Cunha v Crossroads II
2014 NY Slip Op 32920(U)
June 18, 2014
Supreme Court, Westchester County
Docket Number: 58528/2011
Judge: Charles D. Wood
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 INDEX NO. 58528/2011
NYSCEF DOC. NO. 56 RECEIVED NYSCEF: 06/18/2014

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X
EVANDRO CUNHA,

DECISION & ORDER
Index No. 58528/2011
Sequence No. 2

Plaintiff,

-against-

CROSSROADS II and ACADIA REALTY TRUST,

Defendants.
---X
WOOD, J.

The following documents numbered 1-18 were read in connection with defendants' motion for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.	1-12
Plaintiff's Counsel's Affirmation, Exhibits.	13-17
Defendants' Counsel's Reply Affirmation.	18

Plaintiff commenced this action against defendants to recover damages for personal injuries allegeedly sustained by him on November 2, 2010.

NOW based upon the foregoing, the motion is decided as follows:

By way of background, plaintiff, a laborer, alleges that while performing work at the Crossroads Shopping Center on Tarrytown Road in White Plains he was struck and run over by a bulldozer, sustaining injuries. At the time of the accident, plaintiff was employed by Three D Commercial Services Corp., which was contracted to perform work at the Crossroads Shopping Center. When the accident happened, plaintiff was standing near the rear of a Kubota machine. Another worker unexpectedly accelerated the loader toward plaintiff with the bucket elevated

causing plaintiff to jump back, at the same time a second worker was moving the Kubota in plaintiff's direction, and the machine struck plaintiff running over his legs. The complaint alleges that defendants were negligent and violated Labor Law §200,§202,§240 and §241.

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v. Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

The elements of negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). Summary judgment is very rarely appropriate in a negligence case inasmuch as the issue of whether a defendant acted reasonably under the circumstances can rarely be resolved as a matter of law (Davis v. Federated Dept. Stores, Inc., 227 AD2d 514 [2d Dept 1996]).

"Defendants are liable for all normal and foreseeable consequences of their acts, and the plaintiffs need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable [citations omitted]. An intervening act constitutes a superseding cause sufficient to relieve a defendant of liability if it is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct" (Fahey v A.O. Smith Corp., 77 AD3d 612, 616 [2d Dept 2010]). "While a property owner has a duty to maintain its property in a reasonably safe condition, it has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" [internal cites omitted] . A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (Calandrino v Town of Babylon, 95 AD3d 1054, 1055-56 [2d Dept 2012]).

Labor Law §200 and Common Law Negligence

It is well settled that "cases involving Labor Law §200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]). Labor Law §200 codifies the common-law duty of an owner or employer to provide workers with a reasonably safe place to work. "To be held liable under Labor Law §200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work' " (Rojas v. Schwartz, 74 A.D.3d 1046 [2d Dept 2010]). If dangerous or defective equipment was provided to the worker and the worker was injured by it, the property owner will only be liable under Labor Law §200 if it was possessed of the authority to supervise or control the means and methods of the work (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 51 [2d Dept 2011]); Ortega v. Puccia, 57 AD3d 54, 61 [2d Dept 2008]; Giovanniello v E.W. Howell, Co., LLC, 104 AD3d 812, 813-14 [2d Dept 2013]).

Turning first to defendants' branch of their motion for summary judgment, the court finds that defendants made a prima facie showing of their entitlement to judgment as a matter of law dismissing the cause of action asserting a violation of Labor Law §200 and common-law negligence insofar as asserted against them on the ground that they did not supervise, direct, or control the plaintiff's work.

Here, the subject accident occurred entirely as a result of the manner in which the work was being performed as opposed to any dangerous condition onsite. Defendants also note that plaintiff admitted that he never heard of the defendants before commencing the instant action and

never spoke to anyone employed by them, which is further evidence that his work was directed and controlled exclusively by his employer and not defendants. Defendants offer the affidavit of Michael Damore, general manager of Three D, who swears that the truck and equipment was in proper operating condition on the date of the accident. There is no credible evidence presented that defendants supplied other materials for the job or gave instructions to plaintiff prior to the accident. They assert that since there is no evidence that they supervised or controlled plaintiff's work, plaintiff's common law claim and the Labor Law §200 claim should be dismissed (McCallister v. 200 Park, L.P.92 AD3d 927 [2d Dept 2012]).

Based upon the foregoing, the court finds that with respect to the common-law negligence and Labor Law §200 causes of action, defendants made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that plaintiff was injured, not by a dangerous condition, but by the methods or materials of his work, and that they did not have the authority to supervise or control the performance of his work (Jenkins v Walter Realty, Inc., 71 AD3d 954 [2d Dept 2010]).

Defendants having met their initial burden, the burden now shifts to plaintiff. Based upon the arguments and evidence presented, plaintiff has not made a sufficient showing to defeat defendants' motion. Accordingly, that portion of the motion by defendants for an order dismissing the causes of action premised upon Common Law Negligence and Labor Law §200 is GRANTED.

Labor Law §241(6)

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a

nondelegable duty upon owners and general contractors, and their agents to comply with the specific safely rules set forth in the Industrial Code ("the Code") (Ross v. Curtis Palmer Hydro-Elec. Co.,81 NY2d 494 [1993]). Liability may be imposed under Labor Law 241 (6) even where the owner or contractor did not supervise or control the work site. The causes of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 53 [2d Dept 2011]). To state a cause of action pursuant to §241(6), a plaintiff must allege that the property owners violated a regulation that sets forth a specific standard of conduct and not simply a recitation of common-law safety principles (Gonzalez v Perkan Concrete Corp., 110 AD3d 955 [2d Dept 2013]). Thus, a distinction has been drawn between general and specific commands found in the Code, *inter alia,* the violation of a general safety provision does not give rise to liability under Labor Law Section 241(6) (see Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). In this regard, once it has been alleged that a concrete specification of the 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 plaintiff's injury (Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 350 [1998]). If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault (Monroe v. City of New York, 67 A.D.2d 89, 104 [2d Dept 1979]). The Second Department in Seaman v. Bellmore Fire District (59 AD3d 515 [2d Dept 2009]), held "where such a violation [of a specific Industrial Code rule or regulation] is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserves, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate

under the particular circumstances". Therefore, this issue must go to the jury for determination as to whether any negligence of some party to, or participant in, the construction project caused plaintiffs injury, and if proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault. "Contributory and comparative negligence are valid defenses to a section 241(6) claim, moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the fact finder to consider on the question of defendant's negligence" (Misicki v. Caradonna 12 NY3d 511, 515[2009]).

Turning to defendants' motion seeking summary judgment dismissing plaintiff's claims under §241(6), plaintiff alleges that defendants violated the following Industrial Code 12 NYCRR sections:

Section 23-1.15 pertains to regulations of safety railings; Section 23-1.23 pertains to earth ramps and runways; Section 23-3.2 provides general requirements for demolition operations in connection with the demolition of a building or structure protection of adjacent structures, barricades and dust control; and Section 23-3.3 provides regulations for demolition by hand; and Section 23-9.6 provides regulations for the use of aerial baskets. Defendants argue that since the subject accident did not involve the above equipment and stated requirements, these sections are inapplicable to support a §241(6) claim. Defendants have met their prima facie burden. However, plaintiff has not opposed these portions of defendants' motion seeking dismissal. Accordingly, defendants' motion for summary judgment with respect to these sections is GRANTED.

Further, defendants advance that Section 23-1.33 provides regulations for protection of persons passing by construction, demolition or excavation operations. The Second Department

has ruled that this section only applies to persons passing by construction operations and not to workers performing work at a construction site (Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]). Defendants having met their prima facie burden, and plaintiff has not opposed this, defendants motion for summary judgment regarding this section is GRANTED.

Section 23-4.2, generally regulates trench and area type excavations. Defendants point out that arguably the only provision that appears applicable here is Section 23-4.2 (k) which provides that "(k) Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment." Defendants contend that plaintiff was part of the same crew as the driver of both the Kubota and pay loader truck and not a laborer who was performing in the area of a different crew. However, plaintiff claims that he was not part of the crew, but was a bystander, and there is no evidence that plaintiff was actually performing excavation work at the time of the accident. Clearly, there is a question of fact regarding Section 23-4.2, and thus Defendants have not demonstrated their prima facie entitlement to summary judgment with regard to this section. Moreover, the Second Department has ruled that 12 NYCRR 23–4.2(k) provides a sufficient predicate for the imposition of liability pursuant to Labor Law § 241(6) Ferreira v City of New York, 85 AD3d 1103, 1105 [2d Dept 2011]). The court recognizes that the First Department authority supports defendants' claim that the section is insufficiently specific and concrete (*see* Sparendam v. Lehr Constr. Corp. 24 AD3d 388, 389 [1st Dept 2005]). The Third and Fourth Departments concur (Friot v. Wal–Mart Stores, 240 A.D.2d 890, 891 [3d Dept 1997] ; Webber v. City of Dunkirk, 226 A.D.2d 1050, 1051 [4th Dept 1996]).

Section 23-9.2 pertains to the maintenance of power operated equipment. Among other things, defendants refer to the Affidavit of Michael Damore, that stated that there were no known defects or unsafe conditions in the Kubota or pay-loader truck prior to the accident, and that they were found to be in proper working order. The Court of Appeals has found that "an employee who claims to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law §241 (6) based on an alleged violation of 12 NYCRR 23-9.2 (a)" (Misicki v Caradonna, 12 NY3d 511, 521 [2009]). Defendants have met their prima facie burden. In opposition, plaintiff has not demonstrated a triable issue of fact, and thus, this portion of defendants' summary judgment motion is GRANTED.

Section 23-9.4 regulates power shovels and backhoes used for material handling. Defendants argue that this section is factually inapplicable to the case at bar, and specifically subsection (h)(4) regarding unauthorized persons is not factually applicable as plaintiff was part of the excavating crew at the shopping center (Gonzalez v. Perkan Concrete Corp., 110 AD3d 955 [2d Dept 2013]). Moreover, defendants submit that the Kubota was not carrying or swinging any suspended loads but was moving rocks to the side of the pile in front of the retaining wall and its bucket remained positioned in front of the retaining wall. The yellow pay-loader was not carrying any type of load at the time of the accident but simply had rain water in its bucket was directing Chino to spill to the ground. In opposition, plaintiff raises a triable issue of fact as to whether plaintiff was authorized to be present immediately adjacent to the Kubota excavator or the payloader or if he was actually assigned to any tasks in that area. There is also a question of fact as to this section's applicability.

Section 23-9.5 provides regulations regarding the use of excavation machines. Defendants note that the excavation machines were clearly being operated by their designated persons. Plaintiff disputes that the machines were being operated by designated persons. Thus, there appears to be a triable issue of fact, defendants' motion is DENIED regarding this section.

Labor Law §240

Labor Law §240 (1), commonly known as the scaffold law, creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 1993]). This section requires owner and contractors to provide workers with appropriate safety devices to protect against gravity related accidents such as falling from heights or being struck by an improperly hoisted or secured object (Novak v. Del Savio,, 64 AD3d 636 [2d Dept 2009]). To demonstrate entitlement to summary judgment on an alleged violation of Labor Law Section 240 (1), a plaintiff must establish that there was a violation of the statute, and that such violation was the proximate cause of his or her injuries (Blake v. Neighborhood Hous. Servs. ofN. Y. City, 1 N.Y.3d 280, 289, 771 N.Y.S.2d 484 [2003])

The extraordinary protections of Labor Law 240(1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 915-916 [1999], quoting Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 501). Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need

for the safety device in the first instance, no section 240(1) liability exists (Nieves v. Five Boro A.C. & Refrig. Corp., supra at 915, 690 N.Y.S.2d 852, citing Melber v. 6333 Main St., 91 N.Y.2d 759, 763-764 [1998]).

Here, plaintiff's accident did not arise from the force of gravity, a fall from a height or falling object, thus, defendants have demonstrated their entitlement to dismissal of the Labor Law §240 claim as a matter of law. As plaintiff has not demonstrated a triable issue of fact in opposition, judgment dismissing plaintiff's Labor Law Section 240 (1) claims is GRANTED.

Labor Law § 202

Labor Law §202, imposes a duty upon the owner, lessee, agent and manager of every public building and every contractor involved to protect the public and of persons engaged at window cleaning and cleaning of exterior surfaces of a building (Williamson v. 16 West 57th St. Co., 256 A.D.2d 507 [2d Dept 1998]). Clearly, plaintiff's accident did not involve window cleaning or the cleaning of an exterior surface of a building. As such, defendants are entitled to dismissal of the Labor Law §202 claims as a matter of law.

CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment under Labor Law §200 (and common law negligence), §202, §240(1), is granted ; and it is further

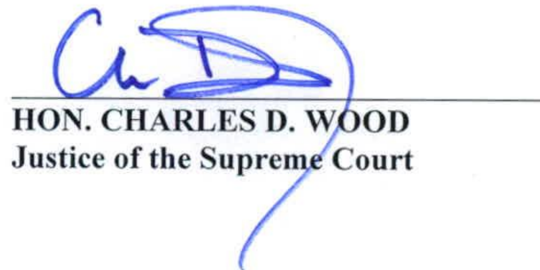
ORDERED, that defendants' motion for summary judgment under Labor Law §241(6) is granted with respect to claims premised on violations of Industrial Code Sections 23-1.5, 23-1.23, 23-3.2, 23-3.3, 23-9.6, 23-1.33, 23-9.2, and is otherwise denied; and it is further

ORDERED, that the parties are directed to appear at a settlement conference on 8/8/14 at 930 a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

All matters not herein decided are denied. Defendants are directed to serve a copy of this Decision and Order, with notice of entry, upon plaintiff within 10 days of such entry. This constitutes the Decision and Order of the court.

The Clerk shall enter judgment in accordance herewith.

Dated: June 18, 2014
White Plains, New York



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