

Forster v Caramagno
2015 NY Slip Op 30513(U)
March 31, 2015
Supreme Court, Suffolk County
Docket Number: 11-36500
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-31-14
ADJ. DATE 9-25-14
Mot. Seq. # 001 - MG
002 - XMD

-----X
CHARLES FORSTER,

Plaintiff,

- against -

DOMINIC CARAMAGNO, DOMINIC
CARAMAGNO d/b/a DCVM REALTY and
DCVM REALTY,

Defendants.
-----X

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers 12-18; Answering Affidavits and supporting papers 19-27; Replying Affidavits and supporting papers 28-29; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the plaintiff's motion for summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that the defendants' cross motion to amend the verified answer so as to assert the defense of Workers' Compensation is denied.

On March 3, 2009, plaintiff allegedly fell and sustained injuries during the course of his employment as a bricklayer as a result of a scaffold collapse at premises known as 1430 Church Street, Bohemia, New York. Defendant Dominic Caramagno (hereinafter "Caramagno"), was an owner of the premises, an industrial building, where the accident took place. Caramagno, who is also the president of Dovin Construction Company, Inc., allegedly hired Dovin to perform masonry work at the building which he owns in partnership with DCVM Realty. Subsequently, plaintiff brought this action for the injuries he allegedly suffered due to the scaffold's collapse. Plaintiff filed a summons and complaint

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dated November 23, 2011. Defendants answered on August 16, 2012. Discovery was completed and a note of issue filed on March 7, 2014.

Plaintiff now moves for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6). Defendants oppose the motion, arguing that plaintiff and Caramagno were co-employees of Dovin, and cross-move for leave to amend their answer to assert Workers' Compensation Law § 29 as a defense. Plaintiff, for the first time in his opposition to the cross motion, alleges that he was employed on the day in question, not by Dovin Construction, but by nonparty JC Masonry and Supply, Inc.

It is well-settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]) and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Labor Law §§ 240 (1) and 241 (6) impose certain nondelegable safety duties upon "contractor[s], owners and their agents." Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *see Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]; *Greenberg v. City of New York*, 81 AD2d 284, 440 NYS2d 332 [2d Dept 1981]). Specifically, Labor Law § 240 (1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian, supra; Sprague v Peckham Materials Corp., supra*). Section 240 (1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513, 577 NYS2d 219 [1991], quoting

Koenig v Patrick Constr. Corp., 298 NY 313, 319, 83 N.E. 2d 133 [1948]). Moreover, an owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (**Ross v Curtis-Palmer Hydro-Elec. Co.**, 81 NY2d 494, 601 NYS2d 49 [1993]; **Rocovich v Consolidated Edison Co.**, *supra*).

Here, plaintiff established his *prima facie* entitlement to summary judgment on the issue of liability by submitting evidence he was injured as a result of a gravity-related accident, and that Dominic Caramagno and DCVM Realty, as owners of the industrial building, failed to ensure he was provided with safety devices designed to prevent or break his fall was the proximate cause of his injuries (*see Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 768 NYS2d 727 [2003]; **Bland v Manocherian**, *supra*; **Henry v Eleventh Ave., L.P.**, 87 AD3d 523, 928 NYS2d 72 [2d Dept 2011]; **Taeschner v M&M Restorations**, 295 AD2d 598, 745 NYS2d 41 [2d Dept 2002]). The burden, therefore, shifted to defendants to demonstrate the existence of triable issues as to whether there was a statutory violation, or as to whether plaintiff's own acts or omissions were the sole cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]; **Squires v Marini Bldrs.**, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). Defendants' opposition fails in this respect. Labor Law § 240 (1) holds owners and general contractors absolutely liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (**Rocovich v Consolidated Edison Co.**, 78 NY2d 509, 518, 577 NYS2d 219; *see also Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 518, 493 NYS2d 102 [1985]).

