McCoy v Metropolitan Transportation Authority
2005 NY Slip Op 30167(U)
June 10, 2005
Supreme Court, New York County
Docket Number: 0102384/2000
Judge: Robert D. Lippmann
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SCANNED ON 3/16/2005

[* 1]

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

PRESENT: ROBERT D. LIPPMANN, Justice — PART 21

CHARLES MCCOY AND MARY ANN MCCOY,

Plaintiffs,

- v-

METROPOLITAN TRANSPORTATION AUTHORITY, METRO NORTH COMMUTER RAILROAD, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, AND THE CITY OF NEW YORK,

Defendants.

INDEX NO. 102384/00

MOTION DATE 2/17/05*

MOTION SEQ. NO. 003

MOTION CAL. NO. 69

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

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

Cross-Motion: ■ Yes ☐ No

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs cross-move, pursuant to CPLR 3042 and 3043, for leave to amend their bill of particulars.

This action arises out of a construction site accident which occurred on February 1, 1999, at the Park Avenue viaduct, at 117th Street, in Manhattan. Plaintiff Charles McCoy (plaintiff), an ironworker then employed by non-party NAB Construction Corp. (NAB), suffered injuries when a large, telescopic hydraulic forklift, called a Gradall, ran over his left ankle and

* Pursuant to the request of the parties, the instant order has been held in abeyance since March 10, 2005, while they attempted to settle the case via outside mediation. The court rendered decision only after it was advised on June 8, 2005 that the parties had reached an impasse in their settlement negotiations.

leg.

Defendant Metro North Commuter Railroad (Metro North) owned the Park Avenue viaduct, and hired NAB to act as general contractor for the renovation of the viaduct. Defendants Manhattan and Bronx Surface Transit Operating Authority, New York City Transit Authority, and the City of New York all deny ownership, possession, or control of the location, and deny hiring any entity to work there. These defendants assert that they are not proper parties to this action because they have no connection to the site or to the accident. No evidence to the contrary has been proffered. Therefore, summary judgment in favor of these defendants is granted.

The Metropolitan Transportation Authority's (MTA) ownership or role, if any, with respect to the viaduct has not been made clear. Defendants only assert that the MTA was not a party to the contract between Metro North and NAB (Persky 7/7/04 Affirm., ¶ 6). One of the ironworkers employed by NAB at the time, James Urezzio, testified that the MTA was on-site all the time, enforcing safety rules (Urezzio Depo., at 25-27), but he thought that Metro North and the MTA were the same entity (*id.* at 32), and he was unable to identify any distinguishing characteristics that would indicate that the men he saw were either Metro North or MTA employees. He just saw that they were wearing clean clothes, with new bright orange vests, and that they were carrying clipboards (*id.* at 26, 32). He described them as clearly not ironworkers (*id.* at 26), and "[t]hey weren't NAB" (*id.* at 32). Since Urezzio's testimony is the only indication that the MTA may have been at the site, defendants urge the court to dismiss the complaint as against the MTA, also, since the MTA and Metro North are not the same entity (Silverstein 1/25/05 Reply Affirm., ¶ 3).

> The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" [citations omitted]

(*JMD Holding Corp. v Congress Financial Corp.*, ___ NY3d ___, 2005 WL 729150 [2005]).

Because defendants have not met their burden of establishing that the MTA was not either an owner or contractor, or had nothing to do with the accident or the site, summary judgment dismissing the complaint as against the MTA is denied.

The Park Avenue viaduct project involved the renovation of one of Metro North's lines. The work was done on an elevated track bed between 110th and 132nd Streets. The job of NAB's ironworkers was to replace the viaduct, redo the station, and take down the "false work" in the area of Park Avenue and 116th to 125th Streets. "False work" is temporary steel that is installed to hold up a structure while ironworkers are dismantling a part of it (*see* Grogan Depo., at 7-8). In the case of the viaduct, the ironworkers installed false work, removed and replaced the structure's steel beams, and then dismantled the false work.

On the day of the accident, a steel beam had been lowered to the ground from the viaduct, and the Gradall was being used to transport the beam to the scrap heap. The beam was 20 feet long, three feet high, and one foot wide, and was suspended approximately one foot above the ground from the Gradall's boom, about six or seven feet in front of the vehicle. The beam was suspended from the boom by a steel cable and choker located at the midpoint of the beam. The Gradall itself was six feet wide, with four wheels, and a cab for the operator on the left side of the vehicle. While a beam is suspended at its midpoint, it swings back and forth, and

front and back whenever the Gradall is in motion. Hence, a worker is positioned at each end of the beam, to hold it steady, and to prevent it from swinging out of control.

Plaintiff was positioned at the right end of the beam, to the right and front of the right front wheel of the Gradall. Another worker was in the same position on the left side of the vehicle. When the Gradall reached 117th Street, it stopped for a red light, causing plaintiff's end of the beam to swing forward. When the light turned green, the Gradall proceeded. The beam swung back at plaintiff, pushing him back, toward the vehicle. Plaintiff braced himself by taking a step back with his left foot, at which time the Gradall's right front wheel ran over his left foot and leg.

Plaintiffs' complaint alleges six causes of action: the first five, asserting claims for common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6) as against each defendant respectively, and the sixth, asserted by plaintiff's wife, for loss of consortium. The complaint and plaintiffs' April 4, 2001 bill of particulars allege violations of Industrial Code (12 NYCRR Part 23) sections 23-1.5 (c); 23-3.3 (h); 23-6.1; 23-9.2; 23-9.4; and 23-9.8. Plaintiffs' cross motion seeks to amend their bill of particulars to assert violations of additional sections of the Industrial Code: sections 23-2.3 (c); 23-8.1 (f) (1) (iv); 23-8.1 (f) (2) (i); 23-8.2 (c) (3); 23-8.2 (d) (1); and 23-8.2 (d) (2).

Plaintiffs' Cross Motion

> To state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications [citation omitted]. ... [T]he failure to identify a qualifying section in the complaint or bill [of] particulars may serve as a basis for summary dismissal of a section 241 (6) claim [citation omitted]. However, this failure is not necessarily fatal to a section 241 (6) claim and, in the absence of unfair

> surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed [citations omitted]

(*Walker v Metro-North Commuter Railroad*, 11 AD3d 339, 340-341 [1st Dept 2004]). Permission to amend a bill of particulars "should be granted freely" (*Adams v Santa Fe Construction Corp.*, 288 AD2d 11, 12 [1st Dept 2001]). However, leave to amend may be denied when no reason is given for a lengthy delay in moving (*see e.g. Reilly v Newireen Associates*, 303 AD2d 214 [1st Dept 2003]), or when the proposed Industrial Code section is either inapplicable or not specific enough to support a section 241 (6) claim (*see e.g. D'Acunti v New York City School Construction Authority*, 300 AD2d 107 [1st Dept 2002]; *Quinlan v City of New York*, 293 AD2d 262 [1st Dept 2002]; *Schwab v A.J. Martini Inc.*, 288 AD2d 654 [3d Dept 2001]).

The note of issue in this matter was filed on June 7, 2004. Plaintiffs' initial bill of particulars is dated April 4, 2001. They subsequently supplemented their bill of particulars on May 5, 2004 in order to expand on the enumeration of plaintiff's surgeries and money damages, but without adding additional sections of the Industrial Code which were allegedly violated.

Defendants oppose plaintiffs' cross motion, in part, because of plaintiffs' unexplained delay in bringing their cross motion. Plaintiffs' moving affirmation is dated November 18, 2004, approximately six months after the supplemental bill of particulars, and approximately five months after the note of issue was filed. If one figures the timing of the cross motion from the date of the initial bill of particulars, the only bill of particulars which alleges particular Industrial Code violations, the length of intervening time is approximately three years and seven months.

