

Giagarra v Pav-Lak Contr., Inc.

2007 NY Slip Op 33056(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 0160-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MATTHEW GIANGARRA,

Plaintiff,

- against -

PAV-LAK CONTRACTING, INC. and B & J
WELDING and IRON WORKS,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Action No. 1

Index No. 160/05

Motion Sequence No. 001 & 002

PAV-LAK INDUSTRIES, INC. i/s/a PAV-LAK
CONTRACTING, INC.,

Third Party Plaintiffs,

- against -

B & J WELDING and IRON WORKS,

Third Party Defendants.

MID ISLAND STEEL CORP. f/k/a B & J
WELDING & IRON WORKS,

Second Third Party Plaintiff,

- against -

RANGER STEEL CORP.,

Second Third Party Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u>6</u>

The defendant MID ISLAND STEEL CORP. f/k/a B&J WELDING & IRON WORKS (MID ISLAND) moves this court for an order pursuant to CPLR § 3212 dismissing the complaint.

The defendant PAV-LAK CONTRACTING INC. (PAV-LAK) cross moves pursuant to CPLR § 3212 dismissing the plaintiff's complaint in its entirety; dismissing any and all cross claims; and alternatively, in the event PAV-LAK is found liable for plaintiff's injuries, an order granting PAV-LAK contractual indemnification against the defendant MID ISLAND.

This is an action for personal injury arising out of an accident that allegedly occurred on September 17, 2004 while plaintiff MATTHEW GIANGARRA was working at a construction site at the Commack Middle School in Commack, New York. Plaintiff alleges he sustained injury to his right knee and leg when he tripped over a piece of wood, a two by four, sticking up from a dirt area that he was traversing while performing work at the subject location. At the time of the accident the plaintiff was an employee of Second Third-Party Defendant RANGER STEEL CORP. (RANGER). The plaintiff alleges the defendants were negligent and in violation of Sections 200, 240 and 241 of the Labor Law of the State of New York.

In an affirmation in support of the motion by defendant MID ISLAND, Mark R. Aledort, Esq., avers that defendant PAV-LAK was the general contractor for the work being performed at the building construction at the Commack Middle School at the time of plaintiff's accident. PAV-LAK as a general contractor entered into a subcontract agreement with the defendant MID ISLAND to fabricate and erect the structural steel at

the construction site. The defendant MID ISLAND then entered into a subcontract agreement with RANGER where by RANGER became responsible for all of the erection and installation of the structural steel at the Commack Middle School. Counsel asserts that MID ISLAND did not have any employees at the job site and did not direct or control any of the work performed by RANGER though its employees.

JAY MASSARO, an employee of PAV-LAK was deposed in this action. He testified he was a project superintendent for PAV-LAK at the job site. He stated he walked the site numerous times during the day to make sure everyone was working in a safe manner. He had the authority to stop work if he saw anyone working in an unsafe manner. He would speak to the foreman or workman to correct the unsafe condition. He stated a PAV-LAK employee, Lou Santosus, was on the job site during erection of structural steel to make sure they were working in a safe manner. He did not recall making any complaints to MID ISLAND about work performed in an unsafe manner. He stated a concrete subcontractor, EAST END, was the most likely company to work with two by fours in the ground level of the site. He also testified that each trade was responsible for cleaning up their own debris.

The owner of MID ISLAND Carl Manz testified at his examination before trial that MID ISLAND did not employ any employees that performed steel erection at the Commack Middle School site and the work was subcontracted to RANGER. He visited the work site a total of six times throughout the project.

Albert Ging testified that he was employed by RANGER as a foreman at the construction site. He stated he complained to his supervisor at RANGER and to Jay Massaro of PAV-LOK about the ground conditions and requested the ground be graded at the beginning of the job. He told Jay Massaro that they were going to have to clean up and grade the area before someone gets hurt.

In an affirmation by Guy Calo, Esq. in support of the cross motion by the defendant PAV-LAK, he argues that the Labor Law §. 200 claim must be dismissed

because PAV-LAK did not supervise or control the activity which brought about plaintiff's injury. He states the deposition testimony of the plaintiff and by his supervisor Al Ging clearly establish that Al Ging, employed by RANGER as foreman at the job site, supervised the plaintiff and directed him as to what work was to be performed on a daily basis. He further argues the common-law negligence claim must be dismissed because PAV-LAK did not have actual or constructive notice of the allegedly unsafe condition as the deposition testimony of Al Ging reveals the only complaint made to PAV-LAK about the condition of the job site was for uneven ground and not the existence of a piece of wood sticking out of the ground. He notes that the plaintiff testified that prior to the accident he had never seen the piece of wood. He argues the Labor Law § 240 claim must be dismissed because there is no evidence that the accident was the result of a gravity related hazard and the Labor Law § 240(2) claim must be dismissed because the alleged accident had nothing to do with scaffolding or staging and did not occur more than 20 feet from the ground or floor. He further argues that the Labor Law § 241(6) claim must be dismissed because the Industrial Code sections relied on by plaintiff are not applicable to the facts of this case. The defendant also argues the plaintiff's claims predicated on OSHA violations must be dismissed because the plaintiff was not an employee of PAV-LAK and OSHA regulations do not provide a basis of liability against PAV-LAK.

In the alternative the defendant PAV-LAK argues that paragraph 6A of its contract with B&J WELDING & IRON WORKS (MID ISLAND) expressly provides that the subcontractor shall indemnify PAV-LAK "To the fullest extent permitted by law".

Counsel for the plaintiff asserts the plaintiff testified that prior to the accident he proceeded to the bolt storage locker located on the dirt on the ground level of the first section of the building under construction, in this area columns and beams were up but the concrete floor had not been poured. Plaintiff testified there were mounds of dirt throughout the area that made working the area difficult. Plaintiff was carrying two

buckets containing bolts on a walkway used by workers that accessed the bolt storage bin. He walked up an incline for approximately 10 feet. When he reached the top of the incline his right foot got caught on something causing his right foot to stop and the weight of the buckets pulled him forward causing injury to his knee. When he turned around he saw a two by four sticking out of the ground.

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590).

The motion by the defendant MID ISLAND is granted in its entirety. The record contains no evidence that the defendant had any employees at the work site or directed or controlled the plaintiff in the performance of his work duties.

The motion by the defendant PAV-LAK is granted partially. The claims of the plaintiff pursuant to Labor Law § 240 are dismissed. There is no evidence that the accident was related to a elevation related hazard or scaffolding and is conceded by the plaintiff.

Further, the claims of the plaintiff pursuant to Labor Law § 200 and 240(1) are also dismissed. The record fails to raise a triable issue of fact that the defendant had constructive notice of the presence of the two by four. Although the defendant coordinated the contractors at the work site and had the authority to review safe working conditions at the work site, this conduct does not rise to the level of supervision or control to hold the defendant liable for plaintiff's injuries (*see, Loiacono v Lehrer McGovern*

Boris, Inc. 270 A.D. 2d 464). Both the plaintiff and his foreman at Ranger testified that the plaintiff was supervised by the foreman.

However, as to the claim pursuant to Labor Law § 241 the court finds the plaintiff has raised a triable issue of fact as whether the accident occurred in an open area in violation of 12 NYCRR 23-1.7(E)(2) and whether the accident occurred in a passageway in violation of 12 NYCRR 23-1.7(e)(1).

In addition, that portion of the motion by PAV-LAK for contract indemnification from MID ISLAND is denied (see, *Flores v Brown Constr. Assoc.* 28 Ad3d 711).

So ordered.

Dated: **September 26, 2007**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION NON FINAL DISPOSITION XXX

ENTERED

SEP 28 2007
NASSAU COUNTY
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