

Vitiello v County of Suffolk

2013 NY Slip Op 33040(U)

November 25, 2013

Supreme Court, Suffolk County

Docket Number: 09-24783

Judge: Denise F. Molia

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CAL No. 13-00001OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-15-13 (#003)
MOTION DATE 7-26-13 (#004)
ADJ. DATE 8-16-13
Mot. Seq. # 003 - MotD
004 - XMG

-----X
JOSEPH VITIELLO,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF
SOUTHOLD and SUFFOLK COUNTY WATER
AUTHORITY,

Defendants.
-----X

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment and cross motion to amend the bill of particulars; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 14; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 15 - 16; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Southold for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, or, in the alternative, granting summary judgment in its favor on its cross claim for common-law indemnification against defendant Suffolk County Water

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Authority is granted to the extent of granting it summary judgment dismissing the plaintiff's causes of action for common-law negligence and violations of Labor Law §§ 200 and 240 (1), and is otherwise denied, and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3025 (b) amending his bill of particulars to include additional violations of the New York State Industrial Code, to wit, 12 NYCRR 23-4.2 and 23-4.4, in support of the plaintiff's cause of action for violation of Labor Law § 241 (6) is granted.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on December 9, 2008 while he was installing water mains on Elijah's Lane in Mattituck, New York. According to the plaintiff, he was injured when one of the dirt walls in the trenched area collapsed on one side, burying him up to his waist, and pinning his leg against a pipe. The project was undertaken by the Suffolk County Water Authority ("SCWA"). The SCWA subcontracted with Elmore Associates, the plaintiff's employer, to perform the installation work, including trenching. The roadway was owned by the Town of Southold ("the Town").

In his complaint and bill of particulars, the plaintiff asserts causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The plaintiff alleges that the defendants were negligent in, *inter alia*, failing to provide him with a safe place to work.

In its answer, the Town asserts a cross claim for common-law indemnification against SCWA. SCWA asserts a cross claim against the Town for contribution.

The Town now moves for summary judgment dismissing the complaint, or, in the alternative, for summary judgment in its favor on its cross claim for common-law indemnification against SCWA. The plaintiff cross-moves to amend his bill of particulars to include additional violations of the New York State Industrial Code, to wit, 12 NYCRR 23-4.2 and 23-4.4, in support of his cause of action for violation of Labor Law § 241 (6).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either a dangerous or defective condition at a work site or the manner in which the work is performed (*see Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Here, the injury did not arise from a defective condition inherent on the property but, rather, from the means utilized by the plaintiff to perform his work (*see Cody v State of New York*, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]). According to the plaintiff's deposition testimony, his employer, Elmore Associates, was hired by SCWA to install new water mains beneath the ground. While he was in the trench installing the pipes, the soil caved in, burying him up to his waist, and pinning his leg against the pipe. The plaintiff testified that after Elmore finished excavating, there was no type of bracing equipment placed in the trench to shore up the sides. The plaintiff testified that in past jobs when the excavation was deeper, Elmore had used bracing equipment to shore up the sides.

In order to be held liable under Labor Law § 200 and for common-law negligence where, as here, the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia, supra* at 61, 866 NYS2d at 330; *see La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; *Orellana v Dutcher Ave. Bldrs., Inc.*, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Here, the evidence established that the Town did not exercise any supervision or control over the plaintiff's work (*see Paez v Shah*, 78 AD3d 673, 910 NYS2d 511 [2d Dept 2010]; *Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; *Harper v Holland Addison, LLC*, 75 AD3d 495, 903 NYS2d 753 [2d Dept 2010]). Thus, the Town established its *prima facie* entitlement to summary judgment dismissing the plaintiff's causes of action for common-law negligence and violation of Labor Law § 200.

The plaintiff does not oppose the branch of the Town's motion which seeks to dismiss his causes of action for common-law negligence and violation of Labor Law § 200. Thus, the plaintiff's causes of action for common-law negligence and violation of Labor Law § 200 are dismissed as against the Town.

Turning to the plaintiff's cause of action for violation of Labor Law § 240 (1), it is well settled that "Labor Law § 240 (1) provides protection from elevation-related risks for workers engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Schick v 200 Bludenburgh, LLC*, 88 AD3d 684, 686, 930 NYS2d 604, 607 [2d Dept 2011] [internal quotation marks omitted]). Here, the Town established its *prima facie* entitlement to summary judgment dismissing this cause of action by demonstrating, through the plaintiff's own deposition testimony, that the plaintiff's injuries were not caused by a failure to provide adequate protection against an elevation-related risk (*see Labor Law § 240 [1]; Winters v Main LLC*, 96 AD3d 428, 947 NYS2d 418 [1st Dept 2012]; *Pope v Safety & Quality Plus, Inc.*, 74 AD3d 1040, 903 NYS2d 124 [2d Dept 2010]).

The plaintiff does not oppose the branch of the Town's motion which seeks to dismiss his cause of action for violation of Labor Law § 240 (1). Thus, the plaintiff's cause of action for violation of Labor Law § 240 (1) is likewise dismissed as against the Town.

