

Linea v City of New York

2010 NY Slip Op 32622(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 108385/03

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 108385/2003
LINEA, CARMELO
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 009
PARTIAL SUMMARY JUDGMENT

INDEX NO. 108385/03
MOTION DATE _____
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed decision.*

FILED
SEP. 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/22/10 _____ CK

CYNTHIA S. KERN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 52

-----X
CARMELO LINEA and JANICE LINEA,

Plaintiffs,

Index No. 108385/03

-against-

DECISION/ORDER

THE CITY OF NEW YORK, JUDLAU
CONTRACTING INC. and MANUEL ELKEN
CO., P.C.

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers

Notice of Motion and Affidavits Annexed.....
Answering Affidavits.....
Cross-Motion and Affidavits Annexed.....
Answering Affidavits to Cross-Motion.....
Replying Affidavits.....
Exhibits.....

Numbered

FILED
SEP 23 2010
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Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when steel fragments flew into his eye during the course of his employment. In a decision dated May 2, 2010, this court granted defendant the City of New York's motion for summary judgment, dismissing plaintiff's complaint consisting of claims pursuant to Labor Law 200 and Labor Law §241(6) and denied plaintiff's cross-motion for summary judgment. Plaintiff now moves to renew and reargue that motion with respect to the court's decision regarding plaintiff's Labor Law §241(6) claim. For the reasons set forth below, plaintiff's motion to renew

and reargue is granted and, upon renewal and reargument, defendant's motion for summary judgment as to plaintiff's Labor Law §241(6) claim is denied and plaintiff's cross-motion for summary judgment on this claim is granted.

The relevant facts are as follows. At the time of the incident, plaintiff was employed by Empire City Subway ("ECS"). On December 16, 2002, plaintiff was cutting and grinding a metal pipe in a trench in the roadway on Barclay Street, just west of its intersection with Church Street, when fragments of hot metal flew into his left eye, injuring it. He was doing so as part of ECS's work to move pipes that it owned that were in the way of a sewer main being installed by the City. ECS was required to move these pipes pursuant to a franchise agreement with the City. The City had contracted with defendant Judlau Contracting Inc. ("Judlau") to install the sewer main. The City did not have a contract with ECS. The City did not hire ECS to do any work, nor did it have any control or authority over the work done by ECS or over ECS employees. ECS provided its employees with all of their equipment and directed their work.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). On a motion for leave to renew, the movant must allege new facts not offered on the prior motion and a reasonable justification for the failure to present those facts on the prior motion or shall demonstrate that there has been a change in the law that changes the court's prior determination. CPLR 2221(e)(2) and (3). Plaintiff argues that either this court misapprehended the law or, in the alternative, that a case decided by the Court of Appeals on June 8, 2010, several weeks after this court's decision in the instant case, *Morton v State of New York*, 15 N.Y.3d 50 (2010) has changed the state of the law. Because this court finds that *Morton*, which either clarified or changed the state of the law, does

affect the outcome of the instant action, plaintiff's motion for leave to renew and reargue is granted.

In *Morton*, the Court of Appeals addressed the issue of when a property owner can be liable under Labor Law §241(6) when the owner did not directly employ the injured worker. *See id.* Section 241(6) of the Labor Law requires owners and contractors, or their agents, to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 at 502 (1993). The *Morton* court held that no contract between a property owner and the injured worker or his employer was required but merely that there be a "nexus" between them. *See Morton*, 15 N.Y.3d at 56. In *Morton*, plaintiff was working for a private water service company to fix a water main installed beneath a road that was part of the State of New York's highway system. The water main was owned by the water company but the land above it was owned by the State. Plaintiff was injured when he climbed into a trench to do work and a side wall of the trench caved in, injuring his foot and leg. The water company did not have a permit to perform the work which resulted in injury to plaintiff. *See id.* The *Morton* court held that "ownership [of the premises where the accident occurred] is a necessary condition, but not a sufficient one. Rather, we have insisted on 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement or other property interest.'" *Id.* (citations omitted). In *Morton*, the plaintiff's employer's lack of a permit or contract to perform the injury-producing work proved fatal to plaintiff's claim. *See id.* The court found that the required nexus was lacking because plaintiff's employer did not have any formal connection, such as a permit or contract, to the owner. *See id.*

In the instant case, the City is not entitled to summary judgment dismissing plaintiff's Labor Law §241(6) claim because there is a nexus between it and the plaintiff. *See id.* The City, as the owner of the street above the pipes which were being moved, is a property owner within the meaning of the statute just as in *Morton*, the State owned the land above the water main at issue. *See id.* The nexus is provided by the fact that ECS was required to move its utilities in order to accommodate the City's water main project. Although ECS did not have a permit or contract to do this work, it was required to do this work by the City itself. That requirement is sufficient to establish a nexus. To the extent that this court initially held otherwise, it did so because it did not apply the *Morton* "nexus" test. This court's failure to apply the *Morton* standard in its May 2nd decision was in error. The court, now applying the *Morton* "nexus" test, finds that the requirement that ECS had to move the pipes which plaintiff was working on provides the requisite nexus.

Plaintiff is entitled to summary judgment on her Labor Law §241(6) claim. This provision requires owners and contractors, or their agents, to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 at 502 (1993). Plaintiff testified that he had a pair of safety glasses with him at the job which were provided to him by ECS. These glasses were open at the top, sides and bottom. Plaintiff submits the affidavit of Stanley H. Fein, a professional engineer, who examined the glasses, reviewed plaintiff's testimony and reviewed the applicable Industrial Code provision, §23-1.8(a), which requires that plaintiff be provided with "approved eye protection equipment suitable for the hazard involved" for workers who are "employed in the

welding, burning or cutting operations or in chipping, cutting or grinding material from which particles may fly." Plaintiff's work, cutting and grinding metal, is exactly the kind for which protective eyewear is required by this section. Mr. Fein concluded that the glasses provided were not suitable to protect against the hazard of flying metal. The City fails to offer any evidence to the contrary which would raise a question of fact. Furthermore, the City's reliance on *Fresco v 157 E. 72nd St. Condo*, 2 A.D.3d 326 (1st Dept 2003) for the proposition that "whether an activity is protected by 12 NYCRR 23-1.8(a) requiring the furnishing of eye protection equipment is a jury question" is misplaced. In *Fresco*, plaintiff was hammering a nail which "bounced up" and injured him. *See id.* Hammering is not an activity listed in 23-1.8(a). However, cutting and grinding metal is specifically enumerated in that section. Therefore, eye protection is required for such an activity as a matter of law.

Accordingly, plaintiff's motion to renew and reargue is granted and, upon renewal and reargument, his cross-motion for summary judgment on his Labor Law §241(6) claim is granted. The action has been discontinued against Judlau Contracting Inc. and Manuel Elken Co., P.C. Therefore, the only remaining issue is plaintiff's damages, which will be determined at trial. This constitutes the decision and order of the court.

Dated: 9/22/10

FILED Enter: PK
J.S.C.
SEP 23 2010
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