

Greenfield v 77 Water St., Inc.

2004 NY Slip Op 30323(U)

October 21, 2004

Supreme Court, New York County

Docket Number: 121984/93

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
Justice

PART 2

Greenfield
77 Water Street One

INDEX NO. 12984/93
MOTION DATE _____
MOTION SEQ. NO. 8
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying memorandum decision.

FILED
NOV 01 2004
NEW YORK
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Dated: 10/21/04

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
JAMES GREENFIELD,

Plaintiff,

-against-

Index No. 121984/93

77 WATER STREET, INC., THE ESTHER KAUFMAN
TRUST, MELVIN KAUFMAN and ROBERT KAUFMAN
As Trustees of THE ESTHER KAUFMAN TRUST,
and WILDMAN & BERNHARDT CONSTRUCTION,
INC.,

Defendants.

-----X
WILDMAN & BERNHARDT CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

MUNICIPAL ELECTRIC, INC.,

Third-Party Defendant.

-----X
77 WATER STREET, INC., THE ESTHER KAUFMAN
TRUST, MELVIN KAUFMAN and ROBERT KAUFMAN
As Trustees of THE ESTHER KAUFMAN TRUST,

Second Third-Party Plaintiffs,

-against-

MUNICIPAL ELECTRIC, INC.,

Second Third-Party Defendant.

-----X
Louis B. York, J.:

This hoary action arises out of a construction accident
which occurred on May 5, 1991, on the 25th floor of premises

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located at 77 Water Street in Manhattan. Plaintiff electrician, an employee of third-party/second third-party defendant Municipal Electric, Inc. (Municipal), was injured while attempting to install a cover on a live electrical panel. Plaintiff and his co-worker were standing on the floor, and had to lift the cover approximately three feet before it could be attached to the panel. Plaintiff lost his grip on the bottom of the cover and it fell, taking plaintiff with it.

On December 10, 2003, oral argument on the motion and cross motions with motion sequence number 007 was scheduled for 9:30 A.M. in Room 289 of the 80 Centre Street courthouse. Counsel for plaintiff failed to appear, and this court directed that judgment be entered granting defendants' motion and cross motion to dismiss the complaint, and denying plaintiff's cross motion to amend his bill of particulars. The court's determination was based on plaintiff's default in appearing for oral argument.

By interim order dated April 14, 2004, this court vacated plaintiff's default, and restored the motion and cross motions with motion sequence number 007 to the motion calendar.

Now, in motion sequence number 008, plaintiff seeks an order vacating the prior grant of defendants' motion and cross

motion¹, and the denial of plaintiff's cross motion.

Plaintiff's counsel attests that his failure to appear at the December 10, 2003 oral argument was the result of a traffic accident that caused him to be stuck in traffic for 45 minutes. He further attests that he was unable to contact either the court or his office, to advise them of the delay, because he did not have a cell phone with him. Plaintiff's counsel opines that his failure to appear was due to circumstances beyond his control, and that his reason for non-appearance should be considered law office failure, and be excused pursuant to CPLR 5015 (a) (1).

Vacatur of the December 10, 2003 order has been granted, but, in light of plaintiff's counsel's arguments in favor of that vacatur, the court now clarifies the admonishment of counsel contained in the April 14, 2004 interim order.

Counsel contends that his actions on December 10 constituted law office failure. "Law office failure" consists of inadvertent mistakes, e.g., attorneys misplacing a file (*Muscarella v Herbert Construction Co.*, 2 AD3d 112 [1st Dept 2003]), or a clerical error (*Mediavilla v Gurman*, 272 AD2d 146 [1st Dept 2000]). The excuse cannot be supported by unsubstantiated allegations of law office failure (*Grezensky v*

¹Counsel for plaintiff makes multiple references to a cross motion brought by Municipal to motion sequence number 007. Municipal made no such cross motion.

Mount Hebron Cemetery, 305 AD2d 542 [2d Dept 2003]), or unsubstantiated allegations of speaking with a court clerk (*Morris v Metropolitan Transportation Authority*, 191 AD2d 682 [2d Dept 1993]).

