

Casillas v Network Infrastructure, Inc.

2011 NY Slip Op 31698(U)

June 22, 2011

Supreme Court, Suffolk County

Docket Number: 26230/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Wesley Casillas,

Plaintiff,

-against-

Network Infrastructure, Inc.
and Madison Taft Equities,Defendants.

Motion Sequence No.: 001; MG
CDISPOMotion Date: 3/15/11
Submitted: 4/20/11Index No.: 26230/2009Attorney for Plaintiff:Siben & Siben
90 East Main Street
Bay Shore, NY 11706Attorney for Defendants:Andrea G. Sawyers, Esq.
3 Huntington Quadrangle
Suite 102S - P.O. box 9028
Melville, NY 11747Clerk of the Court

Upon the following papers numbered 1 to 11 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 4; Answering Affidavits and supporting papers, 5 - 9; Replying Affidavits and supporting papers, 10 - 11.

Plaintiff Wesley Casillas commenced this action to recover damages pursuant to New York State Labor Law §§200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered while cutting through a weld in a door frame on October 1, 2008. Plaintiff was replacing a door at the premises owned by defendants Network Infrastructure, Inc. and Madison Taft Equities located at 94 Taft Avenue, Hempstead, New York. Plaintiff alleges that he was injured when a large angle grinder he was using kicked back and struck him in the jaw and neck while he was standing on the second rung of a ladder. Defendants retained plaintiff's employer, non-party American Industrial Door (hereinafter "American Door") to replace the doors in the building.

Casillas v. Network infrastructure, et al.**Index No.: 26230/2009****Page 2**

Defendants now move for summary judgment dismissing the complaint on the grounds that they were not negligent, they did not supervise plaintiff's work, plaintiff did not sustain a gravity-related fall pursuant to Labor Law §240 (1), and they did not violate Labor Law §241 (6) inasmuch as none of the alleged Industrial Code regulations are applicable to the facts of this action.

By way of the bill of particulars, plaintiff alleges, among other things, that defendants failed to properly construct, arrange, operate and conduct the construction site so as to provide for the reasonable and adequate protection of plaintiff's health and safety; failed to provide the property with safety mechanisms and guards for the grinding saw; and negligently allowed the grinding saw to kick back and strike plaintiff in the chin and neck. Plaintiff also alleges that defendants failed to properly furnish gloves, vests, coveralls, face shield, goggles or other safety devices to plaintiff, which constituted a dangerous and defective condition. Plaintiff alleges that as a result of defendants' negligence and violation of the aforementioned statutes and Industrial Code regulations, he sustained a laceration of the neck with injury to the submandibular gland, facial nerve and Wharton duct and scarring, which required surgery and a lengthy recovery. Plaintiff alleges that defendants violated New York Labor Law §241 (6), specifically the Industrial Code provisions at 12 NYCRR §§23-1.5, 23-1.7, 23-1.8, 23-1.10 and 23-1.12, as well as Labor Law §§200 and 240 (1). In the supplemental bill of particulars, plaintiff alleges that defendants violated the Industrial Code provisions at 12 NYCRR §§19.1 (f), 19.2, 19.8 (a) and (b), 19.32, 19.32 (a) (2) and (b).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. New York, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (see, Stewart Title Insurance Company, Inc. v. Equitable Land Servs, Inc., 207 AD2d 880 [2nd Dept., 1994]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]).

In support of their motion, defendants submit, among other things, the pleadings, the bill of particulars, the supplemental bill of particulars and the deposition testimonies of the plaintiff and Patrick Clarke.

Plaintiff testified that on the date of the accident, he was employed as a foreman for American Door, which installed and fabricated doors. He stated that every day he went to work, his employer would inform him what his assignment for the day would be. His assignment for the day of the accident was to replace a door and frame at defendants' premises. He loaded the new door and frame in the company truck and drove to the premises, accompanied by his helper. He stated that all the tools that were needed were provided by his employer on the truck. He checked in with the building manager before beginning the work. He unloaded an A-frame ladder, a protective face shield, an extension cord, the new door and frame and a DeWalt grinder from the truck. He stated

Casillas v. Network infrastructure, et al.**Index No.: 26230/2009****Page 3**

that he used the grinder many times over the years. He stated that he inspected the grinder prior to use and it was in good shape. He wore work gloves and a face shield when operating the grinder. He did not receive any direction from the building manager regarding how to use the grinder. He removed the lower welds without incident while standing on the ground. He set up the A-frame ladder in front of the doorway, stepped up two rungs and began to grind one of the upper welds. As he was finishing the second weld, the grinder kicked back at him, hit the face shield and cut his jaw and neck. He stated that the grinder locked and the blade jammed in between the weld and the steel of the door frame as he was holding the trigger. He threw the grinder down on the ground and stepped off the ladder. He was taken to the hospital and underwent surgery to repair the laceration.

Patrick Clarke testified to the effect that he is the president of defendant Network Infrastructure, Inc., which occupied the premises. The premises where the accident occurred was purchased in or about 2006 by defendant Madison Taft Equities, LLC. He stated that in or about 2007, he began to renovate the premises. He hired subcontractors to perform minor renovations to the premises and there was no general contractor on the job. His employee, William Butler, was the project manager whose role was to request price quotes and to schedule the subcontractors. American Door was hired to replace roll-up doors and entry doors in the building. While American Door was there, neither Clarke nor Butler gave the workers instructions or supervision as to the performance of their work except the location of the doors to be replaced. Clarke stated that defendants did not provide any tools or materials to complete the jobs performed by plaintiff and his helper. Clarke stated that he did not witness plaintiff's accident but that he was on the premises when it occurred and assisted plaintiff before an ambulance was called. He observed the grinder on the ground about 10 to 15 feet away from plaintiff and saw that it did not have a guard on it.

Labor Law §240 (1) provides, in pertinent part, that owners, general contractors and their agents must furnish "scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection" to a person employed in the erection of a building. The primary purpose of Labor Law §240 (1) is to extend special protections to "employees" or "workers" (see, Mordkofsky v. V.C.V. Dev. Corp., 76 NY2d 573, 577 [1990]; Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513, 520 [1985]). It is well settled that the protection afforded by §240 (1) applies to both "falling worker" and "falling object" cases. In "falling object" cases, Labor Law §240 (1) applies where the object's fall is related to a significant risk inherent in the "difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]). In order to prevail upon a claim pursuant to Labor Law §240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see, Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 [2003]; Bland v. Manocherian, 66 NY2d 452 [1985]; Sprague v. Peckham Materials Corp., 240 AD2d 392 [2nd Dept., 1997]). An injured plaintiff's contributory negligence will not exonerate a defendant who has violated §240 (1) (Raquet v. Braun, 90 NY2d 177, 184 [1997], lv denied 95 NY2d 902 [2000]). Conversely, a defendant is not liable under §240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident

Casillas v. Network infrastructure, et al.**Index No.: 26230/2009****Page 4**

(see, Robinson v. East Med. Ctr., LP, 6 NY3d 550 [2006]; Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 [2003]).

Here, defendants have demonstrated their *prima facie* entitlement to summary judgment dismissing the plaintiff's Labor Law §240 (1) claim. The evidence revealed that plaintiff testified that he was working on the second rung of the ladder and the upper welds were at shoulder level. He also stated that he stepped down from the second rung of the ladder after he was struck by the grinder in the face and neck, and that he threw the grinder away from him. The statute is inapplicable under these circumstances inasmuch as there was no "falling worker" or "falling object."

In opposition, plaintiff failed to raise a triable issue of fact (see, Zezula v. City of New York, 19 AD3d 409 [2nd Dept., 2005]; White v. Dorose Holding, 216 AD2d 290 [2nd Dept., 1995], *lv denied* 87 NY2d 806 [1996]). Plaintiff submits his personal affidavit and the affidavit of Robert L. Schwartzberg, a professional engineer. Plaintiff avers that the door frame was caused to shift by the forces of gravity. Such forces caused the power grinder to jam and kick back which resulted in his injuries. This statement conflicts with his deposition testimony, creating a feigned issue of fact (see, D'Avilar v. Cerebral Palsy Assns. of N.Y. State, 63 AD3d 776 [2nd Dept 2009]; Payne v. 100 Motor Parkway Assoc., LLC, 45 AD3d 550 [2nd Dept., 2007]; Rosenberg v. Kotsek, 41 AD3d 573 [2nd Dept., 2007]). Plaintiff also submits the affidavit of his expert, Robert L. Schwartzberg. Initially, the Court rejects defendants' contention that the expert affidavit of Mr. Schwartzberg should not be considered based on the failure of the plaintiffs to serve a notice pursuant to CPLR §3101 (d) (1). There is no evidence that the failure to disclose this expert was intentional or willful and there is no showing of prejudice (see, Hunting Ridge Motor Sports v. County of Westchester, 80 AD3d 567 [2nd Dept., 2011]; Simpson v. Tenore & Guglielmo, 287 AD2d 613 [2nd Dept., 2001]). However, the expert's opinion is speculative and is not based on facts in the record (see, Samuel v. Arneau, 270 AD2d 474 [2nd Dept., 2000], *lv denied* 95 NY2d 761). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §240 (1) claim is granted.

Turning to the allegations that defendants violated Labor Law §241(6), the statute imposes a nondelegable duty upon owners to ensure the reasonable and adequate protection and safety of construction workers on their premises, "even in the absence of control or supervision of the work site" (Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]). Labor Law §241(6) governs equipment which is brought onto a work site (see, Haider v. Davis, 35 AD3d 363 [2nd Dept., 2006]; Kollmer v. Slater Electric, Inc., 122 AD2d 117, 119 [2nd Dept., 1986]). It is well settled that in order for a plaintiff to prevail under Labor Law §241(6), the plaintiff is required to plead and prove a violation of an implementing regulation (such as an Industrial Code Regulation) which sets forth a specific standard of conduct as opposed to a general reiteration of common law principles (see, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Biszick v. Ninnie Construction Corporation, 209 AD2d 661 [2nd Dept., 1994]). Labor Law §241 (6) provides in pertinent part that:

Casillas v. Network infrastructure, et al.**Index No.: 26230/2009****Page 5**

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 persons employed therein or lawfully frequenting such places.

In support of so much of the motion for summary judgment which seeks to dismiss plaintiff's Labor Law §241 (6) claims, defendants contend that Regulations at 12 NYCRR Part 19 were repealed on October 1, 1997 and that plaintiff's claims pursuant to said section are without basis. In addition, defendants contend that the Industrial Regulations relied on by plaintiff do not apply to the facts of this accident.

Industrial Code §23-1.5, which pertains to the general responsibility of employers to provide a safe place to work, has been held to be too general to give rise to liability under Labor Law §241 (6) (see, Maday v. Gabe's Contr., LLC, 20 AD3d 513 [2nd Dept., 2005]; Greenwood v. Shearson, Lehman & Hutton, 238 AD2d 311 [2nd Dept., 1997]; Vernieri v. Empire Realty Co., 219 AD2d 593 [2nd Dept., 1995]).

Industrial Code §32-1.7 sets forth general requirements for protection from general hazards, such as tripping, and is not applicable to plaintiff's accident.

Industrial Code §23-1.8 provides regulations for protective equipment, such as eye protection, protective apparel and cleanliness of protective equipment. The evidence demonstrates that plaintiff wore a face shield and did not sustain an eye injury. Therefore, this regulation is inapplicable to plaintiff's accident.

Industrial Code §23-1.10 provides for power shut-off requirements for electric and pneumatic hand tools. Plaintiff testified that when the grinder kicked back he had his fingers on the trigger until he threw the grinder down onto the ground after it struck him in the face. Therefore, this regulation is inapplicable to plaintiff's accident.

Industrial Code §23-1.12 provides for regulations for power driven saws and does not apply to the large angle grinder which plaintiff was using at the time of his accident.

Based on the foregoing, defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law dismissing the claim alleging a violation of Labor Law §241 (6).

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff has confined his opposition to the motion for summary judgment to defendants' alleged violations of the Industrial Code at 12 NYCRR §23-1.4, 1.5, 1.10, and 1.12. In relation to Industrial Code §23-1.10, plaintiff avers in his affidavit that when the grinder kicked back, he immediately released his finger from the "on-off" button but the blade continued to spin and struck his face shield and then his jaw and neck.

Casillas v. Network infrastructure, et al.

Index No.: 26230/2009

Page 6

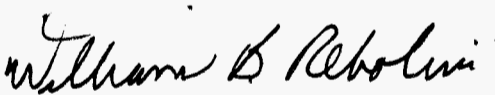
This statement conflicts with plaintiff's deposition testimony and constitutes a feigned issue of fact (see, D'Avilar v. Cerebral Palsy Assns. of N.Y. State, 63 AD3d 776 [2nd Dept., 2009]; Payne v. 100 Motor Parkway Assoc., 45 AD3d 550 [2nd Dept., 2007]). Plaintiff's expert, Mr. Schwartzberg opines that defendants violated New York Industrial Code sections 23-1.4, which defines construction work, 23-1.5, which defines the general responsibilities of employers, and 23-1.12, which defines the responsibility of providing guards for power driven saws. This opinion fails to raise a triable issue of fact inasmuch as § 23-1.4 was not alleged in the bill of particulars, and the remaining regulations were shown to be either too general or not applicable to the facts related to plaintiff's accident. Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim alleging violations of Labor Law §241 (6) is granted.

With respect to the Labor Law §200 and common-law negligence causes of action, Labor Law § 200 is a codification of the common-law duty of owners and general contractors to provide construction workers with a safe place to work (see, Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]). The accident here stems not from a dangerous condition on the premises, but from the manner in which the work was being performed. To be held liable under Labor Law §200 and for common-law negligence when the method and manner of the work is at issue, it must be shown that the "party to be charged had the authority to supervise or control the performance of the work" (Ortega v. Puccia, 57 AD3d 54, 61 [2nd Dept., 2008]). When an injury results from a contractor's methods, recovery cannot be had against an owner who did not exercise supervisory control over the work (see, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Lombardi v. Stout, 80 NY2d 290 [1992]). Here, defendants made a *prima facie* showing that they did not exercise supervisory control over plaintiff's work. Plaintiff did not oppose this showing. Accordingly, the branches of defendants' motion seeking summary judgment dismissing plaintiff's claims alleging common-law negligence and a violation of Labor Law §200 are granted.

Based on the foregoing, it is

ORDERED that the motion (001) by defendants for summary judgment dismissing the complaint is granted; settle judgment (see, 22 NYCRR §202.48).

Dated: June 22, 2011


 HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION