Scoz v J&Y Elec. & Intercom Co. Inc.
2014 NY Slip Op 32077(U)
August 5, 2014
Sup Ct, NY County
Docket Number: 152630/12
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ALDO SCOZ

Plaintiff,

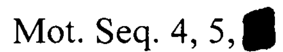
Index No. 152630/12

DECISION and ORDER

-against-

J&Y ELECTRIC AND INTERCOM COMPANY INC. AND THE ELIZABETH SETON HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

Mot. Seq. 4, 5, 

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HON. EILEEN A. RAKOWER:

Plaintiff, Aldo Scoz ("Plaintiff"), brings this action against defendants J&Y Electric and Intern Company Inc. ("J&Y") and the Elizabeth Seton Housing Development Fund Corporation ("Seton"), alleging violations of Labor Law Section §§ 200 and 241(6) and Industrial Code Sections §§ 19.18, 23-9.2, 23-1.12(c), and 23-1.10(b)(1), arising from an incident that occurred on March 19, 2012 wherein Plaintiff sustained personal injuries.

Plaintiff, a self-employed carpenter with nearly thirty years of experience, was hired by J&Y to cut and install word flooring in J&Y's 5 foot-by-5 foot office in the building located at 1991 Lexington Avenue, New York, New York ("Building"). Seton is the owner of the Building in which J&Y leased the office space. Plaintiff alleges that Defendants failed to appropriately supervise his work and provide him with safe tools for the job, and that this led him to sever his finger on his jerry-rigged sawing contraption.

Seton interposed an Answer and asserted four cross claims against J&Y and one counterclaim against Plaintiff. In its first cross claim against J&Y, Seton alleges that J&Y breached its lease by failing to procure a policy of comprehensive general liability insurance naming Seton as an additional insured and seeks to recover its costs and expenses of litigation and any amount for which it may be liable to Plaintiff. In its second cross claim, Seton asserts it is entitled to contractual and common law indemnification for any judgment or verdict rendered

against Seton from J&Y. In its third cross claim, Seton alleges that it was the "beneficiary or third party beneficiary" of a contract between "co-defendants and other parties" and that "co-defendants were in breach of the aforesaid contract(s)." The fourth cross claim is for contribution from J&Y on the basis of apportionment of responsibility for the alleged occurrence, if Seton is found liable.

As against Plaintiff, Seton asserts a counterclaim for common law indemnification from any judgment or verdict rendered against Seton.

J&Y interposed an Answer with four cross claims against Seton and one counterclaim against Plaintiff. In its first cross claim against Seton, J&Y asserts it is entitled to common law indemnification from Seton, should J&Y be found liable to Plaintiff. In its second cross claim, J&Y alleges it is entitled to contribution from Seton, should it be found liable to Plaintiff and not awarded full indemnity on its first cross claim. In its third cross claim, J&Y alleges it is entitled to contractual indemnification from Seton. In its fourth cross claim, J&Y asserts breach of contract as against Seton, for Seton's alleged failure to procure liability insurance for the benefit of J&Y.

As against Plaintiff, J&Y asserts a counterclaim for contractual indemnification, alleging Plaintiff breached his contractual obligation to procure liability insurance.

Under Mot. Seq. 4, J&Y moves for summary judgment pursuant to CPLR §3212 dismissing Plaintiff's complaint and specifically Plaintiff's claims under Labor Law §§200 and 241(6), and dismissing all cross claims by Seton.

Under Motion Seq. 5, Seton moves for summary judgment pursuant to CPLR §3212 dismissing Plaintiff's complaint and specifically Plaintiff's claims under Labor Law §§200 and 241(6), and for a conditional order of indemnification against J&Y (Mot. Seq. 5).

Under Mot. Seq. 6, Plaintiff cross moves for partial summary judgment as to liability under Labor Law §241(6). Plaintiff does not oppose the portion of Defendants' motion to dismiss his Labor §200 claim.

Oral argument was held on May 20, 2014.

Plaintiff claims that Defendants were negligent in failing to adequately supervise and provide the proper, safe equipment for this job, in violation of the

rules and regulations of the Commissioner of the Department of Labor ("Industrial Code"), and that such negligence proximately caused Plaintiff's injury. Plaintiff argues "[t]he proper tool for the job would have been a table saw with the appropriate safety equipment including an easily reachable cut off switch, a 'saw blade cover guard to prevent contact with the saw blade teeth when in operation', and a spreader device to prevent material kickback . . ."

