Melendez v Plato Gen. Contr.
2007 NY Slip Op 34525(U)
July 12, 2007
Supreme Court, Queens County
Docket Number: 1810 1999
Judge: Roger N. Rosengarten
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROGER N. ROSENGARTEN IA PART 23
Justice

DANIEL MELENDEZ, et al. x

- against -

PLATO GENERAL CONTRACTOR, et al.
x

Index Number 1810 1999

Motion Date April 18, 2007

Motion Cal. Numbers 21 & 22

Motion Seq. Nos. 7 & 9

The following papers numbered 1 to 26 read on this motion by defendant Plato General Contractor for an order granting summary judgment dismissing the complaint and all cross claims. Defendant Hugh Maher General Contractors separately moves for an order granting summary judgment dismissing the complaint and all cross claims.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits(A-V)	1-4
Opposing Affirmation-Exhibit (A)	5-7
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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are determined as follows:

This action arises out of renovation work performed on the campus of the United States Military Academy at West Point. Defendant Plato General Contractors (Plato) was the general contractor and Innovative Electrical Solutions Corporation (Innovative), was a subcontractor hired to re-wire housing on the campus. Defendant Hugh Maher General Contractors (Maher) was a subcontractor hired to remove and replace sidewalks and driveways.

Plaintiff Daniel Melendez, a junior mechanic, employed by Innovative alleges that he sustained personal injuries on November 9, 1998, at 9:30 A.M., when after he removed a chopping hammer from a van parked on a newly installed driveway, his foot slipped off the edge of the driveway onto the soil, and sunk four or five inches, causing him to twist his ankle and fall to the ground. Plaintiff sustained injuries to his ankle and back. Mr. Melendez testified that he was employed by Innovative for six days prior to the accident. He stated that the van was parked on a "brand new" driveway, as close as possible to the house, and that he had already carried some items from the van into the house. He stated that the driveway appeared to be stable, and that there was nothing obviously wrong with it. He described the spot where his foot sank as a triangular shaped depression, that "[i]t was a crevice there that wasn't patted down the way it is supposed to be and they just left it with loose dirt on top." He further stated that this area was supposed to be part of the front lawn and although it looked to be stable, it wasn't. Mr. Melendez stated that on the day of the accident he saw workers from another company working on a sidewalk of another house in the area, but did not seek anyone working on the subject driveway.

Hugh Maher the president of Maher testified that his company had entered into a contract with Plato to remove and replace the concrete driveways and sidewalks. All of the old driveways were completely removed before the new concrete driveways were poured. Mr. Maher stated that he acted as the foreman, supervised the work performed by his employees, men and operated the equipment utilized to break up the existing concrete driveways. Maher provided all of the equipment and tools needed to perform this work. He stated that he and his employees worked on one driveway at a time, before beginning work on the next driveway. Mr. Maher stated that prior to pouring the concrete, wooden forms were placed alongside the length of the driveway; that the driveways were approximately twenty feet wide and forty feet long, with grass on each side; that after the concrete was poured it would take one or two days to cure; that once it cured the wooden forms would be removed and the soil alongside the driveway was compacted and that top soil would then be placed on top of the compacted soil in the two feet by four inch ditch created by the forms; that the top soil was then seeded and covered with straw to increase the growth rate. Mr. Maher stated that his workers were trained to make sure that the top soil abutted the edge of the new driveway and was placed at the same height as the newly poured driveway. He stated that during the process of removing and replacing the driveways, caution tape was placed on three foot stakes along the length of the driveway, and that tape was also placed at the foot of the drive so the vehicles could not enter. These stakes would remain in place until the soil and seed were laid down. Mr. Maher stated that in addition to the caution tape, four signs

were placed along the driveway. The caution tape and signs were removed after the concrete was poured and the forms were removed. Mr. Maher stated that he inspected each driveway to see that it was formed and poured properly, and that the placement of top soil, seed and straw on the areas abutting the driveway was proper before he moved onto the next driveway. He stated that if something was deficient he would instruct his employees to correct it. Mr. Maher stated that Plato neither supervised nor provided any instructions regarding the work he and his employees performed. Once the work was completed an employee of Plato identified as "Dean" inspected the work and sent payments to Maher. Mr. Maher stated that the Army Corps of Engineers had an inspector present on a daily basis who inspected the work to see that it was done properly and this person would inform Maher of any existing safety issues.

Constantine Pardalis, Plato's Project Manager, testified that Plato was the general contractor for the revitalization of fourteen family housing units, known as the Lee Houses, at West Point. Plato had separate subcontracts with Maher and Innovative. Mr. Pardalis testified that he was not on the job site on the day of the accident, and that prior to accident he never observed a ditch or hole next to any of the driveways, including the subject driveway. He stated that he observed the subject driveway after the accident and did not recall seeing anything unusual. He also stated that although Plato had a safety officer present at the job site, each of the subcontractors were responsible for the safety of their own workers, the Army Corps of Engineers were responsible for safety on the base, and OSHA also had a representative on site.

