So Lit Lam v Bernard Coll.
2007 NY Slip Op 33276(U)
September 28, 2007
Supreme Court, Queens County
Docket Number: 0006110/2004
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

SO LIT LAM, Plaintiff, -against- BARNARD COLLEGE AND SPARKLE MAINTENANCE, Defendants.	Index No. 6110/04 Motion Date July 31, 2007 Motion Cal. No. 27 Motion Seq. No. 3
BARNARD COLLEGE, Third-Party Plaintiff, -against- LARO WINDOW CLEANING, INC., Third-Party Defendant.	
LARO WINDOW CLEANING, INC., Second Third-Party Plaintiff, -against- SPARKLE MAINTENANCE, INC., Second Third-Party Defendant.	

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on August 21, 2003 due to a window washer's brush that fell on him while he was working on the roof of a second story

premises of defendant Barnard College (Barnard) located at 600 West 116th Street, in the County, City and State of New York.

Plaintiff moves for an order restoring this action to the trial calendar and an order pursuant to CPLR 3025 granting plaintiff leave to supplement the complaint to add two additional causes of action against defendant Barnard for violations of Labor Law §§ 241(6) and 202.

Plaintiff asserts this action was marked off the trial calendar on June 13, 2006 because of the third-party actions and outstanding discovery issues raised by the third-parties. Plaintiff should not be faulted because of their late addition as plaintiff did not know about the contractual status of the third-parties. Defendant had various projects being performed on the premises and failed to warn plaintiff of hazards and ensure his safety.

Plaintiff asserts that he testified at his examination before trial that, when he arrived at work, he went outside to work without meeting anyone from the defendant. He looked around and saw no signs of anyone working outside. Plaintiff was not instructed to wear any safety devices. Julio Vazquez, defendant's Executive Director of Management and Planning, testified that defendant had various renovation projects ongoing in August 2003. Defendant's former employee, Jeffrey Mason, was aware of the work being done in the superintendent's apartment in the basement and was the project manager. Defendant's other employee, Daniel Davis, Assistant Director of Management and Planning, had another project going on, cleaning of the windows, at the same time. Plaintiff argues that either Mr. Davis failed to inform Mr. Mason of the other project or Mr. Mason disregarded his notice. There were no signs notifying workers that there was other work going on in the building. A general contractor would not know of any other work being performed in the building unless informed by members of defendant's staff. Plaintiff argues that, despite this, there was no posting that hardhats or any other safety devices were required at the area where plaintiff was working.

Based thereon, plaintiff seeks to add two causes of action under Labor Law § 241(6), in that, defendant as owner of the building owed plaintiff non-delegable duties which were violated when defendant failed to provide mandated

safety devices. Also, under Labor Law § 202, defendant was required to provide protection for the public and other persons. No safety appliance of any kind was furnished. The windows were cleaned from the outside with the knowledge and consent of the owner. No surprise or prejudice has resulted as no new facts are alleged and defendant was in exclusive possession of knowledge of its various projects ongoing at the time of the accident.

Defendant and third-party defendant Laro Window Cleaning Inc. (Laro), oppose the motion in separate papers. Plaintiff objects to the opposition papers being considered as they were not served timely in violation of CPLR § 2214(b) and the stipulation adjourning the motion. Opposition papers were to be served "in hand" on plaintiff's attorney by July 24, 2007 which was also the last date for service pursuant to CPLR § 2214(b). Neither party offers a valid excuse for tardy service. With respect thereto, defendant's counsel affirms that his legal assistant did not mail his opposition until July 25, 2007 due to law office failure. However, she informed him that she had faxed a courtesy copy to plaintiff on July 24, 2007. Plaintiff, therefore, had his opposition in hand on July 24th and no prejudice has accrued. Further, plaintiff's reply was served late as it was not served until the July 31st return date. Third-party defendant Laro's counsel states that his papers were not served until July 25th because his building had been shut down due to a steampipe explosion. He called plaintiff's counsel, left a voice mail with respect thereto but did not receive a call back.

Based upon the information provided by counsel, this court will consider the opposition papers as well as plaintiff's reply.

Defendant asserts that, contrary to plaintiff's position, discovery is not complete as authorizations, photographs and a supplemental bill of particulars have not been provided. Depositions of defendant Sparkle Maintenance (Sparkle) and third-party defendant Laro have not yet been conducted.

Defendant argues that plaintiff's motion for leave to amend the complaint should be denied due to prejudice and significant delay. Plaintiff waited over four years to allege Labor Law violations. Plaintiff and Mr. Mason testified on October 21, 2005 that there was ongoing renovation at the subject premises. Plaintiff is now

seeking to impose vicarious liability on defendant which was not the actively negligent party. Rather, Cesar Curet, of defendant Sparkle, testified that he dropped the window washing wand which caused the accident. This is a new theory of liability as plaintiff had previously only asserted general negligence causes of action. In addition, plaintiff fails to allege specific violations of the Industrial Code. Plaintiff has failed to respond to defendant's request, in its demand for a bill of particulars, as to claims for specific statutes, regulations, rules and ordinances violated and an order directing such discovery. In any event, defendant argues that the window washing had nothing to do with the ongoing renovation. It was routinely performed prior to the start of the school year.

Third-party defendant Laro also asserts that discovery is outstanding from all parties. Second third-party defendant Sparkle requests the same discovery as asked for by Barnard and Laro.

In reply, plaintiff asserts that authorizations were provided to defendant Barnard. Discovery issues between the other parties has nothing to do with plaintiff. Other discovery requested is either moot or doesn't relate to the injuries claimed by plaintiff. Plaintiff only learned that defendant Barnard had ongoing renovation projects including the window washing from Mr. Vasquez's testimony. Plaintiff was involved in a renovation project and was not provided with a safe workplace.

Decision of the Court

That branch of the motion seeking to restore this matter to the trial calendar is denied without prejudice to seeking such relief in the Trial Scheduling Part upon the completion of all discovery. Certain discovery remains outstanding, including but not limited to, the production of color photographs, compliance with discovery demands with respect to the subject accident served by third-parties and depositions thereof.

That branch of the motion seeking leave to assert additional causes of action based upon Labor Law violations is granted as to Labor Law § 202 and § 241(6). As to the Industrial Code provisions alleged in plaintiff's

supplemental bill of particulars, this court finds that the following are inapplicable: 12 NYCRR 23-1.5; 12 NYCRR 21.3(a) and (b); and 23-1.33.

Initially, this court finds that no prejudice has resulted due to the delay in seeking to amend the complaint to add two new causes of action as this matter is not presently on the trial calendar.

As noted by the court in Cun-En-Lin v. Holy Family Monuments, 18 AD3d 800: "Labor Law § 241(6) 'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers' (Comes v. New York State Elec. & Gas Corp., [82 NY2d 876] supra at 878, 609 NYS2d 168, 631 NE2d 110; see Rizzuto v. Wenger Contr. Co., 91 NY2d 343, 348, 670 NYS2d 816, 693 NE2d 1068; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502, 601 NYS2d 49, 618 NE2d 82; Dickson v. Fanits Foods, 235 AD2d 452, 652 NYS2d 1005). To recover on a cause of action alleging a Labor Law § 241(6) violation, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (see Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 503-505, 601 NYS2d 49, 618 NE2d 82)."

12 NYCRR 23-1.5, 12 NYCRR 21.3(a) and (b), and 23-1.33 are general provisions which are insufficiently specific so as to be considered predicates for liability under Labor Law § 241(6). Further, 12 NYCRR 23-1.33 does not apply to any city in the State of New York having a population of one million or more persons pursuant to Labor Law § 241(8). However, 12 NYCRR 23-1.8(c)(1) sets forth a specific safety device which can form a predicate under Labor Law § 241(6).

While it is clear that the plaintiff was not engaged in window washing, Labor Law § 202 specifically provides that an owner shall not permit any "window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work..."

Accordingly, that branch of the motion seeking to restore this matter to the trial calendar is denied without prejudice to seeking such relief in the Trial Scheduling Part upon the completion of all discovery. That branch of the motion seeking leave to assert additional causes of action based upon Labor Law violations is granted as to

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Labor Law § 202 and § 241(6). As to the Industrial Code provisions alleged in plaintiff's supplemental bill of particulars, this court finds that the following are inapplicable: 12 NYCRR 23-1.5; 12 NYCRR 21.3(a) and (b); and 23-1.33.

This matter is set down for a conference with this Court, located at 88-11 Sutphin Boulevard, Jamaica, New York, in Courtroom 501, on November 9, 2007, at 9:30 a.m., so that the parties can resolve outstanding discovery issues.

Dated:September 28,2007

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HON. DAVID ELLIOT