

**Fontana v BCRE Grand St. Owner, LLC**

2014 NY Slip Op 31691(U)

June 30, 2014

Supreme Court, New York County

Docket Number: 111729/09

Judge: Debra A. James

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Plaintiff's accident occurred on June 25, 2009 at premises then under construction at 31 Grand Street, New York County. Plaintiff was a construction superintendent working for non-party U.S. Reinforced Concrete (USRC) when he allegedly sustained serious injuries caused by a falling unsecured concrete panel while he was in the process of directing the unloading and rigging of a different precast panel in a staging area. Plaintiff alleges that his injuries were caused by the lack of securing devices and storage racks in the staging area of the project where the accident occurred. Plaintiff also alleges that the jobsite was not maintained in a reasonable manner and was hazardous.

NY Rebar claims that it is free of negligence because it owed no duty to plaintiff and it did not create the condition which plaintiff alleges caused the accident. NY Rebar argues that the deposition testimony appended to its moving papers demonstrates that plaintiff's employer USRC was the sole entity responsible for deciding where and how the pre-cast concrete panels would be placed, moved and stored at the accident site. NY Rebar relies on the deposition testimony of non-party Daniel Mooney, the crane operator on the day of the accident. According to Mooney's testimony as cited by the movant NY Rebar was not involved in "the rigging and chocking of the pre-cast members," the work plaintiff was allegedly doing. NY Rebar also cites the

testimony of Posner Tomer (Tomer), project manager of non-party BCS USA. According to Tomer, USRC sub-contacted a portion of the general concrete operations to Rebar, but USRC rigged the precast panels off the trucks. Robert Herer, at the time of the accident employed by NY Rebar, testified that NY Rebar was hired to install rebar and that he did no offloading of precast panels for USRC. According to Herer, NY Rebar was not involved in the rigging or chocking of the precast members involved in plaintiff's accident. Evans Gardner, an employee of defendant New York Precast, also testified that USRC did the offloading of the precast panels. NY Rebar claims that the deposition testimony of these witnesses conclusively demonstrates that it had no involvement in the placement of the pre-cast concrete slab which caused plaintiff's injury.

NY Rebar also alleges that it was not responsible for the maintenance and control of the staging area where plaintiff was injured. Finally, NY Rebar cites to New York City Building Department administrative findings, which, according to it, placed liability with respect to the maintenance and control of the site upon the general contractor BCRE; and OSHA violations and determinations as evidence that plaintiff's employer USRC should be liable for any unsafe work conditions.

Plaintiff and the general contractor BCRE rely upon the deposition testimony of plaintiff to oppose the motion.

According to plaintiff's deposition, USRC was responsible for the rebar and superstructure concrete work on the project until NY Rebar was hired as a subcontractor. Plaintiff testified that once NY Rebar began working on the construction site, NY Rebar's workers, with USRC men helping, would unload the precast concrete panels delivered to the site by truck. According to plaintiff, he was advised by his supervisor to do whatever NY Rebar needed to get the project done. Plaintiff testified that at the time of the accident he was directed by NY Rebar supervisor Herer. According to plaintiff, NY Rebar was responsible for unloading the precast panels on the construction site and deciding where they should be stored when they were offloaded from the trucks.

In addition, plaintiff testified that although USRC was initially responsible for the rebar and superstructure concrete work on the project site, NY Rebar was subsequently hired as a subcontractor to do most of this work. Plaintiff argues that Tomer testified that there were several entities or employees involved in the rigging of these panels. Tomer also stated that and its subcontractors used the restaurant area as a staging area for materials.

The plaintiff and the BCRC defendants also point out that Rebar has not produced a written contract defining its role nor any work log or other documentation that would define the scope

of its work or indicate a lack of notice of the condition of the subject work area.

"Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." Flores v City of New York, 29 AD3d 356, 358 (1<sup>st</sup> Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." Id.

Plaintiff's testimony raises an issue of fact as to whether NY Rebar exercised supervision or control of the work that led to the injury. See O'Sullivan v. IDI Const. Co., Inc., 7 NY3d 805 (2006). Labor Law Section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site. An implicit precondition to this duty is that the party to be charged with that obligation "have the authority to control the activity bringing about the injury to enable it to avoid or correct and unsafe condition". (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (1998)).

If plaintiff's testimony is assumed to be a true statement of fact, as it must be for the purposes of evaluating the motion for summary judgment against him, NY Rebar had control of the

storage area, staged concrete panels, and directed the plaintiff's work in a manner that caused plaintiff's accident. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]). NY Rebar has failed to establish its entitlement to judgment as a matter of law in light of the conflicting testimony cited by the parties in support of their respective positions as the purpose of summary judgment is issue finding and not issue determination. Brennan v 42nd St. Dev. Project, Inc., 10 AD3d 302 (1<sup>st</sup> Dept 2004).

The determinative factor on the issue of control is not whether defendant furnishes equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed (Eldoh v Astoria Contracting Co., L.P., 81 A.D.3d 871 [2<sup>nd</sup> Dept 2011]). Summary judgment in defendant's favor is precluded by issues of fact raised by conflicting testimony as to whether defendants created the condition or had a role in creating the unsafe condition at issue that caused plaintiff to be injured. (Seda v. Epstein, 72 A.D.3d 455 [1<sup>st</sup> Dept 2010]). Therefore, defendant Rebar Installation is not entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against it.

Accordingly, it is

ORDERED that defendant NY Rebar's motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: June 30, 2014

ENTER:

~~Debra A. James~~  
J.S.C.  
DEBRA A. JAMES

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