

Culhane v Bovis Lend Lease, Inc.

2007 NY Slip Op 31866(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0114927/2004

Judge: Doris Ling-Cohan

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PRESENT: HON. DORIS LING-COHAN

PART 36

Justice

Culhane

FILED

INDEX NO. 114927/04

MOTION DATE _____

JUN 28 2007

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Boris Lead Lease
et al.

NEW YORK
COUNTY CLERK'S OFFICE

or X-Motion

The following papers, numbered 1 to 6 were read on this motion for/for Summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

5

Replying Affidavits Suppl. Aff

6

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion or cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FOR THE FOLLOWING REASON(S):

HON. DORIS LING-COHAN

Dated: 6-19-07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
STEPHEN CULHANE and GAIL CULHANE,

Plaintiffs,

- against -

BOVIS LEND LEASE, INC., 731 COMMERCIAL
LLC., 731 RESIDENTIAL LLC, VORNADO
REALTY TRUST, BLOOMBERG L.P. and
BLOOMBERG INC.,

Defendants.

-----x

Index No. 114927/04

Motion Seq. No.: 002

FILED
JUN 28 2007
NEW YORK
COUNTY CLERKS OFFICE

HON. DORIS LING-COHAN, J.:

Defendants, Bovis Lend Lease, LMB, Inc., s/h/a Bovis Lend Lease, Inc. ("Bovis"), 731 Commercial LLC ("731 Commercial"), 731 Residential LLC ("731 Residential"), Vornado Realty Trust ("Vornado"), Bloomberg, L.P., and Bloomberg, Inc., move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

Plaintiffs, Stephen Culhane and Gail Culhane, oppose the motion and cross-move for summary judgment on the Complaint.

Background

Plaintiffs, husband and wife, commenced this action seeking to recover damages for personal and derivative injuries they allegedly sustained when Stephen Culhane was injured while working on the construction project located at 731 Lexington Avenue, New York, New York (the "subject premises"). By

Agreement, dated September 1, 1999, 731 Limited Partnership, the predecessor to 731 Commercial and 731 Residential, retained Bovis to serve as construction manager for the construction of a 54-story, mixed-use retail, office, and residential project at the subject premises. [Agreement, Notice of Motion, Exh. D]. Vornado served as a developer for the construction project. Bloomberg L.P. and Bloomberg Inc. were prospective tenants of the premises.

Stephen Culhane, an ironworker, was an employee of Enclos Corporation ("Enclos"), a subcontractor for Bovis on the construction project at the subject premises. He claims that on September 8, 2003, he was injured when he stepped into a hole on the 25th floor of the building under construction at the subject premises. Specifically, he alleges that he was caused to fall as a result of a hazardous floor opening, 12 inches by six or eight inches. Plaintiffs allege claims against defendants, as active participants in the construction project, for violation of Labor Law §§ 200, 240, 241(6), 12 NYCRR 23-1.5, 23-1.7(b)(e); 23-1.15, 23-2.1, 23-3.3(j)(2)(ii), causing injury to Stephen Culhane, as well as a claim by Gail Culhane for the loss of her husband's services. The Bill of Particulars contains similar allegations.

Issue was joined as to Bovis, 731 Commercial, 731 Residential, and Vornado with the service of an answer generally denying the allegations in the Complaint, asserting affirmative

defenses, and alleging crossclaims for contribution or indemnification against Bloomberg L.P. and Bloomberg Inc. It appears as if Bovis, 731 Commercial, 731 Residential, and Vornado have abandoned their crossclaims since defendants, including Bloomberg L.P. and Bloomberg Inc., are now represented by the same counsel and all, collectively, move for summary judgment dismissing the Complaint. Plaintiffs cross-move for summary judgment on the Complaint.

Discussion

As a preliminary matter, the Court notes that instead of each individual defendant moving separately for summary judgment, defendants, by one set of motion papers, collectively move for summary judgment relying on an affirmation by an attorney without any personal knowledge and assorted exhibits including EBT testimony of plaintiff Stephen Culhane and only one affidavit from any of defendant entities - that is the affidavit of defendant Bovis' employee, Jeff Butler.

It is well established that a party seeking summary judgment must make a prima facie showing of its cause of action or defense sufficiently to warrant the court as a matter of law directing judgment in its favor, and must do so by tendering sufficient evidence to demonstrate the absence of any material issues of fact (see CPLR 3212[b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

[1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Complaint alleges causes of action for violation of Labor Law §§ 200, 240, 241(6), 12 NYCRR 23-1.5, 23-1.7(b)(e); 23-1.15, 23-2.1, 23-3.3(j)(2)(ii), and claim by Gail Culhane for the loss of her husband's services.

Section 200 of the Labor Law 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 (*Lombardi v Stout*, 80 NY2d 290, 294 [1992]). Section 200 provides that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places" and that "[a]ll machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

An implicit precondition to this duty to provide a safe place to work is that "the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano*, 54 NY2d 311, 317 [1981]).

Here, the Complaint alleges, *inter alia*, that defendants were negligent in the ownership and maintenance of the premises under construction, and in failing to provide plaintiff with a safe place to work. Plaintiffs also allege that defendants had actual or constructive notice of the unsafe conditions.

An Incident Investigation Report of the alleged incident was prepared by Ken Kyle, the site safety manager for Bovis. The Incident Investigation Report states, in part, "[w]orker alleges that he was pushing a gang box across the 25th floor, when his foot went into a hole for a riser pipe. Hole size was approx. 7" x 12" (Incident Report, Not of Mot, Exh F). The Incident Investigation Report further states, "[w]orker unaware of surroundings as the riser pipe has been in place for months (*id.*). In addition, the Workers' Compensation Board Employer's Report of Work-Related Accidental/Occupational Disease (Form C-2) states that plaintiff was injured when he "stepped into a hole" while "pushing a gang box to outside hoist on 25th floor" (Form C-2, Not of Mot, Exh G).

At an examination before trial ("EBT"), held on May 4, 2006, Stephen Culhane testified that immediately prior to the incident, he and his co-worker, Tom Gannon, were in the process of moving their materials from the 25th floor to the 26th floor, as their work on the 25th floor was completed (EBT of Stephen Culhane, Not of Mot, Exh H, p. 53). He stated an Enclos foreman had instructed them to move the materials (*id.* at 158-59). He described the 25th floor as a wide open space with no interior walls (*id.* at 53-54). He also stated that at the time of the alleged incident, he was pushing an equipment box, a gang box, "[m]aybe 2 feet by 6 and a half feet", the size of a closet, full of bolts and hardware and other tools, optical levels, safety harnesses safety ropes, to a hoist (*id.* at 55). He further stated that he was at the back side of the gang box, pushing with his right shoulder pressed up against the box and looking off to the left, while his co-worker was guiding the box from the front (*id.* at 59-60). He described the condition of the floor as littered, and stated that he had to maneuver the gang box around the litter to get it to the hoist. (*id.* at 53, 66). He further stated that immediately before the alleged incident, his co-worker told him that he had to push back the gang box because of an obstruction; that as he stepped back, his right foot and right leg went into the hole; and that he put his hand out to help him break the fall (*id.* at 75,77-79). He

stated that he did not notice the hole prior to the alleged incident (*id.* at 81). He also stated that in addition to following the instructions of the Enclos forman, he would follow the instructions of the safety inspectors on the construction project (*id.* at 159). He did not know if the safety inspectors worked for Bovis (*id.*).

In seeking summary judgment, defendants argue that there can be no liability under the common law or Labor Law § 200 since they did not supervise the work which gave rise to the alleged incident. As indicated earlier, defendants collectively moved for summary judgment on one set of papers. While defendants' counsel argues in a conclusory manner that Vornado "simply acted as a developer of the project...Bloomberg, LLP and Bloomberg, Inc. were slated to be tenants at the subject location and had no involvement in the construction process [and that] 731 Limited Partnership transferred ownership of the premises to 731 Commercial, LLC and 731 Residential LLC" [¶4, Affirmation in Support of Motion], he submits no evidence to support these allegations. An affidavit or affirmation by an attorney who is without the requisite personal knowledge of the facts has no probative value. *DiFalco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560 (1 Dept 1981), *aff'd* 54 NY2d 715 (1981). While these reasons may be a basis for dismissing against such

individual defendants, the court is compelled to deny summary judgment because the submitted papers make an insufficient showing.

Furthermore, the written Agreement between 731 Limited Partnership, as owner, and Bovis, as construction manager, required Bovis to "perform and supervise all of the labor, equipment, and materials necessary for the construction ... and completion of the Work" (Agreement, Not of Mot, Exh D, ¶ 1.3). The Agreement defines the term "Work" to "include, without limitation, the furnishing and performing of everything necessary in the preparation, prosecution and full completion of the Work in conformity with the Contract Documents and all Legal Requirements in effect during the term of the Project ..." (*id.*). The Agreement also required Bovis, *inter alia*, to implement safety measures (*id.* at ¶ 2.6.18), conduct necessary job and coordination meetings (*id.* at ¶ 2.7.2), and assume responsibility for all subcontractor work as if it had been performed by Bovis' own forces (*id.* at ¶ 2.7.3).

In addition, at an EBT held on June 5, 2006, Jeff Butler, a superintendent at Bovis, testified that Bovis conducted regular safety meetings for construction project at the subject premises, and that the safety meetings were led by Ken Kyle, who, as stated prepared the report concerning plaintiff's accident (EBT of

Butler, Not of Mot, Exh I, pp. 3, 12-14, 21-22). Mr. Butler also testified that Bovis had a designated labor force to clean up the construction site and protect floor openings (*id.* at 16).

