

Sarmiento v Turner Constr. Co., Inc.

2012 NY Slip Op 31024(U)

April 13, 2012

Supreme Court, New York County

Docket Number: 110432-09

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Manuel Sarmiento and Haidee Orozco,

Plaintiff (s),

-against-

Turner Construction Company, Inc. and
AMCC Corp.,

Defendant (s).

-----X
AMCC Corp.,

3rd Party Plaintiff,

-against-

New York Concrete Corp.,

3rd Party Defendant.

-----X

DECISION/ ORDER

Index No.: 110432-09

Seq. No.: 003

PRESENT:

Hon. Judith J. Gische

J.S.C.

T.P. Index No.:

591195/09

FILED

APR 17 2012

NEW YORK
COUNTY CLERK'S OFFICE
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
NYCC amended n/m (3212) w/JTP affirm, exhs	1
Sarmiento opp w/GWI affirm	2
Turner/AMCC opp w/SAM, exh	3
NYCC reply w/JTP	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff Michael Sarmiento alleges that defendants Turner Construction Company, Inc. ("Turner") and AMCC, Corp. ("AMCC") violated the Labor Laws (sections 240, 241 [6] and 200) and that such violations (and defendants' negligence) were the proximate cause of his injuries. Issue was joined and AMCC impleaded New York Concrete Corp

("NYCC") which appeared and now moves for summary judgment dismissing the third party complaint and any "residual" negligence claims by Turner. The motion is opposed by Turner and AMCC. Sarmiento takes no position on the motion other than to oppose some of NYCC's recitations of the facts surrounding his accident.

Sarmiento prematurely filed his note of issue and it was stricken. It has been re-filed (November 2, 2011) and this motion is timely brought (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The court's decision and order is as follows:

Facts and Arguments

The issue of whether the defendants violated the Labor Laws is not before the court to decide. The sole issue is whether NYCC has established that Sarmiento's injuries were not as a result of any negligence by it. Although the third party complaint asserts claims for contribution and indemnification, NYCC has not moved with respect to those claims.

A very brief recitation of Sarmiento's claims is necessary. Sarmiento, an employee of AMCC and/or AMCI, a union affiliate of AMCC, claims that while he was instructed to clean the third floor with a scaffold and on the day of the accident, as he was pulling along the scaffold, he tripped and fell. Sarmiento testified at his EBT that he "tripped with the trash. When I was on the ground, laying down, I saw all the trash that was around me." Sarmiento elaborated that the trash or debris consisted of "pipes and pieces of ducts" and that there were pieces of concrete among the debris. Although an accident report made at the time of the accident indicates Sarmiento "tripped over a concrete curb, the report is not signed by Sarmiento and at his EBT he testified that he did not recall telling anyone that he had tripped over a concrete curb.

One of Sarmiento's co-workers ("Yanez") is listed as a witness to the accident on a report. Yanez was deposed and testified that he did not actually witness the accident (he had his back turned) but when he heard Sarmiento scream, he turned around and saw Sarmiento on the floor near the door to the mechanical room, close to an uneven area which he explained is "like a little thing that is raised so to stop the water." Yanez also testified "everything [was] clean" in the area where Sarmiento fell. According to Yanez, he had been helping Sarmiento clean the mechanical room which is located on the 4th floor.

NYCC was a subcontractor for AMCC on this project. Pursuant to Article I.A of its subcontract agreement¹ with AMCC made March 29, 2006, NYCC was obligated to provide all labor, materials, tools, etc for "site concrete, excavation, removals, concrete, drainage and sewage systems [etc.]. subcontractor to place dirt, rubbish, debris, etc. into piles for removal by others. NYCC contends it is entitled to summary judgment because there is no evidence it created a dangerous condition, Sarmiento is the only witness to his accident and there is no proof that he tripped over a "curb."

Discussion

"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." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Sarmiento testified he tripped over debris on third floor as he was cleaning. Although there were some concrete pieces, it was not a concrete curb, as

¹Although NYCC did not provide the court with a copy of its subcontract with AMCC, it is provided by AMCC.

AMCC alleges, nor did the accident occur on the 4th floor mechanical room². NYCC has, therefore, established its prima facie case, that Sarmiento did not trip over a concrete curb that was negligently installed by it.

To raise triable issues of fact, AMCC and Turner argue that Sarmiento tripped over the "little raised thing" that Yanez referred to in his EBT, presumably referring the five (5) inch curb like structure bear the entrance to the mechanical room on the 4th floor. Sarmiento testified, however, at his EBT that he did not know where the mechanical room was and that he had been working on the 3rd floor when the accident happened. Turner and AMCC also point out that the accident report completed when Sarmiento fell states that he tripped over a "concrete curb in the South Mechanical Room on the 4th floor." The accident report is not signed by Sarmiento and he denies he tripped over any kind of curb.

Turner and AMCC have failed to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Although they may be inconsistencies about how Sarmiento's accident happened, Yanez is not an eye witness to what happened and Sarmiento denies it is an accurate statement of what occurred. A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts (Zuckerman v. City of New York, *supra* at 563-4). Consequently, the motion by NYCC to dismiss the third party action is granted. The third party complaint is dismissed.

Although NYCC has not elaborated what it means by its motion that any residual

²NYCC states that after his EBT, Sarmiento supplemented his Bill of Particulars to clarify this point. That document has not been provided to the court.

* 6]
or remaining negligence claims against it by Turner be dismissed, Turner does not oppose this branch of the motion and it is granted as well.

This case is ready for trial once mediation is completed on June 13, 2012. Sarmiento shall serve a copy of this decision/order on the on the Mediator and on the Office of Trial Support so the case can be scheduled.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the motion by New York Concrete Corp. for summary judgment dismissing the third party complaint against it is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of New York Concrete Corp. dismissing the third party action; and it is further

ORDERED that any residual or remaining negligence claims against it by Turner are also dismissed; and it is further

ORDERED that this case is ready for trial once mediation is completed on June 13, 2012; Sarmiento shall serve a copy of this decision/order on the on the Mediator and on the Office of Trial Support so the case can be scheduled; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.


Dated: New York, New York
April 13, 2012

FILED

APR 17 2012

So Ordered:

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith J. Gische, JSC