Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JORGE HERNANDEZ,

Plaintiff,

-against-

AUTO PARTNERS, L.L.C. d/b/a SUNRISE TOYOTA, SALVATORE SQUILLACE and ANTONIO BRUGELLIS,

Defendants.

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AUTO PARTNERS LLC s/h/a AUTO PARTNERS L.L.C. d/b/a SUNRISE TOYOTA,

Third-Party Plaintiff,

-against-

DSC CONSTRUCTION CORP.,

Third-Party Defendant.

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INDEX NO.: 12659/06
CALENDAR NO.: 201200539OT
MOTION DATE: 3/27/13
MOTION SEQ. NO.: 006 MOT D

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-12 ; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 13-15 ; Replying Affidavits and supporting papers 16-17 ; ~~Other~~___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant/third party plaintiff Auto Partners LLC s/h/a Auto Partners L.L.C. d/b/a Sunrise Toyota (Sunrise) seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against Sunrise and granting summary judgment in favor of Sunrise and against third party defendant DSC Construction Corp. (DSC) for the claims set forth in the third party complaint is granted; and it is further

ORDERED that plaintiff's complaint and all cross claims asserted against defendant Sunrise are hereby dismissed; and it is further

ORDERED that defendant/ third party plaintiff's unopposed application for an order pursuant to CPLR Section 3212 granting summary judgment against the third party defendant DSC Construction Corp. with respect to defendant/third party plaintiff's third party claims for common law and contractual indemnification and failure to procure insurance is granted.

JCA

On June 6, 2005 plaintiff Jorge Hernandez (Hernandez) sustained injuries while working as a laborer in a parking lot owned by defendant Sunrise. Defendant Sunrise (as owner) and third party defendant DSC (as contractor) had entered into an agreement for the purpose of paving the car dealership's back parking lot. DSC employed Hernandez, who was shoveling hot tar from a six foot wide steel bucket/hopper which was positioned on the front end of a paving machine being operated by defendant Anthony Brugellis. Hernandez was injured when Brugellis lowered the bucket onto his right foot. Defendant Salvatore Squillace was the job site foreman employed by DSC.

Plaintiff's complaint sets forth causes of action sounding in common law negligence and violations of Labor Law Sections 240(1) & 241(6). Plaintiff claims that the defendants were negligent in the ownership, operation, maintenance, management and control of the premises and the construction work which was performed on the premises. Defendant's third party complaint seeks contractual and common law indemnification from plaintiff's employer, third party defendant DSC.

Defendant/third party plaintiff's summary judgment motion seeks an order dismissing the claims set forth in plaintiff's complaint and all cross claims asserted against Sunrise claiming that no viable causes of action are stated in the complaint against the owner of the premises. Defendant claims that no valid negligence claims are stated since Sunrise did not control or direct the work performed in the parking lot and had no authority to supervise the labor performed by the contractor's employees. Defendant Sunrise also claims that no valid Labor Law claims for violations of Labor Law 240(1)&241(6) are viable based upon the deposition testimony which reveals that Hernandez was not injured as a result of an elevated-related risk or as a result of defendants' violation of any relevant section of the Industrial Code. Defendant asserts that Labor Law 241(6) is also inapplicable since the plaintiff was not engaged in the construction or demolition of a building or performing excavation in connection with the construction or demolition of a building. Defendant also argues that Sunrise is entitled to common law and contractual indemnification from DSC since the undisputed evidence proves that the owner was not negligent since Sunrise had no authority to direct, supervise or control the work performed by DSC's employee and since the Sunrise/DSC contract required that the contractor (DSC) indemnify the owner for injuries sustained in connection with the construction project.

In opposition plaintiff submits an attorney's affirmation reciting relevant portions of the parties deposition testimony and claims that substantial issues of fact exist concerning the defendant's failure to provide a safe workplace and proper safety equipment in violation of Labor Law Sections 240(1)& 241(6) sufficient to defeat defendant's summary judgment motion. Plaintiff claims that defendant violated the concrete specifications set forth pursuant to 12 NYCRR 23-9.4 which prohibits the carrying or swinging of suspended loads over areas where individuals are working. Plaintiff asserts that the use of the paving machine carrying a suspended load of tar without proper safety devices was an Industrial Code violation which constitutes the type of activity that Labor Law Section 241(6) was enacted to prevent. Plaintiff also claims that defendant's failure to provide adequate safety devices while lowering the hopper filled with hot tar is an elevation/gravity related risk in violation of Labor Law Section 240(1).

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 action. To grant summary judgment it must clearly appear that no material

and triable issue of fact is presented (*Sillman v. 20th Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 (1957)). The moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 (1985)). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. NYU Medical Center, supra.; Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 (1979)). Once such proof has been offered the burden shifts to the opposing party, who, in order to defeat the motion for summary judgment must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Products*, 148 AD2d 499, 538 NYS2d 843 (2nd Dept., 1979)) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 (2nd Dept., 1981)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR, 248 NY 339* (1928); Prosser, *"Torts"*, 4th Edition Sections 30, 41-42 & 53)). He must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 (2nd Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2nd Dept., 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 (3rd Dept., 2001)).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297, 532 NYS2d 105 (1st Dept., 1988); leave to appeal denied 78 NY2d 783 (1989); *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept., 2000)).