Counsel's actions on December 10, 2003 were not inadvertent. According to his own attestations, he left his home in order to reach court with as little as 15 minutes to spare - this in spite of the fact that counsel is no doubt aware of the unpredictability of commuting in the New York City metropolitan area. This was a conscious choice on his part, not inadvertence.

In addition, even the most cursory glance in and around a courthouse indicates that cell phones have become a ubiquitous appendage and tool of the trade of practicing attorneys. Yet, while counsel was clearly aware that he had a court appearance on the morning of December 10, he chose not to avail himself of this rudimentary tool, or "some other means of communication" (Interim Order, April 14, 2004), as a backup in the event of misfortune or delay. This, again, was a choice, not inadvertence.

Were the court to accept plaintiff's counsel's actions as law office failure, the term would be stretched beyond all reason. The court declines to adopt counsel's arguments, and instead advises counsel that his actions were no less than thoughtless, and were more akin to irresponsible. Counsel would be well advised to make more appropriate choices in any future

dealings with this court.

The motion was granted in the court's discretion because of New York's strong public policy in favor of litigating matters on the merits (see e.g. *Lewis v St. Francis Hospital*, ___ AD2d ___, 781 NYS2d 748 [2d Dept 2004]), and because no prejudice to defendants was shown.

In motion sequence #07, Defendants 77 Water Street, Inc., The Esther Kaufman Trust, and Melvin Kaufman and Robert Kaufman as trustees of The Esther Kaufman Trust (the Kaufman defendants) moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against them. Defendant Wildman & Bernhardt Construction, Inc. (WB) cross-moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it. Plaintiff cross-moves, pursuant to CPLR 3042 (g)², to amend his bill of particulars in order to add Industrial Code provisions in support of his Labor Law § 241 (6) claim.

The Pleadings

The complaint alleges two causes of action: the first for negligence, and the second for violations of Labor Law §§ 200, 240, and 241.

²In 1994, the Legislature amended CPLR 3042 by relettering subdivision (g) as subdivision (b) for actions commenced on or after January 1, 1995. Since this action predates that amendment, the court will continue to refer to the statute as CPLR 3042 (g).

In their answer, the Kaufman defendants allege a cross claim against WB and third-party defendant Municipal for contribution or common-law indemnification.

WB's answer asserts four cross claims against the Kaufman defendants: (1) for breach of "lease/contract/warranty"; (2) for common-law indemnification; (3) for "negligence" (actually contribution); and (4) for contractual indemnification.

Plaintiff's Cross Motion

CPLR 3042 (b) provides that "[i]n any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue." The note of issue in this matter was filed March 18, 2003. Plaintiff's cross motion is dated September 19, 2003. Since plaintiff cannot amend his bill of particulars as of course, the court will determine the cross motion on its merits.

"Labor Law § 241 (6) 'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers' (*Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 878 [1993])" (*Walker v Ekleco Co.*, 304 AD2d 752, 752 [2d Dept 2003]). "[T]o prevail under Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth a specific standard of conduct" (*Paladino v Society of New York*

Hospital, 307 AD2d 343, 345 [2d Dept 2003]). In addition, the cited Industrial Code provisions must be applicable to the facts of the case (see e.g. *Quintavalle v Mitchell Backhoe Service*, 306 AD2d 454, 454 [2d Dept 2003]; *Walker v Ekleco Co.*, 304 AD2d 752, *supra*).

The Kaufman defendants were the owners of the premises. WB was the general contractor for the renovations. Thus, Labor Law § 241 (6) applies to them.

According to his proposed amended bill of particulars, the provisions of the Industrial Code which plaintiff seeks to add are 12 NYCRR 23-1.13 (b) (3) and (4), and 23-6 "applied in conjunction with § 23-1.5 (a)."

