

Rivera v Old Commack Dev. Corp.
2015 NY Slip Op 30512(U)
March 19, 2015
Supreme Court, Suffolk County
Docket Number: 35871-11
Judge: Denise F. Molia
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Index No.: 35871-11

SUPREME COURT - STATE OF NEW YORK I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

WILLIAM RIVERA,

Plaintiff,

- against -

OLD COMMACK DEVELOPMENT CORP.,
WHITFORD DEVELOPMENT INC., MANGOGNA
CONSTRUCTION CORP., RYAN ESTATES CORP.,
VICAM DEVELOPMENT INC., and COURTYARD
HOMES INC.,

Defendants.

OLD COMMACK DEVELOPMENT CORP.,
WHITFORD DEVELOPMENT INC., RYAN
ESTATES CORP., VICAM DEVELOPMENT INC.,
and COURTYARD HOMES, INC.,

Third-Party Plaintiffs,

- against -

CESAR HOME IMPROVEMENT CORP.,

Third-Party Defendant.

CASE DISPOSED: NO
MOTION R/D: 10/24/14
SUBMISSION DATE: 11/21/14
MOTION SEQUENCE No.: 005 MOT D

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Upon the following papers filed and considered relative to this matter:

Amended Notice of Motion dated September 26, 2014; Affirmation in Support dated September 24, 2014; Affidavit of George Kennedy dated September 18, 2014; Affidavit of William Rivera dated September 16, 2014; Exhibits A through R annexed thereto; Affirmation in Opposition dated October 17, 2014; Exhibit A annexed thereto; Reply Affirmation dated November 4, 2014; Exhibits A and B annexed thereto; and upon due deliberation; it is

ORDERED, that the portions of the motion by plaintiff, pursuant to CPLR 3212, for an Order (1) directing the entry of summary judgment in favor of plaintiff and against the defendant Old Commack Development Corp., on the plaintiff's claims pursuant to Labor Law §241(6) and setting the matter down for a trial on the issue of damages; and (2) dismissing the defendants' affirmative defense that plaintiff caused his injuries by his own culpable conduct, is denied; and it is further

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ORDERED, that the portion of the motion by plaintiff, for an Order precluding the use of evidence at trial, in the form of videotapes, photographs or testimony, regarding plaintiff's use of a nail gun post-accident without eye protection, is respectfully referred to the justice who shall preside at the trial of this action.

On October 7, 2011, the plaintiff, William Rivera, was performing construction work at 12 Jenna Court, Kings Park, New York, a/k/a 137 Old Commack Road, Kings Park, New York, ("subject premises"). On that date, the subject premises were owned by defendant Old Commack Development Corp ("Old Commack") as part of a commercial venture. Old Commack was also the general contractor at said construction site. As part of his employment duties with subcontractor CPO Carpentry, the plaintiff was tasked with framing a window, a process that involved nailing wood boards with a pneumatic nail gun. Rivera was provided with a nail gun to perform this job, but was not provided with any eye protection. While he was using the nail gun, an ejected nail or other debris ricocheted and entered plaintiff's unprotected eye, causing him to permanently lose all vision in his right eye.

The disclosure process has been completed, the matter has been certified as ready for trial, and the plaintiff has filed his note of issue. No party has moved to vacate the note of issue. The plaintiff has moved for summary judgment against Old Commack on his claims asserted pursuant to Labor Law §241(6). The plaintiff also seeks to dismiss the defendant's affirmative defense of culpable conduct, and to preclude the defendant from using evidence in the form of videotapes, photographs or testimony, regarding the plaintiff's post-accident use of a nail gun without eye protection.

The plaintiff has asserted a claim under Labor Law §241(6). Pursuant to the Court of Appeals:

"Labor Law §241(6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. Indeed, the history underlying section 241, as amended, clearly manifests the legislative intent to place the 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.'"

Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 348.

Once it has been established that a defendant is an owner or general contractor for the construction project and that plaintiff was employed in the performance of that project, the plaintiff, in order to demonstrate entitlement to summary judgment on a Labor Law §241(6) claim, must prove (1) that there was a violation of the Industrial Code, and (2) that such violation was a proximate cause of plaintiff's injuries (see, Melchor v. Singh, 90 A.D.3d 866, 870, 935 N.Y.S.2d 106, 110).

It is undisputed that defendant Old Commack Development Corp. ("OCDC"), was both the owner of the subject premises and the general contractor of the construction project. It is also undisputed that the plaintiff was a construction worker tasked to perform construction work at the subject premises at the time the accident occurred. Whether or not the plaintiff is entitled to summary judgment on his Labor Law claim will turn on whether he has demonstrated a violation of the Industrial Code, and that such violation was a proximate cause of his injuries.

In his Verified Bill of Particulars, the plaintiff alleges that OCDC violated Industrial Code §23-1.8(a), entitled “Personal Protective Equipment” which provides as follows:

“Eye Protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material for which particles may fly, or while engaged in any other operation which may endanger the eyes.”