Defendants, on the other hand, claim Plaintiff was the sole proximate cause of his own injury; and that even if an Industrial Code rule was violated, such violation does not apply for Plaintiff's §241(6) claim because Plaintiff's creation and use of his sawing contraption rendered any relevant Industrial Code safeguards inoperable.

In support of their motions for summary judgment, J&Y and Seton submit: the pleadings; Plaintiff's verified bill of particulars; the deposition transcripts of Plaintiff, President and owner of J&Y Yam Gurung, and Seton employee Ken Brock; the sworn affidavits of Gurung and expert Lee Winter, an engineer, with knowledge of the devices and materials used by Plaintiff in the course of his work leading to the accident; photographs of the Skil saw and the contraption used by Plaintiff to perform the work at issue in this action; and the operating/safety instructions for use of the Skil saw.

Plaintiff relies on his own deposition testimony, the Photographs, and Brock and Gurung's deposition testimonies.

Plaintiff testifies that the accident occurred around noon on March 19, 2012, while he was working alone in J&Y's small office space cutting and installing a new wood floor. See Plaintiff's Deposition at 60. Gurung, the President and owner of J&Y, testified that he believed this would be a "half day" job. See Gurung's Deposition at 132.

Plaintiff, who has worked in construction for nearly 30 years, testified that he himself brought all the tools for the job and defined the method by which he would work. The only request regarding work equipment Plaintiff made was to "Kenny" [Ken Brock] for ". . . an extension or a switch," and Plaintiff ultimately retrieved one from his own car. See Plaintiff's Deposition at 62-63. Plaintiff testified that he never asked for a different saw or any other equipment. The only person Plaintiff came into contact with at the Building the day of the accident was Brock, a Seton employee. Brock was working in and around the building as a general supervisor on site, and provided Plaintiff access to J&Y's office. Brock

offered Plaintiff another tenant's workbench upon noticing Plaintiff's basket had wheels, but Plaintiff refused the offer. See Brock's Deposition at 43.

Plaintiff "made [his] own table saw out of plywood, an upside down worm saw, and a laundry basket" with the blade "rotating in a different direction [opposite of the direction of a saw 'that you would buy in a store']." See Plaintiff's Deposition at 60. Plaintiff testified that he had lost the bottom guard of the saw he brought and used on the job "maybe 20 years ago" and knew "that saw is made to cut stone." *Id.* at 55.

As more thoroughly described by Defendants' expert witness Lee Winter, and not disputed by Plaintiff,

> "Plaintiff created a make-shift table saw out of his own hand held circular saw, a Skil HD77 ("Skil saw"). Specifically, plaintiff used two screws to mount the base of the Skil saw on a piece of plywood, which had a long thin slit cut out of it to accommodate the 7-1/4 inch blade of the Skil saw. He then turned the Skil saw contraption upside down on top of a large 3 feet by 4 feet fabric laundry/refuse basket so the saw was hanging down underneath the plywood and its blade was showing above the plywood. [The slit that Plaintiff cut in the plywood was only large enough to accommodate the blade of the saw, so any bottom guard would have necessarily been retracted.] Plaintiff also wedged a piece of wood into the on/off switch to bypass the safety feature that cuts off power when the switch is released by one of the two hands required to operate the saw. Plaintiff testified that he then plugged the contraption into a circuit breaker power strip that had an on/off switch."
>
> Winter's Affidavit at ¶ 7.

At Plaintiff's deposition, when asked why he used a contraption that "concerned [him] a little bit," Plaintiff replied, "Well the job is so small, and it was something that I though I could do . . . I didn't think something like this could ever happen to a guy with all the experience like me." Plaintiff's Deposition at 65-66. Plaintiff, a former union worker, was well-aware "[a] union job would never allow [such a contraption]." *Id.* at 66.

Although Plaintiff testifies Ken Brock observed him "[o]n and off" for "security issues," he admits Brock did not closely observe what he was doing, and that no one "in any way control[led] the methodology" of his work. *Id.* at 71-72.

When asked whether J&Y told him to make his contraption, Plaintiff replied "[t]hey had nothing to do with this. They didn't say anything to me." *Id.* at 87-88.

Plaintiff was injured when he "went to grab a piece [of wood flooring] after the cut . . ." *Id.* at 92. Plaintiff immediately left the premises for medical attention. At the hospital Plaintiff told a nurse, Sister Ann, that he had a phone call at the time of the accident, and "maybe that was the distraction" causing the injury. *Id.* at 187, 189-90.

Plaintiff alleges that Gurung saw him use the same saw contraption when he performed a prior job at a different location. *Id.* at 60, 212-13. He further alleges Brock saw him use it the day of the accident. *Id.* at 72. Plaintiff was "surprised" Gurung hired him for this job because the contraption "didn't look safe." He admits, "I'm not designed to do wood. Of course it's unsafe." *Id.* at 212-13. Gurung and Brock deny seeing Plaintiff actually use this contraption. Gurung's Deposition at 34; Brock's Deposition at 40-41. Nevertheless, Plaintiff concedes neither supervised his work.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, conclusory allegations, even if believable, are not enough. *Elrich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dep't 1989].

A. Plaintiff's Labor Law §200 Claim

Under Labor Law §200, "[W]here such a claim arises out of alleged defects or dangers arising from a sub-contractor's methods or materials, recovery against the owner and general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 601 N.Y.S.2d 4499, 4455, [1993].

Defendants claim they had no supervisory control over Plaintiff's work installing the wood floor and move to dismiss this claim. Plaintiff does not oppose

the portion of defendants' motion that seeks to dismiss his Labor Law §200 claim. Therefore Plaintiff's Labor Law §200 claim is dismissed without opposition.

B. Plaintiff's Labor Law §241(6) Claim

"To establish a claim under the statute [§241(6)], a plaintiff must show a specific, applicable Industrial Code regulation was violated and that the violation caused the complained of injury." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 146, 950 N.Y.S.2d 35, 41 [1st Dep't 2012].

Labor Law §241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.S.2d 343, 348 [1998]. Liability may be imposed under this section even where the owner or contractor did not supervise or control the worksite. *See id.*

Under §241(6), a plaintiff must demonstrate that his injury was **proximately caused** by a violation of a rule or regulation of the Industrial Code that applies given the specific facts and circumstances of the accident, and that sets forth a concrete standard of conduct. *Ross v. Curtis-Palmer Hydro-Electric Company*, 601 N.Y.S.2d 49, 55 [1993]; *Blake v. Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484 (2003); *Kerrigan v. TDX Const. Corp.*, 108 A.D.3d 468, 970 N.Y.S.2d 13 [1st Dep't 2013]. "[O]nce it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury." *Rizzuto*, 91 N.Y.S.2d at 350. If so demonstrated, then the owner or contractor is vicariously liable without regard to his or her fault. *See id.* However, the owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence." *Id.*

1. Industrial Code Sections

The interpretation of the Industrial Code is a question of law for the court. *Cardenas v. The American Ref.-Fuel Company of Hempstead*, 244 A.D.2d 377, 664 N.Y.S.2d 453 [2d Dep't 1997]; *see also Szafranski v. Niagara Frontier Trans. Auth.*, 773 N.Y.S.2d 332, 333 [4th Dep't 2004] (whether air compressor or its gauge are 'hand tools' within meaning of the regulation is '[a matter] of law for the Court to resolve').

Plaintiff alleges violations of Industrial Code §§19.18, 23-9.2(a)(1), 23-1.12(c), and 23-1.10(b)(1). The first section alleged, §19.18, does not apply because it has been repealed. The second, §23-9.2(a)(1) does not apply because that section only encompasses "heavy equipment or machinery," and the hand-held Skil saw used here is not "heavy equipment or machinery." *See Cabrera v. Revere Condominium*, 91 A.D.3d 695, 937, N.Y.S.2d 98 [2d Dep't 2012] (determining as a matter of law hand-held power grinder is not heavy machinery).

The third, §23-1.12(c), requires:

(c) Power-driven saws.

(1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

Note: Electrically-driven portable saws are also subject to the provisions of section 23-1.10 of this Part (rule).

(2) Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth. In such operation, such guard shall rise automatically by pressure from the material being cut or shall be so adjusted that as the saw cuts the material, the distance from the material to the underside of the guard does not exceed one-half inch. The exposed teeth of the saw blade beneath the table shall be effectively guarded. Every such saw shall be provided with a cut-off switch within easy reach of the operator without his leaving the operating position.

[...]

(3) Every table circular saw used for ripping shall be provided with a spreader securely fastened in position and with an effective device to prevent material kickback.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.12(c)(1).

Under §23-1.12(c)(1), although Plaintiff has been using his hand-operated Skil saw without its bottom guard since "maybe 20 years ago," the manner in which Plaintiff set up his contraption—by inverting the saw and creating an opening through a piece of wood just big enough to accommodate the saw blade—would have disabled any bottom guard if one existed. See Photographs; Plaintiff's Deposition at 60.

Assuming arguendo the contraption is a "table saw," invoking §§23-1.12(c)(2) or (3), it is clear from the Photographs and Skil Manual that no guard or spreader, even if one had one existed, would have been operational with Plaintiff's contraption. Those safety devices are normally located above the blade on a table saw, and Plaintiff's contraption only permitted the bottom of the blade to come through the plywood. See Photographs; Plaintiff's Deposition at 60.

The fourth section alleged, §23-1.10(b)(1), was likewise not causative of Plaintiff's injury. This section requires "[e]very electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator." Using his own equipment, Plaintiff installed a cut-off switch "very close" to the saw. See Plaintiff's Deposition at 156-57. Moreover, Plaintiff states the Skil saw was equipped with a functional automatic shut-off switch in the handle, but that he overrode this safety feature by wedging a piece of wood between the handle and the body of the saw. *Id.* at pp. 178-80.

2. Sole Proximate Cause

Where a plaintiff "alone define[s] the task at hand, cho[oses] the methods and means to be used, and ma[kes] the decisions that led to the accident," the court may determine the plaintiff's conduct is the sole proximate cause of the accident. *Kerrigan v. TDX Const. Corp.*, 108 A.D.3d 468, 470, 970 N.Y.S.2d 13, 15 [2013] *leave to appeal denied*, 22 N.Y.3d 862, 983 N.Y.S.2d 493 [2014]. In *Kerrigan*, the court found that the manner in which plaintiff's decedent hoisted materials precluded compliance with Industrial Code § 23-8.1, *et seq*. Accordingly, it held "as plaintiff has failed to overcome defendants' prima facie evidence that the decedent's conduct and decisions were the sole proximate cause of the accident, plaintiff's claims [including] . . . 241(6) must all be dismissed." *Id.* at 16. *See also Juchniewicz v. Merex Food Corp.*, 46 A.D.3d 623, 848 N.Y.S.2d 255, 257 [2d Dep't 2007] (holding plaintiff did not have a § 241(6) claim based on 12 NYCRR § 23-1.21(b)(1)(3) after his testimony established "he lost his balance because of the presence of a steel object that interfered with his grabbing hold of the next rung on the ladder, not because the ladder, which all agree was anchored to the wall, moved or gave way").

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Here, Plaintiff was an independent contractor who chose the methods and tools to be used, made the decisions that led to his accident, and did so without any supervision or control by defendants over the methodology of his work. The proximate cause of Plaintiff's injury was his creation and use of the dangerous sawing contraption. Plaintiff admits, "[Defendants] had nothing to do with this. They didn't say anything to me." By knowingly engaging in gross misuse of equipment that rendered any applicable Industrial Code protection irrelevant, Plaintiff was the sole proximate cause of his accident.

The Industrial Code sections Plaintiff relies on to establish his Labor Law §241(6) claim do not apply to the facts of this case. Furthermore, assuming arguendo that certain Industrial Code violations did occur, these violations did not proximately cause Plaintiff's injury because the contraption he created and used would have rendered any relevant safety device inoperable.

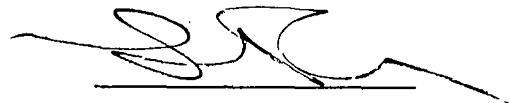
Defendants have made a prima facie showing of entitlement to judgment as a matter of law. Plaintiff has failed to raise a triable issue of fact that Plaintiff was not the sole proximate cause of his own injury.

Wherefore, it is hereby:

ORDERED that Defendants' motion for summary judgment is granted, and the Complaint is dismissed in its entirety as against Defendants and Defendants' cross claims and counterclaims are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.



J.S.C.

Dated: AUGUST 5, 2014

HON. EILEEN A. RAKOWER