

Diggs v 186-196 Herkimer LLC
2022 NY Slip Op 33208(U)
September 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 519723/2016
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of September, 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
BERNARD DIGGS,

Plaintiff,

-against-

Index No.: 519723/2016

Mot. Seq. Nos. 5 & 6

186-196 HERKIMER LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Affidavits (Affirmations) Annexed _____	<u>55 - 67; 53-83 85-98</u>
Opposing Affidavits (Affirmations) _____	<u>71 - 72 74 - 85; 87-89;</u>
Affidavits/ Affirmations in Reply _____	<u>90, 92</u>

Upon the foregoing papers, in this action by Plaintiff, Bernard Diggs (“Plaintiff”), against Defendant, 186-196 Herkimer LLC (“Defendant”), pursuant to Labor Law Sections 200, 240(1) and 241(6); Industrial Code violations pursuant to 12 NYCRR Part 23 Section 23-1.2, 23-1.3, 23-1.4, 23.1-5, 23-1.7(d), 23-1.7(e), 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.30, and OSHA violations pursuant to Sections 1926.10, 1926.20, 1926.200 and 1926.250, Defendant moves (Motion Sequence 5) pursuant to CPLR § 3212, for an order dismissing Plaintiff’s claims and further, for an order extending its time in which to file such motion for good cause shown. Plaintiff moves pursuant to CPLR § 3212 (Motion Sequence 6), for an order granting summary judgment on his Labor Law §§ 240(1) and

241(6) claims, and an order granting Plaintiff leave to serve a Supplemental Bill of Particulars.

Plaintiff commenced this matter by the filing of a Summons and Verified Complaint on or about November 18, 2016 to recover damages for personal injuries that he allegedly sustained to his left index finger on September 4, 2014, while using a circular saw to fabricate a lockbox at the premises/construction site owned by Defendant. Defendant argues that Plaintiff is not entitled to relief under Labor Law §§ 200, 240, 241(6), or common law negligence, because Plaintiff, who worked as a site manager for non-party Mazeh Construction, was not assigned to work at the construction site where the accident occurred. Defendant further argues that several statutory provisions asserted by Plaintiff are not sufficiently specific or do not apply. Additionally, Defendant points out that Plaintiff came to the subject premises on his own volition to visit co-workers, when, without first obtaining permission, he procured a circular saw at the job site and proceeded to use the saw to fabricate a lock box to store his personal items.

Defendant maintains that it did not control or direct Plaintiff's activities at or about the time Plaintiff attempted to fabricate the lockbox. Additionally, Defendant asserts that it exercised no control over Plaintiff or the job site, did not create a dangerous condition, and had no actual or constructive notice of any such condition. Defendant contends there was no height, gravity, or elevation related risk at the time of the accident and further, that the provisions of OSHA asserted by Plaintiff are not a basis for relief, and Plaintiff's accident was neither work-related, nor caused by a violation of the New York Industrial Code.

Defendant annexed, among other things, the deposition testimony of Plaintiff, who admits that he did not receive instructions, directions or any tools from Defendant before he attempted to fabricate the lockbox (NYSCEF Document No. p. 35-38). Defendant also emphasizes the fact that Plaintiff admitted finding the hand-held saw in the back of the construction site and presumed that it belonged to one of the other contractors (*Id.*; p. 42). Defendant further accentuates the fact that Plaintiff acknowledged that permission was usually required before using the tools of another, and Plaintiff failed to obtain permission before using the saw and that he saw the guard was missing before he began using it (*Id.*; p. 52).

Plaintiff argues that he was utilizing the saw to fabricate a lock box at the direction of his employer, Mezah Construction, who refused to purchase one, in order to store job-related and personal items. In support of his motion for summary judgment, Plaintiff insists that the saw in question was upon the premises with no guards and thus, Defendant violated sections of the Industrial Code as follows: (1) Section 23-1.5(c) [No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition]; (2) Section 23-1.12(c)(1) [portable, power driven, hand operated saw ..., shall be equipped with a fixed guard above the base plate]; (3) Section 23-9.2(a)[all power-related equipment shall be maintained in good repair and in proper operating condition at all times. ... any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement]; and (4) Section 23-9.2(b)(1)[all power operated equipment used in construction ... shall be

operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times].

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]) “In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (*Santiago v. Joyce*, 127 AD3d 954 [2d Dept 2015]). The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept 2011]).

Regarding Plaintiffs common law negligence and Labor Law 200 claims, this court is cognizant that Section 200 is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]; *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011]). Labor Law § 200 is the statutory equivalent of common law negligence as to owners and general contractors, because the same standards apply to recovery under either common

law negligence or Labor Law section 200 (*Ortega v Puccia*, 57 AD3d 54, 60-61 [2d Dept 2008]). 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 (*Torres v City of New York*, 127 AD3d 1163, 1165 [2015]).

