Karlsen v Hepler
2020 NY Slip Op 34633(U)
January 13, 2020
Supreme Court, Monroe County
Docket Number: Index #E2018005910
Judge: William K. Taylor

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

ALEXANDER KARLSEN,

Plaintiff,

vs.

SCOTT R. HEPLER and
ULTIMATE DOCK SYSTEMS, INC.,

Defendants.

DECISION, ORDER & JUDGMENT
Index #E2018005910

Special Term January 9, 2020
Appearances:
Robert L. Voltz, Esq. for Plaintiff
Robert M. Shaddock, Esq. for Defendants

Taylor, J.,

Alexander Karlsen ("Plaintiff") sustained severe injuries to his left leg when he was struck by an excavator operated by Scott R. Hepler, owner of Ultimate Dock Systems, Inc. ("Defendants"). Plaintiff commenced the instant personal injury action against Defendants alleging assorted Workers Compensation Law violations, common law negligence, as well as causes of action pursuant to Labor Law §§ 200 and 241(6). Before the Court is Plaintiff's motion for summary judgment pursuant to CPLR 3212 upon his common law negligence and Labor Law § 200 causes of action; he also seeks what amount to declarations that 1) Defendants were Plaintiff's employer on the date of the accident; 2) and that Defendants failed to carry workers compensation insurance for Plaintiff. Defendants

oppose the motion and cross-move for summary judgment upon Plaintiff's Labor Law § 241(6) cause of action.

Turning to the well-settled standards when considering a summary judgment motion "the proponent...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" necessitating a trial. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); CPLR 3212(b). Proof offered by the moving party must be in admissible form. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Dix v Pines Hotel, Inc., 188 AD2d 1007 (4th Dept 1992). And once a prima facie showing has been made "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 NY2d at 324; see also, Mortillaro v Rochester Gen. Hosp., 94 AD3d 1497, 1499 (4th Dept 2012).

As a threshold matter, it bears noting that usually "[w]orkers' compensation benefits are '[t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment.'" Weiner v City of New York, 19 NY3d 852, 854 (2012) quoting Gonzalez v Armac Indus., 81 NY3d 1, 8 (1993). But this exclusive remedy gives way when an employer does not carry workers compensation insurance. In such instances the injured employee may elect his remedy: pursue workers compensation benefits

or commence a direct action against his employer. See Workers Compensation Law § 11 ("[I]f an employer fails to secure the payment of compensation for his...injured employees...[the injured employee] may, at his...option, elect to claim [workers] compensation...or to maintain an action the courts for damages on account of such injury..."). Therefore if 1.) Plaintiff was employed by Defendants at the time of the accident, 2.) Plaintiff's injuries resulted during the course of his employment, and 3.) Defendants failed to provide him with workers compensation coverage, then Defendants would be foreclosed from asserting certain affirmative defenses that Plaintiff's injuries resulted from his contributory negligence or that he assumed the risk. See Workers Compensation Law § 11.

Plaintiff has established the following facts here. He was Defendants' employee and that Defendants did not have workers compensation coverage. As to the latter Defendant Hepler admitted that he did not carry workers compensation insurance at the time of the accident. See Doc. No. 34, Deposition Transcript - Scott Hepler at 89. As to the former the Court must analyze whether Defendants "controlled the 'method and means by which the work is to be done [which is]...the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability.'" See Carlineo v Akins, 71 AD3d 1535 (4th Dept 2010)(internal citation omitted).

Plaintiff established the following facts. He began working

for Defendants in October 2017 until the accident in January 2018; he worked between twenty to forty hours per week earning $20.00 per hour; and he was paid out in cash at the end of the week. See Doc. No. 33, Deposition Transcript - Alex Karlsen at 25-27. Defendants' business was building break walls and docks, and indeed that was the task at hand on the job site where the accident occurred. On the day of the incident, Plaintiff was directed by Defendant Hepler to assist with getting gas in the welder and miscellaneous other jobs. At the time of the incident, Defendant Hepler was operating an excavator digging up sand and clawing it back towards the break wall. Plaintiff was standing to the left of the excavator when he was asked by Defendant Hepler to check the fuel gauge located on the right side of the excavator. Plaintiff walked around the excavator to observe the reading on the fuel gauge. While he was returning around the front of the excavator it moved, causing his leg to be pinned between it and the break wall.

