

Todd v Darr Constr. Equip. Corp.

2007 NY Slip Op 33718(U)

November 15, 2007

Supreme Court, Suffolk County

Docket Number: 0019997/2003

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-24-07
CAL. DATE 7-11-07
Mot. Seq. # 002 - MotD

-----X
KENNETH H. TODD, :
Plaintiff, :
- against - :
DARR CONSTRUCTION EQUIPMENT CORP. :
MELITO CONSTRUCTION CORP., STOP & :
SHOP #546 and the STOP & SHOP :
SUPERMARKET COMPANY, :
Defendants. :
-----X

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motions and supporting papers ; Answering Affidavits and supporting papers 16- 19; Replying Affidavits and supporting papers 20 - 21; Other ; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint is granted as to the plaintiff's Labor Law § 200 and common-law negligence causes of action and is otherwise denied.

The plaintiff commenced this action to recover damages, pursuant to Labor Law §§ 200 and 241 (6), and common-law negligence, for injuries he sustained in an accident at a construction site. The defendant, Melito Construction Corp. (hereafter Melito), was the construction manager for the construction of a store for the Stop & Shop defendants (hereinafter Stop & Shop).

The plaintiff, a union laborer and a member of the Road and Heavy Construction Local 1298, was employed by Darr Construction Equipment Corp. (hereinafter Darr),¹ the excavation subcontractor. The plaintiff testified at his deposition that his foreman, Roger, (no

¹ It appears that the action has been discontinued as against Darr by stipulation of the parties dated March 21, 2005. Although the parties have omitted Darr from the caption, the Court's computer records do not reflect that the stipulation has been filed with the County Clerk or that a motion has been made to amend the caption.

last name) was the only person who directed or controlled his work. Initially, on the day of his accident, he was cutting plastic pipes for connection to a storm drain. To cut the pipes he used an all-purpose saw, called a "demo." The demo saw was gas powered, weighed over ten pounds, and required two hands to operate. Although this specific saw did have a safety guard, the plaintiff testified that his foreman directed that he use it with the guard pulled back, so that the blade was fully visible. The plaintiff stated that he told his supervisor that he wanted to replace the guard in its full position but was directed to leave it as it was, and to make the cuts in an upward motion. The plaintiff cut about twelve plastic pipes and some concrete fittings, all without incident. His supervisor then directed that he cut a steel pipe. It was an old gas main which was still partially buried, with one end suspended one to two feet off the ground. The plaintiff testified that he had to change the blade to cut the steel, that he again told his supervisor that he wanted to fully set the safety guard, and that he was told to leave it as it was. The steel pipe was twelve or sixteen inches in diameter. After he cut about one-quarter of the pipe, the plaintiff felt the saw bind up and he then moved to the other side of the pipe. As he was cutting from the bottom up, and shortly after he began cutting on the new side, the saw bounced out and hit his face and neck, inflicting the injuries complained of herein.

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 (see, *Russin v Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 128 [1987]) who exercised control or supervision over the work and either created a 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]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner and general contractor exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). The defendants established their entitlement to summary judgment as to these claims and the plaintiff did not rebut the defendants' showing with credible evidence to the contrary. The plaintiff's argument that summary judgment is premature because he has not had the opportunity to depose a representative from Stop & Shop is unpersuasive. The plaintiff has failed to show that facts essential to his opposition may exist upon further discovery (*Auerbach v Bennett*, 47 NY2d 619, 419 NYS2d 920 [1979]). Moreover, summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*Ruttura & Sons Constr. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [1999]). Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to the defendants.

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 New York State

Department of Labor. The duty to comply with the Commissioner's regulations imposed by § 241 (6) is nondelegable (see, **Ross v Curtis-Palmer Hydro-Elec. 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 the defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (see, **Ross v Curtis-Palmer Hydro-Elec. Co.**, *supra*; **Rizzuto v L.A. Wenger Contr. Co.**, 91 NY2d 343, 670 NYS2d 816 [1998]).

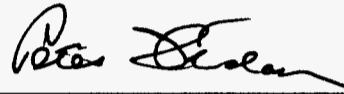
The plaintiff's bill of particulars states that the defendants violated the sections of the Industrial Code found at 12 NYCRR §§ 23-1.5 (a), (b), (c) (1) and (3), and 23-1.9 (b). The defendants established that these sections are either too general or are inapplicable to the plaintiff's accident, and the plaintiff did not oppose dismissal of these sections. Although not in the plaintiff's original bill of particulars, his opposition is confined to the defendants' alleged violation of the Industrial Code at 12 NYCRR § 23-1.12, entitled "Guarding of power-driven machinery," subsections (a), (b) and (c). While subsection (a) is too general and subsection (b) is inapplicable, subsection (c), entitled "Power-driven saws" is at least arguably applicable (**Dowd v City of New York**, 40 AD3d 908, 911, 837 NYS2d 668 [2007]; **Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.**, 271 AD2d 231, 232-233, 705 NYS2d 577 [2000]). It provides, at (1), that "[e]very portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut." Subsection (2) is directed to other than portable saws and is, therefore, inapplicable to these facts.

The defendants' reply to the plaintiff's Industrial Code 23-1.12 (c) (1) claim relies upon the deposition transcript of Edward Bradley, also an employee of Darr, wherein he contradicts the plaintiff's version of the accident by testifying that the demo saw was covered with a fixed safety guard and that it was impossible to set the guard so that it was not completely covering the blade. Such contradiction raises questions of fact as to how the accident happened, and it is not the Court's function to resolve issues of credibility on motions for summary judgment (**Ferrante v American Lung Assn.**, 90 NY2d 623, 631, 665 NYS2d 25 [1997]). The reply also relies upon the deposition transcript of Cliff O'Reilly, an employee of Melito, wherein he states that the plaintiff told him he was hit in the face with the guard, not the blade. Such hearsay evidence is also insufficient to establish the defendants' entitlement to judgment as a matter of law. The Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence and thereby reserve for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (see, **Rizzuto v L. A. Wenger Contr. Co.**, *supra*; **Herman v St. John's Episcopal Hosp.**, 242 AD2d 316, 678 NYS2d 635 [1997]). Accordingly, summary judgment dismissing the plaintiff's Labor

Law § 241(6) claim, based upon the alleged violation of 12 NYCRR § 23-1.12 (c) (1) is denied.

Lastly, the Court notes that the plaintiff did not seek leave to serve the supplemental bill of particulars adding this claim. 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]), the Court, *sua sponte*, grants leave (*Dowd v City of New York*, 40 AD3d 908, 911, 837 NYS2d 668 [2007]; *Latino v Nolan & Taylor-Howe Funeral Home*, 300 AD2d 631, 754 NYS2d 289 [2002]). The plaintiff's supplemental bill of particulars will be deemed served as of the date of service upon counsel of a copy of the instant order with notice of entry.

Dated: NOV 15 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION