

Bruno v Port Auth. of N.Y. & N.J.

2010 NY Slip Op 31844(U)

July 8, 2010

Supreme Court, New York County

Docket Number: 107529/07

Judge: Doris Ling-Cohan

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

Hon. Ling-Cohan

PRESENT.

Index Number : 107529/2007

PART 36

BRUNO, DAVID

vs

PORT AUTHORITY

Sequence Number: 003 + 004

SUMMARY JUDGMENT

FILED

JUL 12 2010

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____

NOTICE DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

By defendant

Greenman - Pedersen, Inc., for summary judgment is granted to the extent provided in the attached memorandum decision.

(consolidated for disposition with motion sequence 004)

Dated: _____

JUDGE DORIS LING-COHAN

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36

FILED

JUL 12 2010

**COUNTY CLERK'S OFFICE
NEW YORK**

Index No.: 107529/07

-----x

DAVID BRUNO,

Plaintiff,

-against-

DECISION

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY AND GREENMAN-PEDERSEN, INC.,

Motion Seq. No.: 003 &
004

Defendants.

-----x

DORIS LING-COHAN, J.:

BACKGROUND

Motion sequence numbers 003 and 004 are consolidated for disposition. In motion sequence number 003, defendant Greenman-Pedersen, Inc. (GPI) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it. In motion sequence number 004, defendant Port Authority of New York and New Jersey (Port Authority) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.

Port Authority owns the Goethals Bridge and Kiska Construction (Kiska) was the general contractor for a renovation project on the bridge. As the general contractor, Kiska was responsible for safety at the bridge, as well as for the means and methods of construction and demolition. Motion 003, Exs. H and J. Port Authority did not have any employees at the Goethals Bridge project in a supervisory capacity. Motion 003, Ex. J.

GPI is a consulting firm hired by Port Authority to provide construction inspection services for the renovation project, which was completed at the end of 2006. Motion 003, Ex, I. GPI had two inspectors at the bridge project at night (the time during which the construction work was performed so as not to interfere with vehicular traffic) and its inspection was limited to review the physical limits of the barrier that was to be demolished as part of the renovation. *Id.* On or around May or June of 2006, Bruno was hired by Kiska to work on the renovation project to demolish a concrete barrier using a jack hammer. Motion 003, Ex. G.

Bruno is a laborer who, prior to his employment with Kiska, had worked on other jobs involving the demolition of concrete and driveways. *Id.* Bruno reported to his foreman, a Kiska employee, his equipment was provided to him by Kiska, and if he had any question about how to perform his work, he would ask his Kiska foreman. *Id.* Kiska was responsible for cleaning up any demolition debris that was created during the course of its work. *Id.* To remove the debris, a bobcat (a vehicular front loader) was used. *Id.*

Bruno was not familiar with GPI; GPI did not direct, control or supervise his work, and he never spoke to any GPI employee, during the time that he worked on the Goethals Bridge project. *Id.* Also, Bruno never spoke to any Port Authority

employees. Motion, Ex. L.

According to the submissions, in the early hours of August 8, 2006, a boom truck arrived at the work site, carrying concrete debris. Allegedly, the boom truck had a piece of rebar protruding from it, and Bruno's foreman instructed him to remove the piece of protruding rebar. Bruno testified at his examination before trial (EBT) that the rebar was extending about three feet out into the lane where the workers were and, if it were not removed, it could have taken a worker's head off. Bruno EBT, at 120. According to Bruno, in order to remove the rebar, Bruno had to walk around debris laying in the lane to get to the truck, and then stand on top of debris to reach the rebar. Bruno stood on a piece of debris which moved while he was attempting to grab the rebar, causing him to fall and injure his shoulder. The debris on which Bruno stood was concrete debris from the barrier that he and his fellow co-workers had demolished during that work shift.

In his EBT, Bruno also testified that, on the day of the accident, the job site had not been cleaned up as it normally was, and that he did not know who had broken up the debris that he was standing on in order to remove the rebar. Bruno EBT, at 38-40. Bruno further stated that he saw Port Authority employees walking around the bridge site taking notes "every once in a while". *Id.* at 108-109.

At the EBT of Thomas Moen (Moen), the GPI representative, Moen stated that he was responsible for inspecting the demolition work, and that the removal of debris was not done in the same way each time. Motion, 003, Ex. J, Moen EBT, at 57. However, Moen said that all debris would be removed before the bridge was opened for vehicular traffic. *Id.* at 58. Moen indicated that it was the contractor that was responsible for the safety of its workers. *Id.* at 63.

