

Cohen v Memorial Sloan-Kettering Cancer Center

2007 NY Slip Op 34351(U)

January 3, 2007

Supreme Court, New York County

Docket Number: 0110800/2005

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 15

WALTER B. TOLUB

Index Number : 110800/2005

COHEN, EDWARD

vs

MEMORIAL SLOAN-KETTERING

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10.29.06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/07

WALTER B. TOLUB c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
EDWARD COHEN and CHRISTINE COHEN,

Plaintiffs,

Index No. 110800/05
Mtn Seq. 001

-against-

MEMORIAL SLOAN-KETTERING CANCER CENTER
and HRH CONSTRUCTION, LLC

Defendants.
-----x

WALTER B. TOLUB, J.:

By this motion, defendants Memorial Sloan-Kettering Cancer Center ("MSKCC") and HRH Construction, LLC ("HRH") move for summary judgment and dismissal of plaintiff's complaint in its entirety. Plaintiffs cross move for summary judgment on their claims of liability pursuant to Labor Law §240(1).

This action arises out of an injury sustained by plaintiff Edward Cohen on May 15, 2003. Mr. Cohen was an employee of nonparty Hugh O'Kane Electric ("O'Kane"). O'Kane was hired to do electrical work for construction on premises located at 1275 York Avenue in Manhattan ("the construction site"). Defendant MSKCC is the owner of the premises. Defendant HRH is the general contractor for the construction site.

Mr. Cohen claims that his injuries were sustained when he fell from a ladder during the course of installing Kindorf pipe racks into the ceiling. Mr. Cohen specifically claims that he fell when he attempted to climb off the ladder and could not

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clear the first step, which was blocked by a metal rod protruding from the unfinished wall (Notice of Summary Judgment Motion, Exhibit E Tr. p. 60-75; Affidavit in Support of Cross Motion). Two reports were filed with respect to Mr. Cohen's injury. The accident report filed by Mr. Cohen states that the injury occurred "getting off ladder heel caught rod and jammed foot on ladder twisting knee" (Notice of Motion Exhibit, G). The incident report makes a similar statement (Notice of Motion, Exhibit H).

In August, 2005, plaintiffs commenced the instant action. Comprised of two causes of action, plaintiffs' first cause of action alleges violations of Labor Law §§ 200, 240(1), and 241(6), common law negligence, violations of Industrial Code provisions §§ 23-1.7, 23-1.7(e)(2), 23-1.30, and 23-2.4, and unidentified OSHA regulations. The second cause of action asserts a claim for loss of consortium.

Discussion

As we have often noted, the role of this court on a motion for summary judgment is limited to finding issues, and not resolving them (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]). See also, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2005] §37:91-92). Success turns upon whether the proponent of the motion has made a "prima facie showing of entitlement to

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judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotations omitted]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340 [1st Dept 2003]). However, "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (Banco Popular North America v Victory Taxi Management, Inc., 1 NY3d 381, 383 [2004]). If there appear to be any questions of fact present, summary judgment will not be granted.

As a preliminary matter, the court notes that plaintiff has withdrawn its cause of action asserting violations under Labor Law § 200. Since this provision of the Labor Law is a codification of common law negligence, the claims arising out of common law negligence are also deemed withdrawn and will not be addressed by this court.

Labor Law 241(6)

In order to sustain a cause of action under Labor Law § 241(6), "plaintiff must demonstrate that his injuries were

proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident"

(Rivera v. Santos, ___ NYS2d ___, 2006 WL 3733844 [2nd Dept. 2006]). See also, Ares v. State, 80 N.Y.2d 959 [1992]; Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 [1993]).

Although plaintiffs in the instant case have asserted multiple violations in their complaint, plaintiffs' vague allegations of OSHA violations are insufficient to sustain the cause of action. Moreover, even plaintiffs concede that Industrial Code §§ 23-1.7(e)(2), 23-1.30, and 23-2.4 are inapplicable to the instant set of facts.

Plaintiffs nonetheless argue that defendants somehow violated Industrial Code § 23-1.7(e)(1), asserting that the ladder used by Mr. Cohen somehow constitutes a passageway.¹ This court disagrees. The papers presented and the case law cited by plaintiffs simply do not support the contention that Industrial Code § 23-1.7(e)(1) is applicable to these facts and circumstances. As such, the portion of defendants' motion for summary judgment seeking dismissal of plaintiffs' Labor Law

¹ 12 NYCRR 23-1.7(e)(1) reads as follows:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

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§241(6) claims is granted.

Labor Law 240(1)

With respect to plaintiffs' Labor Law 240(1) claim, both defendants' motion and plaintiffs' cross motions for summary judgment are denied. Review of the papers presented reveal that both sides have raised questions of fact which this court believes are best resolved by trial. The balance of defendants' motion seeking summary judgment on plaintiffs' second cause of action is therefore, at this juncture, denied.

Accordingly, it is

ORDERED that the portion of defendants' motion seeking summary judgment on the portion of plaintiffs' first cause of action which allege violations of Labor Law § 200 and common law negligence is denied as moot, as both claims have been withdrawn by plaintiffs; and it is further

ORDERED that the portion of defendants' motion seeking summary judgment on the portion of plaintiffs' first cause of action alleging violations of Labor Law §241(6) is granted, and the portion of plaintiffs' complaint containing said allegations of violation under this statute are dismissed; and it is further

ORDERED that the balance of defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is further

[*7]
ORDERED that the Clerk of Court enter judgment in favor of the respective parties in accordance with this decision.

Counsel for the parties are directed to appear for the Mediation date scheduled for this matter on January 24, 2007.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/3/07



HON. WALTER B. TOLUB, J.S.C.

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