The protection provided by Labor Law Section 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (*Jock v. Fien*, 80 NY2d 965, 590 NYS2d 878 (1992)). It applies to owners, contractors or their agents (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 (1981) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v. Stout*, 80 NY2d 290, 590 NYS2d 55 (1992); *Young Ju Kim v. Herbert Construction*, 275 AD2d 709, 713 NYS2d 190 (2000)). If the injury allegedly arises not from a dangerous

condition at the property, but from the method or material used by the subcontractor, an implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity which brought about the injury (*Haider v. Davis*, 35 AD3d 363, 827 NYS2d 179 (2nd Dept., 2006)). The record is clear that the defendant/owner did not have authority or control over the work being performed in the parking lot when plaintiff Hernandez was injured. No basis therefore exists to find defendant liable for plaintiff's injuries based upon a theory of negligence. Plaintiff's causes of action sounding in negligence and violation of Labor Law Section 200 must therefore be dismissed.

Labor Law Section 240(1) provides:

> 1. All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated to give proper protection to a person so employed.

An owner and a contractor have a non-delegable duty to provide required safety devices to a workman at a building site and will be held absolutely liable for a worker's injuries resulting from the breach of that duty (*Ross v. Curtis-Palmer Hydro Electric Company*, 81 NY2d 494, 601 NYS2d 49 (1993)). The "exceptional protection provided for workers by Labor Law Section 240(1) is aimed at "special hazards" that arise when the work site either is itself elevated or is positioned below the level where "materials or load (are) hoisted or secured". "Special hazards" do not encompass any and all perils connected with gravity but are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v. Curtis-Palmer Hydro Electric Company, supra.; Rocovich v. Consolidated Edison Company*, 78 NY2d 509, 577 NYS2d 219 (1991); *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 (1985)). The legislative purpose behind Labor Law 240(1) is to protect workers by placing ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of workers who are "scarcely in a position to protect themselves from accidents" (*Rocovich v. Consolidated Edison Company, supra.; Koenig v. Patrick Construction Company*, 289 NY 313 (1948)). However, in order to prevail upon a claim pursuant to Labor Law 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*Bland v. Mancherian*, 66 NY2d 452, 497 NYS2d 880 (1985); *Sprague v. Peckman Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 (2nd Dept., 1997)).

Although the plaintiff was injured when a hopper filled with hot tar was inadvertently lowered onto his foot, the injury occurred not as the result of an elevation or gravity related risk, but rather was caused by a co-worker's error in lowering the bucket without knowing that the plaintiff's foot was beneath the bucket. There is no proof that a safety or protective device of any kind could have prevented the occurrence and therefore the statute is inapplicable since Labor Law Section 240(1) clearly aims to protect workers from "special hazards" that arise where the work site is either

elevated or perils exist from gravity related injuries resulting from falls from heights or falling objects. In this case, neither situation exists and no viable cause of action is stated against the defendants based upon a violation of Labor Law Section 240(1)(*see Miller v. Weeden*, 7 AD3d 684, 777 NYS2d 516 (2nd Dept., 2004); *Avila v. Plaza Construction Corp.*, 73 AD3d 670, 900 NYS2d 378 (2nd Dept., 2010)).

Labor Law Section 241(6) provides:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law 241(6) requires owners and contractors, or their agents, to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. Unlike Labor Law 200, the duty to comply with the Commissioner's regulations imposed by Labor Law 241(6) is nondelegable (*see Ross v. Curtis-Palmer Hydro Electric Company, supra.; Long v. Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 (1982)). A plaintiff who asserts a viable claim under Labor Law 241(6) need not show that the defendants exercised supervision or control over the work site, but must demonstrate that the defendants' violation of a specific rule or regulation was a proximate cause of the accident (*Seaman v. Bellmore Fire District*, 59 AD3d 515, 873 NYS2d 181 (2nd Dept., 2009)).

No viable claim is stated against the defendant based upon a violation of Labor Law Section 241(6) since the Industrial Code provision which plaintiff claims would provide a legal basis for establishing the defendant's liability is inapplicable since the provision refers to power shovels and backhoes which carry and/or swing suspended loads of materials. The undisputed facts in this case reveal that the instrument involved was not carrying a suspended load of materials, but in fact was a paving machine with a hopper filled with hot tar which was being properly operated when the injury occurred as a result of human error. Under these circumstances the code provision recited by the plaintiff has no application to the underlying facts and therefore defendant's motion seeking an order granting summary judgment dismissing this cause of action must be granted.

Finally with respect to the defendant's unopposed application seeking an order granting summary judgment against the third party defendant DSC for common law and contractual indemnity, defendant's application must be granted

Dated: April 15, 2013

PAUL J. BAISLEY. JR.

J.S.C.