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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Index Number : 117030/2004
BEAZER, EDWARD
VS.
HEALTH AND HOSPITALS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 117030/04
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4,5,6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
JUN 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/11/09

J.S.C.
HON. EILEEN A. RAKOWER

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: PART 5

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EDWARD BEAZER,

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE CITY OF NEW YORK, and BEYS CONTRACTING, INC.,

Defendants.

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Index No. 117030/04
Decision and Order

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he "was working with a Bosch Grinder power saw that was missing the blade guard in order to cut a ste[el] girder on the second floor of the construction site located [at] 959 Eighth Avenue at Bellevue Hospital" in the County and State of New York on June 7, 2004. Defendant Beys Contracting, Inc. ("Beys") moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes. Defendants the New York City Health and Hospitals Corporation and the City of New York ("City") cross-move for summary judgment. Neither plaintiff nor Beys oppose City's motion.

Beys was the general contractor on a project at Bellevue Hospital which was owned by the Dormitory Authority of the State of New York (DASNY). Plaintiff was employed by Turner Construction, the construction manager for the Bellevue project ("Turner"), and alleges that he was injured when the grinder he was using "kicked back and cut his left thumb" Plaintiff alleges violations of Labor Law §200 and 241(6), and more specifically Industrial Code 12 NYCRR 23-1.12(c), as well as common law negligence.

Beys, in support of its motion, submits: the pleadings; plaintiff's bill of particulars; plaintiff's supplemental bill of particulars; plaintiff's second-supplemental bill of particulars; a "response to disclosure demand;" City's "response to case scheduling order;" City's "supplemental response to case scheduling order" (annexed thereto is a deed and the construction contract between Turner and DASNY);a copy

of a document titled "Exchange of Deposition Exhibits;" a document titled "Response to Disclosure Demand;" a copy of a DASNY "Jobsite Incident Report;" a copy of plaintiff's 50-h hearing transcript; a copy of plaintiff's deposition transcript; the deposition transcript of Vincent James, Senor Director for the New York City Health and Hospitals Corporation ("HHC"); the deposition transcript of Peter Lambrakis, Senior Project Manager for Beys Contracting; the deposition transcript of Wendy Delmater for Total Safety Consulting ("TSC"); the deposition transcript of Brendan Carroll, Project Labor Foreman for Turner; the deposition transcript of Stefan Thiersch, Senior Project Manager for DASNY; the affidavit of Michael Kourris, former Project Superintendent for Turner; and the affidavit of Richard C. Otterbein, Licensed Professional Engineer.

Beys first argues that 12 NYCRR 23-1.12 (c) does not apply because it does not cover the use of a grinder, the tool which allegedly caused plaintiff's injury. Further, Beys argues that plaintiff's Labor Law §200 claim must be dismissed because plaintiff has acknowledged that Turner, not Beys, directed and controlled the means and methods of construction. Finally, Beys argues that the common law negligence claims should be dismissed because, according to its engineering expert, the grinder was not defective and the accident was as a result of plaintiff's misuse and improper operation of it. Specifically, Beys claims, that the tool plaintiff was using was taken away from him by a Turner supervisor because it did not contain a guard and he was given a tool with a guard. Beys claims that plaintiff then went back and got the unguarded tool, acting against the advisement of his own supervisor.[1]

Plaintiff, in opposition, concedes that "it appears that laborers using grinders equipped with saw blades do not obtain the protection of 12 NYCRR 23-1.12(c)." Additionally, plaintiff does not oppose defendant's motion to dismiss the Labor Law §200 claims. However, plaintiff claims that triable issues of fact remain regarding his negligence claims, because Beys provided plaintiff with a defective grinder and because the grinder was loaned to plaintiff by Beys in order to complete the cutting job in a timely manner. In other words, the "bailment" provided a benefit to Beys which would raise the standard of care to that of ordinary negligence.

By way of reply, Beys asserts that plaintiff's negligence claim cannot stand because "the way plaintiff was utilizing the angle grinder on the date of the incident,

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[1]Plaintiff was fired for "insubordination" after the accident.

the accident would have occurred whether there was a guard on it or not." Beys submits a supplemental expert affidavit of Mr. Otterbein who, relying on plaintiff's deposition testimony regarding the part of the blade which cut him, opines that:

> It is apparent from this response that Mr. Beazer's accident would have occurred whether or not the wheel guard was installed on the tool. In the affiant's opinion, the application of the wheel guard was immaterial and of no consequence in the happening of Mr. Beazer's accident.

At oral arguments on May 19, 2009, plaintiff's attorney claimed that he needed an opportunity to respond to Beys' supplemental expert affidavit. Specifically, he needed to clarify plaintiff's testimony regarding what part of the blade caused his injury. The disputed testimony is as follows:

> Q: What portion of the blade struck you when you had your accident?
> A: I don't understand.
> Q: Well, was it the front of the blade (indicating)?
> A: Well it don't have a guard on it so its not a front or a back. It's a round wheel.
> Q: Let me ask you this, the part of the blade that was toward the front of the machine is that the part that made contact with your left thumb?
> A: Yes.

