Best v DCG Dev. Group, LLC
2019 NY Slip Op 33754(U)
December 27, 2019
Supreme Court, Wayne County
Docket Number: 78019
Judge: Daniel G. Barrett

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 16th day of October, 2019.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

CHARLES BEST,

Plaintiff,

-vs-

DCG DEVELOPMENT GROUP, LLC,
DCG DEVELOPMENT CO.,
BAST-HATFIELD, INC. AND
BASE HATFIELD CONSTRUCTION, LLC,

Defendants

DECISION
Index No. 78019

DCG DEVELOPMENT GROUP, LLC,
DCG DEVELOPMENT CO.,
BAST-HATFIELD, INC. AND
BAST HATFIELD CONSTRUCTION, LLC,

Defendants/Third Party Plaintiffs,

-vs-

WM. J. KELLER & SONS CONSTRUCTION CORP.,
DELSIGNORE BLACKTOP PAVING, INC.,

Third Party Defendants

Each of the parties has filed a motion for summary judgment.

The Plaintiff, Charles Best, has commenced this action against Defendant DCG Development Group, LLC, DCG Development Co.. (hereafter DCG), the owner, and Defendant Bast-Hatfield, Inc., and Bast Hatfield Construction, LLC (hereafter Bast) the general contractor, for injuries sustained while he operated a boom lift.

In his Complaint, the Plaintiff alleges two negligence causes of action against DCG and Bast. In addition, Plaintiff alleges two Labor Law 241(6) causes of action against DCG and Bast for a total of eight causes of action

DCG and Bast commenced third party actions against third party Defendant WM. J. Keller & Sons Construction Corp. (hereafter Keller) and third party Defendant Delsignore Black Top Paving, Inc. (hereafter Delsignore) asserting three causes of action:

1. Common law indemnification and contribution;

2. Contractual indemnification;

3. Failure to procure and/or maintain liability insurance.

Keller filed a summary judgment motion seeking dismissal of all claims filed against it. In addition, Keller filed a cross-claim against Delsignore and a counter-claim against DCG and Bast.

Delsignore filed a summary judgment motion seeking dismissal of all claims filed against it. In addition, Delsignore filed a cross-claim against Keller.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF LABOR LAW § 241(6) AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SAME CLAIM.

The Court denies summary judgment to Plaintiff and grants the summary judgment to Defendants DCG and Bast dismissing these causes of action. In his Bill of Particulars, Plaintiff cites violations as the following N.Y.S. Industrial Code:

1. 12 NYCRR 23-1.5(a);

2. 12 NYCRR 23-1.32;

3. 12 NYCRR 23-1.7;

4. 12 NYCRR 23-9.22.

The Plaintiff's expert refers to three violations of the Industrial Code:

1. 12 NYCRR 23-1.7(e);

2. 12 NYCRR 23-1.7(f);

3. 12 NYCRR 23-1.32.

23-1.5 is a general provision of the Industrial Code which does not provide the basis for an action (see McCormick v 257 W. Genesee, LLC., 78 A.D. 3d 1581 [4th Dep't. 2010]).

23-1.32 is not applicable because there is no evidence of any written notice given by the Commissioner to the appropriate employer, owner, contractor or his agent which is required before beginning any action by the Defendants.

23-1.7(a) - Protection from general hazards; (a) overhead hazard - this does not involve a work area exposed to falling materials or objects.

23-1.7(b) - applies to (a) falling hazard; hazardous openings and (2) bridge or highway overpass construction. These items are inapplicable to case at bar.

23-1.7(c) - inapplicable as Plaintiff was not exposed to or injured by the hazard of falling into water beneath his work location.

23-1.7(d) - inapplicable as a slippery condition is not a component of this action.

23-1.7(e) - applies exclusively to "passageways" (see Salins v Barney Skanska Constr. Co., 2 A.D. 3d 619 [2nd Dep't 2003]). The place where the accident occurred was not a passageway (see Steiger v L.P. Ciminelli, Inc., 104 A.D. 3d 1246 [4th Dep't. 2013]).

23-1.7(f) - Plaintiff was not injured due to an absence of a stairway, ramp or runway used to access a working level above or below ground, rendering this section inapplicable (see Brownwell v Blue Seal Feeds, Inc., 89 A.D. 3d 1425 [4th Dep't. 2011]).

23-1.7(g) - inapplicable as Plaintiff was not exposed to injured by working in a contaminated or oxygen deficient work area.

23-1.7(h) - inapplicable as Plaintiff was not exposed to or injured by any corrosive substance.

23-9.2 - inapplicable as this section applies to general requirements of power operated equipment. There is no indication that the boom lift was not working properly at the time of the accident.

Since none of these cited Industrial Code sections pertain to the action at bar, these causes of action are not maintainable.

Based on the foregoing, the Court denies the Plaintiff's summary judgment motion on the Labor Law §241(6) claims and grants the Defendants' motion dismissing the Labor Law §241(6) claims.

II DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S NEGLIGENCE CAUSE OF ACTION

Even though Plaintiff did not specifically address this cause of action in responding papers, the Court examines the entire record to determine if the Defendants have established the absence of a material issue of fact.

On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party". (Ortiz v Varsity Holdings, LLC., 18 N.Y. 3d 335, 339 [2011]). Summary judgment is a drastic remedy, to be granted only where the moving party has "tendered sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 N.Y. 2d 320, 324 [1986]) and then only if upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action (id.). The moving party's "failure to make a prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (id.).

This Court finds the Defendants have failed to meet their burden. There are genuine issues of fact requiring a trial.

