

Rosa v Consolidated Edison of N.Y., Inc.

2007 NY Slip Op 31431(U)

May 30, 2007

Supreme Court, New York County

Docket Number: 0103325/2005

Judge: Shirley W. Kornreich

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

PRESENT: **SHIRLEY WERNER KORNREICH**
J.S.C.

PART 54

Index Number : 103325/2005

ROSA, BRUNO

vs

CONSOLIDATED EDISON

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 103325/2005
MOTION DATE 2/19/07
MOTION SEQ. NO. 004
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

1
2
3

Cross-Motion: Yes No

FILED

JUN 01 2007

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: 5/30/07

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: PART 54

----- X
BRUNO ROSA,

Plaintiff,

Index No.: 103325/05

- against-

**DECISION
and ORDER**

CONSOLIDATED EDISON OF NEW YORK, INC.

Defendant.

----- X
KORNREICH, SHIRLEY WERNER, J.:

This personal injury action arises from a construction accident in which the plaintiff, a laborer performing work within a trench, was injured when an electrical cable owned by Consolidated Edison ("Con-Ed") exploded. Con-Ed now moves for summary judgment.

Plaintiff opposes.

I. *Statement of Facts*

A. *Movant Con-Ed's Proof*

In support of its motion, Con-Ed submitted deposition testimony demonstrating the following. The subject accident occurred on December 16, 2004, during a large-scale construction project covering approximately 9 blocks in the area of West 117th Street and Manhattan Avenue, New York, N.Y. EBT of Jason Guenste p. 8. Plaintiff was employed by JLJ Enterprises ("JLJ") and had been so employed for approximately 8 months. EBT of Bruno Rosa p. 16. JLJ was under a contract with the City of New York to excavate and replace City water

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mains and sewers. The work involved "breaking the ducts", a process where the concrete was broken off of the television, utility, and telephone wires so the wires could be moved to accommodate the new water and sewer lines. EBT of Manuel DeSousa p. 12. This was a daily process undertaken by JLJ laborers. *Id.* at 14. The process involved the use of a hand-held hammer so that the laborer would not come in contact with or damage any of the wires. EBT of Manuel DeSousa p.15; EBT of Jason Guenste p. 12. The laborers were given safety instructions daily by JLJ and were told, for safety reasons, to use only a hammer to break the ducts. *Id.* at 16; *Id.* The laborers also were instructed to wear rubber gloves and goggles, equipment provided by JLJ, for protection. EBT of Manuel DeSousa p. 17. Manuel DeSousa, a JLJ foreman, and Jason Guenste, a JLJ laborer, were working at the trench at the time of the accident, and both testified that it was JLJ's custom and standard practice for the utility wires to be active or "live" during this process. *Id.* at 16; EBT of Jason Guenste pp.10-11.

The only witness to the accident was Manuel DeSousa. Mr. DeSousa testified that on the day of the incident he was standing 10 feet from the plaintiff, facing him. EBT of Manuel Desousa p. 18. Plaintiff was responsible for breaking the ducts, and Mr. DeSousa for moving the cables. *Id.* at 19. Approximately five minutes before the accident took place, Mr. DeSousa testified that he saw plaintiff using a "chipping gun" to break the ducts. *Id.* at 20. A "chipping gun" is a power tool, resembling a small jack-hammer powered by an air compressor. *Id.* at 18. Mr. DeSousa testified that a chipping gun is not normally used to break the ducts, and that when

he noticed the plaintiff using the chipping gun,¹ he walked over to the plaintiff and told him to stop using the chipping gun because it was not safe. *Id.*

When Mr. DeSousa moved away, he noticed that the chipping gun no longer was on, but that plaintiff still held it and that its point faced the utility cable. *Id.* at 22. Mr. DeSousa then saw plaintiff turn, causing the chipping gun to come in contact with the cable and the cable to "blow up". *Id.* at 23, 33. Mr. DeSousa testified that over the course of his career he had never seen anyone use a chipping gun to break ducts and that plaintiff's conduct was neither customary nor normally done. *Id.* at 23.