The Court granted leave to plaintiff to file a sur-reply and to all other parties to file any additional responsive papers on this issue.

By way of sur-reply, plaintiff submits a copy of the photograph of the grinder that was shown to him at his deposition along with an affidavit. The photograph contains an "X," marking the place where plaintiff's thumb came into contact with the blade. In his affidavit, plaintiff states:

> I have placed an "X" on the photograph authenticated by me at my deposition . . . [t]he "X" identifies the part of the blade which came into contact with my left hand and its relationship to the rest of the grinder. As is obvious, the "X" demonstrates that a blade guard would have protected my hand. The confusion in my testimony results from the fact that, absent a blade guard, the blade does not have a front or back because the blade is round . . .I consider the "machine" to be the part of

> the grinder to which the blade is affixed. I consider the front of the "machine" to be the end where the blade is attached . . .

Beys submits a sur-sur-reply, claiming that plaintiff should not have been permitted to submit an affidavit now, clarifying his testimony when he has had ample opportunity to do so.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, City, in support of its cross-motion, provides the notice of claim, and argues that it was the State, not the City, who owned the subject building, as is evidenced by the documents appended to Bey's original motion at Exhibit I. It is clear from the Real Property Transfer Report contained therein that the Dormitory Authority of the State of New York owned the premises as of March 26, 2003. Nor did City serve as a contractor or have any supervisory control over the construction project. While City acknowledges that a cross-,motion is not procedurally proper as a vehicle for the relief sought, pursuant to CPLR 2215, no party opposes City's cross-motion or raises a procedural defect. "The factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]). In light of the clear evidence that City is not a proper party, and in the interests of justice and efficiency, City's cross motion is granted.

Plaintiff concedes that his Labor Law §241(6) claim cannot be sustained. However, the question remains whether Beys was negligent in providing plaintiff with the unguarded machine. Plaintiff contends that Beys loaned the grinder to him for its own benefit, and that the grinder, without a guard, was defective, dangerous and not fit for its intended purpose.

> A bailment is classified as being one for the sole benefit of the bailor; or one for the sole benefit of the bailee; or one for the mutual benefit of both parties . . . the standard of care to which the bailee is required to conform, will vary with the above characterization of the bailment . . .dependent upon and varying with the category to which the bailment is assigned, the bailee will be liable either for gross negligence, slight negligence, or ordinary negligence. (*Voorhis v. Consolidated Rail Corporation*, 92 AD2d 501, 503[1st Dept. 1983]).

Plaintiff cites to *Dufur v. Lavin*, 101 AD2d 319[3rd Dept. 1984], which was affirmed by the Court of Appeals, to support its bailment argument. The court there held that "Where one loans property to another, a duty of care arises . . . While the conduct necessary to satisfy such duty depends on the facts and circumstances of the case, including the type and purpose of the bailment, it cannot be said that one who loans property has no duty to act reasonably." There, a fire occurred at a bowling alley as the result of a defective "pin cleaning machine" that was lent by another bowling alley. Ultimately the court held that there was evidence to support a finding of a "mutual benefit bailment" where "defendant bowling alley no longer cleaned its own bowling pins and was about to become the primary customer of plaintiffs' employers whose business required a pin cleaning machine." (*Id.* at 324).

Here, there are conflicting accounts as to how plaintiff obtained the grinder he was using when his accident occurred. Plaintiff claims that he was given the grinder by a Beys employee whereas a Turner supervisor claims that plaintiff got the grinder out of a Turner tool box and Peter Lambrakis, of Beys, testifies that it is company policy not to lend its tools to anyone on the job. Plaintiff has also raised a question of fact as to whether, if the grinder is found to be Beys' property, it benefitted commercially from lending the grinder to plaintiff so that he could complete his work in a timely manner. Brendan Carroll testified that it was regular practice for the Turner employees to use Beys' tools in order to keep the work moving. Finally, there are issues of fact as to whether Beys was negligent in providing plaintiff with a machine that was missing its blade guard, and whether the missing blade guard was a substantial factor in causing the injury sustained.

Wherefore it is hereby

ORDERED that the motion is granted to the extent of granting partial summary

judgment is granted in favor of defendants dismissing those causes of action sounding in Labor Law §§200 and 241(6) and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the motion for summary judgment is otherwise denied; and it is further

ORDERED that the cross-motion is granted without opposition and the complaint is hereby severed and dismissed as against defendants New York City Health and Hospitals Corporation and the City of New York and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that any and all cross-claims as against said City defendants are hereby dismissed; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it form the Part 5 inventory. Any compliance conferences scheduled are hereby cancelled. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 11, 2009

Eileen A. Rakower, J.S.C.