SHORT FORM ORDER

INDEX No. 05-22392
CAL. No. 07-01205-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-4-07 (004)
MOTION DATE 10-12-07 (005)
MOTION DATE 12-28-07 (006)
ADJ. DATE 12-28-07
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - XMD
Mot. Seq. # 006 - XMD

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THERESA STEINBRECHER, as guardian ad Litem of LOUIS A. STEINBRECHER, an incapacitated person and THERESA STEINBRECHER, individually,

Plaintiff,

- against -

DeFOE CORPORATION, PRO SAFETY SERVICES, LLC, AMANDA M. ANDERSON, LORRAINE M. DiLORENZO, MICHELLE L. TROCCHIO and JEFFREY KING,

Defendants.

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Upon the following papers numbered 1 to 53 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 - 23; 24 - 27 ; Answering Affidavits and supporting papers 28 - 35; 36 - 41; 42 - 44 ; Replying Affidavits and supporting papers 45 - 51; 52 - 53 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendant, Pro Safety Services, LLC, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as against it, as well as any cross claims asserted against it, is granted; and it is further

ORDERED that the cross motion (#005) by defendant, DeFoe Corporation, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as against it, as well as any cross claims asserted against it, is denied; and it is further

ORDERED that the cross motion (#006) by defendants, Amanda M. Anderson and Lorraine M. Dilorenzo, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as against them, as well as any cross claims asserted against them, is denied as untimely.

The injured worker, Louis A. Steinbrecher, was profoundly injured at a highway reconstruction project when a motorist proceeded into a closed traffic lane and struck him. Mr. Steinbrecher, by his Guardian ad Litem, commenced this action alleging, among other things, violations of Labor Law §§ 200 and 241(6), and common-law negligence.

DeFoe Corporation (hereafter DeFoe) is the general contractor hired by the State of New York Department of Transportation (hereafter DOT) to reconstruct the median separating the eastbound and westbound lanes for a three-mile stretch of Sunrise Highway. Pro Safety Services, LLC (hereafter Pro Safety) is the safety consultant hired by DeFoe to make recommendations ensuring that conditions on the job site conformed to OSHA rules and regulations and were generally safe. Part of DeFoe's work consisted of demolishing the existing guard rail and removing the existing asphalt and concrete surface, in a process referred to as "milling." Mr. Steinbrecher was employed by New York Dirt, a subcontracting trucking company employed to remove the milling debris. Amanda M. Anderson (hereafter Anderson) lost control of the vehicle[1] she was driving when she was unable to safely decelerate as the traffic slowed down and/or someone suddenly changed lanes in front of her. Anderson's vehicle moved into the right lane, hit the back of a vehicle driven by Michelle L. Trocchio[2] and then proceeded across the middle lane and into the closed lane left lane, striking Steinbrecher.

The contract between DeFoe and the DOT provided for placement of temporary concrete dividers, or "Jersey" barriers, on either side of the center median. These uninterrupted Jersey barriers were to run along each side of Sunrise Highway for the full duration of each phase of the work. At the subject area, Sunrise Highway consists of three eastbound and three westbound lanes. The Jersey barriers ran along the lanes bordering the median, there were no shoulders for the left lanes. On the day of the accident, the left lane of eastbound traffic, nearest to the median, was closed to public vehicles. The closed left lane was being used as the staging area where dump trucks, and the workers attending them, were lined up and waiting their turn to go inside the median area, where the trucks would be filled by the milling machine. From the staging area, the trucks were directed by DeFoe's employees to enter and exit the median area via a 100-foot opening, created by removing sections of the Jersey barriers. Vehicular traffic had been diverted from the staging area by a mobile sign with a lighted arrow and ascending traffic cones; the cones continued along the dividing line between the middle lane and the left lane.[3]

Mr. William Martyniak, one of the dump truck drivers engaged in carting the milling residue away, was an eyewitness to the accident. He testified at his deposition that he was sitting in his truck and waiting to take his turn loading the milling residue when Steinbrecher was hit by Anderson's car.

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[1] The vehicle driven by Anderson was owned by Lorraine M. Dilorenzo.

[2] The vehicle driven by Trocchio was owned by Jeffrey King.

[3] It is not clear how long the line of traffic cones extended.

His truck, like the other dump trucks, was facing east and lined up in the left lane. The only thing separating the left lane staging area and the center lane of traffic was the traffic cones. Martyniak stated that traffic was moving much too fast, a common and dangerous hazard for highway construction. His truck was parked in the left hand lane, about 50 feet before the opening into the median work site. Minutes earlier, Steinbrecher had come to Martyniak's truck to sign his paperwork. Steinbrecher then walked east and was heading towards his own vehicle, stopping a few feet past the opening in the concrete Jersey barriers to speak to other workers, with his back to the traffic. Martyniak testified that he heard the screeching of tires and then saw Anderson's car out of control and moving fast across the center lane and towards Steinbrecher. Anderson's car was not facing directly east, but at an angle, and Steinbrecher was hit by the passenger side of the car. The car then moved into the construction zone for the median,[4] hit the Jersey barrier on the other side, went up in the air, and hit the back of a dump truck parked in the median. Martyniak also testified that the cars in front of Anderson had slowed down but he did not know why and that, although there was a flagman at the site, he did not recall where the flagman was at the time of the accident.

DeFoe argues that it is entitled to summary judgment dismissing the complaint because plaintiff cannot establish that it breached any duty owed to Steinbrecher and, moreover, it is clear from the undisputed facts that Anderson was the sole proximate cause of Steinbrecher's injuries. DeFoe asserts it complied with all the construction specifications and safety procedures for the project, and that closing the left lane, used for staging, was safely accomplished via the use of a lighted arrow and traffic cones. It was without authority to close an additional lane and that, if closing a second lane was necessary, it would need to ask the DOT for such authority.[5] DeFoe argues that closing the center lane was not necessary because on the date of the accident all work was being performed in the center median area and the left lane was only being used as the staging area, that its safety consultant, Pro Safety did not recommend closing the middle lane and, moreover, that it was not customary to close a second lane.[6] Pro Safety's post accident investigation concluded that DeFoe had operated the site in a normal manner and that the construction project was not a factor in the cause of the accident.

Labor Law § 241(6) requires owners and general contractors, or their agents, 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 Department of Labor. The duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (***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 a "general safety standard" need not show

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[4] Since Mr. Steinbrecher was standing a few feet east of the opening, Anderson's car had to travel slightly west to get into the area where the barriers had been removed.

[5] One of the theories behind closing both the left lane and the center lane was that channeling traffic to one lane resulted in slowing the traffic down considerably.

[6] DeFoe also argues that a police presence, with flashing lights, was utilized only to stop or redirect traffic, not to slow it down. It appears that such a police presence was routinely used for night work.

that the defendant exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*).

Here, plaintiff has alleged violation of the protection afforded construction workers found at 12 NYCRR § 23-1.29 (a), which provides:

> Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.

The gravamen of DeFoe's argument that § 23-1.29 (a) was not violated is that the median work area was safely protected by concrete barriers and that the staging area, which was closed to traffic by the placement of cones, did not require the placement of barriers or other safety precautions.[7] DeFoe bases its conclusion that the cones provided adequate protection for the staging area on what it refers to as "normal custom and practice," the findings of its own safety consultant, Pro Safety, and the fact that the contract with the DOT did not require it. However, on its motion for summary judgment, it was DeFoe's burden to establish that, as a matter of law, § 23-1.29 (a) was inapplicable to Mr. Steinbrecher's factual scenario. It has been held that § 23-1.29 (a) is a specific mandate which is a sufficient predicate for a Labor Law § 241(6) claim (***McGuinness v Hertz Corp.***, 15 AD3d 160, 789 NYS2d 121 [2005]; ***Lamuraglia v New York City Tr. Auth.***, 299 AD2d 321, 749 NYS2d 82, *lv denied* 100 NY2d 515, 769 NYS2d 201 [2003]; ***Murray v Stein***, 11 Misc 3d 1052[A]; 814 NYS2d 891, 2005 Misc LEXIS 3081, *8-9 [2005]); that the question of whether the manner in which barricades were deployed constituted a violation of the regulation was a matter to be resolved by the jury (***McGuinness v Hertz Corp.***, *supra*); and that traffic cones or barrels are not "barricades" which protect workers for the purposes of § 23-1.29 (a)[8] (***Streeter v Kingston***, 2 Misc 3d 1007[A], 784 NYS2d 924 [2004]). The parties do not dispute that speeding was a consistent hazard, that it was noted by DeFoe's superintendent and Pro Safety's inspector, and that DeFoe's own workers had complained of the excessive speed of

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[7] Taken to its logical conclusion, DeFoe's argument would make a distinction between the protection afforded the workers who were working in the median area - for example those operating the milling machine and filling the dump trucks with its debris, - and the protection afforded those workers waiting or working in the staging area.

[8] 17 NYCRR § 292.5 provides:

> (a) *Application.* (1) Cones are for use to define the proper travel path along a roadway, and discourage improper travel path choices by drivers. They may be placed on a roadway or shoulder, or be rigidly attached for extended use. They are highly visible, very portable, and present small risk of damage or injury if struck by an errant vehicle; *but provide little separation of traffic flow from adjacent areas occupied by other objects, machinery, or workers*. A series of cones can effectively prevent lane changing and passing maneuvers. [*emphasis added*]

passing motorists.[9] The Court concludes that DeFoe did not establish that the undisputed facts are outside the predicate found at § 23-1.29 (a) (***McGuinness v Hertz Corp.***, *supra*). Accordingly, summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied to DeFoe.

The Court of Appeals has held that a violation of the Industrial Code, while not conclusive as to 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 (***Rizzuto v L. A. Wenger Contr. Co.***, *supra*; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [1997]). Therefore, plaintiff must still establish that the Code was violated and that this violation was a proximate cause of Steinbrecher's injuries (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see*, ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.***, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NYS2d 311, 318, 445 NYS2d 127 [1981]) who exercise control or supervision over the work or either created the allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, an argument may be made that even if Anderson's negligence was the immediate cause of Steinbrecher's injuries, it remains for the jury to determine whether the hazard her vehicle posed was a foreseeable consequence of the nearby traffic and DeFoe's failure to provide adequate protection.[10] If such a hazard was foreseeable, Anderson's intervening negligence will not sever the causal connection between the other defendants' negligence and Steinbrecher's injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315-16, 434 NYS2d 166 [1980]). While Anderson's negligence is a basis for apportioning liability between her and other defendants, it does not, as a matter of law, absolve them completely (***Lucas v KD Dev. Constr. Corp.***, 300 AD2d 634, 752 NYS2d 718 [2002]; ***Lamuraglia v New York City Tr. Auth.***,[11] *supra*; ***Murray v Stein***, *supra*; ***Streeter v Kingston***, *supra*). Therefore, the issue of whether the construction site was operated safely is a matter to be resolved by the jury. Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is denied to DeFoe. To the extent that DeFoe's argument is based on the opinion of its expert, offered for the first time in its reply, the Court has not considered it (***GJF Constr. Corp. v Cosmopolitan Decorating Co.***,

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[9] There is evidence in the submissions to suggest that speed was a factor in Anderson's loss of control.

[10] Sheet 12, paragraph 5, of the contract with the DOT provides that "when the contractor is working within 4.5 m of a traveled lane, the engineer may require the adjacent lane to be closed" and plaintiff's opposition contains evidence that both the middle lane and the left lane had been closed for work performed months *prior* to Mr. Steinbrecher's accident. Therefore, whether the traffic cones were sufficient under the circumstances is a question for the finder of fact.

[11] In ***Lamuraglia*** a bus skidded on wet pavement and into a lane where work was being performed and struck the plaintiff. The Court reasoned that, although the contractor had erected an orange fence to direct traffic away from the lane where plaintiff was working (section 23-1.29[a]), such bare minimum compliance is only some evidence of due care (*id* at 324).

35 AD3d 535, 828 NYS2d 409 [2006]; ***Adler v Suffolk Co. Water Auth.***, 306 AD2d 229, 760 NYS2d 523 [2003]).

However, it is well settled that an implicit precondition to the duty contemplated by Labor Law § 200 is that the party to be charged with that obligation "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (***Rizzuto v L.A. Wenger***, *supra* at 352; ***Russin v Louis N. Picciano & Son***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 306, 836 NYS2d 86 [2007]). Here, Pro Safety established that it was present at the work site once a week, that its role was to inspect and advise only, and that it had no authority to control the work. Such inspection and advisory role is insufficient to impose liability under Labor Law § 200, as well as common-law negligence. Further, without the authority to control the work, Pro Safety was not an agent of DeFoe and is not subject to the vicarious liability imposed by Labor Law § 241(6) (***Dos Santos v STV Engrs.***, 8 AD3d 223, 224, 778 NYS2d 48 [2004]). Moreover, plaintiff has not opposed Pro Safety's motion. Accordingly, summary judgment dismissing plaintiff's complaint and any cross claims asserted against it, is granted to Pro Safety.[12]

Lastly, Anderson's cross motion, having been made more than 120 days after the filing of the note of issue, is untimely. Anderson argues that the untimeliness is not a bar because she can establish good cause for the delay. This alleged good cause is the "newly obtained" expert opinion offered by plaintiff in opposition to the motions by Pro Safety and DeFoe. However, Anderson has misapplied the holding in ***Kunz v Gleeson*** (9 AD3d 480, 781 NYS2d 50 [2004]) which states that good cause may be established where a discovery request relevant to the motion was outstanding until shortly before the motion was made (***Gonzalez v 98 Mag Leasing Corp.*** (95 NY2d 124, 711 NYS2d 131 [2000]) or where a movant was awaiting the receipt of deposition transcripts relevant to the motion (***Burnell v Huneau*** 1 AD3d 758, 767 NYS2d 163 [2003]), as neither of those circumstances is present here. The expert opinion offered in plaintiff's opposition is not evidence that Anderson was awaiting when the note of issue was filed and, as the Court of Appeals has stated, "[n]o excuse at all, or a perfunctory excuse, cannot be good cause" (***Brill v City of New York***, 2 NY3d 648, 652, 781 NYS2d 261 [2004]; ***Filannino v Triborough Bridge & Tunnel Auth.***, 43 AD3d 280, 282, 824 NYS2d 244 [2006]). Accordingly, the cross motion is denied.

Dated: FEB 13 2008

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

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[12] Although a copy of a stipulation discontinuing the action as against Pro Safety has been provided to the Court, said stipulation was not signed by all parties and, therefore, is a nullity in that it does not comply with CPLR 3217 (2).