Because the proposed supplemental bill of particulars "merely amplifie[s] and elaborate[s] upon facts and theories already set forth in the original bill of particulars and [does] not ... raise new theories of liability" (*Adams v Santa Fe Construction Corp.*, 288 AD2d at 12), no prejudice has been shown by defendants, and because delay alone is not a sufficient ground upon which to deny a motion to amend (*see Selective Insurance Co. v Northeast Fire Protection Systems*, 300 AD2d 883, 883-884 [3d Dept 2002]), plaintiffs' cross motion to amend their bill of particulars may be granted if the proposed Industrial Code sections are both applicable and specific enough to support a Labor Law § 241 (6) claim.

Section 23-2.3 concerns "Structural steel assembly." Subsection (c), in particular, provides:

> Tag lines. While steel panels or structural steel members are being hoisted, tag lines shall be provided and used to prevent uncontrolled movement of such panels or members.

The context of the entire section indicates that it pertains to safety measures to be taken when work involves the erection, placement, and assembly of structural steel. Although the Appellate Division, Fourth Department, has implied that section 23-2.3 (c) may be specific enough to support a Labor Law § 241 (6) claim (*see Sebring v Wheatfield Properties Co.*, 255 AD2d 927 [4th Dept 1998]), the provision is inapplicable in this matter. Plaintiffs aver that the beam was being "hoisted" at the time of plaintiff's accident, but this is factually incorrect. The beam was being transported at ground level from the viaduct to a scrap heap. It was suspended from the boom of the Gradall, but this suspension did not involve the elevation of the beam to a position where it could be placed and assembled as part of a structure. Thus, amendment of the bill of particulars must be denied with respect to 12 NYCRR 23-2.3 (c).

Industrial Code Subpart 23-8 pertains to "Mobile Cranes, Tower Cranes and Derricks." Plaintiffs argue that the section 23-8.1 and 23-8.2 provisions which they seek to add to the sections already cited in their complaint and bill of particulars are applicable in this matter because a Gradall is a "mobile crane."

Section 23-8.1 is concerned with "General provisions." Plaintiffs seek to amend their bill of particulars to add subsections 23-8.1 (f) (1) (iv) and 23-8.1 (f) (2) (i), both of which pertain to "Hoisting the load." Since this court has already determined that the beam was merely suspended at the time of plaintiff's accident, and the beam was not hoisted either before or while it was being transported to the scrap heap, these provisions are inapplicable. Plaintiffs' cross motion to amend the bill of particulars must be denied with respect to 12 NYCRR 23-8.1 (f) (1) (iv) and 23-8.1 (f) (2) (i).

Section 23-8.2 is entitled "Special provisions for mobile cranes." Subsection 23-8.2 (c) provides protections with respect to "Hoisting the load," and has been held to be sufficiently specific to be able to support a Labor Law § 241 (6) claim (*see Stang v Garbellano*, 262 AD2d 853 [3d Dept 1999]; *Smith v Hovnanian Co.*, 218 AD2d 68 [3d Dept 1995]). However, since plaintiff's accident was not caused by an improper hoisting of the beam, this section is inapplicable, and can form no basis for plaintiffs' Labor Law § 241 (6) claim. Plaintiffs' contention that the facts of this case and those of *Stang* and *Smith* are similar, and that, in light of these cases, the Gradall here was "hoisting" the beam, is unavailing. The facts of *Stang* and *Smith* are distinguishable, in that one involved a crane lifting a sign from its mounting in order to lower it to the ground (*Stang*), and the other involved sheetrock being unloaded from a flatbed truck by means of a boom (*Smith*). Neither had to do with material being transported at

ground level from one place to another.

Therefore, that part of plaintiffs' cross motion which seeks amendment of their bill of particulars based upon 12 NYCRR 23-8.2 (c) (3) must be denied.

Sections 23-8.2 (d) (1) and 23-8.2 (d) (2) provide, in relevant part:

> (d) Mobile crane travel.
>
> (1) A mobile crane traveling to or from one job site to another or traveling on a street or highway shall not carry any jibs, attachments, buckets or other devices or material attached in any way to the boom whether the boom is in the folded position or not.
>
> ***
>
> (2) Mobile cranes shall not travel with suspended loads unless such crane is under the control of a competent, designated person who shall be responsible for the position of the load, boom location, ground support, travel route and speed of movement.