Labor Law § 241 (6) "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" (**Rizzuto v L.A. Wenger Contr. Co.**, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241 [6]; *see Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see Rizzuto v L.A. Wenger Contr. Co.*, *supra*; **Hricus v Aurora Contrs., Inc.**, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; **Seaman v Bellmore Fire Dist.**, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; **Fitzgerald v New York City School Constr. Auth.**, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; **Cun-En Lin v Holy Family Monuments**, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). Whether a regulation applies to a particular condition or circumstance is a question of law for the court (*see Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 938, 914 NYS2d 203 [2d Dept 2010]). Plaintiff has established that 12 NYCRR § 23-5 of the Industrial Code requiring that all scaffolds be properly secured was violated. Plaintiff testified, as did the independent witness, that the scaffold "kicked back" as it was not properly secured. In

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opposition, defendants do not contest the facts, but rather argue Workers' Compensation as an exclusive remedy, and as their defense, despite not having asserted it in their answer dated August 16, 2012. For the reasons that follow, leave to amend the answer and assert that defense is denied. Accordingly, plaintiff has established his entitlement to summary judgment in his favor.

Plaintiff testified at his deposition that on March 3, 2009, he was employed by Dovin Construction. Caramagno also testified that plaintiff worked for Dovin Construction as a bricklayer, and that plaintiff was paid by a Dovin check. An independent witness, Apolinar Ortega, in an affidavit supplied by plaintiff, swears that he was employed on March 3, 2009 as a bricklayer with Dovin Construction Corp., that he was part of a crew, and that plaintiff was one of the bricklayers on the crew. Plaintiff also testified that Caramagno was president of Dovin Construction, owner of the building and his employer on the date of the accident. Plaintiff, in opposition to defendants' motion, argues he now "remember[s] that I was not employed by Dovin on March 3, 2009, but rather JC Masonry and Supply, Inc., a nonunion shop." Caramagno filed an insurance claim on behalf of JC Masonry and Supply, Inc., yet testified that he is not affiliated with that business, which operates out of his office.


Defendants' cross motion for leave to amend the answer to include the Workers' Compensation defense is denied. Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely given upon such terms as may be just including the granting of costs and continuances. Defendants' motion seeks leave to amend the answer to assert as an affirmative defense that the Workers' Compensation Law is the exclusive remedy available to plaintiffs (*see generally* CPLR 3018 [b]). Defendants' motion was made post-note of issue and thus the Court must consider whether it is timely, whether a reasonable excuse for the delay was offered, and whether any prejudice would result to the plaintiff if the motion were granted (*Matter of Goggins*, 231 AD2d 634, 647 NYS2d 804 [2d Dept 1996]). As to the timing of the application, the Court of Appeals has held that a motion to amend an answer to assert the exclusivity of the Workers' Compensation remedy, in absence of any prejudice, is not prohibitively late and may be allowed during or even after trial (*Murray v City of New York*, 43 NY2d 400, 401 NYS2d 773 [1977]). However, defendants offer no reasonable excuse for the delay in asserting the defense, and in fact, concede that the parties have known from the inception of this suit that plaintiff was in the employ of Dovin Construction.

For the Court to grant the application, defendant must show the proposed amendment has merit (*see* CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; *Sample v Levada*, 8 AD3d 465, 779 NYS2d 96 [2d Dept 2004]). In opposition to the cross motion, plaintiff alleges that the proposed amendment is without merit because he was employed on March 3, 2009, not by Dovin Construction, to which he previously testified under oath, but rather by JC Masonry and Supply, Inc. Plaintiff provides insurance documentation that Dovin Construction's carrier denied Workers' Compensation coverage maintaining plaintiff was employed by JC Masonry, but general liability coverage was available. JC Masonry's carrier found plaintiff eligible for Workers'

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Compensation coverage, but denied general liability coverage. It would appear, therefore, that the *Heritage v Van Patten*, 54 NY2d 1017, 466 NYS2d 958 (1983) co-employee, property owner exclusion would not apply and, it follows, that the proposed amendment would be without merit. This is especially so given Caramango's testimony that he was not an owner of JC Masonry and Supply, Inc. Accordingly, the motion to amend the answer to assert the affirmative defense of Workers' Compensation is denied as it is untimely, without explanation, and defendants have not met their burden of demonstrating that the proposed amendment has merit.

Dated: March 31, 2015



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION