materials in order to tarp the load. Plaintiff's employer, Dirt Fill, had notice of the defective tarp system within sufficient time prior to Plaintiff's accident to have remedied it but failed to do so and that notice is imputed to both Defendants, Mallare and D& H.

In addition, a question of fact exists regarding the applicability of Industrial Code 12 NYCRR §23-2.1(b) which requires the denial of Defendant, Mallare's motion for summary judgment. This section of the Industrial Code applies to debris and Plaintiff's accident occurred during the course of his employment which required him to engage in the unsafe removal of debris on a construction site as he was loading the millings off site to take them to Buffalo Crush Stone.

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff cross moves for partial summary judgment on liability pursuant to Labor Law §241(6) against both Defendants averring that the Defendants were contractors and/or agents of the owner for purposes of the statute; that Plaintiff was engaged in covered work and that the Court should find that the Industrial Code 12 NYCRR §§23-1.7(d) and (e), 23-2.1(b), 23-9.2(a), 23-9.7(c) and (f) were violated as a matter of law.

Plaintiff avers, with regard to Industrial Code 12 NYCRR §§ 23-2.7(d) and (e) (2), known as the slipping and tripping regulations, that Plaintiff is a dump truck driver not an employee involved in the milling operation or other aspects of construction. He should not have

been required to climb up into the elevated truck bed to tarp the load which resulted in his slipping and tripping, when he would have been able to stand on the ground and press a button to utilize the power operated equipment to tarp the load if the tarp system was working properly. Thus, Industrial Code 12 NYCRR §§ 23-9.2(a), 23-2.7(d) and (e) were violated as a matter of law.

Defendant, D & H opposes and argues that there is no evidence that it exercised direct supervision or actual control over the job site or work activity that brought about Plaintiff's injury. Although it had generalized authority to stop a driver from carrying out an unsafe practice on the job site, it did not have authority to supervise or control the manner in which drivers loaded, tarped or transported their loads and/or the manner in which they repaired and/or maintained their trucks.

Plaintiff's incident reports claim Plaintiff was injured climbing up and down his dump truck bed and made no mention of his slipping, twisting and falling in the truck bed. Plaintiff, in his motion, alleges that he was injured when he slipped in the bed of his truck while attempting to maintain the defective tarp system on Dirt Fill's dump truck.

The evidence shows that Plaintiff was tarping asphalt not millings at the time of his injury and a tarp rack was available to assist him in tarping his load while standing on the elevated platform. Plaintiff's decision to stand in his truck bed, rather than on the tarp rack, was the proximate cause of his alleged fall. Thus, questions of fact exist regarding causation which preclude the granting of summary judgment.

Finally, it is not irrelevant that Plaintiff was not on the job site because the scope of the work is the standard to be applied for the imposition of liability under Labor Law §241(6) which requires the work to be performed in a construction area. If Plaintiff is not on Defendant, D &

H's construction site, it cannot be liable for a Labor Law violation, and cites *Bessa v Anglo Industries, Inc., et. al.*, 148 A.D.3d 974 [2d Dept. 2017] as authority for this premise.

D & H's MOTION FOR SUMMARY JUDGMENT

Defendant, D& H also moves, pursuant to CPLR §3212, for partial summary judgment dismissing the remaining causes of action in Plaintiff's complaint averring that Plaintiff's conduct in maintaining his truck tarp did not entail the construction of a structure; the Industrial Code Regulations relied upon by Plaintiff are inapplicable to this case; Defendant, D &H did not supervise or control Plaintiff's work when he was allegedly injured; Defendant, D & H, did not have actual or constructive notice of the unsafe condition that caused the accident and reiterating that Plaintiff was not working in a construction area within the meaning of Labor Law §241(6).

Defendant, D & H references Plaintiff's truck ticket (exhibit B of Eldon King's affidavit) in support of his assertion that Plaintiff was not on the construction site but was 3 1/2 miles away getting asphalt to take to the project. Defendant, D& H pleads that Plaintiff was a transporter not a construction worker and he had to be on site doing work that's integral to the project to be covered under the Labor Law. Defendant, D& H further pleads that there were no materials being readied for the project, and Plaintiff was dumping materials removed from the site and bring asphalt to the site.

Plaintiff opposes and avers that it is not the proximity to the job site that's dispositive of the issue but whether the injury involved readying materials or equipment for immediate use on the job site. In this case, the scope of the work entailed ripping up the road, taking the millings, bringing them off site as part of the scope of the work, and taking asphalt that was readied for the project back to the construction site. Plaintiff further avers that the accident occurred at the designated pull-off site on the job site where drivers were to tarp the load after the conveyer

loaded the dump trucks with the materials that were readied for the project. Plaintiff cites *Duffina v County of Essex,* 111 A.D.3d 1035 [3d Dept. 2013] as authority for his covered work argument. Therefore, Defendant, D& H's motion must be denied.

ANALYSIS

The Court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 N.Y. 2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders Inc. v Ceppos*, 46 N.Y. 2d 223[1978]). The burden on the movant is a heavy one and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hospitals Corp.*, 22 N.Y.3d 824 [2014]).

It is well settled that "[t]he 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 issues of fact from the case." (*Winegard v New York Univ. Med Ctr.*, 64 N.Y.2d 851, 853 [1985]. The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 A.D. 3d 227,228[1st. Dept. 2006]; *accord, Zuckerman v City of New York,* 49 NY2d. 557,562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment will be denied. (*Rotuba Extruders Inc.,* 46 NY 2d. at 231.)

