

Dougherty v Lehr Constr. Corp.

2008 NY Slip Op 31557(U)

June 3, 2008

Supreme Court, New York County

Docket Number: 0112597/2005

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING

PART 44

J.S.C.

Index Number : 112597/2005

DOUGHERTY, JOHN

vs

LEHR CONSTRUCTION

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/15/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 annexed decision.

FILED

JUN 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/3/08

ma

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: JAS PART 44

HON. MILTON A. TINGLING
J.S.C.

JOHN DOUGHERTY,

Plaintiff,

-against-

Index No.

LEHR CONSTRUCTION CORP. and VALDIA
WORTH STREET PARTNERS LLC,

112597/05

Defendants.

FILED

JUN 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

MILTON TINGLING, J. :

Defendant Lehr Construction Corp. (Lehr) moves for summary judgment dismissing all claims asserted against it.

This is a personal injury action. Plaintiff, a laborer employed by Vijay Construction (Vijay), was working in the reconstruction of Chase Bank (the Bank) on 65-77 Worth Street in New York, New York. His involvement in the reconstruction consisted of work on the subcellar, cellar and first floor of the Bank. On December 10, 2004, plaintiff was involved in an accident in the basement of the Bank. He was alone at the site and as he crossed the basement to obtain a tool, he allegedly slipped on a piece of pipe and fell. Plaintiff asserts that Lehr was the general contractor in charge of the reconstruction.

Plaintiff commenced this action against defendants, suing them for common-law negligence and recklessness, as well as for violations of sections 200, 240, 241 and 241-a of the Labor Law. Upon the completion of discovery by the parties, Lehr moves for summary judgment dismissing all claims brought against it, arguing that there is no question of fact that it is not responsible for any condition alleged to have caused plaintiff's accident.

Lehr states that it had no involvement with work being performed where plaintiff

claims to have been injured. Lehr relies partially upon the deposition testimony of its field superintendent Michael Camier. Camier testified that on the date of the accident, he was an assistant field superintendent, and that Lehr was engaged in renovating the interior of the Bank. He testified that Lehr had 8 to 10 employees on site and that Lehr hired its own subcontractors for the project. Camier stated that Lehr did not hire Vijay to perform any work at the project. According to him, Vijay was working on a different area of the project where Lehr did not enter. He testified that Lehr did not supply any equipment, materials or laborers to Vijay. At the time of the accident, Lehr and Vijay worked at separate work spaces.

Lehr seeks dismissal on the ground that the work performed by Lehr and Vijay was separate and distinct, both in nature and position. Lehr claims that it performed no work at the site where plaintiff was injured.

Lehr claims that plaintiff has commenced a separate action for the same personal injuries arising out of the accident in the Supreme Court, New York County, under index number 110311/07. This separate action names J.P. Morgan Chase, Cheever Development and Valdia Worth Street Partners, LLC, which are respectively the property owner, subject tenant and project manager which contracted with Vijay to perform work at the premises.

In opposition, plaintiff concedes that the facts of this action do not support causes of action for common-law negligence or for violations of sections 200 or 240 of the Labor Law. However, plaintiff argues that causes of action for violations of section 241 (6) of Labor Law exist in this case.

Plaintiff contends that Lehr served as general contractor of the project and among its duties were to perform walk-throughs of the project and make sure that all materials were stored

properly and no debris was left lying on the floor. Plaintiff refers to the pipe on the floor at the time of the accident as material that was improperly left on the floor.

Section 241 (6) requires owners of construction sites, general contractors and their agents to ensure that all areas in which work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein. The statute creates a non-delegable duty to comply with provisions of the New York State Industrial Code, 12 NYCRR Rule 23.

In order to prevail under section 241 (6), plaintiff is required to establish a violation of a regulation of the Industrial Code which sets forth specific standards of conduct. See Greenwood v Shearson, Lehman and Hutton, 238 AD2d 311 (2d Dept 1997). Plaintiff specifies Rule 23-1.7 (e) (1) and (2) as providing a basis for liability under section 241 (6). That rule provides in part as follows:

23-1.7 (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

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

According to plaintiff, the pipe that he tripped over at the worksite constituted an obstruction to his work and passage and Lehr was liable for not removing this obstruction.

Plaintiff concedes that he has commenced a second action. He states that he has moved for a consolidation of the two actions. He argues that a dismissal would be premature until all

parties have testified and exchanged discovery.

In reply, Lehr states that since it had no involvement with or control over the work being performed where plaintiff claims to have been injured, it had no responsibility for clearing the area.

Lehr claims not to be aware that plaintiff has moved for consolidation. In the event of a motion to consolidate, Lehr would oppose the motion.

To the extent that plaintiff has asserted a viable claim under section 241 (6), he need not show that defendant exercised supervision or control over his worksite in order to establish his right of recovery. See Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993).

Moreover, plaintiff has alleged failure of compliance with concrete specifications pursuant to Rule 23-1.7 (c). See Holloway v Sacks and Sacks, Esqs., 275 AD2d 625 (1st Dept 2000); see also Singh v Young Manor Inc, 23 AD3d 249 (1st Dept 2005).

The only issue of fact is whether Lehr was the general contractor in this project. Lehr denies hiring Vijay as a subcontractor and the complaint alleges that defendant Valda Worth Street Partners LLC was also a general contractor.

The court is aware of a second action brought by plaintiff for similar injuries. However, there is no evidence that plaintiff has already moved for consolidation of the two actions.

The motion for summary judgment is denied because it is unclear whether Lehr was the general contractor for the project.

Accordingly, it is

ORDERED that Lehr's motion for summary judgment is denied.

DATED:

ENTER:

mm

J.S.C.
HON. MILTON A. TINGLING
J.S.C.

FILED
JUN 06 2008
COUNTY CLERK'S OFFICE
NEW YORK