

Frazier v Long Is. Power Auth.

2007 NY Slip Op 33652(U)

November 5, 2007

Supreme Court, Queens County

Docket Number: 0016833/2003

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x	
ERIC FRAZIER,		Index Number <u>16833</u> 2003
Plaintiff,		Motion Date <u>August 8,</u> 2007
-against-		
LONG ISLAND POWER AUTHORITY, et al.,		Motion Cal. Number <u>14</u>
Defendants.		Motion Seq. No. <u>5</u>
	x	
LONG ISLAND POWER AUTHORITY, et al.,		
Third-Party Plaintiffs,		
-against-		
EDWARD COHEN CORP., etc., et al.,		
Third-Party Defendants.		
	x	

The following papers numbered 1 to 35 read on this motion by plaintiff, pursuant to CPLR § 3212, for summary judgment on the issue of liability under Labor Law §§ 200 and 241(6) against defendants Jamaica Bay Peaking Facility, LLC (Jamaica Bay) and Taggart Associates Corp. (Taggart); on the cross motion by Taggart, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and cross complaints; on the cross motion by Island Instrumentation Systems and Controls, Inc. (Island Instrumentation), pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross complaints and dismissing the third-party action; and on the cross motion by defendants Long Island Lighting Company and Jamaica Bay, pursuant to CPLR 3212, for summary judgment for conditional contractual indemnification against Edward Cohen Corp. d/b/a Edemco (Edemco) and Island Instrumentation.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
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Answering Affidavits - Exhibits	20-25
Reply Affidavits	26-35

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

This is an action to recover money damages for personal injuries suffered by the plaintiff at a construction site accident which occurred on April 29, 2003. The construction site was located at Mott Avenue and Bay 25th Street, Far Rockaway, New York a/k/a the Jamaica Bay Peaking Facility. The premises where the accident took place was owned by Jamaica Bay. Jamaica Bay was also acting as the general contractor for the project. Defendant Edemco was hired by Jamaica Bay to do certain general contracting work at the site. Edemco then hired E. Oliveria Construction Co. (E. Oliveria) as a subcontractor, to perform certain trenching work. The plaintiff, a laborer and excavator, was an employee of E. Oliveria. Jamaica Bay also hired Island Instrumentation as a contractor for the plumbing work. Island Instrumentation hired Taggart as a subcontractor for the plumbing work.

The plaintiff testified that he worked at the construction site for approximately 90 days prior to the accident. On the day of the accident, the plaintiff was helping dig a trench so that plumbers could then come in and install piping. The trench was approximately 8 feet to 10 feet deep. The plaintiff was in the process of leveling off the trench. Right before the accident the plaintiff heard a rumbling sound and then was struck by an oxygen tank together with debris that fell into the trench and struck him on the back. Plaintiff testified that he never heard of either Taggart or Island Instrumentation.

The site project manager for Jamaica Bay testified that Jamaica Bay had the authority to stop any work that it deemed was unsafe. The manager further testified that Jamaica Bay did site inspections throughout the course of every day. Jamaica also hired a site safety manager to supervise the project. The site safety manager performed an investigation into the accident. The safety manager concluded that the accident was a result of the failure to properly secure the oxygen tank.

Taggart owned the oxygen tank that allegedly struck the plaintiff. The foreman for Taggart testified that he was

personally present when the oxygen tank that was involved in the accident was tied to a 6-foot fence that was located approximately 5 to 10 feet from the trench the afternoon prior to the accident. After securing the tank, employees from Taggart left the job site. At the time of the accident the next morning, however, the trench was merely a few feet away from where the tank had been secured. The foreman further testified that he did not see any indication that the oxygen tank fell due to the collapsing of the trench. A report prepared by Island Instrumentation concluded that the accident occurred due to the mishandling and inadequate securing of the oxygen tank by Taggart. However, Taggart claims that the accident occurred when an employee of E. Oliveria attempted to move the tank and it fell into the trench.

The plaintiff moves for summary judgment on the issue of liability against the owner and general contractor, Jamaica Bay, under Labor Law §§ 200 and 241(6). The plaintiff has withdrawn his motion for summary judgment against defendant Taggart. In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470; [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]; Duncan v Perry, 307 AD2d 249 [2003]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). The plaintiff has not met his prima facie burden to show that there was negligence on the part of Jamaica Bay to support a finding of liability under Labor Law § 200.

In order for a contractor or an owner to be liable under Labor Law § 241(6), the plaintiff must prove that his injuries were proximately caused by a violation of an Industrial Code

provision that sets forth specific requirements of conduct (see Rivera v Santos, 35 AD3d 700 [2006]; Jicheng Liu v Sanford Tower Condominium, 35 AD3d 378 [2006]; Portillo v Roby Anne Dev., LLC, 32 AD3d 421 [2006]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v Ludovico, 246 AD2d 642 [1998]; Vernieri v Empire Realty Co., supra).

The plaintiff argues that Jamaica Bay violated 12 NYCRR §§ 23-1.5, 23-2.1 and 23-4.2(f) and (g). 12 NYCRR § 23-1.5 is a general provision and does not provide a basis for Labor Law § 241(6) liability (Maday v Gabe's Contr., LLC, 20 AD3d 513 [2005]; Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]). The other provisions are specific enough to support a claim under Labor Law § 241(6). Issues of fact, however, exist as to whether there was a violation of these provisions that was the proximate cause of the accident. Therefore, summary judgment is not warranted. Inasmuch as issues of fact exist concerning how the accident occurred, summary disposition is not appropriate.

The defendant Taggart cross-moves for summary judgment dismissing the complaint and all cross complaints. The causes of action under Labor Law §§ 200 and 241(6) must be dismissed. Taggart was a subcontractor at the construction site. Since it was neither the general contractor nor the owner of the premises it cannot be found liable under Labor Law §§ 200 and 241(6) (see Kelarakos v Massapequa Water Dist., 38 AD3d 717 [2007]; Bopp v A.M. Rizzo Elec. Contrs., 19 AD3d 348 [2005]; Zervos v City of New York, 8 AD3d 477 [2004]). Conversely, issues of fact exist that warrant denial of the branch of its motion to dismiss the common-law negligence cause of action. While Taggart argues that it did not use the oxygen tank after it was secured to the fence and prior to the time of the accident, it is not clear from the evidence whether the tank was properly secured in an adequate location. Therefore, issues of fact exist, including as to whether the actions of Taggart employees caused or contributed to the accident which injured the plaintiff, which preclude dismissal of the negligence claim (see Kelarakos, 38 AD3d at 719).

Island Instrumentation cross-moves for summary judgment dismissing the complaint, all cross claims and the third-party complaint. The complaint against Island Instrumentation must be dismissed. Island Instrumentation was not the owner or general contractor and did not have the authority to control the work that plaintiff was performing and thus the causes of action under Labor Law §§ 200 and 241(6) should be dismissed (see Kelarakos, 38 AD3d at 718; Bopp, 19 AD3d at 350-51). Furthermore, Island Instrumentation did not create the condition that caused the

accident and thus cannot be found liable for common-law negligence (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]). The cross claims for common-law indemnification must also be dismissed as there is no evidence that there was negligence on the part of Island Instrumentation. On the other hand, summary judgment is not warranted to dismiss the third-party claim by defendant Jamaica Bay for contractual indemnification. Island Instrumentation agreed to indemnify Jamaica Bay under the contract between Jamaica Bay and Island Instrumentation in the event of its own negligence or the negligence of its subcontractors. As there are issues of fact as to the negligence of Island Instrumentation's subcontractor Taggart, summary judgment is not warranted.

Finally, since there is an issue of fact as to what caused the accident, the cross motion by Jamaica Bay and Long Island Lighting Company must be denied. The contracts between Jamaica Bay and both Edemco and Island Instrumentation require the indemnification of Jamaica Bay if either Edemco or Island Instrumentation or their subcontractors were negligent. As there are issues of fact concerning who was negligent the cross motion must be denied.

Accordingly, the motion by plaintiff for summary judgment on the issue of liability under Labor Law §§ 200 and 241(6) against Taggart and Jamaica Bay is denied. The branches of the cross motion by the defendant Taggart for summary judgment dismissing the causes of action under Labor Law §§ 200 and 241(6) are granted and those claims are dismissed. The branch of the cross motion by the defendant Taggart for summary judgment dismissing the cause of action for common-law negligence is denied. The branches of the cross motion by defendant Island Instrumentation to dismiss the complaint and all cross claims and third-party claims is granted except that branch of the motion for summary judgment to dismiss the third-party cause of action for contractual indemnification is denied. The cross motion by defendants Jamaica Bay and Long Island Lighting Company for summary judgment on their claims of contractual indemnification against defendants Island Instrumentation and Edemco are denied.

Dated: November 5, 2007

J.S.C.