

Silaco v DeFoe Corp.
2011 NY Slip Op 32282(U)
August 19, 2011
Sup Ct, Suffolk County
Docket Number: 08-35626
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

P R E S E N T :

COPY

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-4-11
ADJ. DATE 3-16-11
Mot. Seq.# 001 - Mot D

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ANTHONY SILACO,	:	KAZMIERCZUK & MCGRATH
	:	Attorney for Plaintiff
Plaintiff,	:	103-16 Metropolitan Avenue
	:	Forest Hills, New York 11375
- against -	:	
	:	FIEDELMAN & MCGAW, ESQS.
DEFOE CORP.,	:	Attorney for Defendant
	:	Two Jericho Plaza
Defendant.	:	Jericho, New York 11753
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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers 17 - 18; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant DeFoe Corp. seeking summary judgment dismissing plaintiff's complaint is granted to the extent that plaintiff's Labor Law §§ 200 and 240(1) and common-law negligence causes of action are dismissed, and is otherwise denied.

Plaintiff Anthony Silaco commenced this action against defendant DeFoe Corp. to recover damages for injuries he allegedly sustained as a result of a work-related accident that occurred on January 11, 2008 in Brooklyn, New York. Plaintiff's complaint alleges, among other things, that while he was stacking steel I-beams on a wooden skid under the Gowanus Expressway in a storage yard located at 18th Street and 3rd Avenue, he slipped and fell on oil and water on the dirt floor of the storage yard, causing him to sustain an injury to his left ring finger. It alleges that defendant DeFoe Corp. was the general contractor at the work site, which is owned by the New York State Department of Transportation and that plaintiff was an employee of Imperial Ironworks, Inc. ("Imperial"), which was defendant's subcontractor on the job site. It further alleges that on the day of the accident it was raining heavily, and that plaintiff and his coworkers were assigned to clean up the storage yard under the supervision of their foreman, Frankie Valentino. In addition, plaintiff alleges that at the time of the accident he was wearing his personal protective equipment, which consisted of gloves, hard hat, clear glasses, and work boots.

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Defendant now moves for summary judgment on the basis that Section 240(1) of the New York State Labor Law is inapplicable, because plaintiff's injury did not result from a gravity-related fall. Defendant also asserts that plaintiff will not be able to demonstrate liability under Labor Law § 241(6), because he is unable to establish that any section of the New York State Industrial Code was violated or that any violation of such code was a proximate cause of his accident. Instead, defendant contends, plaintiff's own actions were the sole proximate cause of his accident and resultant injuries. Defendant further asserts that it did not directly, supervise or control plaintiff's work at the work site and, therefore, it is not liable under Labor Law § 200. In support of the motion, defendant submits a copy of the pleadings, the parties' deposition transcripts, the deposition transcript of a nonparty witness, Michael Seaver, and a copy of an accident report. Defendant also submits a copy of the contract between it and Imperial.

Plaintiff opposes the motion on the grounds that his accident was caused by debris that was in the work area, and that he was performing his duties in an unlit area which increased his risk for injury. Plaintiff also contends that there are material issues of fact regarding defendant's violation of Section 200 of the Labor Law and its violation of Sections 23-1.7(d), 23-1.7(e)(2) and 23-1.30 of the Industrial Code. Plaintiff concedes that Labor Law § 240(1) is inapplicable to his claim and, therefore, does not oppose that portion of the motion. As a result, plaintiff's claim under Labor Law § 240(1) is dismissed. In opposition to the motion, plaintiff relies on the same evidence as defendant.

It is well established that summary judgment should be granted where there are no genuine material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]). As such, the court's function on a motion for summary judgment is issue finding and not issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910, 841 NYS2d 615 [2d Dept 2007]; *D.B.D Nominee, Inc. v 814 10th Ave Corp.*, 109 AD2d 668, 486 NYS2d [2d Dept 1985]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form so as to eliminate all material issues of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, *supra*). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022, 315 NYS2d 973 [1970]).

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide a safe workplace (*see Rizzuto v I.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]). Liability will attach under Labor Law § 200 where the owner or general contractor has the authority to control the activity that brings about the injury (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; *Ragone v Spring Scaffolding, Inc.*, 46 AD3d

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652, 848 NYS2d 230 [2d Dept 2007]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]; *Mus v Kohen*, 283 AD2d 616, 725 NYS2d 90 [2d Dept 2001]). In addition, where the theory of liability is based upon a defective condition on the premises rather than the manner of the work, liability will attach where the owner or general contractor created the hazard, or had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition (see *White v Village of Port Chester*, 84 AD3d 946, 922 NYS2d 534 [2d Dept 2011]; *Morgan v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 50 AD3d 866, 855 NYS2d 671 [2d Dept 2008]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 687 NYS2d 728 [2d Dept 1999]). However, where the dangerous condition is the result of the contractor's methods and the owner or general contractor exercises no supervisory control over the construction, liability will not attach to the owner or general contractor (see *Comes v New York State Elec. & Gas Corp.*, *supra*; *Young Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Likewise, where the alleged defective or dangerous condition arises from the subcontractor's methods and the owner or general contractor exercised no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or Labor Law § 200 (see *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 827 NYS2d 189 [2d Dept 2006]). Lastly, the common law duty to provide employees with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the employee is to perform or the defects the employee is hired to repair (see *Hansen v Trustees of M. E. Church of Glen Cove*, 51 AD3d 725, 858 NYS2d 303 [2d Dept 2008]).

It is well established that a general contractor's duty to supervise safety on the job site, its authority to stop the work in case of a safety violation, its actual observation of the work on the site, or its retention of contractual inspection privileges is insufficient to constitute control over the subcontractor's employees or manner in which the work is performed (see *McNulty v Executive Kitchens*, 294 AD2d 411, 742 NYS2d 354 [2d Dept 2002]; *Musselman v Gaetano Constr. Corp.*, 285 AD2d 868, 727 NYS2d 792 [3d Dept 2001]; *Sainato v City of Albany*, 285 AD2d 708, 727 NYS2d 741 [3d Dept 2001]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Based upon the adduced evidence, defendant demonstrated its entitlement to the dismissal of the common law and Labor Law § 200 claims by proffering evidence that it neither had direct control or supervision over plaintiff's performance of his duties or the 18th street storage yard, nor did it have notice of the alleged defective condition in the yard (see *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]; *Wolfe v KLR Mech., Inc.*, 35 AD3d 916, 826 NYS2d 458 [3d Dept 2006]; *Blysmo v County of Saratoga*, 296 AD2d 637, 744 NYS2d 564 [3d Dept 2002]). Defendants submitted the deposition of plaintiff, who testified that he only was supervised by his foreman from Imperial and that the accident occurred when he was stacking the third stack of I-beams on the wooden skids. Plaintiff testified that when he reported to work the morning of the accident it was raining heavily, and that he was advised by his foreman that he was required to organize the steel beams that had been delivered to the 18th street storage yard. Plaintiff further testified that his complaints about the unsafe conditions at the work site, such as the damp ground, were made to his foreman, and that the foreman responded that he should "just get it done." Moreover, Michael Seaver testified at his deposition that he was the project superintendent for Imperial on the Gowanus Expressway Project; that Imperial was contracted to perform all structural steel related work on the project; and that Imperial supervised its own employees, who were all union members. In addition, at his deposition, Kevin

Hayden, who is the project superintendent for defendant, testified that he directed the day-to-day coordination of the subcontractors' superintendents and guided the project into completion, and that he only interacted with Michael Seaver. Mr. Hayden testified that the storage yard was deemed "for general contractor's use as it sees fit," that DeFoe provided its usage to Imperial, and that DeFoe also kept storage boxes in the yard. Mr. Hayden further testified that although DeFoe Corp. purchased the structural steel that Imperial used, it was unable to "touch" the steel, since it did not have a contract with any of the steel unions, and it employed steel subcontractors on its projects. Therefore, defendant shifted the burden to plaintiff to raise a triable issue of fact (*see generally Winegrad v New York Univ. Med. Ctr., supra*).

In opposition to defendant's prima facie showing, plaintiff failed to present sufficient evidence to raise a triable issue of fact in regards to whether defendant maintained the requisite supervision or control over the activity which caused his injury (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]; *Blysm v County of Saratoga, supra*; *Riccio v Shaker Pine*, 262 AD2d 746, 692 NYS2d 189 [3d Dept 1999], *lv dismissed* 93 NY2d 1042, 697 NYS2d 570 [1999]; *cf. Kerins v Vassar Coll.*, 15 AD3d 623, 790 NYS2d 697 [2d Dept 2005]). While plaintiff testified that there were diesel boxes/barrels that contained fuel located near the area where the steel was being stacked, he presented no evidence showing that defendant actually owned the diesel boxes/barrels, or that any of defendant's representatives had actual or constructive notice that any of the boxes/barrels may have been leaking. Furthermore, plaintiff testified that he did not feel any slippery substance when he was placing the wooden skids down prior to placing the I-beams on the wooden skids, and that prior to his accident he did not have any slipping or tripping problems while transgressing the dirt floor of the storage yard. Therefore, under these circumstances, defendant cannot be held liable for plaintiff's accident pursuant to Labor Law § 200 (*see Parisi v Loewen Dev. of Wappinger Falls*, 5 AD3d 648, 774 NYS2d 747 [2d Dept 2004]; *Riccio v Shaker Pine, supra*; *cf. Lane v Fratello Constr. Co.*, 52 AD3d 575, 860 NYS2d 177 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 835 NYS2d 705 [2d Dept 2007]). Accordingly, defendant's motion for summary judgment is granted on the Labor Law § 200 and the common law negligence causes of action.

