Eversfield v Brush Hollow Realty, LLC
2010 NY Slip Op 31734(U)
July 2, 2010
Sup Ct, Nassau County
Docket Number: 011145/07
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

____X

ROBERT EVERSFIELD,

Plaintiffs,

-against-

Index No.: 011145/07
Motion Sequence...05, 06, 07
Motion Date...03/25/10

BRUSH HOLLOW REALTY, LLC and CAULDWELL-WINGATE COMPANY, INC. and CAULDWELL-WINGATE COMPANY, LLC., MR. JOHN PORTABLE SANITATION UNITS, INC., MR. JOHN INC., RUSSELL REID WASTE HAULING AND DISPOSAL SERVICE CO. , INC., RALLYE MOTORS, LLC., and RALLYE MOTORS, INC.,

Defendants.

____X

Papers Submitted:
Notice of Motion..x
Notice of Motion..x
Notice of Cross-motion..............................x
Affirmation in Opposition..........................x
Affirmation in Opposition..........................x
Affirmation in Response.............................x
Reply Affirmation.......................................x
Reply Affirmation.......................................x
Reply Affirmation.......................................x

The Defendants, BRUSH HOLLOW REALTY, LLC., CAULDWELL-

WINGATE COMPANY, INC., CAULDWELL-WINGATE COMPANY, LLC., RALLYE MOTORS, LLC and RALLYE MOTORS, INC. [collectively referred to hereinafter as the Brush Hollow Defendants], move pursuant to 22 NYCRR 212.17 (c)[1] for an order vacating the Plaintiff's Note of Issue and Certificate of Readiness and for an order pursuant to CPLR § 3212 granting summary judgment dismissing the Plaintiff's complaint, together with any and all cross-claims and counter claims asserted against them (Mot. Seq. 05, 06).

The Defendants, MR. JOHN PORTABLE SANITATION UNITS, INC., MR. JOHN INC. and RUSSELL REID WASTE HAULING AND DISPOSAL SERVICE CO., INC. [hereinafter Mr. John], Cross-move pursuant to CPLR § 3212 for an order granting summary judgment dismissing the Plaintiff's complaint, as well as the second third-party action, together with any and all cross-claims asserted against them (Mot. Seq. 07).

Factual and Procedural Background:

On October 18, 2006, the Plaintiff, Robert Eversfield, was employed by Nastasi & Associates [hereinafter Nastasi] and was working on a construction site located at One Brush Hollow Road, Westbury, New York (*see* Greenwood Affirmation in Support at Exhibit D). The subject location was owned by the Defendants, Rallye Motors, LLC and/or Rallye Motors, Inc., and was managed by the Defendant, Brush Hollow Realty, LLC (*see* Reilly Affirmation in Support at Exhibit E). Rallye Motors, LLC and/or Rallye Motors, Inc. hired the Defendant, Caldwell-Wingate Company, Inc. and/or Cauldwell-Wingate Company, LLC,

[1] The Court notes the 22 NYCRR 212.17 (c) is inapplicable to the Supreme Court.

as construction manager for the project, which in turn hired Nastasi as a subcontractor (*see* Greenwood Affirmation in Support at Exhibit E at pp. 6,10). The Defendant, Mr. John, was retained by Cauldwell-Wingate Inc. and/or Cauldwell-Wingate, LLC, to provide portable restrooms for the subject construction site (*id.* at p. 12).

On October 18, 2006, the Plaintiff reported to the construction site at approximately 7:00 a.m. and proceeded to the portable restrooms, which were located behind the building under construction (*see* Reilly Reply Affirmation at Exhibit B at pp. 11, 13, 16). The Plaintiff testified at his examination before trial that in order to enter the restroom it was necessary to step onto a cement curb located parallel thereto (*id.* at pp. 19, 20, 21, 22). The Plaintiff further testified that upon exiting the portable restroom, it tilted "3 or 4 inches down", after which he "fell out the door" and "caught the curb with [his] left foot" ultimately landing on his right side sustaining injury (*id.* at pp. 26, 27, 31, 32). Notwithstanding this accident, the Plaintiff proceeded to report to the "foreman of the spacklers" for Nastasi, who directed him to "drive [a] machine and stand in one spot and just spackle and then drive to the next scene and spackle" (*id.* at pp. 38, 39, 40).

By way of procedural background, the underlying action was initially commenced solely against Brush Hollow Realty, LLC and Cauldwell-Wingate Company, Inc., bearing Index No. 011145/07, after which these Defendants served a Third-Party Summons and Verified Third Party Complaint upon the Plaintiff's employer, Nastasi (*see* Reilly Affirmation in Support at Exhibits B, D). Additionally, the Defendants, Brush Hollow

Realty, LLC, Cauldwell-Wingate, Inc. and Cauldwell-Wingate, LLC, served a Third Party Summons and Verified Third-Party Complaint upon Mr. John, which sought, *inter alia*, indemnification and contribution (*id.* at Exhibit D).

