FILED Jun 20 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

----------X

KEVIN WOODS,

Plaintiff,

- against -

THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE CITY OF NEW YORK,

Defendants.

----------X

DECISION AND ORDER

Index No. 310460/2011

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated March 26, 2014 and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's notice of cross-motion dated May 27, 2014 and the affirmation, affidavits, exhibits and memorandum of law submitted in support thereof; defendants' affirmation in opposition dated June 6, 2014; plaintiff's reply affirmation dated June 12, 2014; and due deliberation; the court finds:

Plaintiff, an employee of non-party Frontier Kemper, commenced this Labor Law action to recover damages for injuries suffered when a jackhammer fell onto his left foot. The accident occurred on August 4, 2011 inside a tunnel at the Croton Water Treatment Plant. Defendants The New York City Department of Environmental Protection ("DEP") and The City of New York (collectively "defendants") now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for partial summary judgment on the issue of defendants' liability on his Labor Law §§ 240(1) and 241(6) causes of action. Defendants rely upon the pleadings, plaintiff's General Municipal Law § 50-h hearing transcript, the deposition transcripts, and two unsworn witness statements. Plaintiff also offers the contract for the project and affidavits from Francis "Frank" Ramftl

("Ramftl") and expert Nicholas Bellizzi, P.E. ("Bellizzi") in support of its cross-motion.

Defendants argue the cross-motion is untimely as it was served more than one hundred twenty days after plaintiff filed his note of issue. *See* CPLR 3212(a). The argument is without merit since the cross-motion is based upon the same issues raised in defendants' timely motion. *See Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446, 961 N.Y.S.2d 91 (1st Dep't 2013). The court, though, will not consider Bellizzi's affidavit since plaintiff did not disclose his expert during pre-trial discovery. *See Garcia v. City of New York*, 98 A.D.3d 857, 951 N.Y.S.2d 2 (1st Dep't 2012); *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520; 947 N.Y.S.2d 15 (1st Dep't 2012).

Plaintiff, a sandhog, testified the accident occurred approximately one hundred feet below ground near the bottom of Shaft 21. His co-workers Mike Mills ("Mills") and Ramftl were using a jackhammer to dig a pit for a new pump near the base of the shaft, and part of plaintiff's duties as a "bottom bell" included removing debris. Plaintiff was shoveling debris from the bottom of the pit located two to four feet below the tunnel floor when the front end of the jackhammer struck his left foot. The jackhammer had been sitting on the tunnel floor, and Ramftl had last used the jackhammer five to fifteen minutes earlier. Ten seconds prior to the accident, the jackhammer was still resting on the tunnel floor to plaintiff's left. The jackhammer was not powered on, and he could not recall if all or part of it was over the bottom of the shaft. Plaintiff was shoveling from left to right when he felt pain in his foot. He did not see the jackhammer fall nor did he know how it fell. He had not complained about the lighting conditions or the subject jackhammer prior to the accident. He was given no instructions on how to perform his work from any DEP personnel.

Mills, plaintiff's foreman, was working on the other side of the shaft when he heard plaintiff yell from inside the pit. He did not witness the accident but was aware that plaintiff had been "mucking" out debris from the base of the pit. Mills acknowledged that he completed a witness statement, although the statement did not refresh his memory. The statement read that plaintiff had been standing next to

Ramftl who was "chipping" with the jackhammer when the jackhammer slipped and caught plaintiff's foot. Mills never complained about the jackhammers used on the project.

DEP accountable manager Carl Panutti ("Panutti") testified that he relied on three other DEP inspectors and non-party construction manager URS-HAKS to conduct daily walk-throughs on the project. Panutti learned of plaintiff's accident twenty minutes after it occurred. He was told by Frontier Kemper's project manager Leon Jacobs and safety person John Ridnes that the jackhammer fell while the sandhogs were performing a horizontal drill into the wall of the aqueduct.

Ramftl avers in his affidavit that he left the jackhammer "on top of some rock on the ground of the tunnel" and "mere inches away" from the edge of the trench about five minutes before the accident. The jackhammer did not move, and Ramftl walked away to retrieve a "muck" bag. He then heard plaintiff scream. He did not witness plaintiff's accident. Ramftl stated that there were no racks to place or secure the jackhammers when they were not in use. Ramftl's affidavit does not address his own witness statement signed August 4, 2011 that read he "was running the jackhammer [and] it slipped off a rock and nicked his [plaintiff's] foot."

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 953 N.E.2d 794, 798, 929 N.Y.S.2d 556, 561 (2011). Liability is contingent upon a statutory violation and proximate cause. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 761, 771 N.Y.S.2d 484, 488 (2003). In a falling object case, plaintiff must demonstrate the existence of a hazard contemplated in the statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 662-663, 8 N.E.3d 791, 985 N.Y.S.2d 416 (2014) (citations omitted). Plaintiff must show that the object fell as it was being hoisted or secured or required securing for the purposes of the undertaking. *Id.* Here, questions of fact as to how the accident occurred preclude granting

summary judgment to plaintiff and defendants. *See Higgins v. Consolidated Edison Co. of N.Y., Inc.*, 93 A.D.3d 443, 939 N.Y.S.2d 431 (1st Dep't 2012). While plaintiff testified and Ramftl averred that the jackhammer had been resting on the tunnel floor prior the accident, the witness statements indicate that the jackhammer was in use immediately before it struck plaintiff's foot. Here, the credibility of witnesses is inappropriate for resolution on a motion for summary judgment. *See Fragale v. City of New York*, 88 A.D.3d 488, 931 N.Y.S.2d 13 (1st Dep't 2011).

"In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct." *Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 544, 923 N.Y.S.2d 74, 77 (1st Dep't 2011). Plaintiff in his affirmation indicates that he does not oppose dismissal of his Labor Law § 241(6) claim predicated on Sections 23-1.5 (general responsibility of employers), 23-1.7 (protection from general hazards), 23-1.8 (personal protective equipment), 23-1.10 (hand tools), 23-1.12 (guarding of power-driven machinery), 23-1.13 (electrical hazards), and 23-1.30 (illumination) of the Industrial Code. OSHA violations are also insufficient predicates. *See Greenwood v. Shearson, Lehman & Hutton*, 238 A.D.2d 311, 656 N.Y.S.2d 295 (2d Dep't 1997). Accordingly, plaintiff's claim based on those sections is dismissed.

Plaintiff, though, does allege violations of 12 NYCRR §§ 23-2.1(a)(2) and 23-4.2(f). Plaintiff did not identify Section 23-4.2(f) (trench and area type excavations) until he served an amended bill of particulars seven months after he filed his note of issue. Although he did not seek leave to serve an amended bill of particulars, defendants do not claim to have suffered any prejudice from the delay. *See Burton v. CW Equities*, LLC, 92 A.D.3d 509, 938 N.Y.S.2d 533 (1st Dep't 2012); *Latchuk v. Port Auth. of N.Y. & N.J.*, 71 A.D.3d 560, 896 N.Y.S.2d 356 (1st Dep't 2010). Section 23-4.2(f) provides in part that "[e]xcavated material and other superimposed loads shall be placed at least 24 inches back from the edges of any open excavation and shall be so placed or piled that no part thereof can slide, fall or roll into the excavation." The provision is inapplicable since the jackhammer which fell does not

constitute "excavated material or other superimposed loads." *See McCombs v. Cimato Enters.*, 20 A.D.3d 883, 798 N.Y.S.2d 818 (4th Dep't 2005).

Section 23-2.1 concerns maintenance and housekeeping procedures. Plaintiff argues that the placement of the jackhammer at the edge of the pit constitutes a violation of the second sentence of Section 23-2.1(a)(2), which reads that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Given Mills' testimony and the witness statements, triable issues of fact as to how the accident occurred preclude granting summary judgment in favor of either plaintiff or defendants.

Labor Law § 200 codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. *See Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). Liability may be imposed where defendant supervised and controlled the injury-producing work, *see Suconota v. Knickerbocker Props., LLC*, 116 A.D.3d 508, 984 N.Y.S.2d 27 (1st Dep't 2014), or where defendant had actual or constructive notice of the specific defect or hazardous condition that caused plaintiff's accident. *See Mitchell v. N.Y. Univ.*, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dep't 2004). Defendants have established that the accident occurred as the result of the means and methods of plaintiff's work over which they had no control. *See Suconota v. Knickerbocker Props., LLC, supra*; *Dalanna v. City of New York*, 308 A.D.2d 400, 764 N.Y.S.2d 429 (1st Dep't 2003). Plaintiff fails to raise a triable issue of fact in opposition as he does not dispute that defendants did not supervise or control his work. To the extent that defendants were purportedly aware of an unsafe practice with regard to the storage of jackhammers on the project, plaintiff offers no evidence that defendants were aware of this specific hazard at this specific location. Ramftl's affidavit appears to address a general awareness of the practice.

Accordingly, it is

ORDERED, that the motion of defendants The New York City Department of Environmental

Protection and The City of New York for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's Labor Law § 241(6) cause of action predicated on 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-1.12, 23-1.13, 23-1.30, and 23-4.2(f) and OSHA Article 1926 and dismissing plaintiff's Labor Law § 200 and common low negligence causes of action; and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment on the issue of defendants' liability on his Labor Law §§ 240 and 241(6) causes of action is denied; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants The New York City Department of Environmental Protection and The City of New York dismissing plaintiff's Labor Law § 241(6) cause of action predicated on 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-1.12, 23-1.13, 23-1.30, and 23-4.2(f) and OSHA Article 1926 and plaintiff's Labor Law § 200 and common law negligence causes of action asserted against them.

This constitutes the decision and order of the court.

Dated: June 19, 2014

Lucindo Suarez, J.S.C.