Plaintiffs Daniel Melendez and Michelle Melendez in their complaint allege causes of action against the defendants for common law negligence, violations of sections 200, 240(1) and 241(6) of the Labor Law, violations of sections 23-1.5, 23-1.7(d), 23-1.7(e)(2), 23-1.7(f) and 23-2.1(b) of the Industrial Code, and a derivative cause of action. The defendants have served their answers, and have interposed affirmative defenses and cross claims. Since the last note of issue filed in this action was vacated by this court in an order dated May 10, 2007, the within motions for summary judgment are timely.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

Defendants Plato and Maher's request to dismiss the Labor Law § 240(1) claim:

Those branches of Plato and Maher's motions which seek to dismiss the cause of action for a violation of Labor Law § 240(1) are granted, as the evidence establishes that the plaintiff's injury did not result from an elevation-related risk (see Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267-268 [2001]; Zezula v City of New York, 19 AD3d 409 [2005]; Bomova v KMK Realty Corp., 255 AD2d 351 [1998]; White v Dorose Holding, 216 AD2d 290 [1995], appeal denied 87 NY2d 806 [1996]; Schreiner v Cremosa Cheese Corp., 202 AD2d 657 [1994]). Plaintiffs do not oppose these branches of defendants' motions.

Defendant Plato's request to dismiss the Labor Law § 200 and common law negligence claim:

There is no evidence that Plato directed or controlled the manner in which Mr. Melendez performed his work, had actual or constructive notice of the allegedly dangerous condition, or committed any affirmative act of negligence (see Hernandez v Yonkers Contr. Co., 306 AD2d 379, 380 [2003]; Domenech v Associated Engrs., 257 AD2d 403 [1999]). The fact that Plato inspected the Maher's completed work is insufficient to establish that it had knowledge that the soil beneath the layer of top soil was not properly compacted, as alleged by the plaintiff. Plato thus has established its entitlement to the dismissal of the causes of action for a violation of Labor Law § 200 and for common law negligence. In opposition, plaintiff has failed to submit sufficient evidence in admissible form to raise a triable issue of fact as to these claims against Plato (see Zuckerman v City of New York, 49 NY2d 557, 563 [1980]; Harvey v Sear-Brown Group, 262 AD2d 1006 [1999]; Giordano v Seeyle, Stevenson & Knight, 216 AD2d 439, 440 [1995]; Prado v Bowne & Sons, 207 AD2d 875 [1994]). Therefore, that branch of defendant Plato's motion which seeks to dismiss plaintiff's causes of action for negligence and a violation of Labor Law § 200, is granted.

Defendant Plato's request to dismiss the Labor Law § 241 and Industrial Code claims:

In order for a contractor or an agent of the owner to be liable under Labor Law § 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command (see Rizzuto v Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Vernieri v Empire Realty Co., 219 AD2d 593 [1995]). 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).

Plaintiffs allege violations of 12 NYCRR §§ 23-1.5, 23-2.1(b), 23-1.7(e)(1), 23-1.7(e)(2), 23-1.7(d) and 23-1.7(f) as predicates for the Labor Law § 241(6) cause of action, and as a separate cause of action. However, the facts do not support the reliance on these code provisions. 12 NYCRR § 23-1.5 does not provide a basis for liability under Labor Law § 241(6), as it merely sets forth a general safety standard (Cun-nen Lin v Holy Family Monuments, 18 AD3d 800 [2005]).

12 NYCRR § 23-2.1(b) pertains to the disposal of debris, and does not provide a basis for liability under Labor Law § 241(6) as it is lacking in specificity (Fowler v CCS Queens Corp., 279 AD2d 505 [2001]). Furthermore, there is no evidence that debris in any form contributed to or caused the accident. The soil next to the driveway was part of the lawn and not construction debris.

12 NYCRR § 23-1.7(e)(2) addresses general hazards in "working areas," and provides, in pertinent part, that "the parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulation of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." Here, to the extent that the driveway may be considered a "working area," there is no evidence there of any dirt or debris on the driveway, which caused the plaintiff's accident. The lawn adjacent to the edge of the driveway was not a "working area" as there is no evidence that plaintiff was required to traverse this area in order to gain access to either the van or house. Moreover, neither the allegedly improperly compacted soil nor the newly laid top soil constitutes construction debris.

