

Gordon v Hunt/Bovis Land Lease

2010 NY Slip Op 32099(U)

July 30, 2010

Supreme Court, New York County

Docket Number: 115413/2007

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
J.S.C.
Justice

PART 44

Gordon, Daniel

INDEX NO. 115413/2007

MOTION DATE 5/28/2010

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

Hunt/Bovis Lend Lease

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
AUG 09 2010

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

The motions under motion sequence number five and six are decided in accordance with this decision.

Defendants, Hunt/Bovis Lend Lease Alliance II, A Joint Venture, Hunt Construction Group, Inc., Bovis Lend Lease, Inc., New York City Industrial Development Agency, Queens Ball Park Company, LLC, and Mets Development Company, LLC ("Defendants"), move for summary judgment dismissing Plaintiff Daniel Gordon's ("Gordon") common law negligence and Labor Law §§ 200 and 240(1) claims, and the Labor Law §241(6) claim to the extent it is based on the alleged violation of Industrial Code Sections 23-8.1(b)(1), (2); 23-8-8.1(F)(1), (3), (4), (6), (7); 23-8.1 (1a) (1), (2), (3), (4), (5), (6), (7); 23-8.2(a), (b), (c); and 23-8.5(c). Gordon moves for partial summary judgment over the defendants on the issue of liability pursuant to CPLR §3212 and Labor Law §240(1) and Labor Law §241(6).

On July 13, 2007, Gordon was working on a construction job for Cornell & Co. ("Cornell"), a subcontractor of the joint venture, when the accident occurred. Gordon was taking a column hitch off the crane's headache ball (the weight attached to the hook of the crane) on the project's third tier, or concourse level. The crane was positioned on the field level. As Gordon took the hitch off the

Dated: 7/30/10 mta
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):

crane hook, the headache ball suddenly came at him pushing him backwards. He raised his hand to protect himself and his glove caught on the crane hook, and he was lifted approximately 25 feet. The crane suddenly stopped and Gordon fell off the hook to the concourse level, sustaining alleged permanent injuries.

The movant on a summary judgment motion must establish his case as a matter of law. Winegard v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. §3212; Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. Zuckerman, supra.

Defendants claim there is no evidence that Queens Ballpark or Mets Development had supervisory authority over the work in general or Cornell's work in particular. And the joint venture's general supervisory authority over the project as construction manager did not rise to the level of "direction or control" necessary to permit it to be held liable for the accident pursuant to Labor Law § 200 or a common law negligence cause of action. Defendants rely on Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 318, 445 N.Y.S.2d 127, 130 (1981), which states in part that "only upon obtaining the authority to supervise and control does the third-party fall within the class of those having non-delegable liability as an 'agent' under sections 240 and 241". There is also no liability when a defendant can inspect the construction site to monitor compliance with federal, state, and local safety regulations, but does not have the authority to control or direct anything themselves. Therefore, defendants believe liability cannot be imposed under Labor Law §200 or for common law negligence unless the entity sought to be held liable had the authority to supervise or control the work during which the injury occurred.

Gordon claims Defendants have failed to demonstrate their entitlement to summary judgment as matter of law dismissing the Labor Law §200 claim because the level of control the defendant Hunt/Bovis over the entire job site and the hoisting operations in particular precludes summary judgment. Gordon argues there is a clear question of fact regarding Hunt/Bovis's control over the means and methods of Cornell, its subcontractor. Whether the defendant Hunt/Bovis retained control and supervision over the work site is a triable issue of fact. Labor Law §200, which is a codification of the common-law duty of an employer to provide a safe place to work, applies to an owner or contractor who exercises control or supervision over the work performed at the accident site and have actual or constructive notice of an unsafe condition. Freitas v. New York Transit Authority, 249 AD2d 184, 671 NYS2d 101 (1st Dept 1998).

Defendants argue that Freitas is no longer good law, having been abandoned by the First Department in Hughes v. Trishman Contr. Corp., 40 A.D.3d 305, 836 N.Y.S.2d 86 (1st Dept., 2007). That Trishman, Site-Safety, or both, may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Trishman exercised the requisite degree of

supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence. Hughes, supra. Defendants argue even if Freitas were viable today, the situation there was materially different from the case at bar because there the general contractor's contract with the employer gave it "direct control" over the employer contractor, which when combined with the presence of a site safety manager, the holding of safety meetings, setting scheduling and having the right to terminate the contract created factual issues about whether there was control and supervision.

Gordon asserts the level of control and supervision over the work by Hunt/Bovis is at least as direct as in Freitas. Gordon claims defendant Hunt/Bovis did not merely have general supervisory authority on the project. The testimony of the witnesses on behalf of Hunt/Bovis demonstrates a level of control over the mechanisms which caused the accident. Regarding the defendants other than Hunt/Bovis, Gordon claims the record does not support that those defendants are liable under Labor Law § 200.

The deposition testimony regarding Hunt/Bovis's presence, coordination and scheduling, and the authority to stop work at the accident site, raises factual issues as to the amount of control Hunt/Bovis had over the work being performed and specifically, the hoisting operations at the accident site. Accordingly, Defendants motion for summary judgment on Gordon's Labor Law § 200 claim is DENIED.

Defendants state that the Labor Law 240 (1) claim must also be dismissed. Gordon's injury resulted from a separate hazard unrelated to the danger that brought about the need for a safety device in the first place, and there is no evidence of the device being defective or improperly placed. Defendants claim the risk to Gordon is not the type of extraordinary peril Labor Law § 240 (1) was designed to prevent, and he is not entitled to its protection.

Gordon relies on Runner v. New York Stock Exchange, 13 NY3d 599, 895 NYS2d 279 (2009) where the Court of Appeals rejected the narrow interpretation of Labor Law §240 and set fourth the standard that "Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person". Gordon argues this accident occurred due to improper operation of the crane which resulted in severe gravitational forces causing injury. Gordon claims he was not provided adequate protection from being hoisted and dropped.

Gordon's position working on the elevated third tier of the construction site presents an issue of fact regarding what, if any, safety precautions should have been in place. Accordingly, Gordon's motion for partial summary judgment pursuant to Labor Law §240(1) is GRANTED / Defendants motion for summary judgement pursuant to Labor Law §240(1) is DENIED.

Gordon does not contest that its Labor Law §241(6) claims based on Industrial Code §§ 23-8.1(b)(1), (2); 23-8.1(f)(1)(i),(ii),(iv),(v), (3), (4), (6), (7); 23-8.1 (1a) (1), (2), (3), (4), (5), (6), (7); 23-8.2(a), (b), (c) and 23-8.5(c) should be dismissed. As to the remaining claims of Industrial Code §§ 23-8.1(f)(2) and (5) violations, neither the defense nor plaintiff seek summary judgment of § 23-8.1(f)(2). Gordon seeks partial summary judgment pursuant to Industrial Code § 12 NYCRR 23-8.1(f)(5).

Gordon argues Defendants, as owner and the general contractor, owed a non-delegable duty to protect him. §241(6) of the New York State Labor Law requires that all "areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and constructed as to provide reasonable and adequate protection and safety to the persons employed therein..." Under Labor Law 241(6), the owner and general contractor of an area where construction, excavation or demolition is taking place is liable for injury to a worker in that area caused by the failure of a general contractor or subcontractor to use reasonable care in constructing, shoring, equipping, or guarding the site or in arranging, operating or conducting the work in that area.

Gordon relies on Industrial Code Rule 23-8.1(f)(5) which states "Mobile cranes, tower cranes and derricks shall not hoist, lower, swing, or travel while any person is located on the load or hook". Gordon claims the plain and obvious directives contained in §23-8.1(f)(5) were not followed by the defendants since a mobile crane hoisted while Gordon was on the hook of the crane causing him to be lifted up 25 feet into the air and dropped 25 feet. §23-8.1(f)(5) specifically prohibits owner and contractors from allowing cranes to be operated while a worker is on the hook.

Defendants claim that although Gordon ultimately ended up on the hook and was raised, the issue is how he got there. Defendants claim there is an issue of fact whether or not Gordon was removing or had completed the removal of the rigging from the crane at the time of his accident. If the rigging from the crane was removed Gordon had no reason to be in physical contact with the crane, its hook or any other mechanism. Defendants also claim there is evidence to suggest Gordon himself gave the signal to the signal man to give to the crane operator that all was clear (when it was not) and the crane could be lifted. Defendants argue this establishes an evidentiary showing presenting a triable issue of fact as to comparative negligence Gordon is not entitled to summary judgment.

However, the Court believes there is no evidence of comparative fault on the part of Gordon. There is no dispute that the hook of the crane was hoisted while Gordon was located on the hook, a violation of Industrial Code Rule 23-8.1(f)(5) at the time of the accident.

Accordingly, Gordon's motion for partial summary judgment pursuant to CPLR §3212 and Labor Law § 241(6) based on a violation of Industrial Code Rule 23-8.1(f)(5) is GRANTED.

Defendants motion for summary judgment on Gordon's Labor Law section 200 claim is DENIED / Gordon's motion for partial summary judgment pursuant to Labor Law section 240(1) is DENIED / Defendants motion for summary judgment pursuant to Labor Law section 240(1) is DENIED / Gordon's Labor Law §241(6) claims based on Industrial Code §§ 23-8.1(b)(1), (2); 23-8-8.1(f)(1)(i),(ii),(iv),(v), (3), (4), (6), (7); 23-8.1 (1a) (1), (2), (3), (4), (5), (6), (7); 23-8.2(a), (b), (c) and 23-8.5(c) are DISMISSED / Gordon's motion for partial summary judgment pursuant to Labor Law section 241(6) based on violations of Industrial Code Rule 23-8.1(f)(5) is GRANTED

Issues regarding § § 200 and 240(1) of New York State Labor Law and Industrial Code § 23-8.1(f)(2) remain open.

Parties are to proceed with the scheduled conference.

DATED: July 30, 2010

Met
MORRIS COUNTY CLERK'S OFFICE
J.P.F.

FILED
AUG 09 2010
NEW YORK
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