Tsongas v Apex Constr./Masonry Corp.
2020 NY Slip Op 32105(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 150586/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 150586/2017

NIKOLAOS TSONGAS,

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

APEX CONSTRUCTION/MASONRY CORP., ALAN CUMMING, and GRANT L. SHAFFER,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 68

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion for SUMMARY JUDGMENT.

Rosenberg, Minc, Falkoff & Wolf, New York, NY (Steven Falkoff of counsel), for plaintiff.
Ahmuty, Demers, & McManus, New York, NY (Steven Zecca of counsel), for defendant Apex Construction/Masonry Corp.
Eustace, Marquez, Epstein, Prezioso, & Yapchanyk, New York, NY (Christopher Yapchanyk of counsel), for defendants Alan Cumming and Grant Shaffer.

Gerald Lebovits, J.:

This Labor Law action arises out of injuries suffered by plaintiff, Nikolas Tsongas, when he fell in a hole dug by employees of defendant Apex Construction/Masonry Corp. while working on a construction project on land owned by defendants Alan Cumming and Grant Shaffer ("Homeowner Defendants"). Apex and the Homeowner Defendants now separately move for summary judgment.

BACKGROUND

According to the allegations of the complaint, the Homeowner Defendants own the premises at issue, located at 404 East 9th Street in Manhattan. The Homeowners hired non-party IA Construction Management Inc. as the general contractor. (*See* NYSCEF No. 1 at 3.) IA Construction subcontracted out part of the work to Apex. (*See* NYSCEF No. 59.)

Plaintiff is an IA Construction employee. In November 2016, plaintiff was badly injured when he fell into an unguarded and uncovered hole in the backyard of the premises. Apex employees had previously excavated that hole as part of creating footings for a rear deck. (*See* NYSCEF No. 63 at 1-2.)

Plaintiff sued both Apex and the Homeowner Defendants, asserting claims under Labor Law §§ 200, 240, and 241 (6), and also common-law negligence principles.

In motion sequence 001, the Homeowner Defendants move under CPLR 3212 for summary judgment dismissing the complaint as against them. In motion sequence 002, Apex moves under CPLR 3212 for summary judgment dismissing plaintiff's claims against it. Motion sequences 001 and 002 are consolidated here for disposition. Both motions are denied.

DISCUSSION

A party moving for summary judgment under CPLR 3212 "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." (*Jacobsen v New York City Health & Hospitals Corp.*, 22 NY3d 824, 833 [2014], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has shown prima facie of entitlement, the burden then shifts to the opposing party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*Fair v Fuchs*, 219 AD2d 454, 455 [1st Dept 1995].)

I. The Homeowner Defendants' Motion for Summary Judgment

As an initial matter, the Homeowner Defendants move for summary judgment dismissing any claims brought by plaintiff against them Labor Law §§ 240 and 241 (6). These statutes exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from liability. (*Affri v Basch*, 13 NY3d 592, 598 [2009]). Plaintiff concedes that this exemption applies to the Homeowner Defendants. (*See* NYSCEF Doc No. 39 at 1.) Any Labor Law claims made against the Homeowner Defendants under § 240 and 241 (6) are therefore subject to dismissal.

The Homeowner Defendants also move for summary judgment on plaintiff's claim against them under Labor Law § 200. This motion is denied.

To hold a defendant liable under Labor Law § 200, a plaintiff must show that the accident occurred in circumstances under which (i) the homeowners exercised supervisory control of the manner and method of the work (*Comes v N.Y. State Electric*, 82 NY2d 876, 877 [1993]); or (ii) the homeowners had actual or constructive notice of a dangerous or defective condition and an opportunity to take action, but failed to do so (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]). Here, plaintiff testified that neither Homeowner Defendant supervised or directed his work. (*See* NYSCEF No. 32 at 189, 198-199.) The Homeowner Defendants, though, fail to establish prima facie that they lacked constructive notice of the dangerous condition that brought about plaintiff's injuries.

The Homeowner Defendants emphasize that they were not living on the premises during the renovation of their home (and the construction of a deck in their backyard), and that they did not have first-hand knowledge of the conditions or progress on the project site. But neither the Homeowner Defendants' lack of direct involvement with the renovation project, nor the fact that they were living elsewhere, relieved them of their duty to keep their property in a safe condition and provide workers on the project with a safe place to work. (*See DeFelice v Seakco Constr. Co.*, 159 AD3d 677, 678-679 [2d Dept 2017].) And the evidence relied upon by the Homeowner Defendants (principally deposition testimony given by the parties) does not establish when they or their contractors last inspected the backyard, or how long the hole into which plaintiff fell at been left unguarded and uncovered at the time of plaintiff's fall. Absent that evidence, the Homeowner Defendants cannot meet their initial burden under Labor Law § 200 to show a lack of constructive notice of the dangerous condition at issue. (*See id.* at 679.)

II. Apex's Motion for Summary Judgment

As an initial matter, Apex moves for summary judgment dismissing any claims brought against it under Labor Law §§ 240 and 241 (6). Apex argues that it cannot be liable under these provisions because it was merely a subcontractor on the project, rather than the owner or general contractor. Plaintiff concedes that any claims against Apex under §§ 240 and 241 (6) are subject to dismissal. (*See* NYSCEF No. 62 at 1 & n 1.)

Apex also moves for summary judgment on plaintiff's Labor Law § 200 and common-law-negligence claims. The motion is denied.

As a subcontractor, Apex may be held liable under Labor Law § 200 and common-law negligence principles "for injuries caused by a dangerous condition that it caused or created." (*Hewitt v NY 70th Street LLC*, 2020 NY Slip Op 03280, at *2 [1st Dept June 11, 2020]; *see also Farrugia v 1440 Broadway Assocs.*, 163 AD3d 452, 455 [1st Dept 2018] [noting that a party to a contract may be held liable to a third party where the contracting party fails to exercise reasonable care in its duties and thereby launches a force or instrument of harm].) It is undisputed that the hole into which plaintiff fell was dug by an employee of Apex. Thus, if Apex failed to exercise reasonable care with respect to ensuring that no one fell into that hole, it may be held liable.

Apex argues that it is entitled to summary judgment because it has established as a matter of law that IA Construction, rather than Apex, was responsible for covering the hole after it had been dug. This court disagrees.

To be sure, Apex's co-owner, Michael Flannery, testified at his deposition that IA Construction was responsible for covering the holes dug by Apex before they were used as footing for the backyard deck under construction. (*See* NYSCEF No. 51 at 20.) But the contract between IA Construction and Apex does not include any provision dictating that division of responsibility. (*See* NYSCEF No. 59.) And IA Construction provides affidavits from two IA employees who worked on the project site (Ralph Andino and Tyrone Jackson), each attest to *Apex* being responsible under accepted industry practice for covering up the holes that they had dug. (*See* NYSCEF Nos. 63, 64.)

The Andino affidavit states that consistent with that division of responsibility, Apex employees covered up the holes they had dug overnight—but left the holes uncovered (and unguarded) during the day. (*See* NYSCEF No. 63 at 2-3.) And Andino further states that both he and Jackson repeatedly raised with Apex employees the issue of safety risks due to the uncovered holes; and that the only safety measure taken by Apex in response was to spray orange paint around the holes to make them more noticeable. (*See id.*)

These affidavits are sufficient to raise a fact question as to whether Apex negligently failed to exercise reasonable care as to the potentially dangerous condition that it created when it dug the holes in the premises' backyard.

Accordingly, it is hereby

ORDERED that the Homeowner Defendants' motion under CPLR 3212 for summary judgment dismissing plaintiff's claims against them is granted as to any claims brought against them under Labor Law §§ 240 and 241, and otherwise denied; and it is further

ORDERED that defendant Apex's motion under CPLR 3212 for summary judgment dismissing plaintiff's claims against it is granted as to any claims brought against it under Labor Law §§ 240 and 241, and otherwise denied.

7/2/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

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