Further, Mr. DeSousa and Mr. Guenste both testified that they saw Con-Ed employees, referred to as "inspectors," at the trench every day, including the day of this accident. EBT of Jason Guenste pp. 24, 27; EBT of Manuel DeSousa p. 35. Both men averred that they were never told what to do by any Con-Ed employees, that they were only given instructions by their respective JLJ superiors, and that they never saw any Con-Ed inspector give instructions or directions to anyone from JLJ. *See* EBT of Jason Guenste pp. 13, 24; EBT of Manuel DeSousa p. 11. The plaintiff also testified that no one from Con-Ed exercised authority over him, and he received instructions only from JLJ employees, specifically his foreman Manuel DeSousa. EBT of Bruno Rosa pp. 38, 41. Finally, plaintiff testified that no one told him the cable, electrical, or telephone lines had been deactivated. EBT of Bruno Rosa p. 75.

¹Jason Guenste testified that he heard the air compressor running at the time the accident occurred and then heard the cable explode. *See* EBT of Jason Guenste p. 34-35. He further testified that only the plaintiff and Mr. DeSousa were located near the explosion. *Id.* at 34.

B. *Bruno Rosa's Opposition*

Plaintiff submitted an affidavit in opposition in which he averred that he does not "know what caused the explosion" and that at the time the accident occurred, he had a chipping gun in his hand, but had not started to use it. Aff of Bruno Rosa paras. 3, 7. He further averred that: "[m]y foreman told me to chip away concrete ducts from around electrical cable within the excavation and that the lines had been deactivated. At that point, a massive explosion occurred. At no time did I break through the duct/conduit and come in contact with any electrical wiring or feeders owned by Con-Ed." *Id.*, para. 3. At the time of the accident, plaintiff stated that he wore safety goggles provided by JLJ, but was not wearing any other safety equipment. *Id.*, para. 4. Plaintiff also averred that Con-Ed inspectors were present at the job site on a daily basis and "were constantly observing the work being performed in the excavation as well as checking that the work was being done properly, often giving instructions to JLJ foreman." *Id.*, para. 6.

In addition, plaintiff submitted an affidavit of John K. Hagopian, II, P.E., a licensed engineer. He avers that: "the equipment was not deactivated when the worker was performing his duties within the roadway excavation in proximity to the electrical equipment. Such failure to deactivate the electrical equipment was clearly a violation of good accepted construction practice." Aff. of John K. Hagopian, para. 4. Mr. Hagopian states that he has worked with several power companies, including New York State Electric and Gas, Niagara Mohawk, and Rochester Gas and Electric, on numerous roadway and building excavations in *upstate* New York, and in "every instance involving a similar fact pattern to that as presented here, the power

authority deactivates the electrical circuits to prevent an electrical explosion or electrocution of workers in the proximity of the energized circuit." *Id.*

II. *Conclusions of Law*

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Defendant's motion for summary judgment is addressed below.

A. *Labor Law § 200 and Common Law Negligence*

A plaintiff injured on a construction site cannot maintain a Labor Law § 200 or common law negligence claim against the owner of the subject property unless, as a threshold matter, the owner had the authority to control plaintiff's work, or exercised some supervision or control over the activity bringing about the injury.² See *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993). See also *Gonzalez v. United Parcel Service*, 249 A.D.2d 210 (1st Dept. 1998) (negligence and Labor Law § 200 claims against property owner, dismissed where there was no proof that owner had any

²In this case, JLJ contracted with the City of New York for the excavation and replacement of city water and sewer lines. Con-Ed was not a part of that contract. Con-Ed is in the process of negotiating a fee agreement with JLJ for costs associated with the movement of its utility lines, but no final agreement has been reached.

control over the manner in which construction work was done and there was no proof demonstrating that said defendant controlled or supervised particular task that caused plaintiff's injury). An owner's retention of general supervisory control of a project, coupled with presence at the work site and authority to enforce general safety standards, is insufficient to establish the "control" necessary to hold an owner liable. *See Soshinsky v. Cornell Univ.*, 268 A.D.2d 947 (3d Dept. 2000); *Gonzalez v. United Parcel Service, supra*; *Moutray v. Baron*, 244 A.D.2d 618, 619 (3d Dept. 1997), *lv. denied* 91 N.Y.2d 808 (1998). Plaintiff must demonstrate that the contractor controlled the manner in which plaintiff performed his or her work, i.e., how the injury-producing work was performed. *Hughes v. Tishman Constr. Corp.*, 2007 N.Y. App. Div. Lexis 5883 (1st Dept. 2007).

Here, undisputed deposition testimony establishes that Con-Ed was at the trench on a daily basis watching JLJ's work. However, this general supervisory authority is not sufficient to constitute supervisory control. *See Hughes*, 2007 N.Y. App. Div. at 5883. Rather, the deposition testimony clearly established the plaintiff was supervised and controlled by JLJ at the time of the accident. Although plaintiff's counsel argues that Con-Ed "possessed the authority to stop work if they observed an unsafe condition" and frequently instructed JLJ foreman, no evidence has been submitted to support these conclusory statements. *See S. J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 342 (1974) (bald, conclusory assertions, "even if believable," are insufficient to defeat summary judgment). *See also David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 559 (1979) (affirmation of attorney without personal knowledge lacks probative value on motion for summary judgment). According to

plaintiff's own testimony, no one but employees from JLJ, specifically his foreman Manuel DeSousa, instructed and supervised him. In opposition to the instant motion, and in contradiction of his own and Mr. DeSousa's testimony, does plaintiff for the first time state that Con-Ed inspectors instructed JLJ foreman. A party's affidavit which contradicts prior sworn testimony creates only a feigned issue of fact insufficient to defeat a properly supported motion for summary judgment. *Harty v. Lenci*, 294 A.D.2d 296, 298 (1st Dept. 2002); *see also Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320 (1st Dept. 2000); *Kistoo v. City of New York*, 195 A.D.2d 403, 404 (1st Dept. 1993). Thus, the Labor Law § 200 and Common Law Negligence claims against the defendant are dismissed.

B. *Labor Law § 241(6)*

Under Labor Law § 241(6), a property owner and/or its agent may be held liable for injuries sustained by a construction worker due to the negligence of a subcontractor in failing to maintain the work site in a reasonably safe condition, even where the owner exercised no direct supervisory control over the negligent subcontractor.³ *See Kane v. Coundorous*, 293 A.D.2d 309 (1st Dept. 2002). However, to maintain a Labor Law § 241(6) claim, the plaintiff must allege and prove the violation of a specific provision of the New York State Industrial Code (12 NYCRR Subchapter A) and demonstrate that said violation was the proximate cause of his injuries. *See Canning v. Barney's New York*, 289 A.D.2d 32 (1st Dept. 2001). Although the

³Labor Law 241(6) provides that "[a]ll contractors and owners and their agents...when constructing or demolishing buildings...shall comply with the following requirements:...All areas in which construction...work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work...shall comply therewith."

injured plaintiff need not show that the owner exercised supervision or control over the work site in order to establish his right to recovery under Labor Law § 241(6), the owner can raise plaintiff's culpable conduct—but not assumption of the risk—as an affirmative defense. *See Ross*, 81 N.Y.2d at 502; *Rocovich v. Consolidated Edison Co., Inc.*, 78 N.Y.2d 509 (1998); *Lorefice v. Reckson Operating Partnership, L.P.*, 269 A.D.2d 572 (2d Dept. 2000).

Here, defendants move to dismiss plaintiff's claims arising from alleged violations of the following various Industrial Code provisions, *viz.*, 12 NYCRR §§ 23-1.1.13(b)(3), 23-1.13(b)(4), 23-1.3, 23-1.8(a), 23-3.2(a)(2), and 23-3.2(a)(3).

1. *12 NYCRR § 23-1.13(b)(3) & § 23-1.13(b)(4)*

Industrial Code Rule 23-1.13 provides:

Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.

Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.

12 NYCRR § 23-1.13(b)(3); 12 NYCRR § 23-1.13(b)(4). Plaintiff's expert John K. Hagopian, II, testified that deactivation of the utility cables was customary and standard practice in projects

similar to this one which he has worked on upstate. However, § 23-1.13(a) states “None of the provisions of this subsection shall apply to or in connection with operations conducted by employers, owners, and contractors and their agents subject to the *jurisdiction of the Public Service Commission.*” 12 NYCRR § 23-1.13(a). The Public Service Commission has jurisdiction over “the manufacture, conveying, transportation, sale, or distribution of gas...and electricity for light, heat, or power, to gas plants and to electric plants and to the persons or corporations owning, leasing, or operating the same.” N.Y. Pub. Serv. Law § 5(1)(b) (2007). Con-Ed is a corporation engaged in the operation of electricity for light, heat and power, and clearly falls under the jurisdiction of the Public Service Commission. Therefore, 12 NYCRR § 23-1.13 does not apply to Con-Ed.

2. *12 NYCRR § 23-3.2(a)(2) & 12 § NYCRR 23-3.2(a)(3)*

Section 23-3.2(a)(2) provides:

Before demolition is started, all gas, electric, water, steam and other supply lines shall be shut off and capped or otherwise sealed. In each such case, the service or utility company involved shall be notified in writing at least 24 hours in advance of the start of work on such lines.

Section 23-3.2(a)(3) provides:

Where it is necessary to maintain any gas, electric, water, steam or other supply line during the demolition operations, such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person. If such lines are to be relocated, the service or utility company involved shall be notified in writing at least 48 hours in advance of such relocation. In not more than one normal working day the service or utility company shall notify the employer of the procedure to be followed in performing such relocation and such procedure shall be followed by the employer.

These two subsections apply to demolition work, which is defined as “[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.” 12 NYCRR § 23-1.4(16). Plaintiff correctly notes that demolition work is actionable under section 241(6). *See Nagel v. D&R Realty Corp.*, 99 N.Y.2d 98, 102 (2002). However, the work performed here was the excavation of water mains and sewers. Under the Industrial Code, this type of work falls under the definition of construction, not demolition work. *See* 12 NYCRR § 23-1.4(b)(13) (Construction Work. All work of the types performed in the...excavation, trenching, pipe and conduit laying...in any form for any purpose). Since no demolition work took place here § 23-3.2 is not applicable.

3. *12 NYCRR § 23-1.3*

Section 23-1.3 sets forth general responsibilities and addresses non-specific requirements such as “safe working conditions and safe places to work.” This type of provision is not sufficiently specific to provide a basis for liability under section 241(6). *See Hawkins v. City of New York*, 275 A.D.2d 634, 635 (1st Dept. 2000); *Ross*, 81 N.Y.2d at 505; *see also Williams v. White Haven Memorial Park, Inc.*, 227 A.D.2d 923, 923-24 (4th Dept. 1996) (“Industrial Code...§§ 23-1.3 and 23-1.5(a) and (c)(2) and (3) are general provisions and thus do not provide a basis for liability under Labor Law 241(6)”).

4. *12 NYCRR § 23-1.8(a)*

Section 23-1.8(a) entitled “Eye Protection” provides that “[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons

while employed in welding, burning or cutting operations or in chipping, cutting, or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.” 12 NYCRR § 23-1.8(a). This section is actionable under section 241(6). See *McByrne v. Ambassador Construction Co., Inc.*, 290 A.D. 2d 243 (1st Dept. 2002). However, plaintiff was wearing safety goggles provided by JLJ at the time of the accident. All of the cases cited by the plaintiff deal with injuries that occurred because no eye protection was provided. None of these cases address the issue of liability where a worker suffered eye injuries after he or she was provided eye protection. See *McLoud v. State of New York*, 237 A.D.2d 783 (3rd Dept. 1997) (no section 23-1.8(a) liability where plaintiff was provided with eye protection). The plaintiff has offered no expert evidence as to any deficiency in the goggles provided or as to alternative, more appropriate eye protection. Based on the testimony provided, the safety goggles given to the plaintiff were suitable protection for breaking through the concrete ducts. Consequently, no violations exist pursuant to § 23-1.8(a).

In opposition to this motion, plaintiff has failed to produce admissible evidentiary proof sufficient to establish material issues of fact warranting a trial. *Zuckerman*, 404 N.E.2d at 720.

Accordingly, it is

ORDERED that the summary judgment motion of the defendant is granted and the complaint against the defendant Consolidated Edison is dismissed.

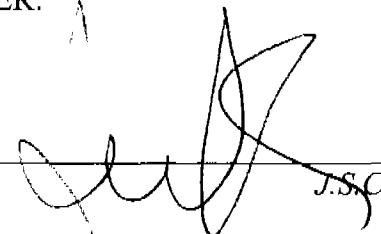
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