Thereafter, the Plaintiff commenced a second action against Mr. John and Rallye Motors, LLC and Rallye Motors, Inc., bearing Index No. 020210/2007 (*see* Reilly Affirmation in Support at Exhibits B, D). By Order dated June 9, 2008, the Honorable Kenneth A. Davis consolidated the two actions, under Index No. 011145/2007 (*id.* at Exhibit G). Additionally, by Order dated December 11, 2008, Honorable Kenneth A. Davis dismissed the action as against Nastasi (*id.* at Exhibit E).

As presently constituted the within complaint contains four causes of action, the First of which sounds in common law negligence, the Second of which is predicated upon Labor Law §200, the Third of which is based upon Labor Law §240 and the Fourth of which alleges violations of Labor Law §241[6].

Motions for Summary Judgment interposed by the Brush Hollow Defendants and by Mr. John Defendants:

In support of the within application, counsel initially argues that as the Brush Hollow Defendants did not supervise or control the work in the which the Plaintiff was engaged, the cause of action predicated upon Labor Law §200 must be dismissed (*see* Reilly Affirmation in Support at Exhibit P; *see also* Kaplan Affidavit in Support at ¶ 5; *see also* Toomey Affidavit in Support at ¶ 5).

Counsel additionally posits that as the Defendants played no part in the

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placement of the portable restrooms and did not have actual or constructive notice of any problems attendant to the placement or maintenance thereof, the cause of action predicated upon common law negligence must similarly be dismissed (*see* Reilly Affirmation in Support at Exhibit P; *see also* Kaplan Affidavit in Support at ¶ 3, 6, 7, 8; *see also* Toomey Affidavit in Support at ¶ 3, 6, 7, 8). Counsel relies upon the annexed deposition testimony of Christopher Hargrove, who worked as Executive Vice President for Cauldwell-Wingate (*see* Reilly Affirmation in Support at Exhibit M at p. 6). Mr. Hargrove testified that he was present on the construction site three to four days per week, between the hours of 6:00 a.m. up until anytime between 4:00 p.m. and 7:00 p.m, and was not aware of any complaints or problems with respect to the portable restrooms (*id.* at pp. 15, 27-28). Counsel further relies upon the annexed affidavit of Deborah Kaplan Brooks, who is a member of Brush Hollow Realty, LLC (*id.* at Exhibit N at ¶ 1). Ms. Brooks avers that "Brush Hollow Realty, LLC had no role in the placement, positioning and/or installation of the portable toilets involved in this incident" and "was not aware of any sort of defect in the placement, positioning or installation of said portable toilets" (*id.* at ¶ 3, 4). Finally, counsel makes reference to the annexed affidavit of Nicholas Toomey, Vice President of Rallye Motors, who similarly avers that Rallye was not involved "in the placement, positioning and/or installation" of the subject restrooms and had no notice and was unaware "of any sort of defect in the placement, positioning or installation" thereof (*id.* at Exhibit O at ¶¶ 1, 3, 4).

In addition to the foregoing, counsel for the Brush Hollow Defendants argues

that inasmuch as the Plaintiff's accident did not involve an elevation related risk, Labor Law §240 is inapplicable thus warranting dismissal of the cause of action which is based thereon (*id.*). Finally, with respect to that cause of action predicated upon Labor Law§ 241(6), counsel argues that the industrial code regulations cited by the Plaintiff are inapplicable to the facts herein and that this section of the Labor Law is equally inapplicable as the Plaintiff was not engaged in construction work at the time of his accident (*id.*). In support of said contention, counsel relies upon the Plaintiff's deposition testimony wherein he testified that he had only just arrived at the work site and had yet to begin working when this accident occurred (*id.*).

Mr. John:

In moving for dismissal of the within complaint, counsel for the Defendant, Mr. John adopts those arguments set forth by counsel for the Brush Hollow Defendants as to why liability under the Labor Law is inapplicable (*see* Greenwood Affirmation in Support of Cross-Motion at ¶ 12). In addition thereto, counsel for the Mr. John Defendants sets forth two additional contentions.

