Henry v 170 E. End Ave., LLC
2012 NY Slip Op 31673(U)
June 21, 2012
Supreme Court, New York County
Docket Number: 116504/08
Judge: Debra A. James
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[* 1]
SCANNED ON 6/25/2012

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59
Justice

ANDREW HENRY,

Plaintiff,

- v -

170 EAST END AVENUE, LLC and PLAZA CONSTRUCTION CORP.,

Defendants.

Index No.: 116504/08
Motion Date: 02/10/12
Motion Seq. No.: 02
Motion Cal. No.: _____

FILED
JUN 22 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☒ Yes ☐ No

Plaintiff Andrew Henry (Henry) sues defendants 170 East End Avenue, LLC (170 East) and Plaza Construction Corp. (Plaza) under Labor Law §§ 200, 240 (1) and 241 (6), for damages suffered in a workplace incident. Defendants move for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Henry opposes the motion and cross-moves for summary judgment in his favor on the Labor Law § 241 (6) claim.

Henry is a union construction worker, employed as a stone derrick man by nonparty Port Morris Marble & Tile (Port Morris). 170 East hired Plaza as construction manager for a project at 170

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

East End Avenue, in Manhattan (the Building). Plaza subcontracted the stone work to Port Morris. The construction area included three sides of the Building and portions of the adjacent public streets, which were partially cordoned off.

Henry was part of a three-man crew charged with transporting stone slabs by forklift at the work site. The crew included Danny Burns, the forklift operator, and Michael Adorno (Adorno), the "flagman," responsible for monitoring and directing public traffic around the vehicle. Henry's job consisted of holding the stone slabs stable while the forklift maneuvered down the public street. This required that he walk in front of the forklift.

On June 22, 2007, the forklift proceeded down East End Avenue, carrying a slab of stone on a boom attached to the forklift's tines. Henry was walking in front of the forklift, holding the stone steady. Adorno was stationed to the rear of the forklift, and was equipped with a flexible fluorescent orange signal flag attached to a two-foot pole, which is used to direct pedestrian and vehicular traffic. Though he could not recall whether he saw the cab before or after he heard the beep, Henry testified that he saw a taxi going pretty fast and almost hit the forklift. He also heard the forklift accelerate.

There is circumstantial evidence, that Burns, in order to avoid the taxi, accelerated the forklift and ran over Henry's feet, injuring him. The taxi did not strike anyone.

At his deposition, Henry stated that Adorno was in position behind or next to the forklift and was holding the signal flag in his hand, but that he did not stop traffic at the time of the accident.

The part of the defendants' motion which seeks dismissal of Henry's Labor Law § 240 (1) claim is unopposed. Such claim is therefore dismissed.

Section 241 (6) places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code. Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993). Henry argues that defendants violated section 23-1.29 of the Industrial Code, entitled "public vehicular traffic" (12 NYCRR 23-1.29) which provides, as relevant:

> (a) Whenever any construction . . . work is being performed over, on, or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, *or such traffic shall be controlled by designated persons*.
>
> (b) Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated

person shall lower the flag or paddle and signal with his free hand.

(Emphasis added).

Defendants contend that there was full compliance with section 23-1.29. In support, they argue that Henry's own testimony establishes that there was a flagman, equipped with a fluorescent flag attached to a two-foot pole, who was monitoring traffic at the time of the incident, and was positioned next to the forklift.

Henry counters that a violation occurred because there was no evidence that the flag person was stationed at a proper and reasonable distance from the work area, facing approaching traffic. At his deposition, Henry testified that Adorno, the flagperson, did not use his flag to stop traffic just prior to the accident. He argues that the taxi, which was in close proximity to the work area, honking its horn just prior to his injury, is circumstantial evidence that the flagperson was not properly positioned, and that such flagperson did not stop traffic where necessary.

The court is persuaded that a question of fact as to whether defendants violated section 23-1.29 has been raised. Though Section 23-1.29 does not require barricades if a designated person is assigned to control traffic, there is an issue of fact as to whether such flag person was properly positioned and/or

stopped traffic when it was necessary. Nor have defendants established as a matter of law that the flag or paddle used by Adorno, the flag person, measured not less than 18 inches in length and width, as required under the Industrial Code.

As to his cross motion for summary judgment, Henry has not established as a matter of law that defendants' alleged failure to comply with Industrial Code section 23-1.29 proximately caused his injury (*see* Egan v Monadnock Constr., Inc., 43 AD3d 692, 694 [1st Dept 2007] [alleged violation of Industrial Code must be a proximate cause of the plaintiff's injury). Accordingly, the cross motion is denied.

Defendants move to dismiss Henry's common-law negligence and Labor Law § 200 claims. Labor Law § 200 codifies the common-law duty imposed upon owners and contractors to provide workers with a safe place to work. Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993). The section provides that

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places"

(Labor Law § 200 [1]).

To establish liability against an owner or general contractor under section 200, a plaintiff must establish that the owner or general contractor directed, controlled or supervised

the manner, means or methods of plaintiff's work, or had actual or constructive notice of a dangerous condition (*see* Hanley v McClier Corp., 63 AD3d 453, 455 [1st Dept 2009]).

Defendants argue that there is no evidence that they supervised or exercised any control over the work that caused the injury. Defendants supply the deposition transcript of Michael Marcolini (Marcolini), one of three or four Plaza superintendents assigned to the work site. Marcolini stated that Plaza did not provide any equipment for Port Morris, did not require approval of Port Morris activities, and only provided coordination and general guidance, but did not get "involved in directly supervising . . . any trade". Defendants also point to Henry's own deposition, wherein he stated that he was supervised directly by a Port Morris foreman and never took direction from any employee of Plaza.

Henry counters that a question of fact remains because, in his deposition, Marcolini stated that Plaza had multiple supervisors on site every day whose duties included, inter alia, coordinating the delivery of stone to the work site. This argument is unpersuasive. Marcolini's description of the supervisors' duties establishes nothing more than "the exertion of general supervisory authority," which is insufficient to establish supervision and control for the purpose of section 200.

Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 272, (1st Dept 2007).

Next, Henry argues that a dangerous condition existed because the public street was not fenced or barricaded to traffic. This argument is also unpersuasive. Labor Law § 200 only requires the defendants to provide "reasonable and adequate protection," and Henry cites no duty that requires defendants to barricade the public street when a flagperson is present.

Accordingly, summary judgment is granted in favor of the defendants on the negligence and Labor Law § 200 causes of action. In light of the foregoing, it is hereby

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted only to the extent that the negligence and Labor Law §§ 200 and 240(1) claims are dismissed, and the motion is otherwise denied, it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed to mediation, and if the action is not settled, they shall appear for a pre-trial conference on September 25, 2012, IAS Part 59, 71 Thomas Street, New York, New York.

This is the decision and order of the court.

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Dated: June 21, 2012 ENTER:

J.S.C.