In addition, it is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact (see Sillman v Twentieth Century-Fox Film Corp., 3 N.Y. 2d 395, 404 [1957]) noting that in deciding a motion for summary judgment "issue finding rather than issue determination, is the key to the procedure."

It is settled law that where the defect or dangerous condition arises from the contractor's methods and the owner or contractor exercises no supervisory control over the operation, no liability attaches to the owner or contractor under the common law or under Section 200 of the Labor Law. (Lombardi v Stout, 80 N.Y. 2d 290, [1992] and Ross v Curtis Palmer Hydro-Elec. Co., 81 N.Y. 2d 494 [2009]).

Bast was hired by DCG to build a hotel on land owned by DCG.

One of the issues in this case is whether the owner, DCG, exercised supervisory control over Keller and Delsignore. DCG hired Keller to do milling and rough grading on the job site and Delsignore to do paving work. There is a contradiction in testimony whether the owner had a representative on the site every day. A representative of the owner testified negatively to this inquiry and a representative of Keller testified when it was busy a representative was on the site daily. The owner directed Keller and Delsignore when to perform their assigned tasks. Keller had worked with the owner for many years and Delsignore had worked with the owner on multiple projects. On Friday, November 21, 2014, Keller had been on the site doing the rough grading and Delsignore arrived at about noon to do the paving. A representative from Keller had testified that Keller had the responsibility of maintaining the ramps where the accident occurred. When it was busy, they would be on the site daily. There is testimony that they were on the site on November 21, 2014.

Delsignore arrived about noon on November 21 and measured the difference and height between the mall parking lot and the milled project site at the south gate where the accident occurred. The measurement was four (4) inches. Delsignore used two by fours to fill the four (4) inch gap when he moved his paver and roller to do work on the site. At the end of the day, Delsignore exited through the south gate.

The Plaintiff testified he was directed to remove the boom lift from the project site on Friday, November 21, 2014 through the north date. The accident occurred on Saturday, November 22, 2014 at about 7:00 in the morning when the Plaintiff was entering the south gate. The Plaintiff testified the height differential between the mall parking lot and the milled project site at the south gate was twelve (12) inches not four (4)

inches. As he entered the south gate of the project the front wheels of the boom lift dropped down twelve (12) inches, according to the Plaintiff. He stopped the vehicle and looked around and then proceeded into the project area. When the back wheels descended twelve (12) inches the operator's basket made contact with the ground resulting in injuries to the Plaintiff.

Plaintiff believes that the height differential from the mall parking lot and the project site was caused by the paver. After the Plaintiff's accident, Delsignore installed a ramp at the south gate.

The contractor, Bast, hired the Plaintiff's employer, Gypsum Co.. Bast had the authority to direct the Plaintiff to move the boom lift from the job site to the mall parking lot. Bast was on the site every day and he had a trailer on site. Bast built the perimeter fence around the job site with two gates. Bast had a key to the gates and allowed the subcontractors to have keys to the gate. Bast contracted directly for all the items of work which were not covered by the Keller contract including final grading. DCG and Bast had responsibilities to schedule their workers and inspect their work.

The Plaintiff's expert will not be allowed to testify about violations of Labor Law § 241(6) at trial, but he can testify about the dangerous condition at the south gate. In his report he opines that the general contractor and the paver are responsible for this dangerous condition.

Despite the fact that the Plaintiff testified he observed the dangerous condition before he drove in it does not bar a recovery. Rather, it only raises an issue of fact for summary judgment purposes, as to the Plaintiff's comparative fault (see Francis v 107-145 West 135th Street Assocs., 70 A.D. 3d 599 [1st Dep't. 2010]). For the foregoing reasons the motions for summary judgments dismissing the Complaint are denied.

III. DEFENDANTS' CLAIMS FOR COMMON LAW INDEMNIFICATION AND CONTRIBUTION AGAINST KELLER AND DELSIGNORE

At this stage, the application is denied.

IV. DEFENDANT'S CLAIM FOR CONTRACTUAL INDEMNIFICATION

There is nothing in the record that supports the Defendants' claim for contractual indemnification against Keller and Delsignore. Therefore this claim is denied.

V. DEFENDANTS' CLAIM FOR FAILURE TO PROCURE AND/OR MAINTAIN LIABILITY INSURANCE BY DCG OR BAST

There is nothing in the record to support this claim. Therefore it is dismissed.

VI. KELLER'S MOTION FOR SUMMARY JUDGMENT

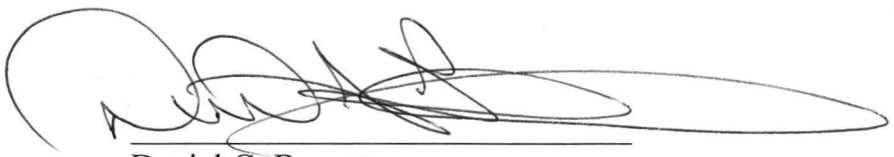
The motion is granted in so far as, the claim for contractual indemnification and failure to procure and/or maintain liability insurance for DCG or Bast is granted. The motion is denied relative to common law contribution and indemnification. Its cross-claim against Delsignore and its counter-claim against DCG and Bast are denied.

VII. DELSIGNORE'S MOTION FOR SUMMARY JUDGMENT

The motion is granted in so far as, the claim for contractual indemnification and failure to procure and/or maintain liability insurance for DCG or Bast is granted. The motion is denied relative to common law contribution and indemnification. Its cross-claim against Keller is denied.

This constitutes the Decision of the Court. Attorney for Plaintiff to prepare an Order consistent with this Decision.

Dated: December 27, 2019
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice