

Toro v Plaza Constr. Corp.

2010 NY Slip Op 32069(U)

July 30, 2010

Supreme Court, New York County

Docket Number: 101189/08

Judge: Marcy S. Friedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: FRIEDMAN
Justice

PART 57

Index Number : 101189/2008
TORO, ORLANDO
vs.
PLAZA CONSTRUCTION
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO. 101189/08
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

is motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

Dated: 7-30-10

M O
MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
ORLANDO TORO,

Plaintiff,

- against -

Index No.: 101189/08

PLAZA CONSTRUCTION CORP., NEW YORK
UNIVERSITY and NEW YORK UNIVERSITY
REAL ESTATE CORPORATION.,

Defendants.

DECISION/ORDER

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

_____ x
PLAZA CONSTRUCTION CORP.

Third-Party Plaintiff,

- against -

RITE-WAY INTERNAL REMOVAL, INC.,

Third-Party Defendant.

_____ x

In this Labor Law action, plaintiff Orlando Toro sues for injuries he sustained while dumping containers of trash into a garbage truck at a construction site. Defendants Plaza Construction Corp. ("Plaza"), New York University ("NYU"), and New York University Real Estate Corporation ("NYU Real Estate") move for summary judgment dismissing the complaint and granting judgment on their contractual indemnification claim against third-party defendant Rite-Way Internal Removal, Inc. ("Rite-Way"). By separate motion, Rite-Way moves for summary judgment dismissing the complaint.

NYU is the owner of the property where the accident occurred and Plaza was the general

contractor or construction manager of the project. Rite-Way was the demolition contractor and was responsible for demolition and carting. (Tarnowski Aff. in Support, ¶ 13.) Plaintiff was employed by Rite-Way as a truck driver assigned to picking up demolition debris. Plaintiff testified that the accident occurred as follows: On October 11, 2007, after making a few stops to pick up debris at other locations, plaintiff arrived at the NYU site and began dumping containers of debris into his garbage truck. (P.'s Dep. at 36, 45.) He testified that he would dump the trash into the truck and pull a lever which activated a blade that would compact the debris. (Id. at 39.) After having dumped about 12 containers, plaintiff dumped another container into the truck and while the blade was compacting the trash, a piece of plastic that was in the debris "exploded" and hit him in the face. (Id. at 47-48.) As a result, plaintiff sustained injuries to his face and eye.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law § 241(6) Claim

Labor Law § 241(6) provides:

All contractors and owners and their agents * * * shall comply with the following requirements:

6. 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 well settled that this statute requires owners and contractors and their agents “to provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law § 241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” (Id. at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (Id.)

In seeking dismissal of plaintiff’s section 241(6) claim, defendants first argue that plaintiff was not engaged in an enumerated activity. Work may be found to be covered by the Labor Law where it does not “fall into a separate phase easily distinguishable from other parts of the larger construction project,” does not take place in anticipation of construction or after construction is completed, and is “ongoing and contemporaneous with the other work that formed part of a single contract.” (Prats v Port Auth. of New York & New Jersey, 100 NY2d 878, 881 [2003]. See also Beehner v Eckerd Corp., 3 NY3d 751 [2004].) “[A] confluence of factors brings plaintiff’s activity within the statute,” including plaintiff’s position as a worker “who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred.” (Prats, 100 NY2d at 883.)

In Rivera v Squibb Corp. (184 AD2d 239 [1992]), this Department upheld the Labor Law claims of a plaintiff who was injured during the construction debris removal process, where the plaintiff was an employee of a subcontractor performing work at the construction site. The court reasoned: “While the injuries occurred on the loading dock area of the ground floor of this building, the debris removal process is part of the construction job site and is accorded the protections of the Labor Law.” (Id. at 240.) Torkel v NYU Hosps. Ctr. (63 AD3d 587 [1st Dept 2009]), on which defendants rely, is not to the contrary. There, the plaintiff was injured while rolling a container of construction debris away from the work site. The majority held that the defendant had not raised the applicability of the Labor Law before the motion court, and therefore did not reach the issue. The dissent held that the removal of the construction debris was not a protected activity under the Labor Law. In so holding, however, it distinguished Rivera, noting that “at the time of plaintiff’s accident, plaintiff’s employer, Rite-Way, was not hired to perform any demolition work on the premises, and the work being performed by plaintiff fell into ‘a separate phase easily distinguishable from other parts of the larger construction project.’” (Id. at 598.) The dissent also emphasized that the Prats standard had not been met, reasoning: “In Prats, the Court found that a confluence of factors brought the plaintiff’s activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred. None of these factors is present in this case.” (Id. at 599 [internal citation omitted].)

Here, defendants fail to demonstrate as a matter of law that plaintiff’s work was not a

protected activity within the meaning of Labor Law § 241(6). In claiming that the work was not protected, defendants rely on the facts that plaintiff was a truck driver, assigned to pick up demolition debris; that he did not perform any actual demolition work; and that he had not been to the NYU construction site prior to the date of the accident. (Sec P.'s Dep. at 11, 34-35.) Defendants also submit daily work logs which show that Rite-Way had not performed work at the project site since September 24, 2007. (See Defs.' Motion, Ex. B.)

In opposition, however, plaintiff submits evidence showing that plaintiff's employer, Rite-Way, was the demolition subcontractor for the project, and that its demolition work was ongoing. In particular, plaintiff submits the Purchase Order Confirmation between Rite-Way and NYU, dated September 13, 2007, and providing a completion date for Rite-Way's work of December 12, 2007. This document describes the work to be done by Rite-Way as "demolition" work, including: Cellar-Phase 1: "[r]emove furred out sheetrock partitions and wood bench"; "[r]emove existing kitchen equipment, conveyor at dishwashing room"; "[c]omplete gut at dishwashing room"; "[r]emove ceiling system"; "[c]art metal base cabinet at servery." (See Purchase Order Confirmation at 2, P.'s Opp., Ex. B.)

Defendants do not dispute that Rite-Way was the demolition subcontractor for the project. Nor do they dispute that Rite-Way continued to perform demolition work that was part of the contract, after plaintiff's accident.

In the instant action, plaintiff's employer was thus clearly hired to perform an activity enumerated under the Labor Law. Moreover, on the facts presented, the court finds that this is not a case in which "there is a bright line separating the enumerated and nonenumerated work." (Compare Beehner, 3 NY3d at 752.) Rather, there is a triable issue of fact as to whether

plaintiff's work was part of the ongoing demolition work to be performed by Rite-Way under the contract, or whether plaintiff's work fell into a separate phase distinguishable from the other parts of the project. (See Prats, 100 NY2d at 881.)

In so holding, the court rejects defendants' apparent contention that Labor Law coverage is unavailable because plaintiff was a truck driver and did not himself perform the demolition. As the Prats Court held, "job titles are not dispositive." (Id. at 882.) The issue is whether plaintiff "was a member of a team that undertook an enumerated activity under a construction contract. . . . The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts." (Id.)

The court also rejects defendants' contention that plaintiff's accident did not occur in an area where construction was being performed. As held in Rivera (184 AD2d at 240), as the debris removal process is part of the construction job site, injuries on the loading dock on the ground floor are subject to Labor Law coverage.

Plaintiff's Labor Law § 241(6) claim is that defendants violated Industrial Code section 23-1.8(a), which provides that "[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in . . . chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes."¹ Defendants contend that section 23-1.8(a) is inapplicable because plaintiff was not engaged in an operation in which it was foreseeable that he could injure his eye. However, it is well settled that "[w]hether an activity is protected by 12

¹While plaintiff pleads violations of other Industrial Code sections in his bill of particulars, plaintiff opposes defendants' motion solely to the extent that it seeks dismissal of his claim under section 23-1.8(a).

NYCRR 23-1.8(a) requiring the furnishing of eye protection equipment is a jury question that turns on whether a particular activity involves a foreseeable risk of eye injury.” (Fresco v 157 E. 77nd St. Condominium, 2 AD3d 326, 328 [1st Dept 2003]; Cappiello v Telehouse Intern. Corp. of Am., Inc., 193 AD2d 478, 480 [1st Dept 1993]. Contrary to defendants’ contention, plaintiff’s claim under Industrial Code § 23-1.8(a) is not barred as a matter of law on the ground that plaintiff’s work was not construction work or work on a structure. As held above, a triable issue of fact exists as to whether plaintiff’s debris removal work was part of his employer’s ongoing demolition work. (Compare Chuchuca v Redux Realty LLC, 303 AD2d 239 [1st Dept 2003].)

The branches of defendants’ motions to dismiss plaintiff’s labor Law § 241(6) claim should accordingly be denied.

The branches of defendants’ motions for dismissal of plaintiff’s claim under Labor Law § 240(1) are unopposed and will therefore be granted. The branches of defendants’ motions for dismissal of plaintiff’s claims under Labor Law § 200 and for common law negligence will also be granted. Plaintiff’s submission of evidence showing Plaza’s presence at the work site is plainly insufficient to raise a triable issue of fact as to whether Plaza supervised or controlled the work. (See Geonic v OD & P NY Ltd., 50 AD3d 444 [1st Dept 2008] [general contractor].)

Plaza and the NYU defendants also seek summary judgment on their contractual indemnification claim against Rite-Way. Plaza and NYU make a prima facie showing of entitlement to summary judgment based on the Purchase Order between Plaza and Rite-Way, in which Rite-Way agrees to indemnify and hold harmless Plaza and NYU “from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever (including attorney’s fees and disbursements) which arise out of or are connected with . . . the performance of

Work by” Rite-Way. (Defs.’s Motion, Ex. E., Art. 10.4.) Defendants make a prima facie showing, which plaintiff does not dispute, that they did not supervise or control plaintiff’s work, and did not have actual or constructive notice of an unsafe condition. Plaintiff’s injury unquestionably arose out of his work for Rite-Way. While Rite-Way argues that this motion for indemnification is premature, it does not submit any evidence whatsoever to show that Plaza or the NYU defendants were negligent. Absent a triable issue of fact as to their negligence, Plaza and the NYU defendants are entitled to judgment on their indemnification claim.

It is accordingly hereby ORDERED that the motion of defendants Plaza Construction Corp., New York University, and New York University Real Estate Corporation, and the motion of third-party defendant Rite-Way Internal Removal, Inc., for summary judgment is granted to the following extent: The § 200 and common law negligence claims are dismissed; the § 240(1) claim is dismissed without opposition; and the § 241(6) claim is dismissed without opposition except to the extent that it is based on Industrial Code § 23-1.8(a); and it is further

ORDERED that Plaza Construction Corp., New York University, and New York University Real Estate Corporation are granted judgment on their claim for contractual indemnification against Rite-Way Internal Removal, Inc.

This constitutes the decision and order of the court.

Dated: New York, New York
July 30, 2010

Marcy Friedman

 MARCY FRIEDMAN, J.C.
FILED
 AUG 05 2010
 NEW YORK
 COUNTY CLERK'S OFFICE