Garay v City of White Plains
2014 NY Slip Op 32900(U)
March 20, 2014
Supreme Court, Westchester County
Docket Number: 55551/2011
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

JOSEPH GARAY,

Plaintiff(s),

- against -

THE CITY OF WHITE PLAINS, THE CITY OF WHITE PLAINS DEPARTMENT OF PUBLIC WORKS, THE CITY OF WHITE PLAINS DEPARTMENT OF PUBLIC SAFETY, AND THE COUNTY OF WESTCHESTER,

Defendant(s).

ORDER
Index No.: 55551/2011
Motion Date: 12/11/13

Defendants The City of White Plains, The City of White Plains Department of Public Works, and The City of White Plains Department of Public Safety ("defendants") move for an order, pursuant to CPLR 3212, granting summary judgment in their favor. Plaintiff cross moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor.

The following papers were read:

Notice of Motion, Affirmation, Exs. A-F, Affidavits (3), Exs. A-I	1-20
Memorandum of Law in Support	21
Notice of Cross-Motion, Affirmation in Support and in Opposition, Exs. A-E	22-28
Affirmation in Reply, Affidavit	29-30

By way of background, on October 26, 2010, plaintiff fell from a White Plains Fire Department fire truck while he was in the process of performing an inspection for his employer, American Test Center. Plaintiff alleges that he was caused to slip and fall due to the presence of oil and/or hydraulic fluid on the fire truck. Plaintiff and defendants now move for summary judgment.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether judgment can be granted to a party as a matter of law based on the proof submitted (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In order to make a *prima facie* showing of entitlement to judgment as matter of law, the movant must tender sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant makes this *prima facie* showing, the burden of going forward shifts to the opponent of the motion to produce competent evidence sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

Initially, defendants contend that defendants the City of White Plains Department of Public Works and the City of White Plains Department of Public Safety do not possess a legal identity separate and apartment from the City of White Plains and should, therefore, be dismissed from the action. Next, defendants contend that Labor Law §§ 240 (1) and 241 and inapplicable to this action and, therefore, plaintiff's claims thereunder must be dismissed. Regarding Labor Law § 240 (1), defendants contend that this section only applies to workers engaged in the erection, demolition, repair, painting, cleaning or pointing of a building or structure. Defendants contend that plaintiff's claim under this section must be dismissed because plaintiff was not performing any of the enumerated activities and that the fire truck is not a building or a structure. Regarding Labor Law § 241, defendants contend that this section only covers industrial accidents that occur in the context of construction, demolition, and excavation. Defendants contend that plaintiff's claim under this section must be dismissed because plaintiff's work does not fall into any of these categories.

Lastly, defendants contend that there is no competent evidence to support plaintiff's claims under Labor Law § 200 and for common law negligence. In support of this argument, defendants assert that plaintiff's testimony makes plain that he has no personal knowledge regarding what caused him to fall. Moreover, although defendants have admitted that there was a leak of hydraulic fluid on the fire truck, the evidence establishes that this leak was nowhere near where plaintiff's accident occurred. Furthermore, defendants contend that there is no evidence that defendants caused or created the complained of condition. In support of this position, defendants proffer the affidavit of the garage foreman, Amadeo Fusca, who avers that he inspected the fire truck the day before the accident and did not observe any oil or slippery substances on the fire truck at the site of plaintiff's alleged slip. In addition, Mr. Fusca avers that, in the hours before the accident, he instructed one of his mechanics to clean up the hydraulic leak. Lastly, defendants note that, as the hydraulic fluid is transparent, there is no competent evidence as to how long this condition existed prior to plaintiff's accident. As a result, defendants contend they are entitled to summary judgment as to plaintiff's claims under Labor Law § 200 and for common law negligence.

In opposition, plaintiff argues that the inspection was part of the fire truck pending repairs and that a vehicle can be considered a building or structure under Labor Law 240 (1) and that there are clear violations of Department of Labor Regulations (12 NYCRR) §23-1.7 (d) and (e), which prohibit employers from allowing workers to work on slippery surfaces or surfaces on which there is an accumulation of dirt and debris. Accordingly, plaintiff contends that the Court should deny defendants' motion as relates to his claims under Labor Law §§ 240 (1) and 241. However, plaintiff offers no response to defendants' argument that defendants the City of White Plains Department of Public Works and the City of White Plains Department of Public Safety do not possess a legal identity separate and apartment from the City of White Plains and should, therefore, be dismissed from the action.

Regarding Labor Law § 200 and common law negligence, plaintiff contends that defendants are merely asserting that plaintiff cannot make out a *prima facie* case at the time of trial, which is insufficient for a movant on a motion for summary judgment. Regarding the substance of defendants' arguments, plaintiff notes, among other things, that all agree that there was a hydraulic fluid leak on the fire truck and defendants did nothing to ensure that it did not continue to leak in the hours before plaintiff's inspection. Plaintiff also argues that defendants' motion rests on the faulty premise that there was no oil on the fire truck because he had it wiped off. However, countering this position, plaintiff notes that he overheard, while he was on the ground after the fall, one of defendants' employees state something to the effect that the hydraulic leak caused the fall, and the mechanic that Mr. Fusca allegedly instructed to clean up the leak does not remember any such instruction. For the reasons set forth in his opposition to defendants' motion, plaintiff contends that the Court should deny defendants' motion and grant summary judgment to plaintiff on his claim under Labor Law § 200 and common law negligence.

Initially, the Court finds that defendants the City of White Plains Department of Public Works and the City of White Plains Department of Public Safety do not possess a legal identity separate and apartment from the City of White Plains and are, therefore, dismissed from the action.

Labor Law § 240 (1) covers individuals involved "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure . . . ." Although an inspection may fall within Labor Law § 240 (1) (*see Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878, 883 [2003]) and a truck may constitute a "building or structure" (*see Farrington v Bovis Lend Lease LMB, Inc.*, 51 AD3d 624, 625 [2d Dept 2008]), plaintiff's inspection does not fall within Labor Law § 240 (1). Contrary to plaintiff's contention, there is no evidence that plaintiff's inspection was part of or necessary preparation for repairing the fire truck or that he was performing duties ancillary the repair of the fire truck. On the contrary, in his affidavit, Mr. Fusca avers that plaintiff's inspection

was part of an annual inspection and Mr. Fusca testified that there was discussion about cancelling the inspection because of the hydraulic leak (Fusca EBT at 50-51). Based on the parties submissions, it seems clear that the inspection of the fire truck and the anticipated repairs relating to the hydraulic leak were unrelated. Accordingly, defendant's motion for summary judgment is granted to the extent that plaintiff's claim under Labor Law § 240 (1) is dismissed.

Labor Law § 241 applies to "[a]ll contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith . . . ." As explained above, plaintiff was employed to perform an inspection of a fire truck on the date of the accident. This inspection had nothing to do with "constructing or demolishing buildings or doing any excavating in connection therewith." Accordingly, defendant's motion for summary judgment is granted to the extent that plaintiff's claim under Labor Law § 241 is dismissed.

Labor Law § 200 is a codification of the common-law duty of property owners provide workers with a safe place to work (*see Chowdhury v Rodriguez*, 57 AD3d 121, 127 [2d Dept 2008]). As a result, liability under Labor Law § 200 is governed by common law negligence principles (*see id.*). As such, a property owner may be held liable "if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*see Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]). The property owner's duty may also include the duty to warn of a dangerous condition, which is latent (*see Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]).

It is undisputed that there was a leak of hydraulic fluid on the fire truck. There is some evidence that two of defendants' employees were on the fire truck in or area of the area of the hydraulic leak within 24 hours of plaintiff's inspection. Although Mr. Fusca testified that he directed one of his mechanics to clean up the hydraulic leak on the day of the accident prior to plaintiff's inspection, the actual mechanic testified that he did not remember being so instructed (Shymonowicz EBT at 22, 31 & 45). Both parties agree that the hydraulic fluid, which both parties agree was present somewhere on the fire truck, is transparent and not readily observable under certain circumstances. Plaintiff testified that no one warned him about the presence of the hydraulic fluid leak (Garay 50-h at 32-33). Plaintiff also testified that he cleaned his boots prior to coming to the location to perform the inspection, that he did not walk through any wet or slippery areas prior to ascending the fire truck, and that he observed some oily substance on the bottom of his boots after he fell (Garay EBT at 87-88).

In viewing the evidence in the light most favorable to the nonmoving party, and giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence, we conclude that there are triable issues of fact with respect to whether defendants created the alleged condition, had actual or constructive notice of the alleged condition, had a duty to warn plaintiff of the alleged condition, and whether defendant satisfied their duty to warn plaintiff of the alleged condition. Accordingly, the motions for summary judgment filed by plaintiff and defendants are denied as they relate to plaintiff's claims under Labor Law § 200 and common law negligence.

This matter is scheduled for a Settlement Conference on May 13, 2014 at 9:30 a.m. in Room 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther, King, Jr. Boulevard, White Plains, New York. This order will be electronically filed.

Dated: March 20, 2014
White Plains, New York

HON. HORAZIO R. BELLANTONI
Justice of the Supreme Court

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