Munoz v Lower Manhattan Dev. Corp.
2011 NY Slip Op 33259(U)
July 15, 2011
Supreme Court, Queens County
Docket Number: 9765/09
Judge: James J. Golia
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** Justice   IAS TERM, PART 33

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JAMES MUNOZ AND JENNY AMAYA,   Index No: 9765/09

Plaintiff(s),   Motion Date: 04/28/11

-- against --   Cal. No: 26

LOWER MANHATTAN DEVELOPMENT CORPORATION AND BOVIS LEND LEASE LMB. INC.,   Sequence No. 2

Defendant(s).

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The following papers numbered 1 to 21 were read on this motion by defendants for summary judgment pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.............................	1 - 11
Answering Affirmation, Affidavits and Exhibits.................................	12 - 19
Reply Affirmation and Affidavit..........	20 - 21

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a labor law action in which plaintiff alleges that defendants violated Labor Law §§ 200 and 241(6). Defendants move this court for an order granting summary judgment and dismissing plaintiff’s Labor Law §§ 200, 240(1), 241(6) claims.

In the first instance the court notes that plaintiff’s bill of particulars, as supplemented, does not allege a violation of Labor Law § 240(1), therefore, the branch of defendants’ motion seeking dismissal of this claim is denied as moot and without opposition.

To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant

the court as a matter of law in directing judgment in his favor (CPLR 3212 (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212(b). (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]).

Plaintiff was employed as a laborer by nonparty LVI Environmental Services, Inc., a subcontractor of defendant Bovis. Plaintiff alleges that while working in the sub basement of the premises owned by defendant Lower Manhattan Development Corporation and located at 130 Liberty Street, New York, New York 10006, he was hit by an excavator causing injury to his right leg. That plaintiff was injured when an excavating machine ran over his right leg is not disputed, defendants contend that plaintiff's injuries were not precipitated by a violation of the Labor Law.

Turning first to Labor Law § 241(6). This section of the Labor Law imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition (see Rizzuto v LA. Wenger Contr. Co., Inc., 91 NY2d 343, 348, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]). "In order to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (Reilly v Newireen Associates, 303 AD2d 214, 218, 756 N.Y.S.2d 192 [1st Dept 2003], citing Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]).

To impose liability upon the defendants for violations of the Labor Law, the violations must constitute a proximate cause of the accident (*Misirlakis v. E. Coast Entm't Props.*, 297 A.D.2d 312 (N.Y. App. Div. 2d Dep't 2002)

Here, plaintiff alleges violations of §§ 23-1.5, 23-1.30, 23-9.2(a), 23-9.2(b)(1), 23-9.5(c) and 23-9.5(g) of the Industrial Code.

The violation claim based on 12 NYCRR 23-1.5 is dismissed as this provision merely sets forth a general safety standard and therefore does not provide a basis for liability under Labor Law § 241(6). (*Cun-En Lin v. Holy Family Monuments*, 18 A.D.3d 800 [2d Dept 2005])

The violation claim based on 12 NYCRR 23-1.30, is also

dismissed this section reads as follows:

"Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

Defendant contends that the lighting was adequate, however, defendant also contends that even if the lighting is deemed to be inadequate, lighting was not the proximate cause of the accident. Although defendants have failed to establish compliance with 12 NYCRR 23-1.30, the evidence before the court establishes that lighting was not a substantial factor in the happening of the accident. Plaintiff was hit by the excavator while it was moving in reverse. Bo Britton, the operator of the excavator, testified that just prior to the accident he was backing the excavator up, that he was looking forward and that he did not look back before the accident occurred. Plaintiff testified that just prior to the accident the excavator was behind him, that the machine was moving backward and that he and the machine operator were back to back.

Notwithstanding defendants' failure to make a prima facie showing that there was no violation of 12 NYCRR 23-1.30, it is clear from the evidence before the court that to the extent there was a violation of 12 NYCRR 23-1.30, such a violation was not the proximate cause of the accident. Therefore the claim based on 12 NYCRR 23-1.30 is dismissed.

The alleged violations of 12 NYCRR 23-9.2(a) is also dismissed. This section requires that all power-operated equipment be maintained in good repair and in proper operating condition at all times.

Michael Casales, project supervisor for LVI, plaintiff's employer, testified that the excavator was new, that it had not been used; and that all equipment was inspected on a daily basis. Bo Britton, the operator of the excavator testified that on the day of the accident he inspected the machine and found the machine in proper working order. Based on this testimony, defendants have met their burden with respect to this allegation. Plaintiff, submitted no arguments to oppose this branch of defendants motion and therefore, plaintiff has failed to raise any issues of fact.

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With respect to the alleged violation of 12 NYCRR 23-9.2(b)(1), defendant have failed to make a prima facie case. This section of the Industrial Code requires that all power-operated equipment used in construction, demolition or excavation operations be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times. On the record before the court, defendant has failed to establish that the equipment was being operated in a safe manner. Therefore, the branch of defendant's motion seeking to dismiss plaintiff's claim based on 12 NYCRR 23-9.2(b)(1)is denied.

With respect to the alleged violation of 12 NYCRR 23-9.5 (c), the claim is dismissed. This section reads as follows:

"Operation. Excavating machines shall be operated only by designated persons. No person except the operating crew shall be permitted on an excavating machine while it is in motion or operation. No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation. When an excavating machine is not in use, the blade or dipper bucket shall rest on the ground or grade. The operator of an excavating machine shall not leave the controls of such machine at any time when the master clutch is engaged and the engine is operating. Oiling and greasing shall be performed only while an excavating machine is at rest and the master clutch disengaged. The boom or the bucket, dipper or clamshell of a power shovel shall not pass over the seat or cab of a truck or other vehicle while any person is in such seat or cab."

On the evidence before the court, defendants have sufficiently established that his section is inapplicable to the facts of this case and plaintiff has failed to offer any evidence to the contrary.

With respect to the alleged violation of 12 NYCRR 23-9.5(g), defendants have failed to meet their burden. This section reads as follows:

"Backing. Every mobile power-operated excavating machine except for crawler mounted equipment shall be provided with an approved warning device so installed as to automatically sound a warning signal when such machine is backing. Such warning signal shall be audible to all persons in the vicinity of the machine above the general noise level in the area."

Defendants argue, that this section is not applicable because the excavator involved in the incident was not “crawler mounted” and therefore a warning signal was not required. Defendants also argue that if the excavator is deemed to be “crawler mounted” it was equipped with a warning signal and therefore, there was full compliance with the section.

The admissible evidence before the court does not establish that the excavator was not “crawler mounted” nor does it establish that the warning signal was audible over the general noise level in the area.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (see *Jock v Fien*, 80 NY2d 965 [1992]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 798 NYS2d 501 [2005]; see also *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). "An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury " (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877, 631 NE2d 110, 609 NYS2d 168 [1993], quoting Russin v Louis Picciano & Son, 54 NY2d 311, 317, 429 NE2d 805, 445 NYS2d 127 [1981]; see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352, 693 NE2d 1068, 670 NYS2d 816 [1998]). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (Comes v New York State Elec. & Gas Corp., supra at 877; see Lombardi v Stout, 80 NY2d 290, 295, 604 NE2d 117, 590 NYS2d 55 [1992]; Rosenberg v Eternal Mems., 291 AD2d 391, 392, 737 NYS2d 632 [2002]).

It is undisputed that plaintiff’s day to day work activity was supervised by Mike Casale, the project supervisor for LVI additionally, Mike Casale testified that the excavator that hit the plaintiff was rented by LVI.

Where a Labor Law § 200 claim arises out of alleged defects or dangers resulting from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged had authority to supervise or control the operation (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 505; Cambizaca v New York City Tr. Auth., 57 AD3d 701, 702, 871 N.Y.S.2d 220; Ortega v Puccia, 57 AD3d at 62).

A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the

responsibility for the manner in which the work is performed (Erickson v Cross Ready Mix, Inc., 2010 NY Slip Op 6073, 3 (N.Y. App. Div. 2d Dep't 2010)

Although defendant Bovis had the responsibility to establish a health and safety plan that had to be approved by defendant LMDC, the evidence before the court sufficiently establishes that defendants did not supervise or control the manner in which the work was performed. Therefore plaintiff's Labor Law §200 claim is dismissed.

Accordingly, the motion by defendants for summary judgment is granted to the extent that plaintiff's Labor Law §241(6) claim alleging violations of §§ 23-1.5, 23-1.30, 23-9.2(a) and 23-9.5(c) of the Industrial Code are dismissed. Plaintiff's claim based on Labor Law § 200 is also dismissed. However, plaintiff's Labor Law § 241(6) claim alleging violations of §§ 23-9.2(b)(1),and 23-9.5(g) of the Industrial code survive this motion and may proceed.

This constitutes the Order of the Court.

Dated: July 15, 2011

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JAMES J. GOLIA, J.S.C.