This evidence is sufficient to establish that Plaintiff was Defendants' employee and that the injury arose out of and during the course of Plaintiff's employment. See generally, Gladwell v C&S Communications, 224 AD2d 775 (3d Dept 1996). And Defendants' arguments as to waiver, estoppel, or that there are triable issues of fact as to whether Plaintiff was Defendants' employee are unavailing. For instance, Defendant Hepler's statement that he has no employees is conclusory and self-serving. Additionally, Defendants' argument that Plaintiff being paid in cash somehow

creates a triable issue of fact likewise finds no support in caselaw. And as Plaintiff notes in reply, Defendants never provided him with an IRS Form 1099. Defendants' further argument that the Court should defer to a Workers' Compensation Board determination as to Plaintiff's status as an employee is an impossibility because Plaintiff has elected his remedy by resorting to the instant lawsuit rather than workers' compensation, as is his right. And as such, he has elected his exclusive remedy and may not later seek redress through workers' compensation.

Thus, Plaintiff was Defendants' employee. Plaintiff's injuries arose out of said employment. And Defendants failed to carry workers compensation coverage. Therefore, it follows that Defendants' affirmative defenses of contributory negligence or assumption of risk are hereby precluded and that portion of Plaintiff's motion is GRANTED.

The Court next turns to Plaintiff's motion as it seeks summary judgment upon his Labor Law § 200 and common law negligence causes of action in that Defendants allegedly failed to provide Plaintiff with a safe place to work. Labor Law Section 200 claims involve injuries from defective or dangerous conditions on the work site or injuries from the manner in which the work is performed. See e.g., Mayer v Conrad, 122 AD3d 1366, 1367 (4th Dept 2014). "With respect to...recover[y] under a theory that there was a dangerous condition on the premises, the general contractor 'may be liable...if it has control over the work site and [has created or has] actual or

constructive notice of the dangerous condition.'" Pelonero v Sturm Roofing, LLC, 175 AD3d 1062, 1064 (4th Dept 2019)(internal citation omitted). "Where, however, the worker's injuries stem from the manner in which the work was being performed, no liability attached...under the common law or under Labor Law § 200 'unless it is shown that [Defendant] had the authority to supervise or control the performance of the work.'" Mayer v Conrad, 122 AD3d 1366, 1367 (4th Dept 2014)(internal citation omitted). Here, whether classified as a method and manner of work theory of liability or a dangerous condition theory, Plaintiff has met his initial burden.

Plaintiff's theory is that Defendant either moved the excavator himself or allowed it to move and thereby cause Plaintiff's precipitant injuries. According to Defendant Hepler's testimony, the front end of the excavator was sitting upon an accumulation of 6 inches of snow and ice near the break wall and tapered back towards the driveway. Defendant Hepler acknowledged that this accumulation of snow and ice had built up over the weeks that they were on the job site. See Doc. No. 34, Deposition Transcript - Scott Hepler at 100-01. Under an additional theory of liability, Plaintiff alleges that Defendant failed to disengage the hydraulics in the excavator by engaging a lock out lever that would have precluded inadvertent movement. In support of that theory, Plaintiff offers an affidavit from a workplace safety expert John Bieger. In addition to failing to engage the hydraulic lock out lever, Bieger also opined that Defendants failed to prevent the

excavator from moving on the ice through the use of sand, timbers, or mats.

Taken together, the above evidence establishes that Defendant Hepler was in control of the construction site where the injury occurred. He controlled the method and manner of Plaintiff's work, and was at the literal controls of the excavator at the time of the injury producing event. Thus, Plaintiff has met his initial burden upon his common law and Labor Law § 200 causes of action.

