Dominguez v Farina
2011 NY Slip Op 31321(U)
May 6, 2011
Supreme Court, Nassau County
Docket Number: 5708/09
Judge: Thomas P. Phelan
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS, PART 2
NASSAU COUNTY

HILARIO DOMINGUEZ,

Plaintiff,

ORIGINAL RETURN DATE: 12/07/10
SUBMISSION DATE: 03/22/11
Index No. 5708/09

-against-

ANTHONY FARINA, DAVID WEISS, RMN CORPORATION, 2407 PITKIN AVENUE CORPORATION, UNLIMITED CONSTRUCTION, INC. and NORTH STAR BUS, INC.,

Defendants.

MOTION SEQUENCE #5, 6

The following papers read on this motion:

Notice of Motion.. 1
Cross-Motion... 2
Answering Papers... 3
Reply.. 4

Defendant, Anthony Farina, moves pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint, with prejudice. Plaintiff cross-moves pursuant to CPLR 3212 for an order granting summary judgment as to the issue of liability with respect to those claims predicated upon Labor Law§§ 240(1) and 241(6).

The record reveals that on October 3, 2007, plaintiff was employed by Unlimited Asphalt &Masonry and was working on a construction site located at 9802 Ditmas Avenue, Brooklyn, New York. On said date, the subject location was owned by defendant, Anthony Farina, and leased to defendants, David Weiss ("Weiss") and North Star Bus , Inc. ("North Star"). At this time, defendants, Weiss and North Star, were building a structure on the subject premises in connection to their business, which involved providing buses with mechanical and maintenance services. By order dated, May 7, 2010, this Court granted plaintiff's unopposed application, which sought a judgment by default against North Star Bus, Inc.

On October 3, 2007, plaintiff was installing and screwing together the steel beams forming the "structure of the building," which was then under construction at the subject premises. Plaintiff testified that he "was seated on a metal post," which comprised part of the building being constructed. This post was fastened at ground level to a concrete base and was approximately 25 feet high, which plaintiff accessed by utilizing a ladder at the construction site. Plaintiff testified that he was seated atop the metal post waiting for a beam to be lifted so that he could screw it into the proper place. The steel beam was lifted from the ground by way of a hoisting machine, which included a bucket, from the bottom of which the beam was attached with a rope. This machine was being operated by an individual named Craig, who was a fellow employee and immediate supervisor of plaintiff.

Plaintiff testified that as the steel beam was being lifted, the machine "made a bad movement" and the bucket hit him on the left leg in the area of the knee. Plaintiff stated that the impact from the bucket was "light." Immediately after the accident, plaintiff remained sitting on the post, after which he was transferred back to ground level by use of "the payloader," whereupon he was placed into a white pick-up truck and driven to Brookdale Hospital by Craig. Upon presentment to the hospital, plaintiff was diagnosed with having sustained a fracture of the left distal femur and underwent surgery to his leg in connection therewith. Plaintiff was ultimately released from the hospital on October 23, 2007.

As a result of the foregoing, the underlying action was commenced by plaintiff and alleges claims predicated upon Labor Law §§200, 240(1) and 241(6). The applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the application interposed by defendant, Anthony Farina. In support thereof, counsel for defendant initially argues that Mr. Farina was an out-of-possession landlord, who neither supervised nor controlled the work in the which plaintiff was engaged and as such the cause of action predicated upon Labor Law §200 must be dismissed. Counsel relies, *inter alia*, upon the annexed deposition testimony of Anthony Farina, who testified that he had no knowledge with respect to either the type of structure being built on the subject premises or how said structure was being constructed. Counsel further relies upon an affidavit from defendant, wherein he avers that he "did not select, hire, or pay Unlimited Construction as [sic] or any other contractor for any construction work on the subject land I lease to David Weiss and North Star Bus, Inc." (Farina Aff., ¶6).

With respect to those claims predicated upon Labor Law §240, counsel argues that as plaintiff neither fell from a height nor was struck by an object falling from above, the subject accident did not involve an elevation-related risk and said statute is inapplicable warranting dismissal of the those claims based thereon . Finally, with respect to those claims predicated upon Labor Law§ 241(6), counsel argues that the multitude of Industrial Code regulations cited by plaintiff in his bill of particulars are inapplicable to the facts herein.

Plaintiff opposes the instant application and simultaneously cross-moves for an order granting summary judgment as to the issue of liability with respect to those claims based upon Labor Law

§§240(1) and 241(6). Plaintiff's cross-motion is opposed solely by defendant, Anthony Farina ("Farina").

Initially, and with respect to those claims predicated upon Labor Law §200, counsel for plaintiff does not specifically direct any opposition arguments directly thereto but generally suggests that the evidence as adduced herein demonstrates that defendant Farina was cognizant of and involved with the construction project underway at the subject premises. To this point, counsel makes reference to the deposition transcript of co-defendant, David Weiss, who testified that he was referred to Unlimited Asphalt & Masonry by defendant Farina and that Mr. Farina was present at a meeting which was held prior to any agreement being consummated. Counsel additionally relies upon that portion of Mr. Weiss' deposition, wherein he states that the procedures with respect to the erection of the building "came from Anthony Farina."

With particular regard to plaintiff's claims based upon Labor Law §240(1), counsel contends that plaintiff was exposed to a "double elevation hazard," which resulted from Mr. Dominguez working at a location 25 feet above ground, as well as because he was required to unload steel beams "hoisted up to him 25 feet up in the air and then lowered from above him to the level where he was working." Counsel stresses that while plaintiff did not fall from the steel post upon which he was situated, he almost fell therefrom as is evidenced from his deposition testimony wherein he allegedly stated that he "was able to hang on after being hit by the hoisting machine" and that "he had the presence of mind to not let go of the steel beam he was on and to be knocked off to the ground 25 feet below."

With respect to the matter of proximate causation, counsel posits alternative theories. Initially, counsel contends that plaintiff was not provided with any type of safety equipment and said failure was a clear violation of Labor Law §240(1) which proximately caused the subject accident. Alternatively, counsel posits that the hoisting machine was in fact the safety equipment in use but that same was not operated in such a way so as to afford plaintiff the proper protections as are required by the statute.

Finally, with respect to those claims based upon Labor Law §241(6), counsel argues that plaintiff has successfully alleged violations of 12 NYCRR 23-2.3(a) and 12 NYCRR 23-6.1(e) and accordingly is entitled to summary judgment thereon.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212(b); *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application, and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). Assertions set forth by an opposing attorney, which are unsupported by factual proof, lack probative value and are insufficient to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247 [1980]).

Labor Law §200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof a duty to provide workers with a safe environment in which to perform their assigned duties (*Lombardi v Stout,* 80 NY2d 290 [1992]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494[1993]; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept 2001]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008]). "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Rizzuto v L.A. Wenger Contracting Co., Inc.,* 91 NY2d 343 [1998], quoting *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). Thus, in order to establish liability against either an owner, general contractor or an agent thereof, plaintiff must demonstrate that the owner, general contractor or agent exercised supervision and control over the work being performed or had actual or constructive notice of the alleged unsafe condition (*Sprague v Peckham Materials,* 240 AD2d 393 [2d Dept 1997]; *Parisi v Loewen Development of Wapppinger Falls, LP,* 5 AD3d 648 [2d Dept 2004]; *Astarita v Flintlock Construction Services, LLC*, 69 AD3d 888 [2d Dept 2010]).

In the instant matter, while plaintiff testified that when working at the subject premises he took direction "only from Craig," defendant Weiss also testified that the procedures with respect to the erection of the building "came from Anthony Farina." Accordingly, the Court finds the existence of factual questions with respect to the degree of control, if any, that defendant Farina exercised over the work site and with respect to whether he had any notice of a dangerous condition, which may have existed thereat (*Sprague v Peckham Materials,* 240 AD2d 393 [2d Dept 1997]; *Parisi v Loewen Development of Wapppinger Falls, LP,* 5 AD3d 648 [2d Dept 2004]; *Astarita v Flintlock Construction Services, LLC*, 69 AD3d 888 [2d Dept 2010]).

Therefore, based upon the foregoing, that branch of the application made by defendant Farina which seeks an order granting summary judgment dismissing plaintiff's claims based upon common law negligence and Labor Law §200 is hereby denied.

Labor §240(1) provides in relevant part that "all contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection . . ." to construction workers who are employed on the subject premises. "While the reach of section 240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Martinez v City of New York*, 93 NY2d 322, 325 [1999] quoting Labor Law §240 (internal citations omitted); *Valdvia v Consolidated Resistence Co. of America, Inc.*, 54 AD3d 753 [2d Dept 2008]). The duty imposed by the statutory provisions is nondelegable in nature and an owner or contractor who breaches the duty may be held liable in damages caused thereby, irrespective of whether it actually exercised supervision or control over the work performed (*Cahill v Triborough Bridge and Tunnel Authority,* 4 NY3d 35, 39 [2004]). However, for liability to attach in accordance with the statute, it is incumbent upon plaintiff to demonstrate "that the statute was violated and that the violation proximately caused his injury" (*Id.; see also Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

In opining as to the scope of hazards which fall within the purview of the statute, the Court of Appeals has held that Labor Law §240(1) and the provisions thereof "do not encompass any and all peril that may be connected in some tangential way with the effects of gravity" and rather the statutory protections are applicable to ". . . such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]; *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]). While the statute is to be liberally construed so as to give effect to the purposes for which it was promulgated, in consideration of the strict liability imposed thereby, the statutory language should not be so contorted as to bring within its sphere that which the legislature did not intend to include (*Koenig v Patrick Construction Corp.*, 298 NY 313 [1948]; *Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657 [2d Dept 1994]).

In the matter *sub judice*, having carefully reviewed the respective submissions of the parties herein, this Court finds that plaintiff's accident does not fall within the ambit of Labor Law§ 240 (1) (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]; *Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]). As noted above, counsel for plaintiff posits that the subject accident resulted from elevation-related hazards stemming from the height of the metal post from which plaintiff almost fell, as well as from the fact that the bucket which struck plaintiff was "lowered from above him."

Initially, the Court notes that there is no support in the record that plaintiff almost fell from the post upon which he was situated. While this Court is quite cognizant that "[t]he application of section 240(1) does not hinge on whether the worker actually hit the ground" (*Striegel v Hillcrest Heights Development Corporation*, 100 NY2d 974, 978 [2003]), here, there is no competent evidence that Mr. Dominguez either "almost fell" from the metal post or that he somehow managed to "hang on" thereto after being struck by the bucket (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993];

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Narducci v Manhasset Bay Associates, 96 NY2d 259, 267 [2001]). To the contrary, as recited above, plaintiff testified that immediately after being struck in the leg by the bucket, he remained seated on the metal post.

Further, plaintiff herein clearly testified that as the hoisting machine was lifting a metal beam up to where he was situated, the bucket attached thereto struck his left knee. There is a complete absence of any record evidence that the bucket was "lowered from above" plaintiff (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]; *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]).

Based upon the foregoing, that branch of the application made by defendant Farina which seeks an order granting summary judgment dismissing plaintiff's claims based upon Labor Law §240(1) is granted. Accordingly, plaintiff's cross-application, which seeks an order granting summary judgment as to liability with respect to his claims predicated upon Labor Law §240(1) is denied as moot.

As to those claims predicated upon Labor Law §241(6), plaintiff's bill of particulars sets forth violations of numerous sections of the Industrial Code as the predicates for his Labor Law §241(6) claims. However, in the subsequent opposing papers he only addresses those violations based upon 12 NYCRR 23-2.3(a) and 12 NYCRR 23-6.1(e). Accordingly, this Court will treat those sections not addressed as abandoned and will not speak to same herein. Further, with respect to plaintiff's claims based upon 22 NYCRR 23-6.1(e), said section is not recited in the bill of particulars and rather is raised for the first time in opposition to defendant's instant application. Accordingly, any arguments attendant thereto are insufficient to oppose defendant's instant application seeking summary judgment (*Slacin v Aquafredda*, 2 AD3d 624 [2d Dept 2003]; *Harrington v City of New York*, 6 AD3d 662 [2d Dept 2004]).

As to the remaining code violation alleged by plaintiff, same is based upon12 NYCRR §23-2.3(a), which provides the following: "During the final placing of structural steel members, loads shall not be released from hoisting ropes until such members are securely fastened in place. Structural steel members shall not be forced into place by hoisting machines while any person is so located that he may be injured thereby." The language contained in this regulation plainly speaks to protecting workers from being injured from the particular load being hoisted. Here, as recited above, plaintiff was not injured by the steel being hoisted but rather by the bucket to which the steel beam was attached at the bottom. Accordingly, this section of the Industrial Code is not applicable herein.

Based upon the foregoing, that branch of the application made by defendant Farina which seeks an order granting summary judgment dismissing plaintiff's claims predicated upon Labor Law §241(6) is granted and those claims are dismissed. Accordingly, plaintiff's cross-application, which seeks an order granting summary judgment as to defendants' liability with respect thereto, is denied as moot.

All applications not specifically addressed are denied.

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This decision constitutes the order of the court.

Dated: 5-6-11

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

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MAY 10 2011
NASSAU COUNTY
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