DaSilva v Haks Engr., Architects & Land Surveyors, P.C.
2013 NY Slip Op 32397(U)
October 3, 2013
Sup Ct, New York County
Docket Number: 109258/11
Judge: Donna M. Mills

[* 1]

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

PRESENT : DONNA M. MILLS **PART** 58

Justice

PAULO DA SILVA,

Plaintiff,

-v-

HAKS ENGINEERS, et al.,

Defendants.

INDEX NO. 109258/11

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL NO. _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2, 3
Answering Affidavits– Exhibits	4
Replying Affidavits	5

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 10/3/13

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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PAULO DA SILVA,

Index No.: 109258/11

Plaintiff,

-against-

HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C., EARTH TECH NORTHEAST, INC. and HAKS ET JOINT VENTURE,

Defendants.

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Mills, J.:

This is an action to recover damages for personal injuries sustained by a worker on August 5, 2009, when he fell from a scaffold while working on a reconstruction project involving Croton Falls Dam, Croton Falls Diverting Dam and Cross River Dam (the project).

Defendants Earth Tech Northeast, Inc. (Earth Tech) and the Haks Et Joint Venture (Haks Et) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Paulo Da Silva's complaint, as well as all co-defendant cross claims asserted against Earth Tech and Haks Et. In addition, defendant Haks Engineers, Architects and Land Surveyors, P.C. (Haks Engineers) cross-moves for summary judgment dismissing the complaint against it, as well as Haks Et.

Plaintiff alleges that Earth Tech, Haks Engineers and Haks Et (collectively, defendants) were negligent and violated Labor Law sections 200, 240 (1) and 241 (6) and applicable provisions of the Industrial Code Rule 23 of the state of New York. Specifically, plaintiff claims that defendants failed to provide him with a safe place to work and a safe and proper work platform, which caused him to fall and become injured.

BACKGROUND

On December 18, 2006, defendant Earth Tech and defendant Haks Engineers entered into a joint venture agreement for the purpose of carrying out the requirements of contract CRO-228CM. CRO-228CM is a contract under which the Department of Environmental Protection (the DEP) hired Haks Et to provide construction management services for the project (the CMS contract). Pursuant to the CMS contract, Haks Et was responsible for such construction management services as, among other things:

> "inspect[ing] the installation of all facets of the work . . . verify[ing] and prepar[ing] estimates for payment . . . monitor[ing] the coordination of the Contractors' coordination of their work with each other . . . verify[ing] that the Construction Contractors have obtained all work permits and that all required controlled inspections are satisfactorily performed with proper records maintained . . . provid[ing] adequate staffing to perform field inspection services for concrete specified in the contract documents . . . [and] ensur[ing] that all employees conduct field inspections in conformance with all applicable codes"

(Clifford Affidavit, exhibit B, CMS contract at S14-15).

In addition, pursuant to the CMS contract, Haks Et was to "arrange and conduct meetings with the Construction Contractors for each Construction Contract," prepare and distribute field progress reports and "[p]rovide equipment and supplies for routine activities, testing, and observations associated with the implementation of the work" (*id.* at SR-18).

The CMS contract also provided, in pertinent part:

> "It is the responsibility of the Construction Contractors, and not the responsibility of the CM, to determine the means and methods of construction . . .. However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property . . . such means and methods must be reported to the Commissioner, or to his/her duly authorized representative"

(*id.* at SR-13). In addition, the CMS contract stated:

> "The CM will not supervise, direct, control or have authority over or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto"

(*id.* at SR-23).

As to the health and safety aspects of the project, the CMS contract required that Haks Et develop and implement an "overall Health and Safety Plan," as well as review the prime contractors' health and safety plans for conformance with OSHA requirements (*id.* at SR -21, SR-23). Importantly, the CMS contract specified:

> "However, the CM's review of the [health and safety plans] shall not create any duty on the part of the CM to the contractor or to any other party and such review shall not diminish each contractor's obligation with respect to the safety and protection of persons and property under its construction contract"

(*id.*).

In order to carry out the actual construction work, the DEP hired another joint venture, Yonkers-Dragados Joint Venture (Yonkers-Dragados JV). Haks Et contracted with a resident engineering inspection service, Haider Engineering, P.C. (Haider), an engineering inspection service, to monitor the Yonkers-Dragados JV's compliance with its contract with the DEP.

On the day of the accident, plaintiff, employed by nonparty Yonkers Contracting, Inc., was working on the project as an employee of Yonkers-Dragados JV. Plaintiff was allegedly injured when an unsecured plank on the scaffold he was working on shifted, causing him to fall to the concrete ground below.

It should be noted that, in its decision and order dated January 29, 2013, the court dismissed all third-party claims against Haider, on the ground that Haider established that it did not direct, supervise or control the work giving rise to plaintiff's injury, nor did it have the authority to do so.

DISCUSSION

"'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 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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 Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

It should be noted that plaintiff does not set forth any substantive arguments in opposition to Haks Et's motion, with the exception of his argument that summary judgment would be premature at this time, since depositions of the parties have not yet been conducted and construction documents have not yet been exchanged which might determine the extent of supervision and monitoring performed by Haks Et.

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as

follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

It is well-settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant

exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Initially, as plaintiff was injured when one of the planks of the scaffold he was working on shifted, the factual scenario in the instant case clearly shows that the accident occurred, not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *see also Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]).

As explained in *Cappabianca* (99 AD3d at 144-145), a means and methods analysis is applied when an allegedly dangerous condition on the premises directly arises from the manner and means of the work. In *Cappabianca*, the plaintiff's work at the job site consisted of cutting bricks with a stationary wet saw. The saw and its stand stood on a wooden pallet which sat on a concrete floor (*id.* at 142). When in use, a wet saw sprays water on bricks in order to cool and lubricate them, also reducing dust and flying particles (*id.*). According to the plaintiff's testimony, when the saw that he was using malfunctioned, it sprayed water onto the floor,

making it slippery (*id.* at 142-143). Thereafter, after cutting a brick and turning to place it on an adjacent pallet, the pallet upon which the plaintiff was standing "shifted on the slippery floor as he turned, causing him to lose his footing" and fall (*id.* at 143).

Notably, the *Cappabianca* Court held that "all of the contributing causes of the accident directly arose from the manner and means in which [the plaintiff] was performing his work" (*id.* at 144). Thus, "[s]ince the City defendants and Skanska did not control the work that caused the accident, the section 200 and related negligence claims were properly dismissed" (*id.*). The *Cappabianca* Court reasoned:

> Since defendants could not control the activity that continuously produced the water, namely, the operation of the wet saw, they lacked any ability to correct the unsafe condition and thus were not liable under section 200 or for negligence [citation omitted]

(*id.* at 146).

Cited by the Court in *Cappabianca*, in *Dalanna v City of New York* (308 AD2d 400, 400 [1st Dept 2003]), the First Department affirmed the dismissal of a Labor Law § 200 claim which was brought by a plumber who was injured when he tripped over a bolt that protruded from a concrete slab. Prior to the day of the accident, a number of bolts had been used to temporarily anchor a tank to the slab before its permanent installation at another location. After the tank was removed, the plaintiff's employer was supposed to have cut all the bolts level with the surrounding surface. However, the plaintiff's employer neglected to cut the bolt on which the plaintiff tripped.

The Court in *Dalanna* determined that the protruding bolt was not a defect inherent in the property, but instead, its presence was the result of the manner in which the plaintiff's employer

performed its work. Therefore, even though the owner and construction manager had constructive notice of the bolt, they could only be held liable under Labor Law § 200 if they had exercised supervisory control over the employer's work (*id.*).

Likewise, in the instant case, the loose plank that caused plaintiff to lose his balance and fall from the scaffold was not the result of a defect inherent in the property; rather, it was the result of the manner in which the scaffold was either constructed and/or maintained. Therefore, in order to find defendants liable under Labor Law § 200, it must be shown that defendants exercised some supervisory control over the injury-producing work.

In support of their argument that Haks Et did not exercise supervisory control over the injury-producing work, defendants put forth the affidavit of John Clifford, wherein Clifford states that Haks Et did not install or inspect the subject scaffold. Clifford notes that Haks Et hired Haider "to conduct resident engineering inspection services, meant to monitor the Contractor's compliance with the contract's terms" (Clifford affidavit). Of relevance, Clifford also states that:

> "Haks ET did not direct, supervise or control the Plaintiff, or the means and methods by which Plaintiff performed work. Furthermore, Haks Et did not supply Plaintiff or his employer with any equipment or materials to perform said work including, but not limited to, the scaffold on which Plaintiff was working when he was allegedly injured."

Clifford further notes that, "[w]ith regards to safety, the Contractor was solely responsible for the safety of its employees. HAKS ET was not responsible for the safety of any of the Contractor's employees." In fact, Haks Et's site safety responsibilities were limited to developing and implementing an overall health and safety plan for the site, reviewing the health and safety plans for the contractors working at the site, and for making sure these plans

conformed with applicable OSHA regulations. In his affidavit, Clifford also maintains that Hak Et's safety responsibility did not "encompass Plaintiff's alleged injury because the conditions that caused the Plaintiff's alleged injury were the responsibility of his employer, Yonkers-Dragados" (*id.*).

In addition,, defendants put forth the language of the CMS contract, which states, in pertinent part:

> "It is the responsibility of the Construction Contractors, and not the responsibility of the CM, to determine the means and methods of construction . . .. However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property . . . such means and methods must be reported to the Commissioner, or to his/her duly authorized representative"

(Clifford Affidavit, exhibit B, CMS contract at SR-13). In addition, the CMS contract states:

> "The CM will not supervise, direct, control or have authority over or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto"

(*id.* at SR-23). Further, the CMS contract requires that each construction contractor was to designate a site safety officer who would "be solely responsible for the health, safety, and personal protection of the contractor's employees and any visitors to the site" (*id.* at SR-23).

Here, while a review of Clifford's affidavit and the CMS contract indicate that Haks Et may have conducted certain inspections for the project, monitored the coordination of the contractors' work and developed an overall safety plan for the project, this duty to enforce general safety is insufficient to raise a question of fact as to whether Haks Et supervised, directed or controlled the work that allegedly caused plaintiff's accident (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co.*, 104 AD3d 446, 449 [1st Dept 2013] [general level of supervision

found not enough to hold defendant liable for plaintiff's injuries where defendant was responsible for making sure the work was going according to schedule, and where its superintendent regularly inspected the work and had the authority to stop work]; *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006] [while the general contractor's safety manager may have had overall responsibility for safety at the job site, this duty to enforce general standards of safety was insufficient to raise a question of fact as to any negligence on its part]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [where it was demonstrated that plaintiff never took orders from defendant and defendant had no responsibility to oversee the work performed by plaintiff or his employer, and that defendant conducted regular walk-throughs of the site and, if he observed an unsafe condition, had the authority to correct it, or, if necessary, to stop work, Court held that defendant's general supervision and coordination of the work site was insufficient to trigger Labor Law § 200 liability]).

Thus, defendants are entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against them (*see Tighe v Hennegan Constr. Co.*, 48 AD3d 201, 202 [1st Dept 2008]).

WHETHER HAKS ET IS A PROPER LABOR LAW DEFENDANT FOR THE PURPOSES OF LABOR LAW §§ 240 (1) AND 241 (6)

In addition, it must be determined as to whether Hak Et, as construction manager, may be vicariously liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6). While a construction manager of a work site is generally not responsible for injuries under Labor Law §§ 240 (1) and 241 (6), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

"'When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*id.* 864, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d at 318). The parties' actual course of practice is controlling for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240 (1) (*Ortega v Catamount Constr. Corp.*, 264 AD2d 323, 324 [1st Dept 1999]).

Here, as discussed previously, a review of the evidence in this case indicates that, while Haks Et may have had some general authority over the work site, it did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the construction and maintenance of the subject scaffold, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law §§ 240 (1) and 241 (6) (*see Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005] [Labor Law § 241 (6) claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]; *Lazarou v Turner Constr. Co.*, 18

AD3d 398, 399 [1st Dept 2005] [Labor Law § 240 (1) claim dismissed as against defendant where record established that defendant did not have sufficient supervision or control over the injury-producing work]; *Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125, 126 [1st Dept 1996] [no Labor Law § 240 (1) liability where defendant's contract with owner was limited to demolition and construction of two walls, and where it had no right to control the work site]).

"A construction manager whose 'duties [are] limited to observing the work and reporting to the contractor safety violations by the employees' does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods" (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468 [1st Dept 1998]; compare *Walls v Turner Constr. Co.*, 4 NY3d at 864 [Court noted that defendant Turner was not a typical construction manager, because it had "broad responsibility" as a "coordinator and overall supervisor for all the work being performed on the job site," including the plaintiff's work]).

As Haks Et did not supervise or control the injury-producing work at issue in this case, it cannot be held vicariously liable as a statutory agent for the purposes of Labor Law §§ 240 (1) and 241 (6). Thus, as they are not proper Labor Law defendants, defendants are entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them.

WHETHER SUMMARY JUDGMENT IS PREMATURE BECAUSE FURTHER DISCOVERY IS NEEDED

In opposition to defendants' motion for summary judgment, plaintiff argues that summary judgment would be premature at this time, since depositions of the parties have not yet been conducted and construction documents have not yet been exchanged. However, as plaintiff has

not sufficiently demonstrated that said discovery items would lead to relevant evidence that would raise a triable issue of fact in this matter, plaintiff's claimed need for discovery does not defeat summary judgment (*Woodard v Thomas*, 77 AD3d 738, 740 [2d Dept 2010]. "It is settled that a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment" (*Hariri v Amper*, 51 AD3d 146, 152 [1st Dept 2008], citing *Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377, 378 [1st Dept 2006]).

As set forth previously, defendants submitted evidence, in admissible form, which demonstrates that Haks Et did not supervise or direct the work that allegedly caused plaintiff's injury. As such, Haks Et cannot be deemed an agent of the owner or general contractor, so as to find defendants liable under Labor Law §§ 240 (1) and 241 (6). This same evidence establishes that Haks Et did not supervise the means and methods of the injury-producing work, and thus, defendants are not liable for plaintiff's injuries under a common-law negligence theory or Labor Law § 200.

As defendants established a prima facie showing of entitlement to summary judgment, the burden shifts to plaintiff to establish, by admissible evidence, the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562). Here, plaintiff has failed to make such a showing. While plaintiff puts forth an affidavit outlining his beliefs that Haks Et was responsible for running the job site, coordinating and overseeing the work, and walking the site checking on the work, as discussed previously, none of these duties rises to the level of supervision and control over the injury-producing work to warrant a finding that defendants are liable for plaintiff's injuries under the Labor Law.

"Mere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Bachrach v Farbenfabriken Bayer AG*, 36 NY2d 696, 697 [1975] ["Hope alone will not raise a triable issue"]; *Trails W. v Wolff*, 32 NY2d 207, 221 [1973]; *Hariri v Amper*, 51 AD3d 152). Moreover, plaintiff has failed to sufficiently explain "what additional facts are unavailable to [him] or are exclusively within [defendants'] control" (*Hariri v Amper*, 51 AD3d at 152).

The court has considered plaintiff's remaining contentions on this issue and finds them without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Earth Tech Northeast, Inc. and the Haks Et Joint Venture (Haks Et's) motion is granted and the complaint and cross claims are dismissed with costs and disbursements as to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant Haks Engineers, Architects and Land Surveyors, P.C.'s cross motion is granted and the complaint is dismissed as to this defendant and Haks Et with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 10/3/13

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

OCT 08 2013

COUNTY CLERK'S OFFICE
NEW YORK