

Cary v Five Bros., Inc.
2011 NY Slip Op 33066(U)
November 21, 2011
Sup Ct, Suffolk County
Docket Number: 31980/2007
Judge: Jr., Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X

BRUCE CARY and CLAIRE CAREY,

Plaintiffs,

-against-

FIVE BROTHERS INC., KEYSpan ENERGY CORPORATION, J. PETROCELLI CONTRACTING INC., DARR CONTRACTING CORP., HK NEW PLAN MARWOOD SUNSHINE CHEYENNE, LLC., NEW PLAN EXCEL REALTY TRUST, INC., STOP & SHOP SUPERMARKET COMPANY, STOP & SHOP FOOD STORES, INC. and STOP & SHOP, INC.,

Defendants.

-----X

J. PETROCELLI CONTRACTING, INC.

Third-Party Plaintiff,

-against-

VIRGINIA SURETY COMPANY, INC.,

Third-Party Defendant.

-----X

HK NEW PLAN MARWOOD SUNSHINE CHEYENNE, LLC and NEW PLAN EXCEL REALTY TRUST, INC.,

Second Third-Party Plaintiffs,

-against-

VIRGINIA SURETY COMPANY, INC.,

Second Third-Party Defendant.

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INDEX NO.: 31980/2007

CALENDAR NO.: 2010009900T

MOTION DATE: 9/30/3010

MOTION NO.: 013 MD; 014 MD; 015 MD

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-22; 23-35 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 36-40; 41-43; 44-46 ; Replying Affidavits and supporting papers 47-48; 49-50 ; Other ___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 013) plaintiffs Bruce Carey and Claire Carey pursuant to CPLR §3211 and R. 3212 is determined pursuant to CPLR R. 3212 as a motion for summary judgment against defendants HK New Plan Marwood Sunshine Cheyenne, LLC, New Plan Excel Realty Trust, Inc., Stop & Shop, Inc., J. Petrocelli Contracting, Inc. and Darr Contracting Corp. on the causes of action premised upon the alleged violation of Labor Law §§240(1) and 241(6) and is denied; and it is further

ORDERED that the motion (motion sequence no. 014) of defendants Stop & Shop Supermarket Company, LLC, Stop & Shop Food Stores, Inc., Stop & Shop Inc., HK New Plan Marwood Sunshine Cheyenne, LLC, and New Plan Excel Realty Trust, Inc., pursuant to CPLR R. 3212 for summary judgment dismissing the complaint and cross claims asserted against them is denied; and it is further

ORDERED that the motion (motion sequence no. 015) by defendants Five Brothers, Inc., J. Petrocelli Contracting, Inc. and Darr Contracting Corp. pursuant to CPLR R. 3212 for summary judgment dismissing the complaint as asserted against them on the claims premised upon common law negligence and Labor Law §§200, 240(1) and 241(6) is denied.

Plaintiff Bruce Carey, an employee of Fast Response, Inc., a fireproofing subcontractor, claims to been injured in the course of his employment when he fell into an open manhole in the parking area of a “Stop & Shop” store under construction at 700-760 Patchogue/Yaphank Road, Medford, New York on January 28, 2005. It is claimed that the allegedly concealed manhole was in an open, unguarded, unprotected, snow-covered and unsafe condition. The first cause of action set forth in the complaint is premised upon the defendants’ alleged violation of Labor Law §200, §240 and §241(6); the second cause of action is premised upon the defendants’ alleged negligence; the third cause of action is premised upon the defendants’ alleged negligent hiring, training and supervision of their employees; the fourth cause of action alleges defendants violated the Industrial Code of the State of New York (12 NYCRR §§ 23-1.7(b)(1), 23-1.29(a), 23-1.15, 23- 16.2(e)) and OSHA standards (29 CFR §1926.501(b)(4)); and a fifth cause of action asserts a derivative claim on behalf of plaintiff’s wife Claire Carey.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v*

Aeroxon Prods., 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Plaintiffs' motion seeks summary judgment against the defendants HK New Plan Marwood Sunshine Cheyenne, LLC, New Plan Excel Realty Trust, Inc., Stop & Shop, Inc., J. Petrocelli Contracting, Inc. and Darr Contracting Corp. on the causes of action premised upon the alleged violation of Labor Law §§240(1) and 241(6). In support, they have submitted, *inter alia*, an attorney's affirmation; copies of the pleadings, answers and amended answers, bill of particulars and supplemental bills of particulars; unsigned transcripts of the depositions of Bruce Carey dated April 24, 2008, August 7, 2008, and September 23, 2008, John Byrne dated March 5, 2009, Anthony Moscarella dated February 12, 2009, John Canetti dated February 24, 2009, and Jack Clemente dated June 9, 2009; Stop & Shop Owner Contract dated April 2, 2004; various photographs and an "Employee's Questionnaire" dated March 18, 2005. However, none of the deposition transcripts, including those of the plaintiff, have been signed and therefore, are not in admissible form, and no affidavit demonstrating compliance with CPLR R. 3116 has been submitted with the transcripts. The motion is not supported by an affidavit from the plaintiff or a signed transcript of the depositions and therefore fails to comport with CPLR R. 3212. In any event, factual issues, as set forth hereinafter, mandate denial of plaintiffs' motion.

Defendants Stop & Shop Supermarket Company, LLC, Stop & Shop Food Stores, Inc., Stop & Shop Inc., HK New Plan Marwood Sunshine Cheyenne, LLC, and New Plan Excel Realty Trust, Inc. seek summary judgment dismissing the complaint and cross claims asserted against. In support of this motion, the defendants have submitted an attorney's affirmation; photographs; the affidavit of Anthony Moscarella dated August 31, 2010; the defendants' answer and various demands.

The defendants have failed to provide a copy of the pleadings as required pursuant to CPLR R. 3212 and cannot incorporate by reference those submissions by other parties. Even if the pleadings were provided with the moving papers, the affidavit submitted by Anthony Moscarella leaves the court to speculate on many issues and leaves issues unresolved. In his affidavit, Anthony Moscarella states that he was Project Manager for Stop & Shop Supermarket Company and was involved in the project at 700-60 Patchogue/Yaphank Road, Medford. He states there was a fence which was positioned to restrict access in front of the Stop & Shop store under construction. He states it was the responsibility of J. Petrocelli Contracting, Inc ("Petrocelli"), the construction manager, to determine who could park inside that area, or what materials could be off-loaded in the area. He had no knowledge concerning whether Petrocelli restricted parking in that area by contractors. He states he never observed an unsafe condition and never observed any open manholes. Stop & Shop had a Safety Inspector and he was not aware of any complaints in connection with this work. At the time of the accident, many of the drainage vaults and manholes had been installed, and the site work on the parking lot was not completed as it was only rough graded. There was no underpavement or pavement or running course of asphalt.

The collars of the manholes were exposed and were above the grade of the surrounding ground in order to leave room for the final paving. He considered this one of the many usual and ordinary risks of a construction site--a stage of construction that a worker must look out for.

The foregoing is insufficient to demonstrate entitlement to summary judgment. There are many factual issues left unanswered by the affiant Moscarella, including, but not limited to, who owned the property, what warnings, if any, were posted in the parking area where the manholes were located, when the last inspection of the area was prior to the accident, how manholes were protected to assure safety, and the relationship among these moving defendants. These factual issues preclude a finding of summary judgment as a matter of law.

Defendants Five Brothers, Inc., J. Petrocelli Contracting, Inc. and Darr Contracting Corp., seek summary judgment dismissing the complaint as asserted against them on the claims premised upon common law negligence and Labor Law §§200, 240(1) and 241(6). In support of the motion, the defendants have submitted, *inter alia*, an attorney's affirmation; copies of the pleadings and answers, bills of particulars; unsigned copies of the transcripts of the depositions of plaintiff Bruce Carey dated April 24, 2008, August 7, 2008, and September 23, 2008, non-party Jack Clemente dated June 9, 2009, and the signed transcript of the deposition of Joseph Petrocelli dated January 21, 2009.

Joseph Petrocelli testified that he is the treasurer of J. Petrocelli Contracting, Inc., and that his brothers John Petrocelli, Jr., Jerome Petrocelli, and James Petrocelli are the president, secretary, and vice president, respectively, of the corporation, which is in the business of general construction and construction management. Petrocelli testified that the corporation has two separate contracts for the Stop & Shop project: one with Stop & Shop Supermarket for demolition of the old building and construction of a new Stop & Shop, and one with New Plan Development, the landlord at the site, for site work other than the building, including landscape, curbs, storm drainage, parking pavement, grading and irrigation. He then testified that New Plan Excel Realty Trust was the landlord. He never heard of HK New Plan Marwood Sunshine Cheyenne, LLC. Joseph Petrocelli did not know who the owner of the site was. He stated he was the construction manager for Stop & Shop Supermarket, and his duties involved weekly meetings, coordination, scheduling, contract issues, and management coordination with the job superintendent, Jack Clemente.

Ken Fellela was his supervisor at the New Plan job. He himself visited the site about once weekly. Joseph Petrocelli hired subcontractors and entered into contracts with them. The parking lot project was being done for both projects for Stop & Shop and New Plan as both contracts called for the installation of storm drains. Darr Contracting Corp. ("Darr") was responsible for trench work, installation of the manholes and applying the manhole covers. Bohler Engineering was the site engineer, but was not contracted by Petrocelli. Five Brothers, Inc. was the carpentry contractor. He described storm drain B21 as a dry well which was ten feet around and fifteen feet deep, below grade, but did not know when Darr installed it. He referred to his notes of October 14, 2004, and indicated there was storm sewer installation progressing over several weeks but he did not know if it involved the B21 manhole. Petrocelli was responsible for safety but there was no testimony concerning what safety was to be provided or was provided with reference to the

manholes. Wood stake (1x3) barricades were placed around manholes which Darr would have put in place. Joseph Petrocelli testified that he had the authority to stop construction if he saw what he deemed an unsafe construction project. Petrocelli had no orange cones, no signs or barrels on site. He testified that Fast Response, plaintiff's employer, was hired as a subcontractor to install fireproofing. He did not know if Fast Response was working at this job site on January 28, 2005. He did not know if snow removal was conducted at the project. Petrocelli's notes indicated that Darr was clearing snow and preparing the rear alley on January 27, 2005. He identified a picture of a manhole which had been run over.

Based upon the foregoing, defendants have not demonstrated *prima facie* entitlement to summary judgment dismissing the complaint and cross claims asserted against them. No contracts have been submitted. The relationships among the moving parties to this application have not been set forth. The identity of the owner of the subject property is not clear. There has been no testimony concerning whether the manhole covers were installed by Darr, if there was grading in the area, and what safety precautions and warnings were at the site in the area of the accident. The weather conditions were not set forth and it is not known if snow plowing was performed in the designated parking area and at or near the manhole at issue, and who would have performed such plowing. There was no testimony concerning when the last inspection of the area where the accident occurred was or by anyone concerning the plowing.

In light of all of the foregoing, all of the motions for summary judgment are denied.

Dated: November 21, 2011

PAUL J. BAISLEY, JR.
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION