George v Rock-Forty-Ninth LLC

2007 NY Slip Op 32659(U)

August 9, 2007

Supreme Court, Queens County

Docket Number: 0018579/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

CLIVE GEORGE	Index Number 18579 2004
	Motion Date April 10, 2007
-against-	Motion Cal. Number 15
ROCK-FORTY-NINTH LLC, et al.	Motion Seq. No. 5

The following papers numbered 1 to 13 read on this motion by defendants Rock-Forty-Ninth LLC, MSDW 745, LLC, and Morgan Stanley & Co., Incorporated (MSDW) pursuant to CPLR 3212 for summary judgment dismissing the complaint and on the cross motion by the plaintiff to amend the bill of particulars.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered as a result of a construction site accident. The accident occurred on September 6, 2001 at premises located at 745 Seventh Avenue, New York, New York. The moving defendants had various ownership interests in the premises. The plaintiff brought claims under Labor Law §§ 200, 240(1) and 241(6).

The plaintiff, a journeyman electrician, was an employee of Unity Electric. Unity Electric was hired by the general contractor, non-party Tishman Construction Corporation of New York, Inc. to do various electrical work at the premises. On the day of

the accident the plaintiff was moving spools of wire from the twenty-first floor to the seventeenth floor of the building. The plaintiff and a coworker would roll a spool of wire on top of the pallet jack, then move the pallet jack into the elevator, and then unload the spools after reaching the seventeenth floor. The accident occurred at approximately 8:30 A.M. after the plaintiff and the coworker had exited the elevator when they were in the process of moving some spools of wire. The plaintiff alleges that immediately before the accident he was moving some of the spools he and his coworker had previously brought down out of the way, to make room for spools that were on the pallet jack. The plaintiff then allegedly heard a loud noise and a wire spool rolled off the pallet jack and struck him in his lower back and right knee. The plaintiff testified at his examination before trial that he did not see the pallet jack break and that he did not know what caused it to break. The plaintiff further testified that his employer, Unity Electric, was solely responsible for controlling and directing his work. The plaintiff was unaware of MSDW's involvement in the construction project. MSDW testified that while it had an employee at the construction site to monitor the progress of the construction, it did not supervise the plaintiff's work.

The plaintiff's argument that the motion should be denied as untimely is without merit. Pursuant to a so-ordered stipulation dated September 26, 2006, which was signed by the plaintiff, the defendants had until October 26, 2006 to make a summary judgment motion. The motion was served on October 24, 2006. Inasmuch as a motion is made when the notice of motion is served, the motion is timely (see Rivera v Glen Oaks Vil. Owners, 29 AD3d 560 [2006]; Russo v Eveco Dev. Corp., 256 AD2d 566 [1998]).

For an owner or general contractor to be liable under Labor Law § 200 and common-law negligence, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. On this issue, the moving defendants have established as a matter of law that they had no actual or constructive knowledge of the defective condition at the work site and exercised no control or supervision over plaintiff's work (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006] Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact that would warrant denial of the motion.

The claim under Labor Law § 240(1) must be dismissed as the work involved did not involve elevation-related risks for which special safety devices were required (see Bonse v Katrine Apt. Assoc., 28 AD3d 990 [2006]; Magnuson v Syosset Community Hosp.,

283 AD2d 404 [2001]; Wendell v Sylvan Lawrence Co., 279 AD2d 383 [2001]; Rossi v Mount Vernon Hosp., 265 AD2d 542 [1999]).

Under Labor Law § 241(6), liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the owner or contractor did not supervise or control the work site (see Gizza v New York City School Constr. Auth., 22 AD3d 800 [2005]). The moving defendants established their prima facie entitlement to summary judgment by establishing that the Industrial Code Sections relied upon by the plaintiff, 12 NYCRR §§ 23-1.27, 23-1.28 and 23-9.9 were inapplicable to the facts of the case. The defendants established that § 23-9.9 applies to power buggies rather than pallet jacks. The defendants further established, prima facie, that neither §§ 23-1.27 nor 23-1.28 were applicable under the facts of the case (see Wegner v State Street Bank & Trust Co., 298 AD2d 211 [2002]).

In opposition, the plaintiff raised an issue of fact as to whether there was a violation of § 23-1.27 that was the proximate cause of the accident (see Perron v Hendrickson/Scalamandre/Posillico (TV), 22 AD3d 731 [2005]; Donohue v CJAM Assoc., 22 AD3d 710 [2005]; Shields v Gen. Elec. Co., 3 AD3d 715 [2004]). Unlike in Wegner v State Street Bank & Trust Co. (298 AD2d 211 [2002]), here, the plaintiff submitted an expert affidavit that raised an issue of fact as to the applicability of § 23-1.27. The plaintiff failed to raise an issue of fact as to the applicability of the other Code sections and claims predicated upon a violation of those sections are dismissed.

Plaintiff cross-moves to amend his bill of particulars by alleging new provisions of the Industrial Code to support his Labor Law § 241(6) claim. While the plaintiff's motion seeks to amend his bill of particulars to add multiple Code provisions, the only provision not alleged in the original bill of particulars is 12 NYCRR § 23-9.8. Leave to serve an amended bill of particulars should be freely granted in the absence of prejudice (Lipari v Babylon Riding Ctr., 18 AD3d 824 [2005]). The identification of this provision does not raise any new factual allegations and does not prejudice the defendants so, if the provision is applicable, the plaintiff would be allowed to amend the bill of particulars (see Latino v Nolan & Taylor-Howe Funeral Home, 300 AD2d 631 [2002]; Noetzell v Park Ave. Hall Hous. Dev. Fund Corp., 271 AD2d 231 [2000]). However, § 23-9.8 is not applicable to the facts of the case, as that section covers fork lifts rather than pallet jacks (see Fitzgerald v New York City School Constr. Auth., 18 AD3d 807 [2005]; Scott v Am. Museum of Natural History, 3 AD3d 441 [2004]). Therefore, the plaintiff's motion to amend his bill of particulars is denied.

Accordingly, the branches of the motion by defendants Rock-Forty-Ninth LLC, MSDW 745, LLC, and Morgan Stanley & Co., Incorporated for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) are granted and those claims are dismissed. The branch of the motion for summary judgment dismissing the Labor Law § 241(6) claim is granted to the extent provided herein and the portions of the Labor Law § 241(6) claim predicated on 12 NYCRR §§ 23-1.28, 23-9.8 and 23-9.9 are dismissed, while the portion of the claim predicated on a violation of 12 NYCRR § 23-1.27 is not dismissed. The cross motion to amend the bill of particulars is denied.

Dated: August 9, 2007

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J.S.C.