As for the plaintiff's cause of action for violation of Labor Law § 241 (6), it is well settled that "[a] plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (*Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 958, 951 NYS2d 54, 56 [2d Dept 2012]). Here, the plaintiff cited New York Industrial Code Sections 23-1.5, 23-1.7, 23-1.13, 23-1.15, 23-1.16, and 23-1.17. The Town correctly asserts that the plaintiff's injuries were not caused by a failure to comply with any of the Industrial Code (12 NYCRR) provisions cited by the plaintiff in support of his Labor Law § 241 (6) claim. Specifically, it has been held that 12 NYCRR 23-1.5 is a general safety directive and, as such, is insufficient to support a cause of action for violating Labor Law § 241 (6) (*see Kochman v City of New York*, 110 AD3d 477, 973 NYS2d 114 [1st Dept 2013]; *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]). Furthermore, 12 NYCRR 23-1.7 pertains to overhead, falling, tripping, drowning, slipping, and other hazards including oxygen deficient work areas and corrosive substances, which do not apply to the collapse of soil in a trench (*see* 12 NYCRR 23-1.7). In addition, New York Industrial Code Sections 23-1.13, 23-1.15, 23-1.16, and 23-1.17 are also inapplicable to the facts of this case since, as noted earlier, the plaintiff's injuries were the result of the collapse of soil in a trench and 12 NYCRR 23-1.13 pertains to electrical hazards, 12 NYCRR 23-1.15 pertains to safety railings, 12 NYCRR 23-1.16 pertains to safety belts, harnesses, tail lines, and lifelines, and 12 NYCRR 23-1.17 pertains to life nets. Thus, the Town established its *prima facie* entitlement to dismissal of the plaintiff's cause of action for violation of Labor Law § 241 (6).

However, in opposition and in support of his cross motion to amend his bill of particulars to include violations of 12 NYCRR 23-4.2 and 23-4.4, the plaintiff asserts that triable issues of fact exist as to whether the Town, as the owner of the public roadway where the water main work was taking place, failed to ensure that the excavation was properly shored or braced in violation of sections 23-4.2 and 23-4.4 of the Industrial Code and Labor Law § 241 (6). 12 NYCRR 23-4.2 pertains to trench and area type excavations and 12 NYCRR 23-4.4 pertains to sheeting, shoring, and bracing.

"Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 536, 970 NYS2d 572, 573 [2d Dept 2013] [internal quotation marks omitted]). It has been held that a plaintiff is entitled to amend his bill of particulars to add additional Industrial Code violations where the "[p]laintiff's belated allegations . . . entail [] no new factual allegations, raise [] no new theories of liability, and ha[ve] caused no prejudice" (*Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432, 954 NYS2d 13, 15 [1st Dept 2012] [internal quotation marks omitted]; *see also Latchuck v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 896 NYS2d 356 [1st Dept 2010]). Here, since the plaintiff's theory of the case, supported by the allegations in his bill of particulars and his deposition testimony, has always been that he was injured when the sides of the trench collapsed, burying him up to his waist, and pinning his leg against a pipe, the defendants cannot claim prejudice or surprise (*id.*).

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In opposition, the Town has not shown that the newly proposed sections of the Industrial Code are inapplicable nor have they established that the proposed amendment to the plaintiff's bill of particulars would result in unfair prejudice. The Town merely asserts that the amendment should not be permitted because it is untimely. However, it has been held that a plaintiff may be granted leave to amend his bill of particulars even after the note of issue is filed where, as here, the amended allegations do not amount to new theories of liability (*see Martino v Bendo*, 93 AD2d 500, 940 NYS2d 253 [1st Dept 2012]). Based on the foregoing, the branch of the Town's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim is denied and the plaintiff's motion for leave to amend his bill of particulars to include violations of 12 NYCRR 23-4.2 and 12 NYCRR 23-4.4 is granted.

With respect to the remaining branch of the Town's motion, which seeks summary judgment in its favor on its cross claim for common-law indemnification against the SCWA, "[s]ummary judgment on a claim for common-law indemnity . . . is appropriate . . . where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*La Lima v Epstein*, 143 AD2d 886, 888, 533 NYS2d 399, 401 [2d Dept 1988]). To be entitled to summary judgment, a party is required to establish "that no negligence act or omission on its part contributed to the plaintiff's injuries, and that its liability is therefore purely vicarious" (*Coque v Wildflower Estates Dev.*, 31 AD3d 484, 489, 818 NYS2d 546, 551 [2d Dept 2006]). Here, the Town has not established that it cannot be held liable as a matter of law for violating sections 23-4.2 and 23-4.4 of the Industrial Code and Labor Law § 241 (6). Thus, the Town is not entitled to common-law indemnification against the SCWA.

Accordingly, the Town's motion is granted to the extent of granting it summary judgment dismissing the plaintiff's causes of action for common-law negligence and violations of Labor Law §§ 200 and 240 (1) as against it, and the plaintiff's cross motion to amend his bill of particulars to include violations of 12 NYCRR 23-4.2 and 12 NYCRR 23-4.4 is granted.

Dated: 11-25-13

Hon. Denise F. Molia

A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION