

DeFlippo v Benjamin Dev. Co., Inc.
2007 NY Slip Op 32306(U)
July 24, 2007
Supreme Court, Suffolk County
Docket Number: 0021112/2000
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200 and 241(6), and common-law negligence, for injuries he allegedly sustained in a trip and fall accident at a construction site. Plaintiff was employed as a plumber by nonparty Acura Plumbing and Heating.

Plaintiff testified at his deposition that he had been employed at the new condominium development for about two months. On the day of his fall, he and a coworker were installing gas lines in the ceiling of the first floor units. Plaintiff stated that the site was littered with construction debris, including pieces of wood, roofing material, and scraps of siding, thrown down by the other contractors. Usually, when he stepped onto a pile of debris it was solid. However, on this particular trip into a unit he stepped onto a pile of debris which was not solid. He was carrying a six-foot, A-frame fiberglass ladder on his left shoulder and a bucket of tools in his right hand, and as he stepped onto the debris it gave way and his body twisted, causing him to trip and fall, and to allegedly sustain the injuries complained of herein.¹

Plaintiff's cross motion seeks leave to serve an amended complaint adding Arlen Contracting Corp., the admitted general contractor, as a defendant. CPLR 3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." Whether to grant or deny leave to amend is committed to the discretion of the Supreme Court (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 471 NYS2d 55 [1983]) and delay alone will not be sufficient cause to deny a party's request to amend (*Felix v Lettre*, 204 AD2d 679, 612 NYS2d 435 [1994]). The relation-back doctrine, codified at CPLR 203(b), allows a claim asserted against a defendant in an amended pleading to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes (*Buran v Coupal*, 87 NY2d 173, 638 NYS2d 405 [1995]). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well (*Buran v Coupal*, *supra* at 178; *Nani v Gould*, 39 AD3d 508, 833 NYS2d 198 [2007]; *Porter v Annabi*, 38 AD3d 869, 833 NYS2d 555 [2007]). Here, plaintiff established the elements of the doctrine. Therefore, leave to serve a supplemental summons and an amended complaint adding Arlen Contracting Corp. as a defendant, is granted,

Labor Law § 241(6) requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. It creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (*see, Ross v Curtis-Palmer*

¹ Defendants dispute plaintiff's deposition version of the accident, which appears to conflict with other evidence.

Hydro-Electric Co., 81 NY2d 494, 601 NYS2d 49 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 405 NYS2d 630 [1978]. Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a “specific positive command” and not merely “general safety standards” need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*Ross v Curtiss-Palmer Hydro-Elec. Co.*, *supra*; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]).

The Court is troubled by the fact that plaintiff failed to state which sections of the Industrial Code were violated by defendants until his instant cross motion for leave to serve an amended bill of particulars, and after filing of his note of issue. Nevertheless, in the absence of unfair surprise or prejudice to defendants (*Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1121, 818 NYS2d 724 [2006]; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 783 NYS2d 362 [2004]) leave is granted, as limited below.

Plaintiff’s proposed amended bill of particulars asserts that defendants violated the Industrial Code at 12 NYCRR § 23-1.7(e), entitled, “Tripping and other hazards,” which provides:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

While the area in front of the condo unit was not a “passageway” for the purposes of § 23-1.7 (e)(1), it was, at least arguably, a “working area” for the purposes of § 23-1.7 (e)(2) (*Giza v New York City School Constr. Auth.*, 22 AD3d 800, 803 NYS2d 162 [2005]; *Bopp v A.M. Rizzo Elec. Contr., Inc.*, 19 AD3d 348, 769 NYS2d 153 [2005] *Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 786 NYS2d 149 [2004]; *see also, Owen v Schulman Constr. Corp.*, 26 AD3d 362 [2006]).

Plaintiff also asserts that defendants violated 12 NYCRR 23-2.1, entitled “Maintenance and housekeeping”, at subsection (b), which states that “[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.” The Court finds that this subsection is inapplicable to plaintiff’s accident and that it lacks the specificity required to qualify for § 241(6) liability (*Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 769 NYS2d 559 [2003]). Therefore, so much of plaintiff’s cross motion which seeks leave to serve an amended bill of particulars is granted to the extent that the amended bill of particulars may add an alleged violation of 12 NYCRR § 23-1.7(e)(2), and is otherwise denied. Defendants’ motion to dismiss plaintiff’s Labor Law § 241(6) cause of action is correspondingly denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son, supra*) who exercise control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, plaintiff alleges that the work site itself was negligently maintained, with piles of debris discarded by the various subcontractors scattered around the entrances to the units (*see generally, Pickering v Lehrer, McGovern, Bovis, Inc.*, 25 AD3d 677, 811 NYS2d 696 [2006]). Moving defendants/owners established that they had no notice of, or control over, the alleged condition, and plaintiff did not refute this with evidence to the contrary. Accordingly, plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed against movants.

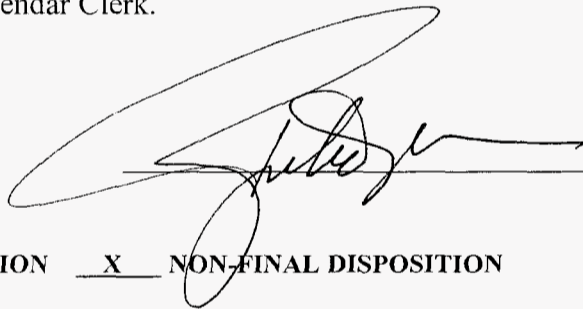
Defendant Benjamin Development Co., Inc. established that it was not an owner of the property at any time, and that Knolls of Melville Redevelopment Company Owners Corp. was not the owner at the time of plaintiff's accident, and plaintiff did not refute this with admissible evidence to the contrary. Accordingly, Benjamin Development Co., Inc. and Knolls of Melville Redevelopment Company Owners Corp. are granted summary judgment dismissing plaintiff's complaint as against them.

Lastly, plaintiff states that with the addition of the general contractor, there is another party yet to be deposed. Therefore, discovery is not complete, and the Court, on its own motion, vacates the note of issue.

The action is reactivated as an IAS matter and shall not be restored to the Trial Calendar until it is certified as ready for trial by the IAS justice assigned.

Serve a copy of this order on the Calendar Clerk.

Dated: JUL 24 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION