

Sinacore v City of New York

2010 NY Slip Op 32059(U)

July 29, 2010

Sup Ct, Richmond County

Docket Number: 102068/07

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----x
PAUL SINACORE, III

Plaintiff,

-against-

CITY OF NEW YORK and EBERHART
CONSTRUCTION COMPANY, INC.,

Defendants.
-----x

DCM Part 6

Present:
Hon. Philip G. Minardo

DECISION AND ORDER

Index No. 102068/07
Motion No. 1361-004

The following papers numbered 1 to 3 were fully submitted on the 17th day of June, 2010:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant Eberhart Construction Company, Inc., with Supporting Papers (dated April 12, 2010).....	1
Affirmation in Opposition by Plaintiff Paul Sinacore, III (dated May 27, 2010).....	2
Movant’s Reply Affirmation (dated June 9, 2010).....	3

Upon the foregoing papers, the motion of defendant Eberhart Construction Company, Inc. for summary judgment dismissing the complaint is granted, in part, and denied, in part, in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 13, 2006 when he fell into a trench, measuring approximately 6 feet wide by 3½ feet deep, which had been excavated by defendant Eberhart Construction Company, Inc. (hereinafter, “Eberhart”). At the time, plaintiff was performing construction work for his employer, nonparty Con Edison, at the Goethals Substation on Staten Island,

SINACORE v. EBERHART

building a “transition ramp” atop a concrete pad on the banks of the Arthur Kill waterway. Insofar as it appears on the papers before the Court, Con Edison, the owner of the substation and the surrounding property, was undertaking the replacement of a large transformer that had failed. The project involved preparing a concrete dock area for the purpose of unloading a barge bearing the new 200 ton transformer. Con Edison had retained Eberhart to perform certain construction work for the project which included excavating a trench on each side of the concrete dock in order to locate and expose the steel pipes that had been installed to anchor the barge. Eberhart admittedly performed this excavation work two days prior to plaintiff’s accident. According to plaintiff, at the time of the incident, he was sliding a 100 pound cable reel located about two feet away from the subject trench when he fell into the hole because it “was difficult to see until [he] was right on top of it.” To the extent relevant, plaintiff claims that his injuries were caused by defendant Eberhart’s failure to erect the required safety devices, e.g., barriers, barricades, wooden planks, lights or caution tape, to warn of the presence of the trench.

By way of background, plaintiff withdrew his claims pursuant to Labor Law §240(1) by stipulation dated January 21, 2010, and on February 17, 2010, this Court granted the motion of defendant The City of New York for summary judgment dismissing the complaint as against it. Hence, the remaining causes of action sound in the alleged violation of Labor Law §241(6), 200 and common-law negligence.

In moving for summary judgment, defendant Eberhart maintains that plaintiff has failed to establish that this subcontractor exercised any supervision or control over his work sufficient to sustain a cause of action under to Labor Law §200 and for common-law negligence. Eberhart further maintains that plaintiff’s cause of action predicated upon alleged violations of Labor Law §241(6) must be dismissed since (1) it was not an agent of

SINACORE v. EBERHART

the owner or contractor within the meaning of the statute, and (2) the Industrial Code provisions plaintiff relies upon are inapplicable to the facts of this case.

In support, the moving defendant points out that plaintiff's supervisor, Stephen Guzowski, testified at his deposition that Eberhart did not have the ability to instruct or direct the manner in which Con Edison's employees performed their work, or to control where and when Con Edison worked at the site. Eberhart also relies upon plaintiff's admission at his deposition, that he did not take orders from anyone other than his supervisor. In particular, when plaintiff was asked if he took orders from anybody other than his supervisor, his response was "[a]bsolutely not."

It is well established that in order to hold a subcontractor liable under Labor Law §200 or liable as a statutory agent of the owner or general contractor under Labor Law §241(6), there must be a showing that the subcontractor "had the authority to supervise and control the work giving rise to these duties", i.e., "control of the work being done and the authority to insist that proper safety standards be followed" (Kehoe v Segal, 272 AD2d 583, 584; *see* Tomyuk v Junefield Assoc., 57 AD3d 518, 521; Torres v LPE Land Dev. & Constr., Inc., 54 AD3d 668, 669; Kelarakos v Massapequa Water Dist., 38 AD3d 717, 718; Bell v Bengomo Realty, Inc., 36 AD3d 479, 481; Zervos v City of New York, 8 AD3d 477, 481). Here, the moving defendant had neither.

In view of the foregoing, it is the Court's opinion that the moving defendant has demonstrated, prima facie, that the sole party with the authority to supervise and control the means and methods of plaintiff's work was his employer, Con Edison. In addition, it is undisputed that Eberhardt's excavation work and presence at the subject site had ceased two days prior to the date of plaintiff's accident (*see* Tomyuk v Junefield Assoc., 57 AD3d at 521; Kelarakos v Massapequa Water Dist., 38 AD3d at 718).

In opposition to the motion, plaintiff has failed to controvert Eberhart's status as a

SINACORE v. EBERHART

subcontractor for the construction project, and his conclusory assertion that questions of fact exist as to whether this defendant was a “statutory agent” of the owner of the premises is alone insufficient to raise a triable issue of fact. Absent any evidence that plaintiff received instructions or directions from this subcontractor (*see* Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-317), or that it exercised supervision and control over the work that caused his injury (*see* Zervos v City of New York, 8 AD3d at 481), plaintiff has failed to rebut defendant’s prima facie case for summary judgment. Accordingly, defendant Eberhart is entitled to summary judgment dismissing (1) plaintiff’s Labor Law §200 claim on the ground that the moving subcontractor did not have authority and control over plaintiff’s work, and (2) his Labor Law §241(6) claim on the ground that it was not a statutory agent, owner or general contractor at the work site (*see* Temperino v DRA, Inc., __AD3d __, 2010 NY Slip Op 6084 *4-5; Scuderi v Independence Community Bank Corp., 65 AD3d 928,929; Kelarakos v Massapequa Water Distr., 38 AD3d at 718; Bell v Bengomo Realty, Inc., 36 AD3d at 481; Zervos v City of New York, 8 AD3d at 481; Ryder v Mount Loretto Nursing Home, 290 AD2d 892, 894).

The same cannot be said, however, of the remaining cause of action against Eberhart for common-law negligence since plaintiff’s injuries are alleged to have arisen from a dangerous condition created by this defendant. According to the deposition testimony of both plaintiff and his supervisor, Stephen Guzowski, there were no barricades, wooden planking or caution tape erected at the accident site. As such, plaintiff has raised questions of fact as to whether Eberhart’s excavation and safeguarding of the trench was negligent, created an unreasonable risk of harm to plaintiff and proximately caused his fall (*see* Kelarakos v Massapequa Water Dist., 38 AD3d at 719; Bell v Bengomo Realty, Inc., 36 AD3d at 481; Ryder v Mount Loretto Nursing Home, 290 AD2d at 894). As a result, defendant Eberhart is not entitled to summary judgment on plaintiff’s cause of action for

SINACORE v. EBERHART

common-law negligence.

Accordingly, it is

ORDERED, that so much of the motion by defendant Eberhart Construction Company, Inc. which is for summary judgment dismissing plaintiff's claims against it under Labor Law §§241(6) and 200 is granted; and it is further

ORDERED, that the balance of the motion which is for summary judgment dismissing plaintiff's claims against defendant Eberhart Construction Company, Inc. for common-law negligence is denied; and it is further

ORDERED, the causes of action upon which summary judgment has been granted are hereby severed and dismissed; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: July 29, 2010

s/ Philip G. Minardo
J.S.C.