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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ANGEL HERNANDEZ,

Plaintiff,

- against -

SEADYCK REALTY CO., LLC, and JOHN DOE, INC.,

Defendant,

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SEADYCK REALTY CO., LLC,

Third-Party Plaintiff,

- against -

P.A. PAINTING AND DECORATING, CORP.,

Third-Party Defendant.

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Index Number: 157770/2012

Sequence Number: 003

Decision and Order

Arthur F. Engoron, Justice

The following papers, numbered 1 to 5, were read on defendant Seadyck Realty Co.'s motion, pursuant to CPLR § 3212, to dismiss the complaint in total, third-party defendant P.A. Painting's cross-motion for summary judgment dismissing the third-party complaint, and plaintiff's cross-motion for summary judgment as against defendant Seadyck:

PAPERS NUMBERED

Defendant Notice of Motion - Affirmation- Affidavits - Exhibits 1
Third-Party Defendant Notice of Cross-Motion - Affirmation - Exhibits 2
Plaintiff Notice of Cross-Motion - Affirmation - Exhibits 3
Defendant Affirmation In Reply - Exhibits 4
Third-Party Defendant Affirmation In Reply - Exhibits 5

Upon the foregoing papers, defendant's motion is granted in part, and third-party defendant and plaintiff's separate cross-motions are denied.

Procedural History

This action arises out of personal injuries allegedly sustained by plaintiff Angel Hernandez ("plaintiff"), a painter employed by third-party defendant P.A. Painting

and Decorating, Corp. ("P.A. Painting"), on July 28, 2014, while using a handheld "grinding tool" "equipped" with a circular saw blade during work on a vanity in an apartment building owned by defendant Seadyck Realty Co., LCC ("Seadyck"). Plaintiff has asserted claims of general negligence, Labor Law § 200, and Labor Law § 241(6). Seadyck commenced a third-party action against plaintiff's employer, P.A. Painting, for common law contribution and indemnification.

Seadyck now moves for summary judgment dismissing the complaint in its entirety. Plaintiff (1) opposes Seadyck's request for summary judgment; and (2) cross-moves for summary judgment on his Labor Law § 241(6) claim. P.A. Painting (1) supports Seadyck's motion for summary judgment; and (2) cross-moves to dismiss Seadyck's claim for common law contribution and indemnification.

For the reasons set forth herein, (1) Seadyck's motion for summary judgment dismissing the complaint on the issue of liability under general negligence and Labor Law § 200 is granted; (2) Seadyck's request for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied; (3) plaintiff's cross-motion on his Labor Law § 241 (6) claim is denied; (4) P.A. Painting's cross-motion to dismiss Seadyck's claim for common law contribution and indemnification is denied.

Background

P.A. Painting employed Angel Hernandez as a painter and was performing construction-related duties within the meaning of § 241(6) at an apartment located at 1-9 Seaman Avenue (Building 9), Apartment 1L, New York, New York. Seadyck owned the Building. On July 28, 2014, plaintiff sustained injuries to his right hand while attempting to cut through a wooden vanity cabinet using a modified angle grinder equipped with a circular saw.

Plaintiff testified at his deposition that P.A. Painting gave him the grinder, in the modified condition, for the express purpose of making a hole in the vanity cabinet. Plaintiff denied modifying the tool himself, and testified that when he removed the grinder from his tool bag to begin work on the vanity the grinder had a circular saw blade attached to it without a guard or handle. According to plaintiff, a co-worker had previously removed the manual handsaw to use in another apartment building, leaving the modified grinder as the only tool available to finish the cutting job. Plaintiff was cutting through the wood vanity with the modified grinder when it slipped and the blade cut him on his right hand.

Discussion

A. Liability Under General Negligence and § 200

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury.' Where the alleged defect or dangerous condition arises from the

contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993). See also Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 (1993).

Here, plaintiff's general negligence and Labor Law § 200 claims arise out of an alleged defect in the equipment provided to him to perform his work on July 28, 2014, in other words, a defect in P.A. Painting's "methods or materials." Seadyck met its burden of establishing, prima facie, that it exercised no supervisory control over plaintiff's work. Seadyck submitted the Affidavit and deposition testimony of Alicia Leo, the manger or agent of the apartment complex where the alleged injury occurred, which demonstrates that Seadyck did not direct or control plaintiff's work, and had no supervisory control over the means and methods of plaintiff's work. P.A. Painting scheduled its own work in Apartment 1-L and supervised the work of its employees. P.A. Painting provided all of the materials, tools, and equipment that it needed to perform the work. Seadyck did not own the portable angle grinder or the circular saw blade that plaintiff was using at the time of his accident, and Seadyck did not provide the portable angle grinder or the saw blade to the plaintiff. Seadyck did not direct plaintiff how to use the portable angle grinder or the circular saw blade and did not control or supervise the work that plaintiff was performing. Nobody from Seadyck provided instructions to P.A. Painting regarding the installation of the vanity cabinet. Nobody from Seadyck was present in Apartment 1-L when plaintiff was working.

Plaintiff failed to submit proof in opposition to Seadyck's showing sufficient to raise a question of fact on the issue of Seadyck's alleged liability under the common law or Labor Law § 200. Plaintiff has not submitted any proof suggesting that Seadyck, the owner, exercised the requisite degree of supervision and control over the portion of the work that led to his injury. Consequently, plaintiff's general negligence and Labor Law § 200 claims are subject to dismissal.

B. Liability Under § 241(6)

Section 241(6) "requires owners and contractors...to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993). "Since section 241(6) imposes a nondelegable duty on property owners, plaintiff need not show that defendants exercised supervision or control over the work site in order to establish a right of recovery under section 241(6)." St. Louis v Town of N. Elba, 16 NY3d 411, 413-14 (2011). Here, plaintiff rests his claim on alleged violations of 12 NYCRR 23-9.2(a) and 12 NYCRR 23-1.12(c).

12 NYCRR 23-9.2(a)

Section 23-9.2(a) was not part of the plaintiffs Amended Bill of Particulars, which would indicate that the plaintiff no longer alleges a violation as a predicate to plaintiff's claim pursuant to Labor Law § 241(6). That being said, assuming arguendo he still is relying on § 23-9.2(a), the Court of Appeals has held that § 23-

9.2(a) is applicable to a non-supervising owner or general contractor if the employer had constructive or "actual notice of the structural defect or unsafe condition." Misicki v Caradonna, 12 NY3d 511, 521 (2009). Here, it is undisputed that the employer was not given notice of the alleged saw modification, detached guard, or missing handle. Without supervision or notice, § 23-9.2(a) is inapplicable as a matter of law, thus leaving no triable issue.

Section 23-1.12(c)

Section 23-1.12(c) Power-Driven Saw, provides as follows:

> (1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

"The preferred rule both as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation. This approach accounts for those circumstances where a slightly different machine is utilized for the same risky objective that is perhaps more frequently or more efficiently achieved by the machine designated by name in the Code." St. Louis v Town of N. Elba, 16 NY3d 411, 416 (2011).

Plaintiff claims that he was using a modified angle grinder equipped with a circular saw blade at the time of the accident. He denied modifying the tool, and testified that the tool was provided to him with the sawblade attached and without any guard. The modified tool also lacked a handle. It is undisputed that plaintiff was cutting/sawing wood at the time of the accident using the teeth of the unguarded circular saw blade and not the traditional abrasive grinding disc. In his affidavit, plaintiff's expert, Thomas Coccihola, characterizes the machine in question as a modified grinder, which is the functional equivalent of a power driven saw. Mr. Coccihola determined that the modified tool violated New York Industrial Code § 23-1.12© in that it lacked a "fixed guard which will completely protect the operator from contact with the saw blade when the saw is operating and with a moveable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut." Id.

Defendant disputes plaintiff's factual claims, but has only raised issues of fact as to whether the modified grinder was functionally equivalent to a power-driven saw to fall within § 23-1.12(c). Therefore, both the defendant's motion, and plaintiff's cross-motion, for summary judgment on plaintiff's Labor Law § 241(6) claim are denied.

