

Ram v City of New York
2015 NY Slip Op 30798(U)
April 8, 2015
Sup Ct, Bronx County
Docket Number: 309902/11
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. 309902/11
Motion Calendar No. 21
Motion Date: 12-22-14

Paramjit Ram

Plaintiff(s),

-against-

The City of New York, The Road Board/Department
of Education of the City of New York, New York City
School Construction Authority, STV/Bradford, JV and
Durante Rentals,

Defendant(s),

DECISION/ ORDER

Present:

**Hon. Wilma Guzman
Justice Supreme Court**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the motions
for summary judgment

Papers

Numbered

Plaintiff Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Defendant Affirmation in Opposition.....	2
Reply Affirmation.....	3

*Upon the foregoing papers and after due deliberation, and following oral argument,
the decision/order on this motion is as follows:*

Defendants; The City of New York, The Board/Department of Education of the City
of New York, New York City School Construction Authority, and STV/Bradford, JV; hereinafter
collectively referred to as NYSCA Defendants, move this court for an order pursuant to CPLR §
3212 seeking summary judgment dismissing Plaintiff, Paramjit Ram's, cause of action.

The proponent of a motion for summary judgment must tender sufficient evidence to
show the absence of any material issue of fact and the right to judgment as a matter of law. See,

Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be submitted from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. See, Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See, Rose v. Da Ecib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if triable issues of fact are non-existent. See, Ruzycki v. Baker 301 A.D.2d 48; 750 N.Y.S.2d 680 (1st Dept. 2002)

Plaintiff has submitted written opposition to this motion.

Plaintiff's commenced their cause of action under Labor Law §§ 200 and 241(6) seeking monetary damages for injuries allegedly sustained on April 27, 2011, as the result of an accident with a pneumatic jackhammer and subsequent fall on the construction site located at 2550 Lafayette Avenue, Bronx, New York, which is owned by The City of New York.

The New York City School Construction Authority (SCA), who is responsible for building new public schools and for managing the construction and renovation of capital projects in New York City's Public Schools, sought to increase, facilitate and encourage the participation of minority-owned, woman-owned, and locally-owned enterprise (MWLBE) firms through the establishment of a mentoring program. Through the mentoring program, the SCA partnered emerging MWLBE firms with larger construction management firms to provide the MWLBE firms with contracting opportunities and experience.

On February 16, 2011, STV/Bradford, JV (STV), a construction management/design firm credited to do work for the SCA, accepted the bid of New Age Construction, plaintiff's employer, for demolition and construction work on the premises 2550 Lafayette Avenue, Bronx, New York. STV was mentoring the contract with New Age Construction through the mentoring program established by the SCA.

As part of the contract, New Age Construction was required to demolish a portion of the existing sidewalk and replace it with a new concrete sidewalk. In order to demolish the

portion of the sidewalk, New Age Construction rented two pneumatic jackhammers from Durante Rentals, LLC. On April 27, 2011, while plaintiff Paramjit Ram used a jackhammer rented from Durante Rentals, LLC to demolish the sidewalk, the chisel for the jackhammer broke and the jackhammer struck the plaintiff on his left foot, which caused him to fall to the ground.

In support of the motion for summary judgment, defendant submits, inter alia, a copy of the pleadings, and the examination before trial of plaintiff, Paramjit Ram and STV construction manager, Albert Calderon.

On January 25, 2013, plaintiff, Paramjit Ram, testified on his own behalf. He testified that he began employment with New Age Construction on April 18, 2011, and he worked for 8 days at the construction site at 2550 Lafayette Avenue, Bronx, New York. He testified that his work consisted of demolishing the sidewalk, painting fences, and constructing new sidewalks. He had used a jackhammer for demolishing the sidewalk for three or four days prior to his accident on April 27, 2011. To his knowledge, he testified that there were no other contractors at the construction site. He further testifies that he only received instructions from Amrinder Singh, and he only received his tools from New Age Construction. He stated that his accident consisted of the chisel for the jackhammer breaking, which caused the jackhammer to strike his foot, causing him to fall to the ground.

On May 30, 2014, STV project manager, Albert Calderon, testified on behalf of NYCSCA defendants. He testified that STV was responsible for the day-to-day mentoring of New Age Construction, which entailed "every aspect of construction, including scheduling, contract interpretations, execution of the work..." assuring that work was being done properly, and assuring that work was being done in a safe manner. He testified that his responsibility was to supervise the work done by the contractor. However, he testifies that STV was not responsible for telling New Age employees how, specifically, to conduct their work.

Labor Law § 200 claim

Labor Law § 200 & common law negligence requires that the general contractor and owner exercise control or supervision over the plaintiff's work. Weekly safety meetings with the subcontractor, regular walkthroughs, and authority to stop the work, alone are insufficient to establish control and supervision over the work of the plaintiff (see *Geonie v. OD & P NY LTD.*,

et al., 50 A.D.3d 444 (1st Dept. 2008)).

NYCSCA defendants argue that plaintiff's Labor Law § 200 claim is inapplicable because NYCSCA defendants (a) did not direct or control the method or manner by which the plaintiff performed his work (b) did not have both actual and constructive notice of the dangerous condition at issue and (c) did not create the dangerous condition of the jackhammer (See Russin v. Picciano & Son, 54 N.Y.2d 311, 317 (1981); Lombardi v. Stout, 80 N.Y.2d 290, 295 (1992); Ross v. Curtis-Palmer Hydro-Electric Co., supra 81 N.Y.2d 494 (1993)). Thus, the plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, because NYCSCA defendants did not have sufficient supervisory control over the plaintiff's accident.

Plaintiff argues that NYCSCA defendants exercised sufficient supervisory control to raise a triable issue of fact. According to the admissions of STV's field manager, Albert Calderon, mentoring the contract with New Age Construction for the SCA mentoring program entailed every aspect of construction, including: scheduling, contract interpretations, paper work, daily reports, inspections, execution of work, supervision to make sure work is being done properly, and supervision to make sure work was being done in a safe manner. Plaintiff argues, "it is abundantly apparent that said defendants had supervisory control over the operation and exercised that supervision and control," which plaintiff further argues is an issue of fact that warrants denial of NYCSCA defendant's motion for summary judgment.

Plaintiff's claim that NYCSCA defendants are liable under Labor Law § 200 relies on the role of SVA as mentors and direct supervisors of New Age Construction. SVA exercised general supervisory control over New Age Construction, but they did not exercise direct supervisory control over the plaintiff's actions. In order to prevail on such a claim against an owner or general contractor, a plaintiff must prove that the party so charged had authority or control over the activity causing the injury, thus enabling it to avoid or correct an unsafe condition (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352, 693 NE2d 1068, 670 NYS2d 816 [1998]). In fact, Albert Calderon, whose testimony is heavily relied upon by the plaintiff, testifies that SVA was not responsible for telling employees from New Age Construction how specifically perform their particular task. Plaintiff himself also testified that he only took instructions from New Age Construction supervisors. Thus, SVA and the other NYCSCA defendants did not exercise direct supervisory control requisite for a claim pursuant to Labor Law

§ 200 (See O'Sullivan v. IDI Construction Co., 28 A.D.3d 225; 813 N.Y.S.2d 373; (2006), Singh v. Black Diamonds LLC, 24 A.D.3d 138, 140 (1st Dept. 2005). Therefore, the plaintiff's claim pursuant to Labor Law § 200 is hereby dismissed.

Labor Law § 241(6) Claim:

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Ross v. Curtis-Palmer Hydro Electric Co., 81 N.Y.2d 494 (1993)). As the duty to comply with the regulation is non-delegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work site in order to establish a Labor Law § 241(6) claim (See Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816; Ross v. Curtis-Palmer Hydro Electric Co., *Supra*, 81 N.Y.2d 494 (1993) ["to the extent that plaintiff has asserted a viable claim under Labor Law 241(6), he need not show that defendants exercised supervision or control over his work site in order to establish his right to recovery"]).

