

Del Genio v Port N. Constr. LLC

2007 NY Slip Op 34076(U)

December 12, 2007

Supreme Court, Nassau County

Docket Number: 0585-05/

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

ROCCO DEL GENIO,

Plaintiff,

- against -

PORT NORTH CONSTRUCTION LLC,

Defendant.

TRIAL/IAS PART 22
NASSAU COUNTY

INDEX NO. 10585/05

MOTION SUBMISSION
DATE: 11/7/07

MOTION SEQUENCE
NO. 005

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>

The defendant moves for an order pursuant to CPLR §3212 granting the defendant summary judgment dismissing plaintiff's complaint against the defendant. The plaintiff submits opposition. The defendant submits a reply affirmation.

Plaintiff initiated this action as a result of sustaining personal injuries when he was struck by the bucket of an excavator on September 24, 2004 while he was performing work at a construction site commonly known as the "Mill Pond Acres" job site in Port Washington, New York. The plaintiff was employed by non-party, J.D. Posillico, and was a member of a four-man crew at the job site. The defendant was the general contractor for the job site.

The Labor Law §240(1) Claim

Section 240(1) of the Labor Law imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards. (*Striegel v. Hillcrest Heights Development Corporation*, 100 NY2d 974). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1)." (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259.) Rather, liability is contingent upon the existence of a hazard contemplated in §240(1). (*Id.*) Labor Law §240(1) was enacted "in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites. (*Misseritts v. Mark IV Construction Co., Inc.*, 86 NY2d 487).

The plaintiff, in opposition to the defendant's motion, does not dispute that plaintiff was standing on the ground when he was hit by the bucket of an excavator and pushed to the ground and fell to ground level. Therefore, the incident at bar does not involve an elevation-related special hazzard.

In light of the foregoing, plaintiff's Labor Law §240(1) claim is dismissed.

The Labor Law §241(6) Claim

Labor Law §241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494). As the duty to comply with regulations is nondelegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the worksite in order to establish a Labor Law §241(6) claim. (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494).

In order to impose liability under this section, the plaintiff must demonstrate that there existed a violation of a specific regulatory provision of the Industrial Code which resulted in injury to the plaintiff. If there was a breach of such a regulation, the general contractor and owner are vicariously liable for the resulting injury without regard to their fault. (*Armer v. General Elec. Co.*, 241 AD2d 581; *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343). However, a regulation which merely sets forth general safety standards, and thus is merely a reiteration of the common law, does not give rise to a nondelegable duty under this section. (*Abreu v. Manhattan Plaza Assocs.*, 214 AD2d 526).

It is well settled that a plaintiff proceeding under Labor Law §241(6) must prove that there was a causative violation of a "concrete" provision of the Industrial Code. (*Ross v. Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494).

Plaintiff initially cited several Industrial Code regulations in his Verified Bill of Particulars and Supplemental Bill of Particulars. However, plaintiff's opposition to the motion addresses only one regulation, *to wit*, 12 NYCRR §23-9.5(c), which provides as follows:

(c) Operation. Excavating machine shall be operated only by designated persons. No person except the operating crew shall be permitted on an excavating machine while it is in motion or operation. **No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation.** When an excavating machine is not in use, the blade or dipper bucket shall rest on the ground or grade. The operator of an excavating machine shall not leave the controls of such machine at any time when the master clutch is engaged and the engine is operating. Oiling and greasing shall be performed only while an excavating machine is at rest and the master clutch disengaged. The boom or the bucket, dipper or clamshell of a power shovel shall not pass over the seat or cab of a truck or other vehicle while any person is in such seat or cab." (Emphasis added).

While Industrial Code regulation 12 NYCRR §23-9.5(c) is “specific”, upon the record herein, the plaintiff has not set forth any evidence to demonstrate that the regulation applies *sub judice*. The regulation states that the “excavating machine shall be operated only by designated persons,” (emphasis added). A “designated person” under Industrial Code §23-1.4(b)(7) is a person selected and directed by an employer to perform a specific task or duty. Here, it is undisputed that the operator of the excavation machine at the time of the incident was a union employee directed by a supervisor to perform the task of operating the excavator. Plaintiff does not set forth that the operator left the controls, that someone else was on the excavating machine who was not designated to operate the machine, or that oiling or greasing was going on at the time of the incident. Rather, plaintiff sets forth that the person designated to operate the machine was not experienced, was unskilled and therefore not qualified. However whether the operator may or may have not been a “qualified” operator, the operator was a “designated” operator. Plaintiff’s contention that the operator was not “qualified” does not dictate that the operator was not “designated”.

In light of the foregoing, as 12 NYCRR §23-9.5(c) is not applicable to the matter at bar, and therefore, plaintiff’s Labor Law §241(6) claim is dismissed.

The Labor Law §200 Claim and the Common-Law Negligence Claim

Labor Law §200 is a codification of the common law duty of an owner or employer to provide employees with a safe place to work. (*Jock v. Fien*, 80 NY2d 965). Liability under Labor Law §200 cannot be imposed unless plaintiff establishes that the owner or general contractor supervised or controlled the work performed, or had actual or constructive notice of the unsafe condition which precipitated plaintiff’s injury. (*Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876; *Murray v. South End Improvement Corp.*, 263 AD2d 577; and *Butigian v. Port Authority of New York and New Jersey*, 266 AD2d 133).

Here, the defendant has made a *prima facie* showing of entitlement to summary judgment dismissing the plaintiff’s cause of action under Labor Law §200 and common law negligence by demonstrating that the defendant did not exercise supervisory control over the injured plaintiff’s work and that the defendant did not have actual or constructive knowledge of the allegedly dangerous condition. (*DeBlase v. Herbert Construction Co., Inc.*, 5 AD3d 624; *Paladino v. Society of New York Hospital*, 307 AD2d 343).

The plaintiff, in opposition to the motion, submits the affidavits of three non-party witnesses, Mike Teigue, Pino Del Genio, and Lorenzo Diglio. Mr. Teigue avers that he was operating the excavator on the morning of the incident when he was reassigned to run a smaller excavator. Mr. Teigue avers that the defendant’s superintendent “Rick” was the onsite “Boss”. Mr. Teigue contends that the new operator assigned to run the excavator was not familiar with the machine and apparently told Mr. Teigue that he did not have a “key”. Mr. Teigue provides that the operator’s failure to have a “key” indicates that the new operator was inexperienced and unfamiliar with the basic fundamentals required to operate the excavator. Mr. Teigue was reluctant to turn over the excavator to the new operator and apparently conveyed his uneasiness to “Rick”, the defendant’s supervisor. Mr. Teigue stated that he had to make sure this new operator was not incompetent. Mr. Teigue provides that the new operator was nervous and did not run the machine well. Therefore, “Rick” and/or the defendant’s supervisor reassigned this new operator to a less difficult task. However, the new operator was later reassigned to the apparently more difficult task of pulling “well-points”, the task performed by the plaintiff at the time that the plaintiff was injured.

Pino Del Genio, the plaintiff's son, avers that he was working at the site at the time of the incident. Pino Del Genio was initially assigned to the pay loader, and was later instructed by his supervisor, Joe Suplay, to work with a four-man crew which included the plaintiff. Pino Del Genio provides that Mike Teigue was reassigned to another machine and a new operator arrived. Mr. Teigue had to show the new operator how to work the controls and operate the boom swing arm with the bucket attached. As per Pino Del Genio, the crew was "making noise" about the new operator's lack of experience in the vicinity where Rick was working. Pino Del Genio avers that the crew did not want to work with the new operator and made specific complaints to "Rick". Pino Del Genio states that he and the crew observed that the new operator "did not have good control of the arm" prior to the incident.

Lorenzo Diglio avers that on the day of the incident, after lunch break, he rejoined the crew and at this time, he met the new operator for the first time. Mr. Diglio states that he saw the operator move the bucket and swing it into plaintiff, pushing plaintiff against the dirt.

Plaintiff's counsel, in opposition to the motion, provides that plaintiff had requested the defendant to identify the new operator by way of Preliminary Conference Order dated June 8, 2006, followed up with a motion, and then a so-ordered stipulation dated July 20, 2007, requiring a non-party to produce the name and address of the machine operator. The defendant moved for summary judgment herein on August 1, 2007, and provided plaintiff with the name and address of the new operator of the machine on September 19, 2007.

The defendant provides that the so-ordered stipulation provided that non-party J.D. Posillico, would provide plaintiff with the name and address of the operator of the excavator at the time of the incident, as the defendant did not know who J.D. Posillico used as the operator. The defendant states that upon notification by the plaintiff that this information was outstanding, defendant promptly supplied the information, *to wit*, on September 17, 2007.

The defendant submits that the affidavits supplied by the plaintiff contradict plaintiff's deposition testimony and should therefore be rejected as the affidavits try to raise feigned issues of fact. Plaintiff testified at his deposition that he did not see anything wrong with the way that the excavator was being operated prior to the incident, that he was working near the bucket, and that he was giving hand signals to the operator.

This Court finds that the submitted affidavits do not contradict plaintiff's testimony. The affidavits merely provide that certain non-parties apparently complained to the defendant about the new operator's inexperience, and that they demonstrated concern that the new operator was not qualified to operate the excavator for the particular task. It is possible that the plaintiff himself was not aware of the new operator's purported inability to operate the excavator, while other workers, including the defendant, were made aware of the operator's purported inability to properly operate the excavator.

In any event, the role of this Court is to determine if *bona fide* issues of fact exist, and not resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). Issue finding rather than issue determination is the key. (*Salino v. IPF Trucking, Inc.*, 203 AD2d 352). The evidence will be construed in a light most favorable to the one moved against. (*Weiss v. Garfield*, 21 AD2d 156). Any inconsistencies between the deposition of the plaintiff and

the affidavits submitted herein present credibility issues for trial. (*Schoen v. Rochester Gas & Elec.*, 242 AD2d 928; *Mickelson v. Babcock*, 190 AD2d 1037). This Court will not strain to find feigned issues of fact in the affidavits supplied by the plaintiff whereby the affidavits do not contradict plaintiff's testimony.

In light of the foregoing, the defendant's motion to dismiss the plaintiff's Labor Law §200 claim and the common-law negligence claim is denied.

Conclusion

The defendant's motion for summary judgment dismissing the plaintiff's complaint is decided as follows:

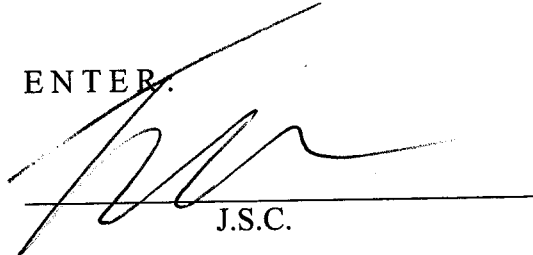
It is hereby,

ORDERED that the plaintiff's Labor Law §240(1) claim is dismissed, and it is further hereby,

ORDERED that the plaintiff's Labor Law §241(6) claim is dismissed, and it is further,

ORDERED that the plaintiff's Labor Law §200 claim and common-law negligence claim are not dismissed.

ENTER.



J.S.C.

Dated: December 12, 2007

cc: Weitz, Kleinick & Weitz, LLP
The Law Office of John P. Humphreys

ENTERED

DEC 14 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**