The plaintiff specifically testified that at the time of the accident he was using a nail gun to frame a window. He was not wearing eye protection at the time of the accident. There is no testimony that eye protection was either provided to or available to the plaintiff on the day of the incident. Although the plaintiff’s expert has opined that a nail gun is the type of tool for which eye protection is mandated under Industrial Code §23-1.8(a), the activity engaged in by the plaintiff at the time of the accident does not constitute any of the specific activities enumerated in that Code section. It is noted that the type and condition of nail gun plaintiff was operating at the time of his accident is unknown, and plaintiff’s expert, in forming his opinion cannot reasonably rely on the content of various Hitachi nail gun manuals that may not describe the actual nail gun at the center of this litigation.

It is well established that whether an operation may endanger the eyes within the context of Industrial Code §23-1.8(a) is a question of fact to be decided by the jury. Zamajtys v. Cholewa, 84 A.D.3d 1360. In that case, the plaintiff was allegedly injured while using a nail gun to install the base moldings when a nail ricocheted and struck his eye. The Appellate Division, Second Department held that the plaintiff failed to eliminate a triable issue of fact as to whether he was engaged in work that may endanger the eyes pursuant to Industrial Code §23-1.8(a), thereby requiring denial of his motion for summary judgment. Guryev v. Tomchinsky, 87 A.D.3d 612, *aff’d*, 20 N.Y.3d 194. In James v. Evergreen Homes Const. Corp., 2011 N.Y.Misc. LEXIS 5490, 2011 NY Slip Op 33006(U), where the plaintiff was using an air-compressed nail gun to secure a piece of plywood when a nail ricocheted back towards him, striking him in the right eye, the Court found triable issues of fact as to whether, at the time of the accident, the plaintiff was engaged in work that may endanger the eyes so as to require the use of protective eye gear pursuant to Industrial Code §23-1.8(a).

Here, the plaintiff was nailing wood boards together in connection with framing a window. It cannot be said, as a matter of law, that Industrial Code §23-1.8(a) is applicable to the facts of this case (see, Dennis v. City of New York, 304 A.D.2d 611, 758 N.Y.S.2d 661). Rather, there exists a triable issue of fact as to whether, at the time of his accident, the plaintiff was engaged in work that “may endanger his eyes” so as to require the use of eye protection pursuant to Industrial Code (12NYCRR) §23-1.8(a). Accordingly, the branch of plaintiff’s motion for summary judgment on his Labor Law §241(6) claim is denied.

Plaintiff also seeks summary judgment dismissing the defendants’ affirmative defense that the plaintiff caused the accident through his own culpable conduct, maintaining that there is no evidence of any culpable conduct on the part of plaintiff. The Verified Answer to the Amended Complaint includes the following First Affirmative Defense at paragraph 11:

“Upon information and belief that whatever damages the plaintiff may have sustained at the time and place mentioned in the Amended Verified Complaint were caused in whole or in part by the culpable conduct of said plaintiff. The amount of damages recovered, if any,

shall therefore be diminished in the proportion to which said culpable conduct, attributable to plaintiff bears to the culpable conduct which caused said injuries.”

The defendants served a response to plaintiff’s demand for a Verified Bill of Particulars as to Affirmative Defenses which included the following affirmative defense:

“At the present time, the defendants lack knowledge of the particulars with regard to the acts of negligence, culpability, lack of care or omissions on the part of the plaintiff which will be claimed caused or contributed to plaintiff’s injuries in whole or in part. Nevertheless, it will be claimed that plaintiff was the sole proximate cause and/or contributed to his injuries in his failure to utilize available eye protection . . . Defendants reserve their right to supplement any and all of the above responses if and when additional information becomes available through further discovery.”

The Note of Issue was filed on or about September 11, 2014. At no time prior to said filing did the plaintiff demand a Supplemental Verified Bill of Particulars from the defendants. Plaintiff maintains that the defendants may only argue a theory of comparative negligence based on plaintiff’s “failure to utilize available eye protection” and cannot expand such defense beyond this. Based upon the plaintiff’s failure to serve an additional demand, the defendants should not be so limited.

Comparative negligence is a valid defense to a Labor Law §241(6) claim and an issue for the jury to decide. Rocovich v. Consolidated Edison Co., Inc., 78 N.Y.2d 509; Lorefice v. Reckson Operating Partnership, L.P., 269 A.D.2d 572. Despite plaintiff’s contention that there is no evidence demonstrating that he engaged in any culpable conduct that caused or contributed to his accident or injuries, the plaintiff testified that he failed to inquire as to whether eye protection was available at the site, yet chose to operate the nail gun without protective gear. It will be up to the jury to determine whether this, or any other action or non-action of the plaintiff constituted culpable conduct. On that basis, the application to dismiss the defendants’ First Affirmative Defense is denied.

During his deposition the plaintiff testified that on a subsequent post-accident job he had used a nail gun without eye protection. The defendants have obtained video and photographic evidence of this action. The plaintiff seeks to have this evidence excluded at trial, contending that its probative value is vastly outweighed by the confusion and undue prejudice to the plaintiff if introduced at trial. This application is one that is more appropriately addressed as a motion *in limine* reserved for the justice presiding at the trial of this action and is hereby respectfully referred to said justice.

The foregoing constitutes the Order of this Court.

Dated: March 19, 2015

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.