First, counsel argues that as Mr. John is neither an owner, a general contractor nor an agent thereof and did not direct or control the injured worker's job activities, the within action must be dismissed (*id.* at ¶ 11, 12). Second, counsel argues that as the evidence adduced herein demonstrates that Mr. John did not place the toilets in the location where they were situated when the Plaintiff had his accident, said Defendant could not have created the

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alleged dangerous condition or have possessed actual or constructive notice thereof (*id.* at ¶ 14, 16). Relevant to this contention, counsel provides, *inter alia*, the affidavit of Luis Gonzaga (*id.* at Exhibit G). Mr. Gonzaga avers that he was employed by the Defendant in October of 2006 and "was responsible for maintenance of various . . . portable toilet units, including the toilets at the job site located at RALLYE MOTORS" (*id.* at ¶ 3). He states that "the last time I performed maintenance to the toilets at RALLYE MOTORS prior to October 18, 2006 was October 17, 2006" (*id.* at Exhibit G at ¶¶ 1, 3). Mr. Gonzaga further avers that during his deposition, he was shown various photographs purportedly taken by the Plaintiff immediately after his accident, but that he "never observed the portable toilets in the position as depicted" and if "the toilets were in fact positioned as depicted in the photograph taken by the Plaintiff, someone must have moved them between October 17, 2006 and October 18, 2006" (*id.* at ¶ 4).

The Plaintiff opposes the respective applications interposed by the Brush Hollow Defendants, as well as that interposed by the Mr. John Defendants. Initially, and with respect to the Brush Hollow Defendants, counsel argues that said Defendants had a duty under Labor Law §§200 and 241[6] to maintain a safe work environment and notwithstanding such duty violated same by permitting the placement of a cement curb in front of the portable restroom and in allowing the restroom to be placed upon unstable ground (*see* Affirmation in Opposition at pp. 12, 13, 14). Counsel additionally argues that inasmuch as the Plaintiff testified that "his fall was precipitated by a shifting of his body 3-4 inches due to an improper

placement of the portable bathroom" the subject accident was "height related" and he is thus entitled to the protections afforded under Labor Law §240 (*id.* at pp. 15, 18). With particular respect to the Mr. John Defendants, counsel contends that said Defendant was negligent in placing the portable restrooms upon a surface that was not level or safe and is thus liable under Labor Law §§ 200 and 241[6] (*id.* at p. 15).

<u>Labor Law §200</u>:

Labor Law § 200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof, a duty to provide workers with a safe environment in which to perform their assigned duties (*Lombardi v. Stout,* 80 N.Y.2d 290 [1992]; *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993]; *Everitt v. Nozkowski*, 285 A.D.2d 442 [2d Dept. 2001]; *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616 [2d Dept. 2008]. "It is well settled that an implicit precondition to this duty 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 Contracting Co., Inc.,* 91 N.Y.2d 343 [1998], quoting *Russin v. Picciano & Son*, 54 N.Y.2d 311,317 [1981]). Thus, in order to establish liability against either an owner, general contractor or an agent thereof, the plaintiff must demonstrate that the owner, general contractor or agent exercised supervision and control over the work being performed or had actual or constructive notice of the alleged unsafe condition (*Sprague v. Peckham Materials,* 240 A.D.2d 393 [2d Dept. 1997]; *Parisi v.*

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Loewen Development of Wapppinger Falls, LP, 5 A.D.3d 648 [2d Dept. 2004]; *Astarita v. Flintlock Construction Services, LLC*, 69 A.D.3d 888 [2d Dept. 2010]).

In the instant matter, the Court has reviewed the record and finds that the Brush Hollow Defendants, as well as the Mr. John Defendant, have each satisfied their respective *prima facie* burdens of establishing entitlement to judgment as a matter of law (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). In opposition, the Plaintiff has failed to raise a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). As an initial matter, the record reveals that the Plaintiff herein had not yet engaged in any construction related work when he suffered his accident and that the activities which brought about the injury were not under the direction or control of any of the moving defendants (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 [1998], *supra*). Moreover, the Brush Hollow Defendants, as well as the Mr. John Defendants, have each demonstrated, via competent evidence, that they neither created the dangerous condition alleged to have caused the Plaintiff's accident nor had any actual or constructive notice thereof (*Sprague v. Peckham Materials,* 240 A.D.2d 393 [2d Dept. 1997], *supra*; *Parisi v. Loewen Development of Wapppinger Falls, LP,* 5 A.D.3d 648 [2d Dept. 2004], *supra*; *Astarita v. Flintlock Construction Services, LLC*, 69 A.D.3d 888 [2d Dept. 2010], *supra*). During his examination before trial, the Plaintiff testified that he was told of two other individuals who allegedly fell out of the portable restrooms. However, no affidavits or other competent evidence, with respect to the individuals involved or the circumstances attendant

thereto, has been provided to this Court for review and consideration (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980], *supra*).

Further, the Court notes that the record clearly demonstrates that the actual work in which the Plaintiff was ultimately engaged on the day of the accident, was neither directed nor controlled by any of the moving Defendants (*Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993], *supra*). An examination of the Plaintiff's deposition reveals that he testified that he had no dealings with either Brush Hollow Realty or Cauldwell, and stated that the Nastasi foreman was the person "who I deal with" (*see* Reilly Affirmation in Support at Exhibit B at pp. 39, 42).

