

Latuner v Benchmark Bldrs., Inc.

2013 NY Slip Op 32917(U)

November 7, 2013

Supreme Court, New York County

Docket Number: 151845/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 151845/2013
LATUNER, MICHAEL
vs.
BENCHMARK BUILDERS, INC.
SEQUENCE NUMBER : 001
PARTIAL 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 decided in accordance with the attached memorandum Decision + order.

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

Dated: November 7, 2013

HON. JOAN A. MADDEN
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: PART 11

-----X

MICHAEL LATUNER,

Index No.: 151845/13

Plaintiff,

-against-

DECISION AND ORDER

BENCHMARK BUILDERS, INC., APOLLO
GLOBAL MANAGEMENT, LLC, SOLOW
BUILDING COMPANY II, L.L.C., AND
SOLOVIEFF REALTY CO. II, L.L.C.,

Defendants.

-----X

JOAN A. MADDEN, J.:

In an action arising out of injuries sustained at a construction site, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment as to his Labor Law § 241 (6) claims as against defendants Solovieff Realty Co. II, LLC, (“Solovieff”) the owner of the construction site, and defendant Solow Building Company II, L.L.C. (“Solow”). Solovieff and Solow oppose the motion and defendant Apollo Global Management, LLC (“Apollo”), the Lessee tenant of the 48th floor where the accident occurred, also opposes the motion. For the reasons below, the motion is denied

BACKGROUND

Plaintiff was injured on February 11, 2013, while he was employed as an electrician by non-party Commercial Electrical Contractors, Inc. (“Commercial”). Commercial had been hired by defendant Benchmark Builders, Inc. (“Benchmark”), the general contractor at the site. According to plaintiff’s affidavit, the accident occurred on the 48th floor when he was installing ground wiring in the east electrical closet. He further states that the electrical power to the electrical closet was not de-energized because, in order to shut off the power, the power would

have to be shut off to the floor and several other connecting floors. According to plaintiff, “the electrical work consisted, in part, of grounding high voltage transformers and disconnect switches in the electrical box in the east electrical closet which required pulling wires from the electrical closet panels to the disconnect switches and from the disconnect switches to the high voltage transformers.” (Plaintiff’s Aff., ¶ 5). Plaintiff said the accident happened when he was “connecting ground wire in the east electric closet on the 48th floor to a lug switch. The ground wire slipped away from the lug and contacted with the electrical power from the energized electrical box causing a flash and an explosion” (id, ¶ 6). As a result plaintiff sustained second degree burns on his hands, wrists, forearms and face.

Plaintiff commenced this action in February 2013. Plaintiff now moves for summary judgment as to liability on his Labor Law § 241(6) claim based on a violation of 12 NYCRR 23-1.13(b)(4) that arguing that Solovieff and Solow breached their non-delegable duty to de-energize the electricity where plaintiff was performing work.

Solovieff and Solow oppose the motion arguing, inter alia, that Labor Law 241(6) does not apply as plaintiff was not engaging in any type of construction, demolition or excavation work at the time of the accident. They also argue that they cannot be considered owners for the purposes of the Labor Law as at the time of the accident Apollo leased the entire 48th Floor of the Building. They also argue that 12 NYCRR 23-1.13(b)(4) is not applicable because plaintiff did not receive an electrical shock but was injured as a result of an explosion by the ground wire coming into contact with the switch. Apollo also opposes the motion, even though the motion does not seek summary judgment against it.

“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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

Labor Law § 241 (6) requires that all contractors, owners, and their agents shall comply with the following requirement:

“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) imposes a nondelegable duty of reasonable care upon owners and contractors to “provide reasonable and adequate protection and safety” to construction workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 159-160 [1982], *rearg denied* 56 NY2d 805 [1982]).

The legislative history underlying section 241 (6) indicates that the statute was meant to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [internal quotation marks and citations omitted]). While this duty is nondelegable and exists “even in the absence of control or supervision of the

worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), “comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

Here, plaintiff claims that he is entitled to summary judgment as to liability under Labor Law § 241 (6) as against Solovieff and Solow based on the violation of two subdivisions of 12 NYCRR 23-1.13 (b) (4), which provides:

(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.”

It has been held that 12 NYCRR 23-1.13 (b) (4) is sufficiently specific to serve as a predicate to liability under Labor Law § 241 (6) (*Harris v Arnell Constr. Corp.* 47 AD3d 768 [2d Dept 2008]; *Crespo v HRH Constr. Corp.* (24 Misc 3d 1246(A), 2009 NY Slip Op 51893U [Sup Ct, NY County 2009]). In addition, while plaintiff states in his affidavit that there was a failure to de-energize the electrical power and such failure to do so caused his injuries, as there has not been any discovery it would be premature to grant summary judgment on plaintiff’s section 241(6) claim. Likewise, while it appears that Solow and Solovieff qualify as owners for the purposes of the Labor Law, and that the work was being done in connection with construction at their building, on this record these facts cannot be established as a matter of law.

Finally, the court notes that the cases relied on by plaintiff, including *DelRosario v. United Nations Federal Credit Union*, 104 AD3d 515 (1st Dept 2013), while factually similar to the instant action, does not hold that summary judgment is properly granted prior to discovery on

a section 241(6) claim arising out of an injury allegedly caused by a violation of 12 NYCRR section 23-1.13 (b) (4).

Accordingly, it is

ORDERED that the motion for summary judgment is denied without prejudice to renewal following completion of discovery; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street on December 12, 2013 at 9:30 am and plaintiff shall notify all parties of the conference.

DATED: November 7, 2013


J.S.C.