

Wajda v A. Russo Wrecking, Inc.

2010 NY Slip Op 32788(U)

October 6, 2010

Supreme Court, New York County

Docket Number: 116742/05

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Wajda

INDEX NO. 116742-05

MOTION DATE 7/21/10

- v -

A. Russo Trucking

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

^{is} motion and ~~cross-motion~~ are decided in accordance with accompanying memorandum decision.

FILED
OCT 07 2010

NEW YORK COUNTY CLERK'S OFFICE

This constitutes the decision and order of the Court.

Dated: October 6, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19**

-----X
EDWARD WAJDA,

Plaintiff,

Index No.: 116742/05
Submission Date 7/21/10
Mot. Seq. No. 006

-against-

A. RUSSO WRECKING, INC., L&M 93RD STREET,
LLC, ROSE ASSOCIATES, INC. and CIVETTA COUSINS,
JV, LLC,

Defendants.

-----X
L&M 93RD STREET, LLC and ROSE ASSOCIATES, INC.,

Third-Party Index No.:
590383/06

Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV, LLC,

Third-Party Defendant.

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Appearances: For Plaintiff :
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For Defendants and Third-Part Defendant:
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Affirm. in Supp. of Def. Motion for Summ. Judg with Att.....	<u>1</u>
Affirm. in Opp. by Plaintiff.....	<u>2</u>
Affirm. in Reply.....	<u>3</u>
County Clerk's File Containing Materials of Prior Motion Practice.....	<u>4</u>

HON SALIANN SCARPULLA, J.:

This is an action to recover damages for personal injuries sustained by a worker when he tripped on a brick while working at a construction site located at 2489 Broadway, New York, New York on April 11, 2005. Defendants L&M 93rd Street, LLC (“L&M”), Rose Associates, Inc. (“Rose”) and Civetta Cousins, JV, LLC (“Civetta”) moves pursuant to CPLR 3212, for summary judgment dismissing plaintiff Edward Wajda’s complaint in its entirety.¹

On the date of the accident, defendant L&M owned the premises where the accident took place. Defendant Rose was a related entity. These two ownership entities hired non-party Kreisler Borg Florman (“Kreisler”) to serve as general contractor on a project demolishing two existing buildings at the site, followed by new construction. Defendant A. Russo Wrecking, Inc. (“Russo”) was the demolition subcontractor on the project, and defendant Civetta was hired to excavate the site and to pour the foundation for the new buildings.

Plaintiff, who was employed by Kreisler as a general labor foreman, testified that his duties on the project included taking seismic readings, unlocking and locking the construction site, keeping the sidewalks surrounding the construction site and the entry-ways of the construction site clean, clearing debris from both inside and outside the worksite, discussing safety issues with the safety officer for the project and keeping a record of the companies that were present at the site each day. Plaintiff maintained that he removed the

¹ Co-defendant A. Russo Wrecking, Inc. previously moved this Court for dismissal of the complaint against it and that such motion was granted verbally by the Court on October 24, 2008.

debris that accumulated at the job site every day by either picking it up by hand or by sweeping it up with a broom and a shovel. Plaintiff also stated that he received his instructions from either the site safety manager or the project superintendent, both employees of Kreisler.

In his affidavit, plaintiff described the construction site as bounded on the north and the east by a plywood fence, bounded on the south by plywood fence across part of a public sidewalk and then by the wall of an existing building, and bounded on the west by the wall of an existing building. Plaintiff explained that the site was completely enclosed and secure, and that there were only two authorized entrances to the site. Both of these entrances were padlocked during non-working hours.

Plaintiff explained that, on the date of the accident, Russo had already demolished the two buildings, thereby creating a large rectangular pit at the construction site. Although most of the demolition work and most of the debris removal had been completed, there was still some leftover demolition debris, including masonry bricks remaining in the pit. After having been away from the site for the weekend, plaintiff arrived at the gate located at the corner of 93rd Street and Broadway on Monday morning. Plaintiff stated that, after he unlocked the gate, he walked approximately one foot into the site, at which time he became injured when he stepped on and tripped over a brick. After his accident, plaintiff observed six to eight other bricks in the immediate area, which he believed were left over from the demolition of one of the buildings. He then used a broom to sweep up the bricks.

Plaintiff further stated that, prior to locking the gate at the end of his workday on the Friday afternoon before the accident, he observed debris on the ground which he swept up inside the gate, before closing and locking it. At this time, only Russo workers were present at the site, as the Civetta workers had already left for the day. Plaintiff does not know how long the brick that he tripped over was present before the accident, although he maintains that it was not there the Friday afternoon before his accident. In addition, plaintiff does not know how the brick came to be in the location of the accident. Plaintiff also stated that he had no reason to anticipate that the walkway would be strewn with debris on the morning of his accident.

Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep’t 1984). “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 eliminate any material issues of fact from the case’.” *Santiago v Filstein*, 35 A.D.3d 184, 185-186 (1st Dep’t 2006)(citation omitted). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of*

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Art, 27 A.D.3d 227, 228 (1st Dep't 2006); *see also Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Plaintiff does not oppose defendants' motion for summary judgment to the extent that defendants seek dismissal of plaintiff's claims for common-law negligence and violation of Labor Law § 200. In addition, plaintiff does not oppose the motion to the extent that defendants seek dismissal of plaintiff's complaint in its entirety as against defendant Civetta. As defendants have put forth a prima facie case as to their entitlement to dismissal of the common-law negligence and Labor Law § 200 claims, and with no opposition from plaintiff, the Court grants that part of defendants' motion.

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so arranged, operated and conducted ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494, 501-502 (1993). However, Labor Law § 241 (6)

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is not self-executing, and to show a violation of this statute, and withstand a defendant's motion for summary judgment, plaintiff must show that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code §§ 23-1.7 (e) (1) and (2), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned. *See Cardenas v One State St., LLC*, 68 A.D.3d 436, 437 (1st Dep't 2009).

The remaining Industrial Code sections, 12 NYCRR §§ 23-1.7 (e) (1) and (2) have been recognized as sufficiently specific to sustain a claim under Labor Law § 241 (6). *See Picchinoe v Sweet Constr. Corp.*, 60 A.D.3d 510, 512 (1st Dep't 2009); *see also Vieira v Tishman Construction Corporation*, 255 A.D.2d 235, 235 (1st Dep't 1998).

Industrial Code 12 NYCRR § 23-1.7 (e) (1) and (2) provide, in pertinent part:

(e) Tripping and other hazards

- (1) Passageways. All passageways shall be kept free from ... debris and from any other obstructions or conditions which could cause tripping.

* * *

- (2) Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from ... debris ... insofar as may be consistent with the work being performed.

Industrial Code 12 NYCRR § 23-1.7 (e) (1) does not apply here because plaintiff's accident did not occur in a passageway, but in an open working area. *See Appelbaum v 100*

Church, 6 A.D.3d 310, 310 (1st Dep't 2004); *see also Lawyer v Hoffman*, 275 A.D.2d 541, 542 (3d Dep't 2000) (temporary roadbed upon which plaintiff fell did not constitute a passageway as contemplated by the statute; *Vieira*, 255 A.D.2d at 235 (no Industrial Code 12 NYCRR § 23-1.7 (e) (1) violation where plaintiff was not injured in a passageway but while working in an open area).

In support of his argument that the location where he was injured was a passageway, plaintiff sets forth facts to show that the accident area was enclosed. However, that the area was enclosed does not necessarily make it a passageway for the purposes of Industrial Code 12 NYCRR § 23-1.7 (e) (1). *See Maza v University Avenue Dev. Corp.*, 13 A.D.3d 65, 65-66 (1st Dep't 2004) (Court found that the courtyard, which was completely enclosed by surrounding buildings and had to be traversed by plaintiff to get to and from his work area, was not a passageway, but a work area).

In addition, while plaintiff's accident occurred in a working area, as required by Industrial Code 12 NYCRR § 23-1.7 (e) (2), this section is inapplicable because the brick that plaintiff allegedly tripped on was an integral part of the work being performed at the site of his accident. *See Solis v 32 Sixth Ave. Co.*, 38 A.D.3d 389, 390 (1st Dep't 2007) (bricks covering the scaffold were integral part of the masonry work); *O'Sullivan v IDI Construction Company*, 7 N.Y.3d 805, 805 (2006) (electrical pipe or conduit that plaintiff tripped over was an integral part of the construction); *see also Appelbaum v 100 Church*, 6 A.D.3d at 310; *Salinas v Barney Skanska Construction Company*, 2 A.D.3d 619, 622 (2d

Dep't 2003) (section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed); *Bond v York Hunter Construction*, 270 A.D.2d 112, 113 (1st Dep't 2000), *aff'd* 95 NY2d 883 (2000) ("the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability").

Further, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR § 23-1.7 (e) (1) and (2), because the brick on which plaintiff tripped was the very condition which he was charged with removing. *See Gaisor v Gregory Madison Avenue, LLC*, 13 A.D.3d 58, 60 (1st Dep't 2004); *Gist v Central School District Number 1*, 234 A.D.2d 976, 976 (4th Dep't 1996) (water sealant was not foreign substance within meaning of regulation, but was integral part of new roof that was being constructed). Defendants have submitted deposition testimony clearly establishing that it was plaintiff's job to remove debris like loose bricks from the job site. *See Marinaccio v Arlington Central School District*, 40 A.D.3d 714, 715 (2^d De'pt 2007) (where plaintiff tripped on a masonry block, the court found no Industrial Code 12 NYCRR 23-1.7 (e) (2) violation where deposition testimony established that, on the day of the accident, it was plaintiff's job to remove debris from the job site).

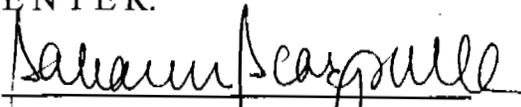
In sum, defendants have shown that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR § 23-1.7 (e) (1) and (2).

For the foregoing reasons, it is hereby

ORDERED that defendants L&M 93rd Street, LLC, Rose Associates, Inc. and Civetta Cousins, JV, LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Edward Wajda's complaint in its entirety is granted, and the complaint is dismissed against these defendants, and the Clerk is directed to enter judgment in favor of these defendants with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the court.

Dated: October 6, 2010
New York, New York

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED
OCT 07 2010
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