

Puig v Consolidated Edison Co. of NY, Inc.
2011 NY Slip Op 33851(U)
April 28, 2011
Sup Ct, Bronx County
Docket Number: 305277/08
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PP 1

-----X

ELIO PUIG,

Plaintiff,

-against-

Index No.
305277/08

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., D'ONOFRIO GENERAL CONTRACTING,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No.
84197/08

AREVA T&D and D'ONOFRIO GENERAL
CONTRACTING,

Third-Party Defendant.

-----X

J. Danziger:

Motion by defendant D'onofrio General Contracting (hereinafter "D'onofrio) seeking dismissal of the claims asserted against them by plaintiff as well as the cross-claims by co-defendant/third-party plaintiff Consolidated Edison Company of New York (hereinafter "Con Ed") relating to contractual indemnification, common-law contribution and common-law indemnification is decided as follows:

For the purposes of this application the following facts are not disputed. On or about February 23, 2007 plaintiff, Elio Puig was employed as an electrical engineer by an entity known as Areva T&D. On that date, Areva T&D pursuant to an agreement with "Con Ed", had sent employees to a work site located at 412 Bruckner Blvd, Bronx County. Plaintiff was to do electrical work at "Con Ed's" power plant which was being conducted at the Mott Haven sub-station located at the aforementioned address. Also, at the same time, D'onofrio was hired by

"Con Ed" to serve as a general contractor who was retained to erect the structure of the building, landscape the exterior and maintain clear access and egress to the work areas around the job site.

At around 7:00 PM on that date, plaintiff was allegedly injured when he tripped and fell while leaving the premises at the conclusion of his work day. As a result of the incident, plaintiff commenced the within action against D'onofrio and Con Ed seeking damages for the injuries claimed to have been sustained from the accident. Plaintiff, as set forth in the Summons and Supplemental Summons & Complaint contends that defendants were negligent in failing to maintain the area in a proper manner. Further, plaintiff seeks damages due to the alleged violation of Sections 200 and 241(6) of the Labor Law. In their answer, Con Ed asserted cross-claims and a third-party action against co-defendant D'onofrio. Now, D'onofrio seeks dismissal of all claims asserted against it.

Movant asserts that summary judgment is warranted as to the Labor Law claims asserted by plaintiff due to the fact that plaintiff was not an employee to be protected by this statute citing, *Mordkofsky v. V.C.V Development Corp.*, 76 NY2d 573 and *Zimmer v. Chemung County Performing Arts, Inc.*, 65 NY2d 513. Based thereon, movant opines that dismissal of the Labor Law claim is required. This court does not agree.

In *Valinoti, et. al. V. Sandvik Seamco, Inc.*, 246 AD2d 345, plaintiff, a UPS worker tripped on a metal stick while reporting to work at a location where construction was ongoing. There, the trial court did not dismiss the Labor Law claim asserted by the UPS worker. That decision was reversed by the Appellate Division, First Department. However, as stated therein, the issue was whether a plaintiff who had been hired not to work "on" the building construction or renovation but was "at" the site where reconstruction was in progress is within the class of workers offered protection by the requisite labor Law sections. To answer that question, the Court of Appeals has noted "...We have held that in order to invoke the protections offered by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent", See *Zimmer v. Chemung County Performing Arts, Inc.*, supra, *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290, *Koenig v. Patrick Constr. Corp.*, 298 NY 313, *Whelan v. Warwick Val. Civic & Social Club*, 47 NY2d 970; and *Mordkosky v. VCV Dev. Corp.*, supra.

In the case at bar, it is undisputed that plaintiff was employed by an agent of the owner to do work at the location undergoing construction. Based thereon, plaintiff is within the class of employees protected by Section 200 of the Labor Law.

Movant also opines that a they did not direct or control plaintiff's activities, claims made under Section 200 of the Labor Law should be dismissed. In furtherance of this position movant cites Hughes v. Tishman, 40 AD3d 305 and Dennis v. City of New York, 304 Ad2d 611.

As set forth in Hughes v. Tishman, supra, an owner may only be held liable for an injury under Section 200 of the Labor Law if it required or controlled the work giving rise to the injury, citing Ross v. Curtis Palmer Hydro-Elec. Co., 81 NY2d 494. Here, plaintiff was allegedly injured when he slipped and fell at the work site where D'onofrio was contractually obligated to keep clean and safe. Whether same was done or if the area where plaintiff fell was a place maintained by D'onofrio are factual questions which must be resolved by a jury. As a result, Donofrio's motion which seeks dismissal for the claims based upon common-law negligence and Labor Law Section 200 violations are denied.

D'onofrio also requests dismissal of claims best upon alleged violations of Section 241(6). In support of their position, movant contends that a specific Industrial Code regulation must have been violated to trigger liability pursuant to that section of the Labor Law. While movant asserts that the issue of whether plaintiff's fall occurred in a passageway can be determined by motion, it is silent as to the issue of the claimed violation of the "illumination" branch of 12 NYCRR 23-1.30. As the issue of whether movant violated the Industrial Code cannot be summarily resolved, those questions prevent the granting of summary judgment and requires such determination by the trier of fact.

Branch of motion seeking dismissal of all cross-claims and third-party claims raised against D'onofrio by co-defendant/third-party plaintiff Con Ed is granted without opposition.

Accordingly, D'onofrio's motion seeking dismissal of plaintiff's claims asserted against it is denied. Portion of application seeking dismissal of all claims asserted by co-defendant/third-party plaintiff Con Ed against D'onofrio is granted. Movant shall serve a copy of this order with notice of entry upon all sides within twenty (20) days of the date herein.

The above constitutes the decision and order of the court.

Dated:

4/28/11

Mitchell J. Danziger
AJSC

MITCHELL J. DANZIGER