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and general contractors to "provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed" (*see Rizzuto v I.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625, 831 NYS2d 547 [2d Dept 2007], *lv denied* 9 NY3d 810, 844 NYS2d 786 [2007]; *Reinoso v Ornstein Layton Mgmt., Inc.*, 19 AD3d 678, 798 NYS2d 95 [2d Dept 2005], *lv dismissed* 5 NY3d 849, 806 NYS2d 168 [2005]). In order to establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of his or her accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *D'Elia v City of New York*, 81 AD3d 682, 916 NYS2d 196 [2d Dept 2011]; *Krewtowski v Braender Condominium*, 57 AD3d 950, 871 NYS2d 304 [2d Dept 2008]; *Mercado v TPT Brooklyn Assoc., LLC.*, 38 AD3d 732, 832 NYS2d 93 [2d Dept 2007]). An owner or general contractor, of course, may raise a valid defense to the imposition of vicarious liability under § 241(6) (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982], *rearg denied* 56 NY2d 805, 1982 N.Y. LEXIS 5940 [1982]).

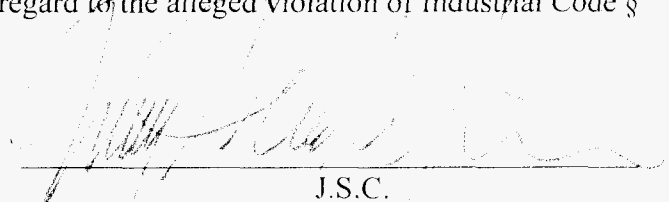
Plaintiff alleges that defendant violated sections 23-1.7(d) and (e)(2) of the Industrial Code, which provide:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

(e) Tripping and other hazards. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Defendant, however, has also made a prima facie showing that 12 NYCRR § 23-1.7(d) is inapplicable to plaintiff's injury. The open ground level of the work site where plaintiff's injury occurred does not constitute a passageway, walkway, or other elevated working surface contemplated by the statute (*see Robinson v County of Nassau*, 84 AD3d 919, 923 NYS2d 135 [2d Dept 2011]; *McKee v Great Atl. & Pac. Tea Co.*, *supra*; *Porazzo v City of New York*, 39 AD3d 731, 834 NYS2d 298 [2d Dept 2007]). However, defendant has failed to make such a showing with regard to Section 23-1.7 (e)(2) of the Industrial Code. Industrial Code § 23-1.7 (e)(2) is sufficiently specific enough to support a claim under Labor Law § 241(6) (*see Smith v McClier Corp.*, 22 AD3d 369, 802 NYS2d 441 [1st Dept 2005]). Plaintiff testified that he was working in the open storage yard underneath the Gowanus Expressway, stacking steel I-beams, when he fell on the greasy dirt floor that contained pieces of newspaper and wood chips. Contrary to defendant's contention, the open storage yard floor where plaintiff was undisputedly working constitutes a work area within the meaning of this section (*see Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 892 NYS2d 94 [1st Dept 2010]; *Canning v Barney's New York*, 289 AD2d 32, 734 NYS2d 116 [1st Dept 2001]). Moreover, neither the grease nor the pieces of newspaper on the floor of the storage yard were "an integral part of the work [plaintiff] was performing" (*see Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 846 NYS2d 302 [2d Dept 2007]; *Appelbaum v 100 Church*, 6 AD3d 310, 774 NYS2d 705 [1st Dept 2004]). Therefore, defendant's motion for summary judgment is denied with respect to the Labor Law § 241(6) cause of action predicated on an alleged violation of Industrial Code § 23-1.7 (e)(2), but is granted with regard to the alleged violation of Industrial Code § 23.1.7(d).

Dated: AUG 19 2011



J.S.C.

HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION