Drake v Tannenbaum
2015 NY Slip Op 30781(U)
May 1, 2015
Supreme Court, Suffolk County
Docket Number: 10-35243
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 10-35243
CAL. No. 14-00209OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - Mot-d
002 - Mot-d

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WAYNE DRAKE,

Plaintiff,

- against -

JOHN J. TANNENBAUM, LAURA L. DELANOY and A CUT ABOVE CARPENTRY, LLC,

Defendants.

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Upon the following papers numbered 1-23 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-15; Answering Affidavits and supporting papers 16-18; 19-21; Replying Affidavits and supporting papers 22-23; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED, that the motion (# 001) by defendants John J. Tannenbaum and Laura J. Delanoy for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted with respect to Laura Delanoy, and with respect to John J. Tannenbaum, is granted to the extent that it (1) seeks dismissal of so much of the complaint as alleges a cause of action for violation of Labor Law § 240 and (2) it seeks dismissal of so much of the plaintiff's complaint as alleges a cause of action for violation of Labor Law § 241(6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8(a), 23-1.16, 23-1.21, and 23-9.2(b) and Occupational Safety & Health Administration rules and regulations (OSHA) § 450(a) et seq., and is otherwise denied; and it is further

ORDERED, that the cross motion (# 002) of defendant A Cut Above Carpentry, LLC for an order pursuant to CPLR 3212 granting summary judgment is granted to the extent that it (1) seeks dismissal of so much of the complaint as alleges a cause of action for violation of Labor Law § 240 and (2) it seeks dismissal of so much of the plaintiff's complaint as alleges a cause of action for violation of Labor Law § 241(6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8(a), 23-1.16, 23-1.21, and 23-9.2(b) and Occupational Safety & Health Administration rules and regulations (OSHA) § 450(a) et seq., and is otherwise denied.

This is an action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and for common-law negligence, for injuries plaintiff allegedly suffered while working at the single-family residence of defendants John J. Tannenbaum ("Tannenbaum") and his former wife Laura Delanoy ("Delanoy"). At the time of the accident, plaintiff was hired by Tannenbaum to perform carpentry work at the personal residence of Tannenbaum and Delanoy. Tannenbaum is also the president and sole owner of defendant A Cut Above Carpentry, LLC ("A Cut Above Carpentry"), a home improvement company which at all relevant times maintained its principal place of business at the residence.

On March 2, 2010, plaintiff, a carpenter with more than two decades of experience, was purportedly injured on the job while using the powered DeWalt table saw provided by Tannenbaum. According to plaintiff, a piece of the wood he was cutting "shot back" and struck him in the right hand as he reached to turn off the table saw. Plaintiff was unsupervised in the garage of the premises at the time of the accident. It is undisputed that prior to the accident, Tannenbaum had offered to assist but plaintiff refused. Plaintiff and Tannenbaum had earlier operated the equipment, at which time Tannenbaum removed the table saw's safety guard. According to Tannenbaum, the guard is a protective sheath that prevents the operator's fingers from coming in direct contact with the blade. Tannenbaum testified that both he and plaintiff removed the guard because the particular cut they were trying to make could not be made with the guard fastened. Plaintiff denied removing the guard but acknowledged he was aware the guard was not fastened. Neither of the individual defendants was present in the garage at the time of the accident.

Following the completion of discovery, the individual defendants move and the corporate defendant cross-moves for summary judgment dismissing the complaint. Specifically, defendants argue (1) Labor Law § 240 is inapplicable to the facts of this case; (2) the industrial code provisions relied upon in support of the Labor Law § 241(6) cause of action are inapplicable or otherwise cannot be established, and, in the alternative, Tannenbaum and Delanoy, as owners of the single family premises, are entitled to an exemption from liability because they did not direct or control the work performed at their single family residence, and (3) the Labor Law § 200 and common law negligence causes of action should be dismissed because they did not direct, control or supervise plaintiff's work. A Cut Above Carpentry further asserts that summary judgment should be granted dismissing the complaint as against the corporate entity because the work at issue was performed on behalf of Tannenbaum and Delanoy, and not the corporation.

In support of the motion, Tannenbaum and Delanoy submit the deposition testimony of plaintiff and Tannenbaum, the affidavit of Tannenbaum, the pleadings, and the bill of particulars. Although the cross-motion of A Cut Above Carpentry is untimely, having been made more than 120 days following the

filing of the note of issue, the Court in its discretion will consider the motion because a timely motion for summary judgment was made on nearly identical grounds (see Braunstein v Half Hollow Hills School Dist., 104 AD3d 893 [2d Dept 2013]).

A Cut Above Carpentry failed to demonstrate prima facie entitlement to summary judgment on its cross-motion dismissing the complaint on the grounds that it is not a proper party. In support of that branch of the cross-motion, the corporate defendant relies upon plaintiff's deposition testimony in which he states there were no written or verbal agreements or documents exchanged between plaintiff and the corporation. This alone is insufficient to warrant summary judgment as the parties failed to submit any written documents or related documentation pertaining to any of the work and for whose benefit the work was performed. However, plaintiff testified he believed he had received unspecified payments from the corporation for work performed on various jobs because Tannenbaum "is the corporation". Since the corporate defendant failed to establish that it is not potentially liable for the alleged negligence in connection with the work, the cross-motion of A Cut Above Carpentry for summary judgment dismissing the complaint as asserted against the corporation on the grounds that the corporation is not a proper party is denied.

I. Labor Law 240(1)

The evidence submitted established defendants' prima facie entitlement to summary judgment dismissing so much of the complaint as alleges a cause of action for violation of Labor Law § 240(1). Labor Law § 240(1), also known as the "Scaffold Law", imposes liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494 [1993]; Henry v Eleventh Ave., L.P., 87 AD3d 523 [2d Dept 2011]; Balzer v City of New York, 61 AD3d 796 [2d Dept 2009]). Labor Law § 240(1) was specifically "designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Ross, supra).

In order to prevail on a Labor Law § 240(1) claim, the plaintiff must show that the statute was violated and that the violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280 [2003]; Felker v Corning Inc., 90 NY2d 219 [1997]). Here, plaintiff's injuries did not result from an elevation-related hazard within the meaning of Labor Law § 240(1) (see generally Kanarvogel v Tops Appliance City, Inc., 271 AD2d 409 [2d Dept 2000]). In opposition, plaintiff does not address this portion of the motion, and further failed to raise any triable issues of fact. Accordingly, the branches of defendants' motion and cross-motion which seek summary judgment dismissing so much of the complaint as alleges a cause of action pursuant to Labor Law § 240(1) are granted.

II. Labor Law 241(6)

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 (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]; Ross, supra). The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (see Misicki v Caradonna, 12 NY3d 511 [2009]). The particular safety rule or regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply set forth general safety standards (Id.; Ross, supra). Comparative negligence is a valid defense to a Labor Law § 241(6) cause of action (see Misicki, supra; Long v Forest-Fehlhaber, 55 NY2d 154 [1982]; Riffo-Velozo v Village of Scarsdale, 68 AD3d 839 [2d Dept 2009]).

In order to recover under Labor Law § 241(6), a plaintiff must establish 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 Ross, supra; Galarraga v City of New York, 54 AD3d 308 [2d Dept 2008]). The rule or regulation alleged to have been breached must be a specific, positive command, and not simply a recitation of common-law safety principles (see St. Louis v Town of N. Elba, 16 NY3d 411 [2011]).

Here, plaintiff alleges defendants violated the regulations found at 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8(a), 23-1.16, 23-1.21, 23-9.2(a) and 23-9.2(b) and Occupational Safety & Health Administration rules and regulations (OSHA) § 450(a) et seq. Although plaintiff appears to have abandoned these predicates, if not the claim, in his opposition to defendants' motions, the Court is compelled to address the regulations raised in the motion papers and provides the following analysis.

The individual defendants assert that they are statutorily exempt from liability for violations of Labor Law § 241(6) because at all relevant times they were owners of a single family dwelling where the work was performed and they had no authority or ability to direct or exercise control over plaintiff's work. Labor Law § 241(6), similar to Labor Law § 240(1), exempts "owners of one and two-family dwellings who contract for but do not direct or control the work". The exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability (see Acosta v Hadjigavriel, 18 AD3d 406 [2d Dept 2005]).

In order to satisfy their prima facie burden on the basis of the homeowners' exemption, Tannenbaum and Delanoy must not only demonstrate that they are the owners of a single-or-two-family residence where the work was performed, but also that they did not "direct or control" the work (see Arama v Fruchter, 39 AD3d 678 [2d Dept 2007]). The phrase "direct and control" is construed strictly and refers to situations where the owner supervises the method and manner of the work (see Boccio v Bozik, 41 AD3d 754 [2d Dept 2007]). Defendants failed to demonstrate prima facie entitlement to dismissal of the claim based on this exemption. In support of the claim, defendants rely upon Tannenbaum's affidavit and deposition transcript in addition to the deposition transcript of plaintiff. Even had defendants provided copies of the deed and certificate of occupancy, the exemption would still not apply to Tannenbaum because a question of fact exists regarding the amount of "direction and control" he exerted over plaintiff's work. Tannenbaum testified that he removed the table saw's protective device guard, and, as such, he, at minimum, contributed to the unsafe condition. Further, as the owner of the table saw, he failed to demonstrate that he lacked either the authority or ability to control the work by correcting the unsafe condition (see Linkowski v City of New York, 33 AD3d 971 [2d Dept

2006]). Potential liability is not to be determined on whether defendant actually exercised the right to correct the unsafe condition, but whether he had the right to do so (Samaroo v Patmos Fifth Real Estate, Inc., 102 AD3d 944 [2d Dept 2013]). Under these circumstances, the individual defendants are not entitled to summary judgment dismissing the Labor Law § 241(6) pursuant to the homeowners' exemption.

However, Delanoy established prima facie entitlement to judgment on the grounds that the evidence failed to demonstrate that she employed plaintiff, that she caused or created the unsafe condition, or had any knowledge of same, and further that she did not have authority to supervise or control the means and methods of the work performed (see DiMaggio v Cataletto, 117 AD3d 984 [2d Dept 2014]; Ortega v Puccia, 57 AD3d 54 [2d Dept 2008]). In opposition, plaintiff relies upon the deposition testimony of Tannenbaum who testified that he consulted with Delanoy prior to hiring plaintiff and regarding the work to be performed. This testimony is insufficient to raise a triable issue of fact as it demonstrates that Delanoy's involvement was no more than that of an ordinary homeowner who was not supervising, directing or controlling the manner of the work (Ortega, supra). Moreover, plaintiff, who chose not to take the deposition of Delanoy, testified that Delanoy "never" individually asked him to do any of the work. Accordingly, summary judgment dismissing the Labor Law § 241(6) claim asserted against Delanoy is granted.

With respect to Tannenbaum and A Cut Above Carpentry, the evidence established defendants' prima facie entitlement to summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241(6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.5 and 23-9.2(b) and federal OSHA provisions on the grounds that such provisions are general safety and responsibility standards that do not give rise to a nondelegable duty under the statute (see Rizzuto, supra; Gonzalez v Perkan Concrete Corp., 110 AD3d 955 [2d Dept 2013]; Maday v Gabe's Contracting, LLC, 20 AD3d 513 [2d Dept 2005]). In addition, the evidence further established defendants' entitlement to summary judgment dismissing so much of the complaint alleging a claim for damages based on a violation of Industrial Code §§ 23-1.7, 23-1.8(a), 23-1.16 and 23-1.21 on the grounds that such provisions are inapplicable to the facts of this case. 12 NYCRR 23-1.7 provides for "protections from general hazards", which include overhead, drowning, slipping, tripping, air contaminated and corrosive substances. 12 NYCRR 23-1.8(a) applies to eye protection and eye protective equipment, and 12 NYCRR 23-1.16 sets forth standards for safety belts, harnesses, tail lines, and life lines. Finally, 12 NYCRR 23-1.21 applies to ladders and ladderways. The evidence, including plaintiff's testimony, does not indicate that plaintiff's injuries arose from any of the hazards specified in such provisions.

In opposition to this branch of the motion, plaintiff failed to raise a triable issue of fact regarding the applicability of the aforementioned sections of the Industrial Code (Ross, supra; Campoverde v Bruckner Plaza Assoc., L.P., 50 AD3d 836 [2d Dept 2008]; Salinas v Barney Skanska Construction Co., 2 AD3d 619 [2d Dept 2003]; Smith v Cari, LLC, 50 AD3d 879 [2d Dept 2008]). Accordingly, the branch of the motion of Tannenbaum and cross-motion of A Cut Above Carpentry which seeks summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241(6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8(a), 23-1.16, 23-1.21, and 23-9.2(b) and Occupational Safety & Health Administration rules and regulations is granted.

However, the evidence submitted failed to establish prima facie entitlement to summary judgment dismissing so much of the complaint as alleges a cause of action for violation of Labor Law § 241(6) as based on Industrial Code (12 NYCRR) § 23-9.2(a). Section 23-9.2(a) is specific enough to give rise to a valid claim under Labor Law 241(6) and imposes an affirmative duty on the employer to "correct" any unsafe condition regarding equipment or machinery upon discovery (Misicki, supra). As indicated above, Tannenbaum testified that the table saw was his and that he removed the protective guard. Accordingly, there exists a triable issue of fact as to whether, at the time of the accident, Tannenbaum and A Cut Above Carpentry failed to correct a known dangerous condition that was the proximate cause of plaintiff's alleged injuries. Accordingly, the branches of defendants Tannenbaum's motion and A Cut Above Carpentry's cross-motion for summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241(6) based upon a violation of Industrial Code 23-9.2(a) are denied.

III. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 codifies the common-law duty imposed upon an owner or general contractor to provide workers with a safe place to work (Rizzuto, supra). "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 [2d Dept 2008]). "These two categories should be viewed in the disjunctive" (Id.).

Where the claim is predicated upon a dangerous or defective condition at the premises, liability attaches where the owner either created the dangerous condition or had actual or constructive notice of the condition without remedying it within a reasonable period of time (Reyes v Arco Wentworth Mgmt Corp., 83 AD3d 47 [2d Dept 2011]; Chowdhury, supra). Where, as is the case here, the alleged injury is the result of dangerous or defective equipment, the property owner will only be liable if the owner possessed the authority to supervise or control the means and methods of the work (Ortega, supra). No liability can attach solely because the owner "may have had notice of the allegedly unsafe manner in which work was performed" (Dennis v City of New York, 304 AD2d 611 [2d Dept 2003]). Moreover, general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability (see La Veglia v St. Francis Hosp., 78 AD3d 1123 [2d Dept 2010]). The authority to review safety at the site, ensure compliance with safety regulations, and to stop work for observed safety violations are similarly insufficient to impose liability (see Austin v Consolidated Edison, 79 AD3d 682 [2d Dept 2010]; McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796 [2d Dept 2007]; Garlow v Chappaqua Cent. School Dist., 38 AD3d 712 [2d Dept 2007]). Rather, it must be demonstrated that the defendant controlled the means and manner in which the work was performed (La Veglia, supra).

Defendants Tannenbaum and A Cut Above Carpentry failed to demonstrate a prima facie entitlement to summary judgment insofar as to the cause of action in violation of Labor Law § 200 and common-law negligence. In this regard, the evidence establishes that Tannenbaum and/or A Cut Above Carpentry controlled the means by which plaintiff performed the work in that Tannenbaum, the corporate president and its sole owner, provided the table saw and said table saw was not equipped with a

protective guard because Tannenbaum had removed the safety device. Tannenbaum, whether in his individual capacity or as corporate president, or both, failed to demonstrate that he lacked authority or ability to control the work by correcting the unsafe condition that he created (see Linkowski, supra; Samaroo, supra). Moreover, removal of the protective guard may constitute an OSHA violation, and, more significantly with respect to the instant motions, evidence of negligence (see Cruz v Long Island Railroad Co., 22 AD3d 451 [2d Dept 2005]). The fact that plaintiff used the table saw without assistance knowing the guard was removed at the time of the accident does not negate defendants' potential liability under the statute. Instead, these claims offer a possible affirmative defense to the negligence claim based upon comparative fault.

Accordingly, the branch of defendants Tannenbaum's motion and A Cut Above Carpentry's cross-motion for summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 200 and common-law negligence is denied.

With respect to Delanoy, she once again established prima facie entitlement to judgment as a matter of law on the Labor Law § 200 and common-law negligence claims insofar that the evidence failed to establish she had any knowledge of the unsafe condition or that she possessed the authority to supervise or control the means and methods of the work performed (see Ortega, supra). In opposition, plaintiff failed to raise a question of fact. Accordingly, summary judgment dismissing the Labor Law § 200 and common-law negligence claims asserted against Delanoy is granted.

Dated: May 1, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION