Acosta v Gouverneur court Ltd. Partnership
2014 NY Slip Op 31366(U)
May 22, 2014
Supreme Court, New York County
Docket Number: 109382/10
Judge: Paul Wooten
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[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

JESUS ACOSTA,

Plaintiff,

- against-

GOUVERNEUR COURT LIMITED PARTNERSHIP and NEW YORK SMSA LIMITED PARTNERSHIP,

Defendants.

INDEX NO. 109382/10

MOTION SEQ. NO. 001

The following papers were read on this motion by defendant for summary judgment pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

In this personal injury action, defendant Gouverneur Court Limited Partnership (Gouverneur Court LP) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint. Plaintiff has responded in opposition to the motion. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

Plaintiff Jesus Acosta (Acosta) commenced this action by filing his complaint on or about July 16, 2010, seeking to recover damages for shoulder injuries he allegedly sustained on March 28, 2008, at approximately 11:00 a.m. when he was caused to trip and fall due to the placement of a U-shaped metal vibration support bracket or brace in the boiler room at his place of work. At the time, Acosta was employed as a maintenance worker for nonparty

Community Access, Inc. (Community Access), a not-for-profit organization involved in, among other things, providing housing in the City of New York for low-income individuals and/or individuals suffering with psychiatric disabilities and/or HIV/AIDS. One of Community Access' locations is the building in which Acosta sustained his accident, located at 621 Water Street in lower Manhattan. At all relevant times, the building was owned and operated by Gouverneur Court LP. Acosta was performing his assigned task of cleaning the boiler room floor when his accident occurred.

The complaint asserts causes of action against both Gouverneur Court LP and New York SMSA Limited Partnership (SMSA) for negligence and violations of New York's Labor Law and Industrial Code based on the condition of the boiler room. According to Acosta, defendants either created the dangerous and defective condition, or had actual and/or constructive notice of the condition which had existed in the boiler room for a sufficient period of time so as to permit them to notice and take remedial measures prior to his cleaning assignment and accident.

After issue was joined, the parties pursued discovery, including the exchange of document evidence and depositions. On or about February 14, 2012, plaintiff served a supplemental verified bill of particulars confirming that he was claiming violations of Labor Law §§ 200 and 241(6), "in that the work [he] was performing at the time of the subject occurrence was incidental to and in preparation for construction work to be performed at the location of the subject occurrence," and that the claimed Industrial Code violations were under 12 NYCRR 23-1.7(e)(1) and (2). Approximately two months later, by written stipulation dated April 18, 2012, all claims and cross-claims asserted against SMSA were discontinued with prejudice (defendant's exhibit I). The Note of Issue was filed on June 26, 2013, and Gouverneur Court LP timely served the instant motion for summary judgment. Central to its motion are Gouverneur Court LP's arguments that the Labor Law does not apply to the facts of this case

and that there is no evidence of a defective or dangerous condition in the boiler room. In his opposition, Acosta contends that there are triable issues of fact precluding dismissal of his Labor Law §§ 200 and 241(6) causes of action as well as his common-law cause of action.

STANDARDS OF LAW

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Labor Law § 200

Labor Law § 200, which is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), states, in relevant part:

> (1) [a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

To establish liability under this statute, a plaintiff must demonstrate either: (1) that the accident is the result of the means and methods used by the owner or contractor under circumstances under which the owner or contractor "exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; or (2) that the accident is the result of a dangerous condition that the owner or general contractor created or had actual or constructive notice of, regardless of whether the defendant supervised and controlled the plaintiff's work (*id.*; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

Labor Law § 241(6)

Labor Law § 241(6) provides, in pertinent part, that:

> "All contractors and owners and their agents . . . when

> constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) 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."

In order to establish a Labor Law § 241(6) claim, "a plaintiff is required to plead and prove a specific violation of the Industrial Code" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011]).

12 NYCRR 23-1.7(e)(1) and (2) state:

> "(e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

DISCUSSION

In support of its motion, Gouverneur Court LP submits a copy of Acosta's deposition transcript and that of two defense witnesses, Robert Shary (Shary), a maintenance supervisor for Community Access, and Margaret Knox (Knox), the secretary of nonparty Gouverneur Court, Inc., the general partner of Gouverneur Court LP, and copies of photographs marked for identification at plaintiff's deposition.

Based on Acosta's testimony, he started working for Community Access in 1994, doing maintenance work in whichever building he was assigned to at a given time. His duties included sweeping and waxing floors, collecting garbage and waste, and changing lights in the building's ceilings (Acosta tr at 13). Acosta, like other Community Access maintenance

workers, took direction from a Community Access supervisor, and on the day before the accident, his supervisor, Ronnie Bonaparte (Bonaparte), told him "[t]omorrow, clean the boiler room" (*id.* at 25). Acosta understood Bonaparte as directing him to clean "[a]ll regarding the floors; to remove and sweep the dust, and to leave it completely clean, and ready to be painted" (*id.* at 26).

Acosta testified that on the day of his accident he was wearing his uniform, which consisted of pants, sneakers and a T-shirt with the Community Access emblem, and that he put on a mask and started sweeping the boiler room floor with the broom and dust pan he found in the boiler room. He testified that he was not required to move or repair anything, nor did he need to use water or other cleaning supplies in order do the work (*id.* at 26-27). He also testified that, in order to reach a part of the floor, he needed to pass between some of the equipment, and when he realized that he could not pass all the way through, he started backing up. This, according to Acosta, is when his accident occurred. "When I was back out, coming out, there is a pipe in a U-shape, and it had some screws coming out, and this is where the hem of my pants tangled up, and I fell like this on my right (indicating)" (*id.* at 28-29). Acosta confirmed that the photographs shown to him during his deposition accurately depicted the boiler room space as it looked at the time of his accident, including the U-shaped metal bracket which snared his pants (*id.* at 29-33; defendant's exhibit E). He stated that, as a result of his fall, he had pain in his right shoulder, and was unable to continue cleaning the boiler room.

At his deposition, Shary testified that Community Access supervisors, such as Bonaparte, were in charge of supervising the maintenance workers, and making sure that the buildings were clean, safe and functioning properly. He explained that Community Access maintained its work order records in a database called "AWARDS," and that regardless of whether the work order concerned a hot water complaint or a request for the boiler room floor to be painted (which he personally ordered in February 2008), the request would appear in the

database. Shary stated that outside plumbing companies were brought in to perform maintenance on the boiler, and named a few. He, however, was unaware who had actually installed the U-shaped bracket/brace or how long it had been there, and he was unaware of any complaints relating to the boiler room prior to Acosta's accident. Finally, when asked about Gouverneur Court LP's relationship with Community Access, Shary testified that he did not know much about their relationship and was unable to answer counsel's questions on that subject.

Knox also testified in this matter, explaining that she has held the position of secretary of Gouverneur Court, Inc. for over 10 years, and that in 2008, she also held the position of project manager for Community Access. Knox stated that 621 Water Street "was a gut rehab and that was completed in 1994 that I was involved in" (*id.* at 13), and that she is the person who, on behalf of defendant, signs management agreements with Community Access, including the agreements pertaining to 621 Water Street. When asked, Knox denied playing a supervisory role in daily maintenance work at 621 Water Street and explained that she would only be involved in the building's maintenance issues if they involved a capital improvement (*id.* at 21).[1] She also stated that "Gouverneur Court LP does not have management or control over Community Access employees," nor did it have that type of authority over Community Access employees back in March 2008 (Knox tr at 12).

When shown photographs of the boiler room at 621 Water Street, Knox acknowledged that they fairly and accurately show what the subject pipe and support looked like in March 2008, but was unable to say how long, prior to that time, the pipe and U-shaped support bracket had been configured in the manner shown, or who had installed the support bracket underneath

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[1] Plaintiff's argument regarding the possibility that the boiler system had been replaced prior to his accident, was resolved by the affidavit of Knox dated April 18, 2013, which states that the boiler had been installed in 2005, and that no parts had been replaced between March 28, 2008 and March 28, 2009 (defendant's exhibit L).

the pipe (*id.* at 18). Finally, Knox, like Shary, was unaware of any accidents, prior to Acosta's, involving someone who fell due to the supporting brace (*id.* at 24).

Relying on the sworn deposition testimony and photographs of the boiler room, together with relevant case law, Gouverneur Court LP argues that it has made a prima facie showing of entitlement to summary judgment. Specifically, it states that Acosta, who was the sole proximate cause of his accident and injuries, is not entitled to relief under the Labor Law or common-law because: (1) he was not a construction worker and this was not a construction site; (2) Gouverneur Court LP neither supervised nor controlled his work, as he took directions from Bonaparte, not Gouverneur Court LP; and (3) there was no evidence of a defect in the boiler room and there is no duty to protect or warn against an open and obvious condition which is not inherently dangerous.

In opposition, plaintiff relies on the testimony of the same deponents, copies of photographs marked for identification at the depositions, and a copy of the AWARDS database print out for 621 Water Street, covering the period between November 9, 2007 and March 26, 2008. Plaintiff argues that the configuration of the boiler room was such that it created a tight and dangerous condition by arranging the boiler room so that it was difficult to pass between the closely spaced boiler equipment, adding that there is no proof that the supporting brace was even necessary. Acosta supports his theory of liability with photographs of the boiler room to show that the equipment's configuration prevented him from completing his assigned task without passing by the protruding U-shaped bracket. And despite his concession that Gouverneur Court LP did not control either his work, or that of any other Community Access employee, Acosta insists that liability can be found under Labor Law § 200. This, he explains, is because his Labor Law § 200 claim, like his common-law claim, is premised on Gouverneur Court LP's retention of control over the boiler room and either caused, created and/or had notice of the dangerous condition which precipitated his accident, but failed to take the

necessary measures to ensure a safe work place (by rearranging the configuration) prior to his accident (*see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; *Mejia v Levenbaum*, 30 AD3d 262, 263 [1st Dept 2006]). Lastly, he contends that, to the extent that Gouverneur Court LP asserts as a defense that the dangerous and defective condition was both open and obvious, that defense only establishes comparative negligence, and is not a complete defense to liability (*see Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]).

With respect to his Labor Law § 241(6) cause of action, plaintiff contends that liability under this statute can also be based on the dangerous configuration of the equipment. Specifically, that the passage between the pipes and wall was too narrow, forcing him to pass so close to the U-shaped bracket that his pant leg became caught, resulting in his accident. He argues that it was this arrangement that violated the Industrial Code which, at sections 23-1.7(e)(1) and (2), requires that passageways be kept free of "obstructions or conditions which could caused tripping" and "sharp projections." Therefore, according to plaintiff, questions of material fact exist as to comparative negligence, as to whether his accident resulted from the dangerous and defective configuration and condition of the boiler room and whether the U-shaped bracket was even necessary, precluding summary judgment (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

For the following reasons, the motion for summary judgment is granted.

Addressing first plaintiff's Labor Law § 241(6) cause of action, upon examination of the record, it is clear that at the time of his accident, Acosta was not engaged in a covered activity. Labor Law § 241(6) "is meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demotion" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]), not routine maintenance. Despite plaintiff's claim that his cleaning was in preparation for painting and/or construction, there is no evidence that the boiler room at 621 Water Street was a construction site, that construction was being performed within that building,

or that Acosta's assigned task on March 28, 2008, constituted anything more than floor sweeping. "The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation" (*Blandon v Advance Contr. Co.*, 264 AD2d 550, 552 [1st Dept 1999]). Accordingly, as a maintenance worker assigned to perform the routine task of floor sweeping, he "was not among the class of workers entitled to protection under Labor Law § 241(6)" (*id.*), and inasmuch as his Labor Law § 241(6) cause of action must be dismissed, the Court need not reach whether there was a violation of 12 NYCRR 23-1.7(e)(1) and/or (2).

Acosta's Labor Law § 200 and common-law negligence claims must also be dismissed. As stated above, the fact that Acosta was sweeping the floor in preparation for paint, does not convert ordinary maintenance into construction work within the meaning of the Labor Law and it is undisputed that Gouverneur Court LP neither supervised or controlled his work. At their depositions, Shary and Knox denied knowledge of any prior, similar incidents involving the boiler room equipment, and no evidence has been produced to either rebut or refute their testimony. As a result, plaintiff has failed to raise a question of fact as to whether Gouverneur Court LP had notice of a defective or dangerous condition, or whether such condition even existed.

With respect to plaintiff's charge that the condition was open and obvious, it is well settled that a property owner has "no duty to protect or warn against an open and obvious condition which is not inherently dangerous" (*Benson v IT&LY Hairfashion, NA, Inc.*, 94 AD3d 932, 932 [2d Dept 2012]; *Cupo v Karfunkel*, 1 AD3d at 51). Again, no evidence has been presented of a defective or dangerous condition, and neither defendant's nor plaintiff's photographs depict a defect or other dangerous condition. To the contrary, the photographs, like the testimonial evidence, confirm that the boiler equipment, including the U-shaped brace, were integral parts of the permanently installed boiler system. The fact that Acosta could not

reach a section of the boiler room, and based on his allegations, was caused to trip due to the presence of a U-shaped bracket, does not, on its own, create a basis for Gouverneur Court LP's liability. "The mere happening of the accident does not establish liability on the part of the defendant" (*Deblinger v New York Racing Assn.*, 203 AD2d 169, 170 [1st Dept 1994] [internal quotation marks and citation omitted]).

Gouverneur Court LP has established its prima facie entitlement to judgment as a matter of law dismissing the complaint against it and, Acosta's unsubstantiated allegations and conclusory assertions fail to raise a triable issue of fact sufficient to forestall summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly, it is

ORDERED that defendant Gouverneur Court Limited Partnership's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Gouverneur Court Limited Partnership is directed to serve a copy of this order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
MAY 28 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-22-14 **Enter:**

PAUL WOOTEN, J.S.C

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