The court finds that Plaintiff, who injured his left index finger with a circular saw that had no guard falls under the category of workers that are injured as a result of a dangerous or defective condition at the premises. Though Defendant maintains that it exercised no supervisory control, Plaintiff has asserted that his employer, the general contractor (Mazeh), instructed Plaintiff to fabricate the lockbox, which raises an issue of fact (*Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 93 [2022][plaintiff must show that an owner or general contractor exercised some supervisory control over the operation to recover]). Consequently, the court finds that summary judgment in favor of Defendant on Plaintiff's common law negligence and Labor Law 200 causes of action is not warranted.

With respect to that branch of Defendant's motion pertaining to Labor Law 240(1), the court finds that Defendant established, prima facie, that Section 240(1) is not implicated under the facts of this case. That section of the Labor Law imposes upon owners, contractors, and their agents a nondelegable duty to provide workers proper protection from elevation-related hazards" (*Zoto v. 259 W. 10th, LLC*, 189 AD3d 1523, 1524 [2d Dept 2020], citing *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The evidence in this matter reveals that the protections of Section 240(1) were

not triggered, since the fabrication of a lock box does not involve or create an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against (*Zoto v. 259 W. 10th, LLC*, 189 AD3d at 1524).

In addressing Defendants motion for summary judgment dismissing Plaintiff's Section 241(6) claims, the court is cognizant of the fact that Section 241(6) imposes a nondelegable duty of reasonable care upon owners, general contractors, and their agents, to provide reasonable and adequate protection and safety to persons employed in or lawfully frequenting, all areas in which construction, excavation or demolition is being performed (*Raised v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 348 [1998]). The Court of Appeals has reiterated that the legislative intent was to place the "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d at 348).

Here, Plaintiff bases his Section 241(6) claim on the fact that the saw he utilized was on the premises with no guard. Plaintiff asserts multiple violations of the Industrial Code, including Sections 23-1.2 (finding of fact), 23-1.3 (application provision), 23-1.4 (definitions), and 23-1.5 (general responsibility of employers), none of which are sufficiently concrete or specific, a requirement that the Court of Appeals recently emphasized in the *Toussaint v Port Authority of New York and New Jersey* case (*See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Additionally, Industrial Code Sections 23-1.7(d), 23-1.7(e), 23-1.7(e)(1), and 23-1.7(e)(2), which apply to tripping hazards, and Section 23-1.30, which is triggered when an accident results from a

lack of lighting, are not applicable. Further, while violations of OSHA regulations may be considered some evidence of negligence, OSHA's framework does not provide an independent basis for recovery (*Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995]). Thus, the court finds that Defendant has established entitlement to summary judgment as a matter of law on the aforementioned Industrial Code and OSHA Sections 1926.10, 1926.20, 1926.200 and 1926.250.

Plaintiff moves for leave to serve a supplemental Bill of Particulars to identify under which Industrial Code sections his claims are based. Plaintiff's failure to include the level of specificity required is not fatal (*Jara v New York Racing Ass'n, Inc.*, 85 AD3d 1121, 1123 [2d 2011]). The incident, as described by Plaintiff, alleges violations of Industrial Code Sections 23-1.5(c)(condition of equipment), 1.12(c)(fixed guard requirement), and 9.2(a)(maintenance). The court finds that Plaintiff has satisfied the criteria for leave to supplement the Bill of Particulars, since those provisions are applicable to the facts alleged here, and there are no new allegations, theories of liability, or showing of prejudice to the Defendant (*Id.*).

Based upon the foregoing, it is hereby

ORDERED, that Defendant's motion (Motion Sequence 5) for summary judgment is granted to the extent that Plaintiff's Labor Law § 240(1), and claims under Industrial Code §§ 23-1.7(d), 23-1.7(e), 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.30, and OSHA §§ 1926.10, 1926.20, 1926.200 and 1926.250 are dismissed, and it is further

ORDERED, that Plaintiffs' motion (Motion Sequence 6) for summary judgment and leave to amend is granted solely to the extent that Plaintiff is granted leave to

supplement the Bill of Particulars, as provided at NYSCEF Document Number 84, to allege violations of the Industrial Code on which Plaintiff's Labor Law § 241(6) claims are based, and it is further

ORDERED, that the Supplemental Bill of Particulars included with Plaintiff's motion, at NYSCEF Document Number 84, is deemed served, upon Plaintiff serving a copy of this order with Notice of Entry upon Defendant within twenty (20) days of such entry.

This constitutes the decision and order of the court.

E N T E R



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**