Defendants' and the Plaintiff seek partial summary judgment on the Labor Law §241(6) claim. Labor Law §241 imposes on owners, general contractors and their agents a non-delegable duty to provide reasonable and adequate protection and safety to persons employed in, or

lawfully frequenting, all areas in which construction, excavation or demolition work is being performed *(Perez v 286 Scholes St. Corp.,* 134 AD3d 1085, 1086 [2d Dept. 2015], citing *Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982 [2d Dept. 2014]

Subsection 6 of Labor Law §241 further defines and expands the "general" contractor and owner's duty as follows, in relevant part:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places....

In order to trigger liability under Labor Law §241(6), there must be a violation of an administrative regulation (Industrial Code) which mandates compliance with a "concrete specification." *Lopez,* 123 A.D.3d at 984.

The Plaintiff must also demonstrate that his injuries were proximately caused by the Defendants' violation of an Industrial Code provision that is applicable given the circumstances of the accident, and then set forth a concrete standard of conduct rather than a mere reiteration of common-law principals in order to establish liability under Labor Law § 241 (6).

Here, the Plaintiff has asserted violations of Industrial Code 12 NYCRR §23-1.7-d (protection for slipping hazards) and 12 NYCRR 23-1.7-e (protection for tripping & other hazards), 23-2.1-b (disposal of debris), 23-9.2-a (power operated equipment), 23-9.7-c (loading of trucks) and 23-9.7-f (dumping trucks) as the basis for his Labor Law § 241(6) claim.

12 NYCRR §23-9.2 (a) provides: "All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or

replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest."

The Court of Appeals in *Misicki v. Caradonna,* 12 N.Y.3d 511 [2009], determined that 12 N.Y.C.R.R. §23-9.2(a) was sufficiently concrete and specific to serve as a predicate to a Labor Law §241(6) cause of action (*See, Misicki,* 12 N.Y.3d at 520–521). The Court held that an employee who claims to have suffered injuries proximately caused by a previously identified and un-remedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery to be corrected by necessary repairs or replacement has stated a cause of action under the Labor Law provision requiring owners and contractors to provide reasonable and adequate protection and safety for workers.

This provision is applicable given the circumstances of Plaintiff's accident. Whether the manually operated hand cranked tarp system falls within the definition of power operated equipment is a question of fact that precludes the granting of summary judgment.

A question of fact also exists regarding the applicability of 12 N.Y.C.R.R. §23-2.1(b) disposal of debris based on the manner in which Plaintiff was required to dispose of debris herein as a result of the defective tarping system as well as whether Defendants knew or should have known that the tarp system did not work.

Finally, a question of fact exists as to whether Plaintiff fell when he was hauling millings or asphalt as well as to the applicability of the Industrial Code provision 12 N.Y.C.R.R. §23.9.7 (c) and whether it was violated.

The Defendants, however, have made a prima facie showing that Industrial Code 12 N.Y.C.R.R. §§ 23-1.7-(d) and (e), 23-9.7 (f) does not apply to the facts of this case and the Plaintiff

has failed to put forth sufficient evidence to raise a triable issue of fact with respect to these questions. Industrial Code §23-1.7(d) requires employers to remove, sand, or cover "foreign substance[s]" which may cause slippery footing and §23-1.7(e) requires areas where persons work or pass to 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. Where, as here, the substance naturally results from the work being performed, it is not generally considered a "foreign substance" under this provision and the truck bed is not a passageway or an area where persons work or pass (*Salinas v. Barney Skanska Constr. Co.*, 2 A.D.3d 619 [2d Dept. 2003] , *see also,* Cabrera v. Sea Cliff Water Co., 6 A.D.3d 315 [1st Dept. 2004].

Plaintiff's motion for summary judgment is denied as issues of fact exist regarding the location where Plaintiff's accident occurred, the scope of the work and Plaintiff's comparative or contributory negligence. Plaintiff has failed to make the requisite prima facie showing that he was otherwise free from any contributory or comparative negligence.

Contributory and comparative negligence are valid defenses to a claim under Labor Law provision requiring owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor in the Industrial Code. Moreover, a breach of a duty imposed by a rule in the Code is merely evidence for the fact finder to consider on the question of negligence. In any event, even if a violation occurred, it would constitute only "some evidence of negligence." (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 351 [1998]; *accord, Belcastro v. Hewlett- Woodmere Union Free School Dist. No. 14,* 286 A.D.2d 744 [2d Dept. 2001]) and "once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or

participant in, the construction project caused plaintiff's injury" (*Rizzuto,* 91 N.Y.3d at 350; *see also, Amerson v. Melito Const. Corp.,* 45 A.D.3d 708 [2d Dept. 2007.])

The Defendants have failed to eliminate all triable issues of fact as to whether the Plaintiff was performing "construction work," as defined by 12 N.Y.C.R.R. §23–1.4(b)(13), and therefore they did not satisfy their prima facie burden as to this issue (*see Simon v. Granite Bldg. 2, LLC,* 114 A.D.3d 749 [2d Dept. 2014]; *accord, Pino v. Robert Martin Co.*, 22 A.D.3d 549, 551 [2d Dept. 2005]).

The parties' conflicting claims and allegations have also raised issues of fact as to the precise scope of Defendant, Mallare's authority at the job site relative to Plaintiff's work. It bears noting in this respect that Defendant, Mallare and the Plaintiff's employer, Dirt Fill, never executed a written agreement defining or memorializing their respective roles and duties in connection with the project.

Defendants and Plaintiff have failed to make a prima facie showing entitling them to dismissal of the Labor Law § 241(6) cause of action.

NOW, having reviewed the aforementioned pleadings and having considered oral argument of Counsel for the parties and due deliberation having been had thereon, it is hereby,

ORDERED, that the Defendants' and Plaintiff's motion for summary judgment is **DENIED.**

This constitutes the Decision and Order of this Court.

Enter: Jan 4, 2018

HON. E. JEANNETTE OGDEN, J.S.C.