

Singer v Sisters, LLC
2007 NY Slip Op 31695(U)
June 18, 2007
Supreme Court, Richmond County
Docket Number: 0011919/2004
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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RAYMOND SINGER and PHYLLIS SINGER,

Plaintiffs,

-against-

SISTERS, LLC and ASPINWALL BUILDING CORP.,

Defendants,

DCM PART 5

Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 11919/04

Motion Nos. 002, 003, 004, 005, 006

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SISTERS, LLC and ASPINWALL BUILDING CORP.,

Third-Party Plaintiff,

-against-

COMMERCE BANK, N.A.,

Third-Party Defendant,

-----X
COMMERCE BANK, N.A.,

Fourth-Party Plaintiff,

-against-

S. DIGIACOMO & SON, INC.,

Fourth-Party Defendant.

-----X

The following papers numbered 1 to 9 were used on this motion this 1st day of May, 2007.

	Papers Numbered
Notice of Motion (Affirmations & Exhibits in Support) [S. DiGiacomo & Son, Inc.] _____	1
Notice of Cross Motion (Affirmations & Exhibits in Support/Opposition) [Commerce Bank, N.A.] _____	2
Notice of Motion (Affirmations and Exhibits in Support) [Sisters LLC] _____	3
Notice of Cross Motion (Affirmations & Exhibits in Support) [S. DiGiacomo & Son, Inc.] _____	4
Notice of Cross Motion (Affirmations & Exhibits in Support) [Plaintiff] _____	5

Affirmation in Reply [Sisters, LLC] _____	6
Affirmation and Exhibits in Reply [Commerce Bank, N.A.] _____	7
Reply [S. DiGiacomo & Son, Inc.] _____	8
Reply Affirmation [Plaintiff] _____	9

On October 22, 2003, the plaintiff, Raymond Singer, allegedly was injured when he tripped and fell on bricks left on the ground at a construction site located at 1837 Richmond Avenue, Staten Island, New York. At the time of the accident Sisters LLC, was leasing the property from non-party Goldgarb-My Florist Inc. and had entered into a sublease agreement with Commerce Bank, N.A., around 2002, to permit construction of a bank on the premises. The plaintiff was an employee of S. DiGiacomo & Son, Inc., the general contractor hired by Commerce to construct the bank.

In June, 2004, plaintiff Raymond Singer commenced this action against Sisters after he tripped and fell over bricks that were piled in the middle of what was to be a two-lane drive through teller for the bank. Plaintiff alleged violations of Labor Law §§ 200, 240 and 241(6) and common-law negligence. In January, 2005, Sisters commenced a third-party action for indemnification against Commerce. In July, 2006, an examination before trial of plaintiff Raymond Singer was held. Thereafter in October, 2006, Commerce commenced a fourth-party action for contribution and/or indemnification against plaintiff's employer DiGiacomo. After issue was joined by all defendants and discovery was purported to be completed, plaintiffs filed a note of issue in January, 2007. At present, DiGiacomo is moving, *inter alia*, to sever the fourth-party action, Commerce and Sisters have separately cross moved for summary judgement dismissing the complaint and plaintiffs have cross

moved seeking an order to amend the bill of particulars to allege specific Industrial Code violations.

Initially, the plaintiff consents to the dismissal of all claims based on violations of Labor Law § 240(1) and OSHA and claims based on violations of Labor Law § 200 against defendant Sisters only.

Turning to S. DiGiacomo's motion to sever the fourth-party action for contractual indemnification, the court finds that severance is appropriate in the instant case. All parties in the main action are ready to proceed to trial and discovery has merely begun in connection with the fourth-party action. Thus, severance is appropriate as it will avoid prejudicing the fourth party defendant by proceeding to trial before adequate discovery and it will not harm the plaintiff (*see, Abreo v. Baez*, 29 AD3d 833, 834 [2d Dept. 2006]). As a result, the remaining relief sought by defendant S. DiGicomo has been rendered academic.

Labor Law § 241(6), requires

[a]ll areas in which construction, excavation or demolition work is being performed [to] 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.

Encumbering owners and contractors, the statute "imposes a nondelegable duty of reasonable care upon [such entities] to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v. Wenger Contr Co.*, 91

NY2d 343, 348 [1998][emphasis and internal quotation marks omitted]). To support a cause of action pursuant to § 241(6), the plaintiff must allege that a specific and concrete provision of the Industrial Code was violated and that the violation was proximate cause of his/her injuries (*see* Rosado v. Briarwood Farm, Inc., 19 AD3d 396 [2d Dept. 2005]).

Contrary to defendants' opposition papers, plaintiff's cross motion to serve a supplemental bill of particulars alleging specific Industrial Code violations, in accordance with § 241(6), is not fatal to his claim (*see* Latino v. Nolan & Taylor-Howe Funeral Home, Inc., 300 AD2d 631, 633-34 [2d Dept. 2002]). Where leave to amend the bill of particulars to allege specific Industrial Code violations is requested after the note of issue has been filed, the motion may be granted upon a showing of its meritorious nature and that the amendment does not allege any new theories of liability or facts that would prejudice the defendants (*see* Dowd v. City of New York, __ AD3d ___, 2007 NY Slip Op. 4439 [2d Dept.]). Here, defendants have long been aware that the trip and fall on debris occurred on a construction site and the sections of the Industrial Code to which plaintiff seeks to add will not prejudice or surprise the defendants. Moreover, defendants have failed to show that any prejudice would result and therefore plaintiff's motion to amend the bill of particulars is granted.

As amended, plaintiff alleges violations of sections 23-1.5, 23-1.7 (d),(e)(1), and (e)(2), 23-2.1 and 23-1.30 of the Industrial Code. Of these, section 23-1.5 addresses "only general safety standards, [and] would not constitute a basis for a claim under Labor Law § 241(6)" (Meslin v. The New York Post, 30 AD3d 309, 310 [1st Dept. 2006]). However, sections 23-1.7, 23-2.1 and 23-1.30 all require "distinct standard[s] of conduct, rather than .

.. general reiteration[s] of common-law principles,” and are the exact type of safety specifications whose violation will support a cause of action under Labor Law § 241(6) (*see Carty v. Port Authority of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept. 2006][section 23-1.7(e) and 23-1.30 are “specific enough to support a cause of action” under Labor Law § 241(6)]; *see also Rosado v. Briarwood Farm, Inc.*, 19 AD3d at 399 [section 23-2.1 of the Industrial Code has the concrete specifications sufficient to maintain a cause of action under Labor Law § 241(6)]. Nevertheless, to avoid summary judgment the plaintiff must establish questions of fact as to whether at least one violation was proximate cause of the accident (*see Biafora v. City of New York*, 27 AD3d 506, 508 [2d Dept. 2006]).

Here, the alleged violations of sections 23-1.7[d][slippery conditions], 23-1.7[e][2][tripping hazards in “working areas”], and 23-2.1[storage of materials in an orderly manner] of the Industrial Code raise sufficient questions of fact regarding whether they were the proximate cause of the plaintiff’s accident.

However, subdivision (e)(1) of section 23-1.7 addresses tripping hazards in “passageways” (12 NYCRR § 23-1.7[e][1]). Defendants Singer and Commerce contend that the pile of bricks which caused plaintiff’s injuries were not in a passageway in accordance with § 23-1.7(e)(1) and is inapplicable. Plaintiff has failed to present any evidence that the area in which he fell was a passageway in accordance with the Industrial Code. In fact, plaintiff stated that he fell in an area that was to constitute a two lane drive-through for the bank, and such large areas are inadequate to constitute a “passageway” within the meaning of the Industrial Code (*see Alvia v. Temen Elec. Co.*, 287 AD2d 421, 423 [2d Dept. 2001][finding that an open area is not a passageway]; *Canning v. Barneys New York*, 289

AD2d 32, 34 [1st Dept. 2001][holding that an area used for loading and unloading materials is not a “passageway” under 12 NYCRR § 23-1.7[e][1]). Therefore, in the absence of any opposing evidence suggesting that the area in which plaintiff fell was a regulated “passageway”, the branch of plaintiff’s motion to amend the bill of particulars to allege a violation of Industrial Code 23-1.7(e)(1) is denied.

Similarly, section 23-1.30 addresses illumination of work areas and in this instance, no evidence was presented that plaintiff’s fall was caused by inadequate lighting and therefore this section is inapplicable (*see Militello v. 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159 [1st Dept. 2005]). Hence, the branch of plaintiff’s motion to amend the bill of particulars to allege a violation of Industrial Code 23-1.30 is denied.

Labor Law § 200(1) 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” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). In order “[t]o establish liability [thereunder] . . . it must be established that the owner or general contractor exercised supervision and control over the work [being] performed at the [time of injury], or had actual or constructive notice of the allegedly unsafe condition” (*Stafford v. Viacom, Inc.*, 32 AD3d 388, 390 [2d Dept 2006] quoting *Dennis v. City of New York*, 304 AD2d 611, 612 [2d Dept 2003][internal quotations marks omitted]; *Carty v. Port Auth of N.Y. & N.J.*, 32 AD3d at 733, quoting *Rizzo v. Wenger Constr. Co.*, 91 NY2d at 348). Here, there are questions of fact as to Commerce Bank’s supervision and control over the work site and whether they had actual or constructive notice of the allegedly defective condition because it was their responsibility to keep the area clear of debris (*see Acosta v.*

Hadjigavriel, 18 AD3d 406, 407 [2d Dept. 2005]).

Accordingly, it is,

ORDERED that the branch of the motion of the defendant S. DiGiacomo & Son, Inc. to sever the fourth-party action is granted; and it is further,

ORDERED that the balance of the relief requested by S. DiGiacomo & Son, Inc. is denied as academic; and it is further,

ORDERED that the branches of the cross motions of Sisters, Aspinwall Building Corp., and Commerce for summary judgment on the cause of action alleging violations of Labor Law § 240(1) is granted; and it is further,

ORDERED that the branch of the plaintiff's cross motion for leave to amend the bill of particulars to allege violations of 12 NYCRR 23-1.7(d), 12 NYCRR 23-1.7(e)(2) and 23-12 NYCRR 2.1 is granted; and it is further,

ORDERED that the branch of plaintiff's cross motion for leave to amend the bill of particulars to allege violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7(e)(1) and 12 NYCRR 23-1.30 is denied, and it is further,

ORDERED that the branch of the defendant's cross motion for summary judgment dismissing the cause of action alleging violations of Labor Law § 241(6) is denied; and it is further,

ORDERED that the branch of the cross motion of defendants Sisters and Aspinwall Building Corp. for summary judgment dismissing the cause of actions based on violations of Labor Law § 200 and common law negligence is granted; and it is further,

ORDERED that the branch of the cross motion of defendant Commerce for summary judgment dismissing the cause of actions based on violations of Labor Law § 200 and common law negligence is denied; and it is further,

ORDERED that the Clerk should enter judgment and mark records accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

E N T E R,

Dated: June 18, 2007

J.S.C.