The parties have not cited any case law with respect to whether these provisions are specific enough to support a section 241 (6) claim, and the court has found none. Therefore, the court must determine whether these sections can support a section 241 (6) claim by using the criteria set forth by the Court of Appeals in *Ross v Curtis-Palmer Hydro-Electric Co.* (81 NY2d 494 [1993]).

The Court in *Ross* discussed the distinctions between the general, common-law duties of owners and contractors found in Labor Law § 200, and the nondelegable duties set forth in Labor Law §§ 240 (1) and 241 (6), and determined that if an Industrial Code provision merely reiterates common-law standards, and "adds nothing to the general common-law rule requiring the provision of a safe workplace" (*id.* at 504), that provision cannot support a section 241 (6) claim. Rather, the Court held that regulations which mandate compliance with concrete

specifications give rise to a nondelegable duty, while regulations which establish general safety standards do not (*id.* at 505). Regulations which incorporate the descriptive terms set forth in Industrial Code § 23-1.4 (a), such as "adequate, effective, equal, equivalent, firm, necessary, proper, safe, secure, substantial, sufficient, [and] suitable" (*id.* at 502) are general terms which do not give rise to the nondelegable duty mandated by Labor Law § 241 (6).

Using these criteria, this court finds that 12 NYCRR 23-8.2 (d) (1) and 23-8.2 (d) (2) do not merely reiterate common-law standards, but rather, mandate compliance with concrete specifications, and thus, may support a Labor Law § 241 (6) claim.

The parties dispute whether a Gradall is a "mobile crane" or not. Assuming, without deciding, that it is, the court finds that the above sections may be applicable to the facts of this case. Therefore, plaintiffs' cross motion for leave to amend their bill of particulars is granted with respect to 12 NYCRR 23-8.2 (d) (1) and 23-8.2 (d) (2).

Defendants' Motion

Labor Law § 240 (1)

"Labor Law § 240 (1) protects workers from elevation-related hazards when they are injured while involved in certain enumerated work activities" (*Panek v County of Albany*, 99 NY2d 452, 455 [2003]). The statute has no bearing on this case, since plaintiff was not exposed to any elevation-related hazard. Thus, that part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted.

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200 codifies 'the common-law duty imposed upon an owner or general contractor to maintain a safe construction site' [citations omitted]" (*Carney v Allied Craftsman General Contractors*, 9 AD3d 823, 824 [3d Dept 2004]). In cases, such as this one,

where an accident arises out of a contractor's method of performing its work, liability under Labor Law § 200 and common-law negligence "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]; *see also Carney*, 9 AD3d at 824).

No evidence that either the MTA or Metro North exercised supervisory control over plaintiff's work has been proffered. The evidence establishes that NAB was the general contractor at the site, and that non-party Bechtel was the construction manager. Thus, neither the MTA nor Metro North exercised supervision in either of those roles. The fact that the MTA or Metro North, as owner, may have dispatched someone to ensure compliance with safety regulations does not amount to the supervision or control of the work which would subject either of them to liability under section 200 or common-law negligence (*see e.g. Warnitz v Liro Group, Ltd.*, 254 AD2d 411 [2d Dept 1998]; *Buccini v 1568 Broadway Associates*, 250 AD2d 466 [1st Dept 1998]).

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

Labor Law § 241 (6)

Section 241 (6) of the Labor Law "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 and Gas Corp.*, 82 NY2d 876, 878 [1993]). As stated above, in order to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific, applicable Industrial Code provision which mandates compliance with concrete specifications (*see Walker v Metro-North Commuter Railroad*, 11 AD3d 339, *supra*).

In their complaint and April 4, 2001 bill of particulars, plaintiffs allege that defendants violated 12 NYCRR 23-1.5 (c); 23-3.3 (h); 23-6.1; 23-9.2; 23-9.4; and 23-9.8.

Section 23-1.5 ("General responsibility of employers") is inapplicable, since neither the MTA nor Metro North was plaintiff's employer; NAB was.

Although section 23-3.3 ("Demolition by hand"), subsection (h) ("Demolition of structural steel by hand") has been found specific enough to support a section 241 (6) claim (*see Sweeney v Yonkers Contracting Co.*, 269 AD2d 590 [2d Dept 2000]), it is inapplicable in this matter. The provision as a whole clearly indicates that the activity protected is the demolition/dismantling of structural steel, not merely transporting a steel beam at ground level from one place to another.

Subpart 23-6 of the Industrial Code is concerned with "Material Hoisting." This court has found that the beam was not being hoisted at the time of plaintiff's accident, and that plaintiff's accident was not the result of the beam being hoisted. Thus, section 23-6.1 is inapplicable in this matter.

Subpart 23-9 deals with "Power-Operated Equipment." Plaintiffs have not indicated which sections of this subpart they believe support their section 241 (6) claim, and section 23-9.2 ("General requirements") has subsections (a) through (i), with sub-sections for several of the provisions. This scatter-shot approach to pleading should be avoided.

Subsection 23-9.2 (a), 23-9.2 (b), and 23-9.2 (c), even if applicable, have been found to be not specific enough to support a section 241 (6) claim (*see e.g. Hassett v Celtic Holdings*, 7 AD3d 364 [1st Dept 2004] [23-9.2 (a)]; *Webber v City of Dunkirk*, 226 AD2d 1050 [4th Dept 1996] [23-9.2 (b)] [although the First Department has held that subsection 23-9.2 (b) (2) is sufficient to support a section 241 (6) claim (*see Padilla v Frances Schervier Housing*

Development Fund Corp., 303 AD2d 194 [1st Dept 2003], the subsection is inapplicable here because there is no evidence that the operator of the Gradall did not remain at the controls while the beam was being handled]; *Armer v General Electric Co.*, 241 AD2d 581 [3d Dept 1997] [23-9.2 (c)]). The remaining subsections are inapplicable in this matter.

Section 23-9.4 ("Power shovels and backhoes used for material handling") is inapplicable.

Each of the subsections of section 23-9.8 ("Lift and fork trucks") is inapplicable.

This court has found that sections 23-8.2 (d) (1) and 23-8.2 (d) (2) are specific enough to support a section 241 (6) claim. However, whether a Gradall is a "mobile crane" or not is a question of fact which precludes summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, with respect to these two provisions.

In light of the above, that part of defendants' motion which seeks summary judgment dismissing plaintiffs' section 241 (6) claim is granted, except with respect to plaintiffs' claim which rests on Industrial Code sections 23-8.2 (d) (1) and 23-8.2 (d) (2), which part of the motion is denied.

Loss of Consortium

A claim for loss of consortium is derivative of plaintiff's claim (*see e.g. Pavon v Rudin,* 254 AD2d 143, 144 n 1 [1st Dept 1998]; *Spose v Ragu Foods*, 124 AD2d 980, 980 [4th Dept 1986]). Since part of plaintiff's section 241 (6) claim remains, that part of defendants' motion which seeks summary judgment dismissing plaintiff's wife's claim is denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' cross motion for leave to amend their bill of particulars is granted only with respect to the addition of 12 NYCRR 23-8.2 (d) (1) and 23-8.2 (d) (2), and is otherwise denied; and it is further

ORDERED that the motion for summary judgment is granted in part, and the complaint is severed and dismissed as against defendants Manhattan and Bronx Surface Transit Operating Authority, New York City Transit Authority, and the City of New York, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants' motion for summary judgment is granted, except with respect to that part of plaintiffs' Labor Law § 241 (6) claim which rests on Industrial Code sections 23-8.2 (d) (1) and 23-8.2 (d) (2), which part of the motion is denied; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiffs' loss of consortium claim is denied.

Dated: June 10, 2005

FILED
JUN 16 2005
COUNTY CLERK'S OFFICE

ENTER:

ROBERT D. LIPPMANN, J.S.C.

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