

Rodriguez v 121 Vermilyea Realty Corp.

2013 NY Slip Op 30258(U)

January 21, 2013

Supreme Court, New York County

Docket Number: 101131/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Mader 'ice

PART 11

Index Number : 101131/2010
RODRIGUEZ, JUAN
vs
121 VERMILYEA REALTY
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Answering Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Replying Affidavits _____	<input type="checkbox"/> No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the attached attached Memorandum Decision and order.

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

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 21, 2013

[Signature], J.S.C.
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
JUAN RODRIGUEZ,

Index No. 101131/10

Plaintiff

- against -

121 VERMILYEA REALTY CORP., and EAST
COAST MANAGEMENT, LLC

Defendants.

-----X
JOAN A. MADDEN, J

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this action seeking to recover damages in connection with a workplace injury,

defendants 121 Vermilyea Realty Corp. ("Vermilyea") and East Coast Management, LLC

("ECM"), the owner and managing agent of the premises where plaintiff was injured move for

summary judgment dismissing the complaint. Plaintiff opposes the motion.

Plaintiff is the superintendent and porter for 121 Vermilyea Avenue, New York, NY a 15-unit apartment building. Plaintiff alleges he sustained injuries to his hand while operating an electric table saw which did not have a guardrail. Plaintiff claims that as a result of the accident, his fingers were severed and later reattached. According to plaintiff, all tools and supplies were provided by his employer Vermilyea and/or ESM, and that the table saw had been in the basement of the premises since at least 1998. Plaintiff also maintains that Nelson Gualpa ("Gualpa"), an employee of ESM, was his direct supervisor and sometimes bought materials for various work performed by plaintiff. At the time of the accident, plaintiff was repairing a hole in one of the inner walls of the basement. According to plaintiff, he called Gualpa before performing the repair and received Gualpa's permission to make the repair and that Gualpa brought the cement to the premises for the repair.

After the accident, Gualpa provided plaintiff with a general release agreeing to release claims arising out of the accident for \$5,000. Plaintiff alleges he is illiterate, speaks only Spanish, and that no one read the release to him, which is in English, before he signed it.

As to the instant motion for summary judgment, for the reasons stated below, the motion must be denied as untimely. Note of issue was filed on March 30, 2012. CPLR 3212(a) and this court's order of April 12, 2012, provided that dispositive motions are to be made within 120 days of filing of note of issue. Thus, the motion had to be made by July 30, 2012. Here, defendants did not make the motion until August 1, 2012.

A party may bring an untimely motion for summary judgment if it can show good cause for the delay. A showing of good cause under CPLR 3212(a) requires "a sufficient explanation for the untimeliness-rather than simply permitting meritorious non-prejudicial filings, no matter how tardy." Brill v. City of New York, 2 NY3d 648, 652 (2004).

Defendants assert good cause for the delay exists based on an office mistake in calendaring the date by which the motion had to be made; the need to depose two non-party witnesses; motions in connection with another case which defendants' attorney, a solo practitioner, had to submit in state and federal courts, and the illness of defendants' secretary. As to defendants' argument regarding miscalendaring, defendants point to their mistake in adding five days due to plaintiff's mailing of the note of issue.

Defendants argue that Luciano v. Apple Maintenance & Services, Inc., 289 AD2d 90 (1st Dept 2001) and Szabo v. XYZ, Two Way Radio Taxi Assn., 267 AD2d 134 (1st Dept 1999) endorsed such an addition and that it was not until Group IX, Inc. v. Next Print. & Design Inc., 77 AD3d 530 (1st Dept 2010) that the First Department held that the five-day addition for mailing

the note of issue does not apply. Defendants further argue that their inadvertent reliance on the prior holdings in Luciano and Szabo, which were not repealed until Group IX in 2010 establishes good cause. Group IX was not a recent decision and was decided more than 20 months before the dating issue, and, thus, defendants' argument based on the holdings in Luciano and Szabo is unavailing.

Nor do defendants' other arguments have merit. Defendants fail to explain the relevancy and materiality of the deposition testimony of the two nonparty witnesses. Moreover, defendants' arguments based on their attorneys' work load and the illness of an employee are not persuasive, particularly in light of defendants' failure to apply for an extension of time based on these circumstances.

In any event, even if the motion was timely made, it lacks merit. First, as to the effect of the release, counsel for defendants acknowledged at oral argument that there were triable issues of fact as to the validity of the release. Next, defendants argue that under Workers' Compensation Law ("WCL") § 11, plaintiff is barred from bringing this action. Section 11 (1) of the WCL provides, in relevant part, that workers' compensation benefits are the exclusive remedy of "an employee ... except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents ...an injured employee may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury . . ."

Here, it is undisputed that Vermilyea failed to maintain a workers compensation policy to provide compensation for plaintiff and thus under WCL § 11, plaintiff has a right bring the instant action against Vermilyea. See generally, Boles v. Dormer Giant, Inc., 4 NY3d 235

(2005). Moreover, defendants' argument that plaintiffs' acceptance from Vermilyea of his salary, medical expenses and an apartment constitutes an election by plaintiff of workers' compensation benefits is without legal foundation.

The remaining issue concerns defendants' potential liability under Labor Law § 200.¹ Labor Law § 200 is a codification of the common-law duty imposed on property owners, general contractors, and employers to provide workers with a safe work site. Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993). "[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition*'" Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998], quoting Russin v Picciano & Son, 54 NY2d 311, 317 (1981).

Generally, Labor Law § 200 claims fall into two disjunctive categories: those involving the manner in which the work is performed, and those where a worker is injured as a result of dangerous or defective premises conditions at the work site. Schultz v Hi-Tech Constr. & Mgt. Servs., Inc., 69 AD3d 701 (2d Dept 2010). Here, the record raises factual issues as to whether defendants had the authority to supervise the work and as to whether they had actual or constructive notice of the defective condition of the table saw. Moreover, contrary to defendants' position, whether plaintiff volunteered to perform the work at issue is not dispositive, particularly as there is evidence that Vermilyea paid for the materials for the job and Gualpa supplied plaintiff with the cement, and approved the job. In addition, it is undisputed that the saw was at

¹The complaint and the bill of particulars allege a violation of Labor Law § 200 only, although the bill of particulars does specify two sections of the Industrial Code which potentially provide a predicate to liability under Labor Law § 241(6). However, as the motion for summary judgment seeks relief only with respect to the pleaded violation of Labor Law § 200, this decision will address only the merit of that claim.

the premises since 1998, and plaintiff maintains that Gualpa would have known that the saw was needed to cut the wood for a wooden lathe to be placed into the wall in connection with the repair of the hole. Under these circumstances, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim. See Voultepsis v. Gumley-Haft-Klierer, Inc., 60 AD3d 524 (1st Dept 2009).

In view of the above, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to proceed to mediation..

DATED: January 21, 2013



J.S.C. **FILED**

FEB 06 2013

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