It has been held that when a plaintiff is not using a hoisting device, section 23-6 does not apply (see e.g. *Salinas v Barney Skanska Construction Co.*, 2 AD3d 619 [2d Dept 2003]; *Aloi v Structure-Tone*, 2 AD3d 375 [2d Dept 2003]; *Toefer v Long Island Rail Road*, 308 AD2d 579 [2d Dept 2003]; *Hawkins v City of New York*, 275 AD2d 634 [1st Dept 2000]). It has also been held that section 23-1.5 (a) is not sufficiently specific to support a Labor Law § 241 (6) claim (see e.g. *Sihly v New York City Transit Authority*, 282 AD2d 337 [1st Dept 2001], citing *Hawkins v City of New York*, 275 AD2d 634, *supra*; *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863 [4th Dept 2000]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [2d Dept 1997]). Obviously, an inapplicable

provision "applied in conjunction with" a non-specific one cannot form the basis of a section 241 (6) claim.

Section 23-1.13 (b) (3) and (b) (4) of the Industrial Code pertain only to employers, and thus, are inapplicable with respect to WB and the Kaufman defendants.

In light of the above, plaintiff's cross motion to amend his bill of particulars is denied, and that part of defendants' motion and cross motion to dismiss plaintiff's Labor Law § 241 (6) cause of action is granted.

Defendants' Motion and Cross Motion

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees a safe work place [citations omitted]. This provision applies to owners, contractors, or their agents, who "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" [citations omitted]. In order for liability to attach under Labor Law § 200 or under a theory of common-law negligence, an owner or contractor must have created or had have [sic] actual or constructive notice of the defective condition which caused the accident [citation omitted]

(*Paladino v Society of New York Hospital*, 307 AD2d at 344-345.

Liability under Labor Law § 200 "may not be assigned absent proof that the defendant exercised some supervisory control over the work in the course of which the plaintiff was injured" (*DeSimone v Structure Tone*, 306 AD2d 90, 90 [1st Dept 2003])).

There is no evidence that the Kaufman defendants had any authority to supervise or control plaintiff's work. Thus, no liability under Labor Law § 200 or common-law negligence attaches to them. There is no evidence that WB had such authority, either, and the fact that WB was the general contractor at the site does not require a finding of liability against it. A general contractor may have general supervisory responsibility for a project, but such general responsibility does not rise to the level required by Labor Law § 200 or by common-law negligence (*id.* at 90-91).

Therefore, that part of defendants' motion and cross motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them is granted.

Labor Law § 240 (1)

Labor Law § 240 (1) imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). The statute was designed

to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other

protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*

(*ibid.* [emphasis in original]).

Labor Law § 240 (1) is inapplicable in this matter. As plaintiff and his counsel have made abundantly clear, the hazard that plaintiff encountered, and the risk that he attempted to avoid, was the electricity present in the panel. The wires in the panel were "live," i.e., energized, and if the cover had made contact with those wires, the contact could have resulted in an explosion (Plaintiff's Depo., at 18). The risk/hazard was completely non-elevation-related. Plaintiff's argument that the hoisting device was needed in order to avoid the heavy cover's contact with the energized panel underscores this fact.

It is well-settled that

not every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 (1) [so] as to render the owner or contractor liable for an injured worker's damages (see, *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). We have expressly held that "Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of ... [a] required safety device" (*id.* at 500 [other citations omitted])

(*Misseritti v Mark IV Construction Co.*, 86 NY2d 487, 490 [1995]).

Therefore, the part of defendants' motion and cross motion which seeks summary judgment dismissing plaintiff's Labor

Law § 240 (1) claim is granted.

The Cross Claims

Because the complaint is being dismissed, the two third-party actions and the cross claims of WB and the Kaufman defendants are also dismissed (see e.g. *Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]; *Kojic v City of New York*, 76 AD2d 828, 829 [2d Dept 1980]).

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's cross motion (motion sequence number 007) to amend his bill of particulars is denied; and it is further

ORDERED that defendants' motion and cross motion for summary judgment dismissing the complaint and all cross claims are granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of appropriate bills of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 21, 2004

ENTER:

Lby

LOUIS B. YORK

J.S.C.

FILED

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