The complaint alleges three causes of action: (1) negligence; (2) failure to comply with section 200 of the Labor Law; and (3) violation of Labor Law § 241 (6) and Industrial Code §§ 23-1.7 (a) (1); (a) (2); (b) (1); (b) (2); (d); (e) (1); (e) (2); 23-1.15 (a)-(e); 23-1.16 (a)-(f); 23.3.3 (a)-(m); 23.3.3 (f); (k) and (I). The court notes that the parties argue a cause of action premised on a violation of section 240 (1) of the Labor Law, even though no such cause of action appears in either the complaint or the amended complaint. Regardless, the court will address this issue in its discussion, as it has been raised.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186

(1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Labor Law § 200 is a codification of duties imposed under a theory of common-law negligence (*O'Sullivan v IDI Construction Company, Inc.*, 28 AD3d 225 [1st Dept], *affd* 7 NY3d 805 [2006]), and, therefore, the same standards of proof apply to both theories.

Section 200 (1) of the Labor Law states:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health, and safety of all persons employed therein or lawfully frequenting such places."

However,

"[w]here a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work."

Hughes v Tishman Construction Corporation, 40 AD3d 305, 306 (1st Dept 2007).

General supervisory control is insufficient to meet the

burden of maintaining a claim under Labor Law § 200; a plaintiff must demonstrate that the owner or contractor actually controlled the manner in which he performed the work. *Id.* at 307. Further, merely monitoring and overseeing a project is not enough to render an owner or contractor liable pursuant to Labor Law § 200. *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003).

"In order to prevail on such a claim, plaintiff must demonstrate that defendant had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Accordingly, liability can only be imposed if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition [internal quotation marks and citations omitted]."

Singh v Black Diamonds LLC, 24 AD3d 138, 140 (1st Dept 2005).

In the instant matter, neither Port Authority, nor GPI exercised supervision or control over Bruno's work, which was the responsibility of Kiska, Bruno's employer. Bruno himself testified that he only reported to a Kiska supervisor, that a Kiska supervisor ordered him to remove the rebar in question, and that he had no contact with any of defendants' employees. Motion 003, Ex. G, Bruno EBT, at 26.

The court notes that, although Bruno argued that the debris created a dangerous condition, the facts indicate a cause of action based on the means and methods of operation rather than the open and obvious debris on the bridge. See *Gasper v Ford Motor Co.*, 13 NY2d 104 (1963); *Schindler v Ahearn*, 69 AD3d 837

(2d Dept 2010). Working around the debris that had accumulated during his work shift is part of and inherent in Bruno's work, and so should be obvious to any worker in the area. See *Bombero v NAB Construction Corp.*, 10 AD3d 170 (1st Dept 2004).

Therefore, based on the foregoing, Port Authority's and GPI's motion for summary judgment is granted with respect to the causes of action based on common-law negligence and violation of Labor Law § 200.

Section 240 (1) of the Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Section 240 (1) of the Labor Law, commonly referred to as the scaffold law, imposes absolute liability on owners, contractors, and their agents, for any breach of its statutory obligations that is a proximate cause of injury to a worker. *Sanatass v Consolidated Investing Company, Inc.*, 10 NY3d 333 (2008). However, as the Court stated in *Blake v Neighborhood Housing Services of New York City, Inc.* (1 NY3d 280 [2003]):

"Throughout our section 240 (1) jurisprudence we have stressed two points in applying the doctrine of strict (or absolute) liability. First, that liability is contingent on a statutory violation and proximate cause.

... [v]iolation of the statute alone is not enough; plaintiff [is] obligated to show that the violation was a contributing cause of [the injury], and second, that when those elements are established, contributory negligence cannot defeat the plaintiff's claim [internal quotation marks and citations omitted]."

* * *

"On the other hand, **defendant may be granted summary judgment if the record establishes conclusively that no Labor Law § 240 (1) violation was shown to have been a proximate cause of the accident and that the accident was therefore caused solely by plaintiff's conduct.**"

Id. at 297, 293 n 8 [emphasis added].

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one."

Jones v 414 Equities LLC, 57 AD3d 65, 69 (1st Dept 2008).

The "elevation-risks" covered by the statute are

"[t]he contemplated hazards ... related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured [internal quotation marks and citation omitted]."

Melber v 6333 Main Street, Inc., 91 NY2d 759, 762 (1998).

The statute does not embrace the type of ordinary and usual peril to which a worker may be exposed at a construction site.

Alvia v Teman Electrical Contracting, Inc., 287 AD2d 421 (2d Dept 2001).

In the case at bar, Bruno was not working at an elevation.

His foreman asked him to remove a rebar from a truck which was, according to Bruno's own testimony, protruding from the truck at a height approximately level with the heads of the workers employed in the lane next to where the truck would be moving. Bruno is the one who decided to stand on debris to remove the protrusion; he was not told to stand on the debris, and he never requested any device to assist him.

In his opposition to the instant motion, Bruno's only response on this issue is to state that he thought he needed to climb on the debris to get to the necessary height to perform the task, and since he was provided with no safety devices, this cause of action should not be dismissed. To support his contention, Bruno has provided no evidence or case law for support. Under these circumstances, the court concludes that Bruno's injuries were not caused by a violation of section 240 (1) of the Labor Law. *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, *supra*. Hence, defendants' motions to dismiss any cause of action based on a violation of section 240 (1) of the Labor Law is granted.

Section 241 (6) of the Labor Law states:

"All 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."

It is undisputed by the within parties that, in order to

have a violation of Labor Law § 241 (6), there must also be a violation of one of the regulations promulgated under the Industrial Code, 12 NYCRR Part 23. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 (1993). Although the complaint and the amended verified bill of particulars enumerate multiple sections of the Industrial Code that Bruno alleges were violated, in the instant motion only a portion of those sections have been discussed: 23-1.7 (e) (1); 23-1.7 (e) (2); 23-1.7 (d); 23-2.1; 23-3.3 (c) and (k); and 23-3.4.

In *Lopez v City of New York Transit Authority* (21 AD3d 259 [1st Dept 2005]), the Appellate Division held that sections 23-1.7 (d) and 1.7 (e) (2) of the Industrial Code may have been violated when that plaintiff slipped on some debris at the work site and injured himself. In so finding, the Court reversed a lower court ruling that granted that defendant summary judgment on the section 241 (6) claim, and found instead that questions of fact precluded granting summary judgment. *Accord, Quinn v Whitehall Properties, II, LLC*, 69 AD3d 599 (2d Dept 2010). The same argument holds true in the case at bar. Therefore, defendants' motions are denied with respect to the alleged violations of these sections of the Industrial Code.

However, Bruno's argument that section 23-2.1 of the Industrial Code is applicable to the case at bar is unpersuasive. That section of the Industrial Code mandates that building

materials be stored in a safe and orderly manner. There is no indication that the storage of the debris in any way caused or contributed to Bruno's accident. The case cited by Bruno, *Donnelly v City of Niagara Falls* (5 AD3d 1103 [4th Dept 2004]) is clearly inapposite, because in that case, the worker was injured when a bag of debris was thrown, in an attempt to rid it from the work site.

Similarly, section 23-3.4 of the Industrial Code, which concerns the use of mechanical methods of demolition, and sections 23-3.3 (c) [inspection] and (k) [storage] of the Industrial Code have no relevance to the facts of the instant case. In fact, Bruno's only argument with respect to these sections is that they are applicable because mechanical instruments were used at the work site, and that if the debris were properly stored he would not have stood on it, which is not persuasive.

Lastly, Bruno avers that 23-1.7 (e) (1), which concerns maintaining clear passageways, applies to the facts of the case because the debris was in the passage lane that he had to use to reach the truck. However, he did not trip because of debris blocking his walkway; he slipped on some debris that he stood upon to reach the protruding rebar on the truck. Therefore, Bruno's argument with respect to this section of the Industrial Code is unavailing.

All other sections of the Industrial Code alleged to have been violated, but not discussed with respect to this motion, are deemed abandoned.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of Greenman-Pedersen, Inc.'s motion for summary judgment (motion sequence number 003) dismissing the first and second causes of action as against it, based on common-law negligence and violations of Labor Law §§ 200 and 240 (1), is granted; and it is further

ORDERED that the portion of Greenman-Pedersen, Inc.'s motion for summary judgment dismissing the third cause of action as against it, based on violations of Labor Law § 241 (6) and Industrial Code sections 23-1.7 (d) and 23-1.7 (e) (2), is denied; and it is further

ORDERED that the portion of Port Authority of New York and New Jersey's motion for summary judgment (motion sequence number 004) dismissing the first and second causes of action as against it, based on common-law negligence and violations of Labor Law §§ 200 and 240 (1), is granted; and it is further

ORDERED that the portion of Port Authority of New York and New Jersey's motion for summary judgment dismissing the third cause of action as against it, based on violations of Labor Law § 241 (6) and Industrial Code sections 23-1.7 (d) and 1.7 (e) (2),

is granted; and it is further

ORDERED that the remainder of the action shall continue; and
it is further

ORDERED that within 30 days of entry of this order,
plaintiff shall serve a copy upon all parties; with notice of
entry.

Dated: 7/8/10



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Bruno.helewitz.wpd

FILED
JUL 12 2010
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