Kwan Jin Jun v Sung Pyo Hong
2020 NY Slip Op 34278(U)
December 22, 2020
Supreme Court, Kings County
Docket Number: 501399/2016
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December, 2020.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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KWAN JIN JUN,

Plaintiff,

- against -

SUNG PYO HONG, SNEAKER, Q LLC, NOSTRAND RETAIL GROUP LLC AND NRP LLC II,

Defendants.

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NOSTRAND RETAIL GROUP LLC,

Third-Party Plaintiff,

- against -

SQ BROOKLYN INC.,

Third-Party Defendant.

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DECISION/ORDER

Index No. 501399/2016

Mot. Seq. 4, 5 and 6

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	90-111, 113-134, 140-147
Opposing Affidavits (Affirmations)	141-145, 141-145, 162-165
Reply Affidavits (Affirmations)	154-157, 158-161, 169

Upon the foregoing papers, defendants Sung Pyo Hong (Hong) and defendant/third-party defendant SQ Brooklyn Inc. move, in motion sequence four, for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint alleging violations of Labor Law §§ 200 and 241(6) and any cross claims and counterclaims. Defendant Nostrand Retail Group LLC (Nostrand Retail) moves, in motion sequence five, for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any cross claims and counterclaims. Plaintiff Kwan Jin Jun (plaintiff) moves, in motion sequence six, for an order pursuant to CPLR 3124 and 3126

precluding defendants from offering any testimony on the issue of liability at trial and in support of the aforementioned summary judgment motions.

Plaintiff commenced this action by filing of the summons and complaint on February 1, 2016. Plaintiff alleges that he was injured on January 31, 2013 while performing carpentry work as part of the renovation of a retail shoe store known as "Sneaker Q" located at 1887 Nostrand Avenue in Brooklyn, New York (1887 Nostrand). Defendant Hong was the sole owner and president of SQ Brooklyn Inc., the entity that leased the ground floor space at 1887 Nostrand from the owner of the property, NRP LLC II. In 2012, Nostrand Retail purchased 1887 Nostrand from NRP LLC II and the lease agreement with SQ Brooklyn Inc. was assigned to Nostrand Retail. The action was discontinued as against NRP LLC II by stipulation dated August 25, 2017. On July 13, 2017, Nostrand Retail commenced a third-party action against SQ Brooklyn Inc., which was also discontinued by stipulation dated February 20, 2020.

Plaintiff claims that he sustained injuries to his left hand while using a power-driven table saw to construct wooden display cases and fixtures to be used in the store. In his bill of particulars, he claims that defendants were negligent in failing to properly supervise his work, failing to provide him with a safe place to work and proper protection, and failing to provide plaintiff with a safe power-driven saw equipped with a safety guard covering the blade. He alleges that his Labor Law § 241(6) claim is premised upon a violation of Industrial Code section 12 NYCRR 23-1.12(c)(2).

As an initial matter, plaintiff argues that defendants' summary judgment motions must be denied as untimely. After the note of issue was filed on January 15, 2019, defendants moved to vacate the note of issue and for an extension of time to file their summary judgment motions. The resultant orders, dated February 27, 2019 and June 3, 2019, did not vacate the note of issue but directed that further discovery take place beyond the 60-day deadline for summary judgment motions (*see* Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6). The February 2019 order further indicated that defendants "reserve[d] their right to seek an extension in time to move by motion for summary judgment." In light of the foregoing, the Court finds that defendants established good cause in support of the branches of their motions which were, in effect, for leave to serve and file their late summary judgment motions (*see Khan v Macchia*, 165 AD3d 637, 638-639 [2d Dept 2018] [finding good cause shown for extension of summary judgment deadline where "Court Attorney Referee so-ordered a stipulation which directed that further discovery take place beyond the date that summary judgment motions were to be filed"], citing *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Plaintiff's cross motion seeking to preclude defendants from submitting affidavits or testimony in support of their motions for summary judgment and on the issue of liability is denied. Plaintiff failed to demonstrate that defendants willfully and contumaciously failed to comply with the Court's prior discovery orders (*see Belle-Fleur v Desriviere*, 178 AD3d 993, 995 [2d Dept 2019]; *Chase-Morris v Tubby*, 69 Misc3d 349, 352 [Sup Ct, Westchester County 2020] [defense counsel's cancellations of deposition dates due to counsel lacking authorized copies of plaintiff's medical records was not willful and contumacious conduct]). In addition, plaintiff's good faith affirmation fails to set forth the efforts counsel took to resolve the discovery disputes regarding the scheduling of defendant Hong's deposition and whether the deposition would be conducted remotely by electronic means (*see Roye v Gelberg*, 172 AD3d 1260, 123 [2d Dept 2019]; 44A NY Jur 2d Disclosure § 437 ["a motion for sanctions must be preceded by a good-faith effort to resolve the discovery dispute, and a party that fails to detail such an effort in an affirmation of good faith in support of its application for sanctions is generally not entitled to an order imposing sanctions on the opposing party."]).

Preliminarily, the Court notes that defendant Hong and SQ Brooklyn Inc. demonstrated, prima facie, that Hong is not a proper Labor Law defendant in his individual capacity and that plaintiff's complaint must be dismissed as against Hong. Plaintiff's deposition testimony, Hong's affidavit and the lease agreement for 1887 Nostrand establish that Hong was acting as an officer of SQ Brooklyn Inc. and that he did not retain plaintiff in his individual capacity (*see Mondone v Lane*, 106 AD3d 1062, 1064 [2d Dept 2013] [Labor Law claims dismissed as against individual defendant-shareholder of contractor because a "corporation has a separate existence from that of its officers and shareholders" and "the complaint is devoid of any allegations sufficient to pierce the corporate veil"]). Plaintiff failed to raise a triable issue of fact in opposition.

Standard of Review

It is well settled that "the 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977, 978 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Labor Law § 200

Defendants seek summary judgment dismissing plaintiff's Labor Law § 200 claim. Labor Law § 200 is a codification of the common-law duty to maintain a safe work site (*Villada v 452 Fifth Owners, LLC*, 2020 NY Slip Op 07121, *2 [2d Dept 2020]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Boody v El Sol Contr. & Constr. Corp.*, 180 AD3d 863, 864 [2d Dept 2020], quoting *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). "[W]hen the manner and method of work is at issue in a Labor Law § 200 analysis, the issue is 'whether the defendant had the authority to supervise or control the work'" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Poalacin v Mall Props. Inc.*, 155 AD3d 900, 900 [2d Dept 2017]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*Casilari v Condon*, 185 AD3d 896, 898 [2d Dept 2020], quoting *Ortega v Puccia*, 57 AD3d at 62). Where the plaintiff's accident arose from an alleged dangerous condition at the work site, liability may be imposed upon a defendant if it had control of the worksite and either created the condition or had actual or constructive notice of it (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 715 [2d Dept 2020]).

Here, as plaintiff's claims arise from the alleged failure to provide plaintiff with a safe power-driven saw equipped with a safety guard, the Court finds that the accident arose from alleged defects in the methods or materials utilized by the plaintiff to perform his work as opposed to a dangerous or defective condition at the site.

Hong and SQ Brooklyn Inc. established by submission of, inter alia, plaintiff's deposition testimony and Hong's affidavit that neither Hong nor SQ Brooklyn Inc. directed, supervised or controlled

the methods and means of plaintiff's work, or furnished plaintiff with the tools and equipment he used to perform the work (*Casilari v Condon*, 185 AD3d at 898; *Turgeon v Vassar Coll.*, 172 AD3d 1134, 1136 [2d Dept 2019]). Defendant Nostrand Retail demonstrated its entitlement to summary judgment dismissing plaintiff's Labor Law § 200 claim on the same grounds (*id.*). Plaintiff, an independent contractor, testified that he purchased and arranged for the delivery of all materials needed to create the displays and brought his own tools and equipment, including the defective table saw. He further testified that he received no instructions on how to perform his work and that he decided what work would be performed each day.

Additionally, there is no evidence in the record that any defendant had knowledge that the table saw was missing the safety guard. Plaintiff testified that he set up the table saw in the basement of 1887 Nostrand shortly after the commencement of the project. He testified that the plastic safety guard had broken off around one or two months before the incident at a different work site and that he never told Hong that the guard was missing. He also testified that he was aware that it was dangerous to use the saw without the safety guard. Despite knowing that it was dangerous for him to continue using the saw, plaintiff testified that he used it close to 30 times before the incident.

In opposition, plaintiff failed to raise a triable issue of fact. In his papers, plaintiff contends that the accident was substantially or concurrently caused by defendant Hong's insistence on completing the project by February 1, 2013 "when he knew plaintiff was working 20-22 hours a day and only getting an hour or two of sleep" (plaintiff's affirmation in support ¶ 36). He further claims that they did not agree upon a completion date at the time of the estimate or commencement of the project. Even if these belatedly asserted claims can be construed as a basis of liability under section 200, said allegations are contradicted by plaintiff's deposition testimony that the completion date for the project was agreed upon at the time of the commencement of the project and never changed (*see Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006] [owner's "admonitions to hurry the work" insufficient to raise triable issue of fact as to the owner's liability under section 200]).

Accordingly, the branch of defendants Hong and SQ Brooklyn Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted. The branch of Nostrand Retail's motion for summary judgment dismissing said claim is also granted (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [defendants granted summary judgment on section 200 claim where, inter alia, there was no evidence that plaintiff notified defendants that the saw was missing safety guard; "defendants had no duty to warn plaintiff about an alleged defect where plaintiff had used the saw on many occasions in the past and was aware that it had no guard."]). The Court notes that plaintiff failed to allege a separate cause of action for common-law negligence in the complaint. To the extent that there is a common-law negligence claim, that cause of action must also be dismissed for the reasons set forth above.

Labor Law § 241(6) claim

Defendants also move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim which is premised on a violation of Industrial Code section 12 NYCRR 23-1.12(c)(2). Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in construction, excavation or demolition work (*see Moscati v Consolidated Edison Co. of N.Y. Inc.*, 168 AD3d 717, 718 [2d Dept 2019], citing *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 758 [2d Dept 2012]). To prevail on a motion for summary judgment dismissing a plaintiff's Labor Law § 241(6) claims, a defendant must

demonstrate "that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged" (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *see also Zukowski v Powell Cove Estate Home Owners Assn., Inc.*, 187 AD3d 1099, 1103-1104 [2d Dept 2020]).

Plaintiff alleges that defendants violated 12 NYCRR 23-1.12(c)(2), requiring that "[e]very power-driven saw, other than a portable saw ... be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth," by not providing plaintiff with a saw equipped with a safety guard covering the saw blade. As noted by plaintiff, this Industrial Code provision is sufficiently sufficient to serve as a predicate for liability under Labor Law § 241(6) (*see Sheng Hai Tong v K & K 7619, Inc.*, 44 AD3d 887, 889 [2d Dept 2016]).

Defendants argue that they are entitled to summary judgment on the ground that plaintiff was the sole proximate cause of his injuries. The sole proximate cause defense requires that defendants demonstrate that plaintiff "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice" (*Cioffi v Target Corp.*, 2020 NY Slip Op 06487, *2 [2d Dept 2020], citing *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *see also Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]). Defendants contend that plaintiff was the sole proximate cause of his accident because he was injured using his own defective table saw despite knowing that it was dangerous to do so and with only one hour of sleep.

Defendants' argument misapprehends the standard for sole proximate causation in the context of Labor Law §§ 240 and 241(6) claims. *Woloszyn v 834 Fifth Ave. Corp.* (2018 NY Slip Op 32173[U] [Sup Ct, New York County 2018]) is instructive. In *Woloszyn*, the plaintiff alleged violations of Labor Law §§ 200 and 241(6) based upon, inter alia, the defendant owner's failure to provide plaintiff with a table saw equipped with a safety guard as required by section 23-1.12(c)(2). The defendant owner moved for summary judgment dismissing plaintiff's section 200 and 241(6) claims. The court granted defendant's motion for summary judgment on the section 200 claim on the ground that the owner did not furnish plaintiff with the defective saw or supervise or control his work. In support of its motion for summary judgment dismissing plaintiff's section § 241(6) claim, defendant argued that plaintiff was the sole proximate cause of his accident "because plaintiff used a saw that he knew might be unsafe without seeking assistance or guidance" (*id.* at *7). Noting that it was undisputed that the saw was not equipped with a safety guard, the court rejected defendant's sole proximate cause arguments stating that the "[p]laintiff cannot be the sole proximate cause of his accident, as the record raises no issue as to whether a safer saw, or a saw-guard, was available to him" (*id.*; *cf. Scoz v J&Y Elec. & Intercom Co. Inc.*, 137 AD3d 535, 535 [1st Dept 2016] [plaintiff-independent contractor was the sole proximate cause where he built a "makeshift table saw" using a saw that he personally owned where his intentional, "jury-rigged" use of the tool would have rendered any safety guard ineffectual]).

Here, as in *Woloszyn*, it is undisputed that the table saw lacked a safety guard and defendants presented no evidence as to whether a safety guard or an alternative device was "readily available" to plaintiff at the work site (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020]). In addition, defendants failed to argue that the accident would have occurred in the same manner had there been a safety guard in place or that plaintiff's injuries were not caused by the lack of the safety guard (*see Matute v Town of Hempstead*, 179 AD3d 1047, 1049 [2d Dept 2020] [issue of fact as to

whether plaintiff was the sole proximate cause where circular saw he personally owned was "jury-rigged" rendering safety guard ineffectual]). Accordingly, defendants failed to demonstrate that they are entitled to dismissal of plaintiff's Labor Law § 241(6) claim on the ground that plaintiff was the sole proximate cause of his accident.

To the extent that defendants claim that they cannot be liable to plaintiff under Labor Law § 241(6) because they did not supply the table saw to plaintiff, this argument is also unavailing (*see Matute v Town of Hempstead,* 179 AD3d at 1049; *Haider v Davis*, 35 AD3d at 364 ["Labor Law § 241(6) governs equipment which is brought onto a work site… the owner failed to establish his entitlement to summary judgment…as he failed to submit evidence that the subject mitre saw was equipped with two guards. The failure to make such a showing requires the denial of that branch of the motion."]; *Bajor v 75 E. End Owners, Inc.*, 2010 NY Slip Op 33760[U], *3 [Sup Ct, New York County 2010], *affd* 89 AD3d 458 [1st Dept 2011] ["75 East End argues that it cannot be liable to the plaintiff under section 241(6) claim because it did not supply the table saw to plaintiff. This argument is without merit since an owner's duty under section 241(6) is nondelegable."]).

In light of the foregoing, the branch of defendant Hong and SQ Brooklyn Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted only to the extent of dismissing plaintiff's section 241(6) claim against defendant Hong. The branch of defendant Nostrand Retail's for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied.

Conclusion

Defendants Hong and SQ Brooklyn Inc.'s motion (motion sequence 4) is granted to the extent that:

(1) all of plaintiff's claims as against defendant Hong are dismissed;
(2) plaintiff's Labor Law § 200 claim is dismissed as against SQ Brooklyn Inc.; and

the motion is otherwise denied. Defendant Nostrand Retail's motion (motion sequence 5) is granted to the extent that plaintiff's Labor Law § 200 claim is dismissed. To the extent that there is a common-law negligence claim, that claim must be dismissed as against all defendants as well for the reasons set forth above. Plaintiff's cross motion (motion sequence 6) is denied.

This action shall proceed as against defendant SQ Brooklyn Inc. and Nostrand Retail on plaintiff's Labor Law § 241(6) claim.

This constitutes the decision and order of the Court.

Dated: December 22, 2020
Brooklyn, New York

ENTER,

Dawn Jimenez-Salta, J.S.C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court