Therefore, based upon the foregoing, that branch of the application interposed by the Brush Hollow Defendants, which seeks an order granting summary judgment dismissing the Plaintiff's claims based upon common law negligence and Labor Law §200 is hereby **GRANTED** and that branch of the application interposed by the Defendant, Mr. John, which seeks an order granting summary judgment dismissing the Plaintiff's claims based upon common law negligence and Labor Law §200 is hereby **GRANTED**.

Labor Law 240[1]:

Labor §240[1], provides in relevant part that "all contractors and owners and their agents * * * shall furnish or erect, or cause to be furnished or erected * * * scaffolding, hoists, stays, ladders, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection. . ." to construction workers

who are employed on the subject premises. "While the reach of section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Martinez v. City of New York*, 92 N.Y.2d 322, 325 [1999] quoting Labor Law § 240 [internal citations omitted]). The duty imposed by the statutory provisions is nondelegable in nature and an owner or contractor who breaches the duty may be held liable in damages caused thereby, irrespective of whether it has actually exercised supervision or control over the work performed (*Cahill v. Triborough Bridge and Tunnel Authority,* 4 N.Y.3d 35 [2004]).

In opining as to the scope of hazards which fall within the purview of the statute and which are therefore compensable thereunder, the Court of Appeals has held that Labor Law § 240 (1) is applicable to ". . . such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993], *supra.*). While the statute is to be liberally construed so as to give effect to the purposes for which it was promulgated, in consideration of the strict liability imposed thereby, the statutory language should not be so contorted as to bring within its sphere, that which the legislature did not intend to include (*Koenig v. Patrick Construction Corp.*, 298 N.Y. 313 [1948]; *Schreiner v. Cremosa Cheese Corp.*, 202 A.D.2d 657 [2d Dept. 1994]).

In the matter *sub judice*, the record plainly demonstrates that the Plaintiff was

not engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" at the time of his accident and thus Labor Law §240 is inapplicable (*Martinez v. City of New York*, 92 N.Y.2d 322, 325 [1999], *supra*). Moreover, the record is devoid of any evidence that the Plaintiff was injured as a result of working on an elevated work site (*Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993], *supra.*). Rather, as can be adduced from the deposition testimony, the Plaintiff was located in a portable restroom which tipped forward 3 to 4 inches causing him to fall. Such an accident, while unfortunate, in not a "gravity related" accident as is contemplated by the statute (*id; Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991], *supra*).

Thus, based upon the foregoing, that branch of the application interposed by the Brush Hollow Defendants, which seeks an order granting summary judgment dismissing the Plaintiff's claims based upon Labor Law § 240 (1) is hereby **GRANTED** and that branch of the application interposed by the Mr. John Defendants, which similarly seeks an order granting summary judgment dismissing the Plaintiff's claims predicated upon Labor Law § 240 (1) is **GRANTED**.

Labor Law §241(6):

Labor Law § 241 [6] provides that "[a]ll areas in which construction, excavation, or demolition 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 or lawfully frequenting such places." The

definition of construction work as provided in 12 NYCRR 23-1.4 [b] [13] provides the following, in relevant part:

> "All work of the type performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure."

The Court of Appeals has ruled that this definition as provided in the Industrial Code, "must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v. Realty Corp.*, 99 N.Y.2d 98 at 103 [2002]). As the above cited deposition testimony clearly indicates, the Plaintiff's accident happened at a time when he was engaged in utilizing a portable restroom. There is no evidence in the record that the subject accident occurred during any construction, demolition or excavation.

Therefore, based upon the foregoing, that branch of the application interposed by the Brush Hollow Defendants, which seeks an order granting summary judgment dismissing the Plaintiff's claims predicated upon Labor Law § 241 [6] is hereby **GRANTED** and those claims are accordingly dismissed, together with any and all cross-claims and counter-claims asserted against them (Mot. Seq. 06). As to that branch of the cross-motion interposed by the Defendant, Mr. John, which seeks an order granting summary judgment dismissing the Plaintiff's claims based upon Labor Law § 241 (6), said application is hereby **GRANTED** and the claims are dismissed as is the second third-party complaint, together

with any and all cross-claims asserted against said Defendant (Mot. Seq. 07).

In accordance with the foregoing, the application interposed by the Brush Hollow Defendants for an order striking the Plaintiff's Note of Issue and Certificate of Readiness is hereby **DENIED** as moot (Mot. Seq. 05).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York
July 2, 2010

Hon. Randy Sue Marber, J.S.C.

ENTERED
JUL 07 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE