SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Index Number : 105212/2011
CANN, WILLIAM
vs.
F.J. SCIAME CONSTRUCTION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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 _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 7/23/13

LBY, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
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

WILLIAM CANN,

Plaintiff, **Index No. 105212/11**

– against –

F.J. SCAIME CONSTRUCTION CO., INC., ENGINEERED DEVICES CORPORATION, and THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Defendants.

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York, J.S.C.:

In this personal injury action plaintiff William Cann ("Cann"), a Century Maxim signalman, alleges that on June 5, 2008, he fell off the back of a flat-bed tractor trailer onto a safety barricade at, or near, 41 Cooper Square, New York, New York. Defendants F.J. Scaime Construction Co., Inc. ("Scaime") and the Cooper Union for the Advancement of Science and Art ("Cooper Union") now move, pursuant to Sections 200, 240(1), and 240(6) of the New York Labor Law, for summary judgment, on the grounds that 1) the tractor trailer's flat bed does not present an elevation risk within the meaning of Section 240(1); 2) plaintiff's Section 241(6) claim is invalid because it does not contain any violation of a regulation set forth by the Commissioner of Labor; and 3) defendants' activities do not support a valid cause of action under Section 200. To satisfy the requirements of Section 241(6), plaintiff has filed a cross-motion to amend his bill of particulars to include defendants' violation of Industrial Code § 23-1.29(a). For the reasons below, summary judgment is granted and the cross-motion to amend is denied.

Background

In his May 5, 2012 deposition, Cann alleges that on the morning of the day in question he was working on a flat-bed tractor trailer at 41 Cooper Square in Manhattan. While he was loading or unloading scaffolding he lost his footing and fell backwards off of the back of the truck onto a safety barricade which was positioned perpendicular to the way the truck was facing. Cann states that the truck contained no toe board, lip, gate, or anything around the perimeter to prevent workers from falling. It is undisputed that had the barricade not been located so close to the truck, Cann would have fallen approximately four feet to the ground as opposed to landing directly onto the barricade after falling approximately two feet. However, it is disputed which fall would cause greater injury. It is also disputed whether the barricade's placement provided adequate safety for the Century Maxim workers from nearby traffic or if its placement was inherently dangerous.

The other issue in this case is whether defendants had supervision over the activities that caused the injury to make them liable under Section 200. Scaime's field superintendent, John Fitzpatrick, oversees the day-to-day operations of the construction of the building. Fitzpatrick denies instructing Cann in the method and manner in which his work was performed. Defendants contend plaintiff was instructed and directly supervised only by Century Maxim supervisor, "Dominick Jr." Plaintiff argues that his work activities, and resulting injuries, were within the purview of Fitzpatrick's employment.

Discussion

Under CPLR 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to

warrant the court as a matter of law in directing judgment in favor of any party." Also, CPLR 3212(e) allows for summary judgment to be granted for some, but not all of the causes of action. These causes of action will be "severed from any remaining causes of action." CPLR § 3212(e).

1) Labor Law § 240(1)

Plaintiff does not oppose defendants' motion to dismiss the Labor Law § 240(1) cause of action. Therefore, defendants prevail on this portion of their motion.

2) Labor Law § 241(6)

Under Labor Law § 241 (6) a building owner and contractor must "provide reasonable and adequate protection and safety" for workers involved in building construction, excavation or demolition, and comply with safety rules and regulations promulgated by the State Commissioner of Labor. Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502, 601 N.Y.S.2d 49, 52 (1994). Therefore, a plaintiff must assert a specific and applicable violation of the New York Industrial Code to assert a valid Section 241(6) claim. See id.

Here, plaintiff has not stated any violation of the New York Industrial Code; therefore, defendants have moved for summary judgment. See Keller v Kruger, 39 Misc 3d 720, 732, 961 N.Y.S.2d 876, 886 (2013). In response, plaintiff has filed a cross-motion to amend his bill of particulars to include a violation of Industrial Code § 23-1.29(a). Plaintiff argues this is permissible because it requires no additional discovery and thus does not unfairly surprise defendants. Plaintiff also argues summary judgment should not be granted because material issues of fact exist. Defendants argue that cross-motion to amend should be denied not because it is devoid of merit, but because the facts in the case-at-hand do not apply to Industrial Code § 23-1.29(a). Additionally, defendants claim that plaintiff's injury was not proximately caused by the alleged violation of Industrial Code § 23-1.29(a).

New York Industrial Code Section 23-1.29(a), entitled "Public Vehicular Traffic," states:

> Whenever any construction, demolition or excavation 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 shall be controlled by designated persons.

For Cann to prevail on a motion for leave to amend the bill of particulars he must not cause "prejudice or surprise resulting directly from the delay." Pier 59 Studios, L.P. v Chelsea Piers, L.P., 40 A.D.3d 363, 365-66, 836 N.Y.S.2d 68, 70 (1st Dept. 2007). He need not prove the proposed amendment's merits, but the proffered amendment must not be "insufficient on its face." Id. at 366, 836 N.Y.S.2d at 70. Interpretations of Industrial Code regulations and determinations as to whether a particular condition is within the scope of the regulation are questions of law for the court. See Penta v Related Cos., 286 A.D.2d 674, 675, 730 N.Y.S.2d 140, 141 (2nd Dept. 2001). Moreover, to establish liability under Labor Law § 241 (6), Plaintiff must demonstrate that his injuries were caused proximately by a violation of an Industrial Code provision that mandates compliance with concrete specifications. See La Veglia v St. Francis Hosp., 78 A.D.3d 1123, 1125, 912 N.Y.S.2d 611, 614 (2nd Dept. 2010).

Defendants point out that Section 23-1.29(a) is intended to direct public vehicular traffic away from areas where traffic could be hazardous to the persons performing work. The regulation focuses on hazards caused by public traffic and gives no guidelines for the placement of barricades and fences to prevent other types of injury. See Industrial Code § 23-1.29(a). Plaintiff counters that Section 23-1.29(a) applies because the improper placement of the barricades created a dangerous work environment. Plaintiff argues that the placement of the barricade did not adequately protect the workers from public vehicular traffic because the

barricades were not placed far enough away from the worksite and the vehicles could strike or injure the workers. However, this is not hazard that caused plaintiff's injury.

Though New York courts allow parties to amend their claims to include Industrial Code violations in satisfaction of Section 241(6), e.g. McCoy v Metropolitan Transportation Authority, 38 A.D.3d 308, 309, 832 N.Y.S.2d 26, 27 (1st Dept. 2007), the alleged injury must be related to a specific regulation set forth by the Commissioner of Labor, and must not be insufficient on its face. See id.; see also Borowicz v International Paper Co., 245 A.D.2d 682, 684, 664 N.Y.S.2d 893, 895-96 (3rd Dept. 1997) (holding plaintiffs must prove a violation of a regulation of the Commissioner of Labor "that sets forth a specific standard of conduct as opposed to a reiteration of common-law principles"). Industrial Code § 23-1.29(a) is often applied where a vehicle strikes a plaintiff. See e.g. Lucas v KD Dev. Const. Corp., 300 A.D.2d 634, 635, 752 N.Y.S.2d 718, 720 (2nd Dept. 2002). The court cannot find any holding in which the improper placement of barricades constituted a violation of Section 23-1.29(a) when a vehicle did not strike a plaintiff. Moreover, plaintiff has not provided any case law that supports his argument.

Plaintiff's contention that McGuinness v Hertz Corporation supports his position is misguided. 15 A.D.3d 160, 789 N.Y.S.2d 121 (1st Dept. 2005). The McGuinness Court held that Section 23-1.29(a) covers work that is "an integral part of the construction project" and is performed on the worksite "in close proximity to the street." McGuinness, 15 A.D.3d at 161, 789 N.Y.S.2d at 122-23. However, that decision does not detail how plaintiff's injury occurred. Accordingly, plaintiff's attempt to rely on this case is unpersuasive.

Even in cases in which a vehicle struck a plaintiff, the courts have rejected the argument that barricades can present an "inherently dangerous condition." E.g. Delaney v City of New

York, 78 A.D.3d 540, 541, 911 N.Y.S.2d 57, 59 (1st Dept. 2002). Therefore, Section 23-1.29(a) only protects individuals from vehicular traffic and not from other dangers a barricade itself may pose. As no public vehicle struck or injured Cann, Section 23-1.29(a) does not apply.

For the reasons above, the court denies plaintiff's cross-motion to amend the bill of particulars and grants the portion of defendants' motion seeking dismissal of plaintiff's Labor Law § 241(6) claim.

3) Labor Law § 200

Defendants also move for summary judgment because (1) defendants did not supervise the means and methods of Cann's work and (2) the accident did not result from a hazardous condition under Section 200. Plaintiff opposes this motion, claiming defendants did supervise the activities that caused his injury and that material issues of fact exist.

Labor Law § 200 states:

> All places to which this chapter applies shall be so . . . equipped . . . as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. All . . . equipment . . . shall be so placed . . . as to provide reasonable and adequate protection to all such persons . . .

This section codifies the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work. See Russin v Louis N. Picciano & Son, 54 N.Y.2d 311, 316-17, 445 N.Y.S.2d 127, 129 (1981); see also Lopez v Dagan, 98 A.D.3d 436, 438, 949 N.Y.S.2d 671, 673 (1st Dept. 2012). The text of Section 200 merely states that items such as barricades should be positioned to provide reasonable and adequate protection to all person employed in the designated area. However, the party responsible for providing this safe place to work must "have the authority to control the activity bringing about the injury" and must have either actively enabled it or failed to remedy the unsafe condition. Russin 54 N.Y.2d at 317, 445 N.Y.S.2d at 129. Additionally, when the general contractor's methods give rise to

the dangerous condition and the owner has no supervisory control over the activity, "no liability attaches to the owner under the common law or under Labor Law Section 200." Comes v New York State Electric & Gas Corp., 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 169 (1993). Under these standards, plaintiff must show that defendants' positioning of the barricade actively enabled the unsafe condition bringing about the injury.

In the case at bar, it is disputed whether defendants moved or positioned the barricades, or oversaw this action, to allow trucks to enter and exit the loading area. Plaintiff argues the deposition of Scaimes's field supervisor, John Fitzpatrick, suggests he was responsible for positioning the barricades because he oversaw the day-to-day operations of the site. Fitzpatrick's responsibilities included managing the construction of the building, overseeing various safety issues, organizing product and material delivery, dealing with subcontractors, and managing other Scaime labor foreman. However, aside from pointing to the fact that Fitzpatrick oversees some safety issues, product delivery, and labor foreman, plaintiff has failed to demonstrate that Fitzpatrick, or any other Scaime employee, had any control over where the barricades were placed. See Griffin v. Clinton Green South, LLC, 98 A.D.3d 41, 48-49, 948 N.Y.S.2d 8, 13. Additionally, Fitzpatrick states the barricades were placed in accordance with the Department of Transportation's standards.

Furthermore, plaintiff has failed to demonstrate that the barricades' placement gave rise to a dangerous condition that caused plaintiff's injury, as deemed necessary by the Russin court. Plaintiff argues that because defendants have not submitted proof of the exact location of the barricades, defendants have not made a *prima facie* case entitling them to summary judgment. This argument is without merit because it overlooks the fact that both parties agree on where the barricades were located, and, more importantly, confuses what action gave rise to the dangerous

condition that caused plaintiff's injury. It was not the placement of barricades that gave rise to a dangerous condition, but rather, the loading or unloading of the scaffolding. This is because the placement of the barricade is not what caused plaintiff to fall, it simply altered the fall caused by loading or unloading scaffolding. Therefore, as the barricades' placement is of little importance in this case under Section 200, it is not relevant whether falling onto the barricade, as opposed to falling directly onto the street, caused the plaintiff greater injury. Consequently, there are not material issues of fact.

Lastly, defendants assert that they have complied with the Comes standard, see Comes, 82 N.Y.2d at 877, 609 N.Y.S.2d at 169, because no Scaime employee instructed Cann to load or unload the scaffolding. Because plaintiff has failed to affirm that he received instructions from anyone other than Dominick Jr., it cannot be said that defendants directed, controlled or supervised the means and methods of Cann's work. Therefore, no liability should attach to Scaime or Cooper Union.

For the reasons above, it is hereby

ORDERED and ADJUDGED that defendants' motions for summary judgment are granted, and all causes of action are dismissed.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER

Dated: 1/23/18

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.