

Edwards v C & D Unlimited, Inc.

2001 NY Slip Op 30000(U)

February 6, 2001

Supreme Court, Suffolk County

Docket Number: 0023558/1998

Judge: Donald Kitson

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SUPREME COURT - STATE OF NEW YORK
PART 29 SUFFOLK COUNTY

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Present:

Hon DONALD KITSON
Justice

MOTION DATE: 11/13/00
SUBMIT DATE: 12/28/00
MOTION NO.: 006 MOT D
007 MG

MORGAN EDWARDS and KRISTINE EDWARDS,

Plaintiffs,

- against -

C & D UNLIMITED, INC., GOLIATH
SALES, LTD. and ANTORINO SEWER &
DRAIN, INC.,

Defendants.

x PLTF'S/PET'S ATTY:
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MOSES
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NEW YORK, NEW YORK 10007

DEFT'S/RESP'S ATTY:
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845 THIRD AVENUE
NEW YORK, NEW YORK 10022

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ALBERTSON, NEW YORK 11507

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The Court in its deliberations herein has considered:

1. Notice of Motion for Summary Judgment and supporting papers including Memorandum of Law;
2. Notice of Cross-Motion and supporting papers;
3. Affirmation in Opposition and in support by Defendant, C & D UNLIMITED INC.;
4. Affirmation in Opposition by Defendant, DON ANTORINO SEWER & DRAIN, INC.;
5. Affidavit in Opposition by Plaintiff;
6. Reply Affirmation.

Defendant, C&D UNLIMITED, INC., moves for summary judgment based on Labor Law §§200 and 241 (6) and on common law negligence grounds. Plaintiff cross-moves for summary judgment on liability pursuant to Labor Law §241 (6).

By Order of this Court, plaintiffs' claims under Labor Law 240 (1) against defendant C & D UNLIMITED, INC., were dismissed. This defendant now claims that summary judgment is warranted on all other claims. The Court notes that there is only one defendant left in this action, namely C & D UNLIMITED, INC..

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue. (Barclay v Denckla, 182 AD2d 658, 582 NYS2d 252 (2nd Dept., 1992)) It is well-settled that the movant has the burden of proof to demonstrate the absence of any material issues of fact. (Tessier v New York City Health and Hospitals Corporation, 177 AD2d 626, 576 NYS2d 331 (2nd Dept., 1991)) Thereafter, the opposing party must produce evidentiary proof, in admissible form, which demonstrates that a trial is required because of material questions of fact (Taylor-Warner Corp. v Minskoff, 167 AD2d 382, 561 NYS2d 797 (2nd Dept., 1991))

The Court hereby grants the motion of defendant, C & D UNLIMITED, INC., for summary judgment on the Labor Law §200 and common law negligence claims asserted by plaintiffs. In this Court's Order dated February 12, 2000 which is the law of the case, the Court found that it was the injured plaintiff who was hired in a supervisory capacity to make sure that the defendant, ANTORINO SEWER & DRAIN, INC., was doing the job properly. Moving defendant correctly points out that it never exercised any supervision or control over the

performance of the work at the time of the plaintiff's injury. This defendant having shown entitlement to summary judgment, it was incumbent upon the plaintiffs to show a triable issue of fact, which they have not done. At no time do the plaintiffs oppose this defendant's motion as it relates to **Labor Law §200** and common law negligence claims. Accordingly, the Court hereby dismisses plaintiffs' causes of action as against C & D UNLIMITED, INC. based on **Labor Law §200** and common law negligence.

The Court now considers the plaintiffs request and the request of C & D UNLIMITED, INC. for summary judgment based on **Labor Law §241 (6)**. This defendant argues that **Labor Law §241 (6)** is inapplicable to the present case because the plaintiffs must establish a violation of a specific safety violation promulgated by the Commissioner of the Department of Labor, which they have failed to do. Defendant claims that the alleged violation of the **Industrial Code**, namely **§23-1.5, § 23-1.33, §23-4.4 and §23-4.5** do not apply to the instant facts.

The injured plaintiff was working at an excavation and construction site. At the time, drainage pools were being installed, requiring the creation of a large hole. Mr. EDWARDS was measuring the depth of the hole when the grassy area gave way, causing him to fall approximately forty (40) feet to the bottom of the hole. Plaintiffs explain that the sides of the holes were not shored in any manner and that it was not equipped with any safety line to prevent his fall. Counsel for plaintiffs alleges that this defendant violated the **Industrial Code 12 NYCRR §23-1.7(b) (1) and 23-4.2(a) and (h)**. The Court notes that plaintiffs do not argue that **Industrial Code §§23-1.33 23-4.4 and 23-4.5** are applicable to this case.

In this case, the Court finds that this defendant has failed to meet its burden demonstrating that summary judgment dismissing plaintiffs' claim under **Labor Law §241 (6)** is warranted. Defendant merely surmises that plaintiffs have failed to show a violation of the **Industrial Code**, without any further explanation. This defendant states that plaintiff was not doing excavation work; however, **Industrial Code §23-4.2** is applicable to a person working at or frequenting an excavation and mandates protection.

Defendant also argues that **INDUSTRIAL CODE §23-1.7(b) (1)** requires hazardous openings to be guarded but defendant's counsel opines that because the digging in this case was ongoing and a work in progress, that section of the **Industrial Code** is "inapplicable to this case that no safety cover or railing could be constructed and installed and still enable ANTORINO to dig the hole". This is pure conjecture on the part of defendant's counsel. Defendant also claims that for the same reason, any violation of **Industrial Code §23-4.2** is also inapplicable to these facts because "sheeting and shoring cannot be installed at a work site that is constantly evolving because of the work in progress". Again, this is counsel's opinion and as such, the Court denies this defendant's motion for summary judgment on the **Labor Law §241(6)** cause of action.

Labor law §241(6) is not a strict liability statute and once it is alleged that a violation of the Code has taken place, it is for the jury to decide whether the negligence of some parties has caused injury to plaintiff. (see, **Rizzuto v L.A. Wenger Constr. Co.**, 91 NY2d 343, 670 NYS2d 816 (1998)) Plaintiff has provided the affidavit of a safety consultant who opines that "the sides of the hole should have been shored, guarded or otherwise supported to prevent the earth from giving way". The Court does find that **Industrial Code 12 NYCRR §§23-1.7(b) (1) and 23-4.2(a) and (b)** do apply to the instant facts. Nevertheless, because **Labor Law §241(6)** is not a strict liability statute, the Court must evaluate whether plaintiffs have demonstrated the absence of a triable issue of fact on said claim, specifically whether the violation was the proximate cause of the injury. A violation of the Industrial Code only constitutes "some evidence of negligence", for which this defendant may be held liable (see, **Lorefice v Rekson Operating Partnership**, L.P., 269 AD2d 572, 703 NYS2d 507, (2nd Dept., 2000))

Most of the affidavit of plaintiffs' expert, Howard I. Edelson, is devoted to the failure to equip the injured plaintiff with any protective devices so as to prevent his fall. The safety consultant, however, also states that the hole should have been shored. It is then incumbent upon defendant to show some triable issue of fact, such as any negligence on the part of the injured plaintiff or an inability to shore up the opening, which was not done. There are no allegations of contributory negligence on the part of the injured plaintiff. No expert's affidavit was submitted by this defendant, counsel merely providing conclusory statements that sheeting and shoring could not be installed because

the work site was constantly evolving. Based on same, plaintiffs' motion for summary judgment on the claim pursuant to **Labor Law §241(6)** is hereby granted.

The foregoing constitutes the ORDER of this Court.

DATE: February 6, 2001


J.S.C.