Lopez v City of New York
2020 NY Slip Op 34923(U)
December 23, 2020
Supreme Court, Bronx County
Docket Number: Index No. 24932/2013E
Judge: Donald Miles
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ANGEL LOPEZ,

Plaintiff,

-against- Index No.: 24932/2013E

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, MEGA CONTRACTING GP, LLC, PHIPPS COMMUMITY DEVELOPMENT CORP., PHIPPS HOUSES, INC., and LEBANON WEST FARMS HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

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MEGA CONTRACTING GROUP, LLC, i/s/h as MEGA CONTRACTING GP, LLC,

Third-Party Plaintiff,

-against- T.P. Index No.: 83858/2015

SOIL SOLUTIONS INC.,

Third-Party Defendant.

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HON. DONALD MILES:

Defendants, LEBANON WEST FARMS HOUSING DEVELOPMENT FUND CORPORATION (referred to herein as LEBANON), and MEGA CONTRACTING GROUP, LLC, (referred to herein as MEGA) move for summary judgment in their favor seeking dismissal of Plaintiff's action and any cross claims and counter claims as against them.

Introduction, Parties and Submissions:

This is an action to recover damages for alleged personal injuries sustained by Plaintiff ANGEL LOPEZ (referred to herein as LOPEZ), in an accident which occurred on, or about, February 22, 2013, at about 7:15 a.m., at a construction site in the Bronx, New York. Plaintiff was a laborer, employed by Soil Solutions, to perform services related to drilling work. Plaintiff LOPEZ alleges that he was injured when an air hose disconnected from the drill rig and whipped, striking Plaintiff in the head and face -- due to a defective safety device, a "whip check".

In his Complaint, Plaintiff includes causes of action sounding in Labor Law § 200 and common law negligence, Labor Law § 240(1), and § 241(6). Plaintiff's alleged injuries include traumatic brain injury and nasal bone fractures. (*See* Plaintiff's Complaint dated February 15, 2015; and Bill of Particulars, dated August 22, 2016).

The only remaining Defendants are Defendant LEBANON, who was the owner of the premises, and Defendant MEGA, who was the general contractor for the project -- which was for the construction of three multi-family apartment buildings with commercial space. MEGA had subcontracted with Soil Solutions, Plaintiff's employer, to perform drilling into rock for the pile foundations.

It is noted that Defendants, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, were dismissed from this action by Orders of this Court dated October 30, 2019, and March 10, 2020. The Third-Party action against SOIL SOLUTIONS INC., was discontinued by "Notice of Discontinuance of Third-Party Action", dated June 15, 2016.

Defendant PHIPPS NEIGHBORHOODS, INC., (incorrectly named herein by its former name, PHIPPS COMMUNITY DEVELOPMENT CORP.), was dismissed by a separate Order of this Court, whereby this Court granted its unopposed motion for summary judgment. The parties discontinued the action as against Defendant PHIPPS HOUSES, (incorrectly named herein as PHIPPS HOUSES, INC.).

In support of their Motion, Defendants' submissions include the pleadings; the deposition transcripts of: Plaintiff, dated October 10, and November 16, 2017, Defendant MEGA (by Charles Sotiriou), and Defendant LEBANON/PHIPPS (by Michael Wadman); the Affidavit of Michael Wadman together with the construction agreement between LEBABON and MEGA; the Subcontract Agreement between MEGA and Soil Solutions; the Affidavit of Defendants' expert, Michael Cronon, Professional Engineer, dated May 29, 2020; and Soil Solution's Incident Report/Witness Statement, dated Feb. 22, 2013 (by Michael Maternowski).

In opposition to the Motion, Plaintiff's submissions include the Affidavit of Plaintiff's expert, Herbert Heller, Jr., Professional Engineer, dated August 26, 2020.

LABOR LAW § 200 and § 240(1)

Those parts of the Defendants' Motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims, and Plaintiff's Labor Law § 240(1) cause of action, are granted, without opposition.

LABOR LAW § 241(6)

The issue remaining is the viability of Plaintiff's Labor Law § 241(6) cause of action to the extent that it is predicated on a violation of 12 NYCRR §23-1.5(c)(3). However, that part of Defendants' motion for summary judgment dismissing the remainder of the Industrial Code sections alleged by Plaintiff, is granted, without opposition, since those sections are deemed abandoned.

Labor Law § 241(6) "Construction, excavation and demolition work" provides as follows:

> "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. The **commissioner may make rules** to carry into effect the provisions of this subdivision, and **the owners and contractors**

> **and their agents for such work ... shall comply therewith**". [emphasis added]

"Labor Law § 241(6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors '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" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]).

In this seminal case, the Court of Appeals pronounced:

> "[W]e have repeatedly recognized that section 241(6) imposes a **nondelegable duty upon an owner or general contractor** to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein. Thus, **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** [--someone within the chain of the construction project--] **caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault**" [emphasis added]

(*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]).

For purposes of the nondelegable duty imposed upon owners and general contractors by Labor Law § 241(6), and the regulations promulgated thereunder, the provisions of the Industrial Code mandating compliance with concrete specifications give rise to the duty, while those that establish general safety

standards do not. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

--12 NYCRR § 23-1.5(c)(3)

12 NYCRR § 23-1.5(c)"Condition of equipment and safeguards" provides as follows: "(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

The First Department has established that this section is not too general to support a Labor Law § 241 (6) claim. (*Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). This was reiterated in a very recent case with similarities to the instant matter, wherein a plaintiff was injured in an accident that also involved drilling operations, where the Court stated that:

> "The First Department has ruled that section 23-1.5 [c] is specific enough to serve as a predicate for a section 241(6) cause of action (*Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 6 N.Y.S.3d 42, citing *Misicki v Caradonna*, 12 NY3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375, in which the Court of Appeals found analogous specificity in 12 NYCRR § 23-9.2 (a)"

(*Witt v Brookfield Props. OLP, Co., LLC*, 67 Misc 3d 1230[A], 2020 NY Slip Op 50688[U], *2 [Sup Ct, NY County 2020]). Accordingly, in *Witt*, the Court held that the cause of action under Labor Law § 241(6), predicated on 12 NYCRR § 23-1.5(c)(3), was viable as against the owner of the premises and the project general

manager, stating that plaintiff "Robert Witt has sufficiently alleged a defective core drill and broken water pump; the cause of action under Labor Law § 241(6) shall go forward" *Id*.

Herein, both parties cite the Incident Report/Witness Statement made by Soil Solution's employee, Michael Maternowski, the drill rig operator, who describes the incident as follows:

> "My name is Michael Maternowski and I am a driller with Soil Solutions, Inc. I was on the above-referenced job site when the above-referenced incident occurred. Angel Lopez was wearing proper safety equipment including a hard hat, safety glasses, and work boots when we started our drilling work.
>
> When we started our air compressor, we heard a hissing sound coming out of the fittings indicating we had a blockage in the hose. Angel Lopez was assisting me in clearing the blockage from the air hose. The air hose is wire reinforced rubber hose with each end having a Boss Threaded Spanner fittings that connects from the air compressor to the drill rig. We shut down the air compressor using the ball valve which stops the flow of air. We removed one end of the hose from the drill rig and used a hammer on the rubber part of the hose to break down the ice. **We kept the whip-check in place from the hose to the drill rig at all times. When the ice blockage dislodged, the hose recoiled, causing the hose to jump, hitting Angel Lopez in the face.** We immediately called 911 and Angel was rushed to the hospital". [emphasis added]

(*See* Incident Report/Witness Statement by Michael Maternowski, dated Feb. 22, 2013).

A "**whip check is a safety cable** used to reduce the movement of an air hose in the event of a hose, coupling or fitting failure. A whip cheek is a steel

cable with loops on each end. **These loops are positioned on both sides of a hose connection to keep the hose from moving if the connection fails**" [emphasis added]. (*See* Affidavit by Herber Heller, Jr., P.E., dated August 26, 2020).

The size of the "whip checks", utilized that day, were one and one-half to two feet long, according to the Plaintiff. (Plaintiff's deposition, dated Nov. 16, 2017, p. 15-16).

Mr. Maternowski's account is consistent with Plaintiff's testimony, which includes that the "whip checks" were attached in place, while the Plaintiff was working with Mike Maternowski (the drill operator), and Oscar Perez (a journeyman). Plaintiffs stated that "the hose came off the drill rig somehow and smacked me in the face", according to Plaintiff's co-workers, including Sean, who was an excavator operator, who saw "the whole thing happen", and so informed Plaintiff when he came to visit Plaintiff in the hospital.[1] (*See* Plaintiff's deposition, dated October 10, 2017, p. 106, 142-46, and deposition, dated Nov. 16, 2017, p. 6-13).

[1] Sean provided a video of the day of the accident; however, the Plaintiff's deposition testimony does not indicate whether the video shows how the accident occurred. (Plaintiff's deposition, dated Nov. 16, 2017, p. 6-13).

Thus, Plaintiff alleges that the safety device, the "whip check", failed to perform its function, since it did not hold the hose, that was connected to the drill rig, in place. Further, regarding the cause of the accident, Plaintiff was asked the following question, and gave the following answer:

> "Q. As you sit here today, do you have any knowledge as to whether or not the hose itself came off the drill rig and struck you or if it was the slack in the hose that struck you?
> A. Slack would never do it, do ... what happened to me ... [b]ecause it's ... impossible. The slack on that just moves maybe a couple inches. It won't move no feet".

(Plaintiff's deposition, dated November 16, 2017, p. 20-21).

The incident occurred on Plaintiff's first, and only, day on this job, and he did not know the other workers who witnessed the accident. Due to his injuries, Plaintiff could not remember what occurred after he walked towards Mike, just prior to the accident. (Plaintiff's deposition, dated October 10, 2017, p. 106, 142-46, and deposition dated Nov. 16, 2017, p. 7, 14).

In support of Defendants' Motion, Defendants include the testimony of MEGA's assistant construction superintendent, Mr. Sotiriou, who was present at the job site on the date of the accident, and saw the injured worker on the ground, and saw the blood. As to how the incident occurred, he also stated "that the hose may have disconnected somehow". Mr. Sotiriou's duties included

monitoring the job site. He did not recall whether he provided any safety items to Soil Solutions. (Sotiriou deposition, p. 11, 16, 23, 26-33).

In support of Defendants' motion, their expert engineer, Mr. Cronin, cites to the same Incident Report by Maternowski, as well as to portions of Plaintiff's deposition testimony dated November 16, 2017, and concludes that: "Mr. Lopez's accident was caused by the actions of employees of Soil Solutions, Inc., in the methods employed to clear a clog in an air hose." (*See* Affidavit by Michael Cronin, P.E., Engineering Consultant, dated May 29, 2020). The documents Mr. Cronin reviewed also included the deposition transcript of Mr. Sotiriou, as well as photographs, a video, and Incident Reports.

However, Mr. Cronin does not address whether or not the subject "whip check" was kept sound and operable.

Defendants otherwise failed to proffer sworn testimony, or affidavits made by persons having knowledge of the relevant facts, and/or documentation, addressing the issue at hand, which is whether the subject "whip check" was "kept sound and operable", and/or was damaged, or known to be damaged, within the meaning of the aforesaid Industrial Code section, 12 NYCRR § 23-1.5(c)(3). Accordingly, the moving Defendants failed to make out a prima facie

showing of their entitlement to summary judgment, on this motion, as a matter of law.

It is well-established that:

> "As we have stated frequently, **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** *(Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). **Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers** *(Winegrad v New York Univ. Med. Center, supra*, at p 853). Once this showing has been made, however, 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 *(Zuckerman v City of New York, supra*, at p 562)" [emphasis added] (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212, subd [b]), and **he must do so by tender of evidentiary proof in admissible form**" [emphasis added] (*Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]).

Moreover, there was no reason given as to why the moving Defendants could not address the condition of the "whip check" by submitting such sworn testimony, or affidavits in admissible form, made by, for instance, an officer or

employee of Soil Solutions having knowledge of the relevant facts, and/or who witnessed the accident. Indeed, it is acknowledged that: "No deposition was taken of Mr. Maternowski or other Soil Solutions employees". (*See* "Affirmation in Support" by Defendants' Counsel, dated May 29, 2020, p. 14).

In opposition to the motion, Plaintiff's engineer summarizes the accident as follows: "the air hose [having pressures up to 3,000 psi], blew off the drill rig, striking plaintiff in the head and face, injuring him". (*See* Affidavit by Herbert Heller, Jr., P.E.).

According to Mr. Heller, this happened as a result of the failure of the safety device, a "whip check", during the performance of the work. Mr. Heller opines "within a reasonable degree of engineering and site safety certainty that the whip check used at this connection ... was damaged or defective." As part of his analysis, he reviewed Plaintiff's testimony, and Mr. Maternowski's Incident Report, and other listed documents. (*See* Affidavit by Herbert Heller, Jr., P.E.).

In a recent case involving 12 NYCRR 23-1.5 (c)(3), the Court held that defendants' motion for summary judgment should be denied "with respect to the section 241(6) claim insofar as it alleges a violation of 12 NYCRR 23-1.5 (c)(3) because that regulation is sufficiently specific to support a claim under section 241(6)" (*Salerno v Diocese of Buffalo, N.Y.*, 161 AD3d 1522, 1524 [4th Dept 2018]).

In *Salerno*, plaintiff had allegedly sustained injuries while he was working on a construction project at a cemetery owned by defendants. The safety device at issue was a safety bar that lowered onto the operator's lap while, as part of his work, while he was operating a "Bobcat skid-loader". The safety device apparently failed since: "When plaintiff raised the safety bar to exit the machine, the safety bar allegedly fell and struck him". Under the circumstances, the Court held that there was a viable claim against the owner of the premises, pursuant to 12 NYCRR 23-1.5 (c)(3). (*Salerno v Diocese of Buffalo, N.Y.*, 161 AD3d 1522, 1523 [4th Dept 2018]).

Herein, Plaintiff alleges that the safety device, namely, the "whip check", failed to perform its function, and so was not "kept sound and operable" within the meaning of the aforesaid provision of the Code, causing his injuries. When a plaintiff "has thereby alleged a breach of this provision of the Code [, it] would then remain for a jury to decide whether a violation, in fact, occurred; and whether the negligence of some party to, or participant in, the construction project caused plaintiff's injuries. If negligence is established, [the owner of the premises] ... would be vicariously liable for plaintiff's injuries without regard to fault" (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009]).

Accordingly, even assuming, *arguendo*, that Defendants had met their burden on their motion for summary judgment, there would remain questions of fact, for a jury to decide, including whether a violation of the subject section of the Code occurred, and whether the alleged negligence of Soil Solutions, in failing to keep the "whip check" "sound and operable", caused Plaintiff's injuries. If so, the Defendants, the owner LEBANON, and the general contractor MEGA, who have a nondelegable duty, would be vicariously liable to the Plaintiff without regard to their fault. (*See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). In this regard, Defendants' expert engineer pointed to some negligence on the part of Soil Solutions' employees which caused the accident. (*See* Affidavit by Michael Cronin, P.E., Engineering Consultant).

It is noted that a "plaintiff was not also required to demonstrate his freedom from comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 323, 76 N.Y.S.3d 898, 101 N.E.3d 366)." (*Ortega v R.C. Diocese of Brooklyn, NY*, 178 AD3d 940, 942 [2d Dept 2019]).

Accordingly, that part of Defendants' motion seeking dismissal of the Labor Law § 241(6) cause of action, predicated on the section of the Industrial Code relied upon by Plaintiffs, namely, 12 NYCRR § 23-1.5(c)(3), is denied.

The remainder of Defendants' motion for summary judgment is granted, without opposition, and so the remaining Industrial Code sections, and the remainder of the causes of action -- namely, the Labor Law § 200, common law negligence, Labor Law 240(1) causes of action -- are dismissed, as set more fully forth herein.

This constitutes the decision and order of this Court.

Dated: DEC 23 2020, 2020

HON. DONALD MILES, J.S.C.