In order to impose liability under this section, the plaintiff must demonstrate that there exists a violation of a specific regulatory provision of the industrial code, which resulted in injury to the plaintiff. If there was a breach of such a regulation, the general contractor and owner are vicariously liable for the resulting injury without regard to their fault (See Armer v. General Electric Co., 241 A.D.2d 581, 659 N.Y.S.2d 916 [3d Dept. 1997], leave denied, 90 N.Y.2d 812, 666 N.Y.S.2d 101, 668 N.E.2d 1383 [1997]; Rizzuto v. L.A. Wenger Contracting Co., Inc., *supra* 91 N.Y.2d 343 [absence of actual or constructive notice to owner or general contractor is irrelevant to the imposition of Labor Law § 241(6) liability]). However, a regulation which merely sets forth general safety standards (and thus is merely a reiteration of the common law) does not give rise to a non-delegable duty under this section (see Abreu v. Manhattan Plaza Assoc., 214 A.D.2d 526 [2nd Dept. 1995]). The relevant statutes are as follows:

Labor Law § 241(6) states, in pertinent part...

"All contractors and owners and their agents...when constructing, excavating,

demolishing...shall comply with the following requirements:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work...shall comply therewith."

Plaintiff alleges that NYCSCA defendants violated the following Industrial Code Section.

12 NYCRR 23-9.1 Application of this subpart

The provisions of this Subpart shall apply to power-operated heavy equipment or machinery used in construction, demolition and excavation operations. These provisions shall not apply to material or personnel hoists (see Subpart 23-6) nor to cranes and derricks (see Subpart 23-8).

12 NYCRR 23-9.2(a) General requirements

(a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

NYCSCA defendants argue that plaintiff insufficiently pleads its Labor Law § 241(6) claims, for plaintiff's alleged violations of sections 23-1.5, 23-1.7, 23-1.32, 23-3.2, 23-3.3, and 23-9.2 of the industrial code are either inapplicable to the instant action or not sufficiently specific to support a cause of action. NYCSCA defendants also argue that OSHA claims must be dismissed because they are inapplicable to plaintiff's claims against NYCSCA defendants, for OSHA is not applicable to a contractor that is not a plaintiff's employer and an alleged violation

of OSHA regulations cannot be used to support a Labor Law § 241(6) claim (See Vernieri v. Empire Realty Co., 219 A.D.2d 593, 598 (2nd Dep't 1995).

In response to NYCSCA defendant's arguments regarding plaintiff's Labor Law § 241(6) claim, plaintiff withdraws the alleged violations of sections 23-1.5, 23-1.7, 23-1.32, 23-3.2, and 23-3.3 of the industrial code and alleged violations of OSHA regulations because of inapplicability, but plaintiff claims that sections 23-9.1 and 23-9.2(a) of the Industrial Code are pertinent to the foregoing Labor Law § 241(6) claim. Plaintiff argues that issues of fact exist pursuant to NYRR 23-9.2(a), such as whether the STV project manager ever inspected the jackhammers or other equipment. Plaintiff further argues that another issue of fact exists: whether a pneumatic jackhammer should be considered a "power-operated heavy equipment or machinery used in construction, demolition, or excavation" pursuant to Industrial Code 23-9.1.

The jackhammer, as NYCSCA defendants assert, is characterized as a hand tool in Industrial Code § 23-1.13(b)(4)1. Accordingly, plaintiff's alleged violations of 12 NYCRR § 23-9.2(a), is inapplicable to the instant action because a jackhammer is not characterized as heavy machinery pursuant to 12 NYCRR § 23-9.1. Without any further alleged industrial code violations, the plaintiff cannot impose liability and has not sufficiently satisfied the requisite allegations pursuant to Labor Law § 241(6).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted as to Labor Law § 200 and the plaintiff's complaint is dismissed as to defendants The City of New York, The Board/Department of Education of the City of New York, New York City School Construction Authority, and STV/Bradford, JV. It is further

ORDERED that defendant's motion for summary judgment is granted as to Labor Law § 241(6) and the plaintiff's complaint is dismissed as to defendants The City of New York, The Board/Department of Education of the City of New York, New York City School Construction Authority, and STV/Bradford, JV. It is further

ORDERED that the Clerk of the Court mark the Court file accordingly. It is further

ORDERED that defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this order.

This constitutes the decision and order of the court.

4/8/15

DATE



HON. WILMA GUZMAN
Justice Supreme Court.