12 NYCRR § 23-1.7(e)(1) requires that the accident take place in a passageway. 12 NYCRR § 23-1.7(d) states that "employers shall not suffer or permit to suffer an employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in slippery condition." Contrary to the plaintiffs' contention, the open, ground level driveway where the injured plaintiff was working, and the adjacent lawn did not constitute a passageway, walkway, or other elevated working surface contemplated by 12 NYCRR § 23-1.7(d) and 12 NYCRR § 23-1.7(e)(1) (see Porazzo v City of New York, 39 AD3d 731 [2007]; Roberts v Worth Constr., Inc., 21 AD3d 1074, 1077 [2005]; Morra v White, 276 AD2d 536 [2000]; Lawyer v Hoffman, 275 AD2d 541, 542 [2000]; Constantino v Kreisler Borg Florman Gen. Constr. Co., 272 AD2d 361 [2000]). There is also no evidence that plaintiff was working on a "floor" that was in a slippery condition (see generally, Appelbaum v 100 Church L.L.C., 6 AD3d 310 [2004]). The court notes that counsel's present assertion that plaintiff slipped on gravel was improperly raised in her

opposing affirmation and is not supported by the plaintiff's deposition testimony.

12 NYCRR § 23-1.7(f) which applies to stairs, ramps and runways to working levels above or below ground is inapplicable here, as plaintiff was working at ground level, and the lawn and soil immediately adjacent to the driveway were at the same height as the driveway.

Therefore, as none of the cited provisions of the Industrial Code are applicable here, Plato's request to dismiss the Labor Law § 241(6) and Industrial Code claims, is granted.

Defendant Maher's request to dismiss the Labor Law §§200 and 241(6) claims:

Liability cannot be assessed for a violation of Labor Law §§ 200 and 241(6) against a subcontractor who did not control the work that caused the plaintiff's injury (see Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Zervos v City of New York, 8 AD3d 477, 481 [2004]). Here, it is undisputed that Maher neither controlled nor supervised the injured plaintiff's work. Furthermore, the evidence presented establishes that Maher had completed the work at the subject driveway and had left this portion of the construction site before the injured plaintiff even began his work. Maher's control and supervision of the work performed by its own employees does not give rise to a cause of action on behalf of the plaintiffs under the Labor Law. Therefore, Maher is entitled to summary judgment dismissing all of the causes of action asserted against it which were predicated upon alleged violations of Labor Law §§ 200 and 241(6) (see Kelarakos v Massapequa Water Dist., 38 AD3d 717 [2007]).

Defendant Maher's request to dismiss the Common Law Negligence Claim:

The court finds that plaintiff has raised a question of fact as to whether Maher negligently performed its work. Specifically, the plaintiffs have raised triable issues regarding whether Maher failed to properly compact the soil after it removed the wooden boards and stakes alongside the driveway, so as to cause a depression or crevice in the soil. To the extent that Maher asserts that any such defect was trivial and therefore not actionable, it is noted that this defense is generally reserved for property owners. Furthermore, as neither the plaintiff nor Maher have adequately described the dimensions of the alleged defect or produced any photographs, defendant has not established, as a matter of law, that the defect was trivial (see generally, Trincere v County of Suffolk, 90 NY2d 976 977 [1997]; Taussig v Luxury Cars of Smithtown, Inc., 31 AD3d 533 [2006]; Mendez v De Milo, 17 AD3d 328 [2005]). To the

extent that Maher's counsel asserts that some other entity may have caused the condition complained of, this claim is purely speculative. Therefore, that branch of Maher's motion which seeks summary judgment dismissing the plaintiffs' cause of action alleging common-law negligence is denied (see Kelarakos v Massapequa Water Dist., supra).

The Derivative Claim

That branch of defendant Plato's motion which seeks to dismiss the derivative claim of Michelle Melendez is granted, as all of plaintiff Daniel Melendez' claims against Plato are dismissed.

That branch of defendant Maher's motion which seeks to dismiss the derivative claim of Michelle Melendez is denied, as plaintiff Daniel Melendez may maintain his claim for common law negligence against Maher.

The Cross Claims

Plato's request to dismiss all cross claims asserted by Maher and Innovative against it for apportionment, common law contribution and common law indemnification, is granted.

Maher's request to dismiss all cross claims is granted solely as to Plato's cross claims for common law contribution and indemnification.

Conclusion

Defendant Plato's motion for summary judgment dismissing the complaint in its entirety and all cross claims asserted by Maher and Innovative against this defendant for apportionment, common law contribution and common law indemnification, is granted. Defendant Maher's motion for summary judgment dismissing the complaint is granted as to the causes of action for violations of Labor Law §§ 200, 240(1) and 241(6) and for violations of the Industrial Code, and is denied as to the cause of action for common law negligence and the derivative cause of action. Maher's request to dismiss all cross claims asserted against it is granted to the extend that Plato's cross claims for common-law contribution and common-law indemnification are dismissed.

Dated: July 12, 2007

J.S.C.