Given the utter failure of defendants to submit affidavits or other evidence as to the role of each of the defendants in this collective motion, ~~the~~ summary judgment is denied. Further, at the very least, the submitted evidence raises triable issues as to whether Bovis supervised the work which gave rise to the alleged incident (see *Moore v Metro North R.R.*, 233 AD2d 192, 192-193 [1st Dept 1996]). Furthermore, the statement in the Incident Investigation Report that the riser pipe has been in place for months raises a triable issue as to whether defendants had notice of the alleged hazardous condition that caused plaintiff's injuries. Thus, the branch of the motion that seeks to dismiss the Labor Law § 200 claim must be denied.

Section 240(1) of the Labor Law, often referred to as the "scaffold law", provides that "[a]ll contractors and owners and their agents' engaged in cleaning a building or structure must furnish or erect proper scaffolding, ladders, and similar safety devices to protect employees in the performance of their work" (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]). Section 240(1) imposes absolute liability on contractors, owners, and their agents for any breach of the statutory duty which has

proximately caused injury (*id.*). The statute was enacted to prevent those types of accidents in which a scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 499-500 [1993]). The duty imposed by Labor Law § 240(1) is nondelegable (*id.* at 502). However, an accident alone does not establish a Labor Law § 240(1) violation or causation (*Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d 280, 289 [2003]). Rather, § 240(1) establishes absolute liability for a breach which proximately causes an injury (*id.*). A violation of § 240(1) creates absolute liability, and the failure to provide any safety devices is such a violation (*id.*). Thus, plaintiff must show that the violation of § 240(1) was a contributing cause of his fall and resulting injuries (*id.*).

Here, the gravamen of the Labor Law § 240 claim is that Stephen Culhane's right foot and leg went through a hazardous opening on the 25th floor of the construction project. This claim must be dismissed as a matter of law since the alleged incident cannot be considered to have resulted from an elevation-related risk as contemplated by the statute (see *Toefer v Long Is. R.R.*, 4 NY3d 399 [2005]).

Labor Law § 241(6), "by its very terms, imposes a non-delegable duty of reasonable care upon owners and contractors '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 L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). The statute also requires owners and contractors to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The purpose of the statute is to place the "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Rizzuto v L.A. Wenger Contr. Co.*, *supra*, quoting 1969 NY Legis Ann. at 407-408). In order to support a cause of action under Labor Law § 241(6), plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct (see *Ross v Curtis-Palmer Hydro Elec. Co.*, *supra*, at 504-05).

Plaintiffs allege that defendants violated Labor Law § 241(6) and Industrial Code Rule 23 §§ 23-1.5, 23-1.7(b)(e); 23-1.15, 23-2.1, 23-3.3(j)(2)(ii) by failing to protect hazardous floor

openings on the construction project. Stephen Culhane claims that his right foot and leg went through a hazardous opening on the 25th floor of the construction project. Section 23-1.5 is a general safety provision of the Industrial Code, not a concrete specification with which a defendant must comply under the Labor Law, and thus, cannot form the basis of a § 241(6) claim (see *Gordineer v County of Orange*, 205 AD2d 584 [2d Dept 1994]). Furthermore, § 23-1.7(b)(1), which requires that every hazardous opening into which a person may step or fall must be guarded by a substantial cover or a safety railing, is inapplicable where, as here, the hole is too small for the worker to fall through (see *Rice v Board of Educ. Of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003]). Moreover, §§ 23-1.7(d) and (e), pertaining to slipping and tripping hazards, respectively are inapplicable, based upon the evidence submitted herein. Likewise, there is no evidentiary proof to establish violations of § 23-1.15, pertaining to the provision of safety rails, § 23-2.1, pertaining to maintenance and housekeeping, or 23-3.3(j)(2)(ii), pertaining to floor openings more than 16 inches in least dimension. Thus, defendants are entitled to summary judgment dismissing the Labor Law § 241(6) claim.

A derivative claim for loss of consortium seeks to compensate a spouse for the loss of the services of a party due to injury

(see *Liff v Schildkrout*, 49 AD2d 622, 632 [1980]). The pleadings and supporting documents sufficiently set forth the injuries sustained by Stephen Culhane, and defendants fail to establish entitlement to summary judgment dismissing the derivative claim. Thus, the branch of the motion that seeks to dismiss the claim for loss of services must be denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent that the causes of action for violation of Labor Law §§ 240 and 241(6) are dismissed and it is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further


ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants with notice of entry.

Dated:

6/19/07



Hon. Doris Ling-Cohan, J.

FILED
JUN 28 2007
NEW YORK
COUNTY CLERK'S OFFICE