And with the burden shifted, Defendants have failed to raise a triable issue of fact. For instance, Defendants' argument that it was Plaintiff's choice to cross in front of the excavator is insufficient to raise a triable issue that Defendants lacked direction, control, or supervisory authority over Plaintiff's injury-producing work. And with respect to an alleged dangerous condition, whether that be the proper use of safety procedures regarding the excavator's hydraulic system or using proper footings to prevent the excavator from moving under icy conditions, Defendants have failed to raise a triable issue of fact as to their liability in the happening of the accident. Thus, Plaintiff's motion for summary judgment upon his common law and Labor Law § 200 causes of action is hereby GRANTED.

Defendants cross-move for an order granting partial summary judgment and dismissal of Plaintiff's Labor Law § 241(6) cause of action. Defendants also seek a protective order pursuant to CPLR 3201(a) for Plaintiff's alleged failure to serve expert disclosure

in accordance with this Court's scheduling order. As to his Labor Law § 241(6) claim, Plaintiff relies upon the following code and regulation provisions: 12 NYCRR 23-1.5(a); 12 NYCRR 23-4.2(k); 12 NYCRR 23-9.5(a); and 12 NYCRR 23-9.5(c).

"To make out a prima facie cause of action pursuant to Labor Law § 241(6), [plaintiff] must allege that defendants violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles." Adams v Glass Fab, Inc., 212 AD2d 972, 973 (4th Dept 1995). As Defendants correctly observes, claims using 12 NYCRR 23-1.5(a) are not sufficiently specific to support a Labor Law § 241(6) cause of action. See e.g., Wilson v Niagara Univ., 43 AD3d 1292, 1293 (4th Dept 2007). Such is the case here. And the same is true with respect to Plaintiff's reliance upon 12 NYCRR 23-4.2(k). "That regulation is not sufficiently specific to support the section 241(6) cause of action." Buhr v Concord Sq. Homes Assoc., Inc., 126 AD3d 1533, 1535 (4th Dept 2015).

This leaves Plaintiff's theory under 12 NYCRR 23-9.5(a) and (c). Subsection a provides that "[e]xcavating machines shall not be used where unstable conditions or slopes of the ground or grade may cause such machines to tilt dangerously [and t]o prevent such unstable conditions, mats of timber or equivalent means to afford stable footings shall be provided." Here, assuming arguendo that Defendant met his initial burden that a Labor Law § 241(6) claim under 12 NYCRR 23-9.5(a) does not lie on the facts presented here,

Plaintiff has raised a triable issue of fact in response. Specifically, Plaintiff's expert opined that Defendants' failure to ensure the excavator had proper footing, coupled with the excavator operating upon 6 inches of ice tapering from the break wall back towards the driveway, was in violation of the industrial code. Additionally, Defendant Hepler also testified that the excevators was moving around during operation.

And as to 12 NYCRR 23-9.5(c) and 12 NYCRR 23-1.4, Defendants have established that these provisions are inapplicable to the facts presented and Plaintiff has failed to raise a triable issue in response.

Finally, the Court considers Defendants' motion for a protective order pursuant to CPLR 3103(a) to preclude Plaintiff's workplace safety expert because of Plaintiff's failure to disclose said expert in accordance with the expert disclosure time line contained in the scheduling order. Defendants here have suffered no prejudice as they had ample knowledge of Mr. Bieger's involvement in the case and indeed met him when he examined the excavator. Thus there is no surprise or prejudice and Defendants' motion for a protective order is therefore DENIED.

Accordingly, Plaintiff's motion for summary judgment upon his common law and Labor Law § 200 causes of action is hereby GRANTED. Defendants' cross-motion seeking summary judgment upon Plaintiff's Labor Law § 241(6) cause of action insofar as it relies upon alleged violations of 12 NYCRR 23-1.5(a), 12 NYCRR 23-4.2(k), 12

NYCRR 23-9.5(c) and 12 NYCRR 23-1.4 is GRANTED. As to alleged violations under 12 NYCRR 23-9.5(a), Defendants' motion is DENIED. Finally, Defendants' motion for a protective order pursuant to CPLR 3103(a) is DENIED.

Any prayers for relief not specifically addressed herein are DENIED.

This constitutes the Decision, Order and Judgment of the Court.

Honorable William K. Taylor
Supreme Court Justice
Dated: January 13, 2020