OSHA Regulations

"It has been held that violations of OSHA standards do not provide a basis for liability under Labor Law § 241(6)." Vernieri v Empire Realty Co., 219 AD2d 593, 598 (2nd Dep't 1995). Consequently, OSHA regulations do not establish a non-delegable duty and are inapplicable to this statute.

B. Third-Party Complaint for Common Law Contribution and Indemnification Under Workers' Compensation Law § 11

P.A. Painting cross-moves to dismiss Seadyck's claim for common law contribution and indemnification on the grounds that P.A. Painting is the plaintiff's employer and the plaintiff has not suffered a "grave injury" within the meaning of Workers Compensation Law § 11. Workers' Compensation Law § 11 states in pertinent part:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

It is settled that "injuries qualifying as grave are narrowly defined in Workers Compensation Law § 11." Castro v United Container Mach. Grp., Inc., 96 NY2d 398, 401 (2001). However, there is disagreement as to what degree of functionality a hand must have in order to be deemed a "grave injury" under § 11. In Kraker v Consol. Edison Co., 23 AD3d 531, 533 (2nd Dep't 2005),

> the injured plaintiff testified he could type with his right hand one key at a time, could brush his hair with his right hand, and could carry his shoes in his right hand. This [...] information established, as a matter of law, that the injured plaintiff did not sustain a total loss of the use of his right hand and accordingly, did not sustain a grave injury.

In Trimble v Hawker Dayton Corp., 307 AD2d 452, 453 (3rd Dep't 2003), the Third Department found that "the report of a functional capacity evaluation stat[ing] that plaintiff is able to extend and close his right thumb and fingers sufficiently to grasp, hold and carry objects in his right hand" was enough for the third-party defendant

to meet its burden to establish lack of a grave injury. However, this was determined only after the third-party defendant was able to conduct its own Independent Medical Exam of the plaintiff to determine the extent of the injuries (which has not yet happened in our case). Yet, the Third Department has also found that where "a plaintiff retains only 'passive movement' of the hand or arm, that may qualify as a total loss of use of the hand or arm." Balaskonis v HRH Constr. Corp., 1 AD3d 120 (3rd Dep't 2003) ("Where there is plaintiff expert evidence that there is only passive movement" then triable questions are raised as to "whether plaintiff has in fact permanently lost total use of his left hand and arm...thus precluding summary judgment."). Similarly, in Millard v Alliance Laundry Sys., LLC, 28 AD3d 1145, 1147 (4th Dep't 2006), there was evidence that the plaintiff retained some ability to use her left arm but could not use her left arm or hand "for any grooming, bathing, toileting, feeding, dressing or other activities." The court in Millard found that there were triable issues of fact whether plaintiff sustained a grave injury by retaining only passive movement in her left arm and hand.

Here, there is an issue of fact as to whether plaintiff retains only passive movement in his right hand. Plaintiff alleges that injuries he sustained to his right hand have resulted in permanent loss of use of that hand. Plaintiff testified that after undergoing four surgical procedures, he is unable to hold his thumb against his other fingers. He is unable to make a fist with his right hand, unable to hold a pen or pencil, use a fork or knife, brush his teeth, button his shirt, pull up a zipper, write using his right hand, or put on a belt using his right hand. In addition, plaintiff indicated that the only time he is able to use his right hand is to grab large, light objects like a pillow, blanket, an article of clothing, or a cup. Plaintiff's claim that he is unable to use his right hand is supported by Ellen G Rader Smith, a Licensed Occupational Therapist, whom plaintiff has identified as an expert in this matter. Ms. Rader Smith reports that her Hand Function Evaluation is "consistent with that which Mr. Hernandez reports as limitations for the performance of all daily activities, where he now relies on the left hand as the dominant hand and uses the right hand more as a functional assist."

Considered collectively, plaintiff has raised an issue of fact as to whether the right hand was gravely injured within the meaning of the Workers' Compensation Law. Indeed, Seadyck's argument that P.A. Painting's cross-motion is premature because plaintiff has not yet submitted to an Independent Medical Exam, is correct. Consequently, P.A. Painting is not entitled to dismissal of Seadyck's third-party complaint for common-law contribution and indemnification.

Untimely Cross-Motion

Seadyck raises another argument in opposition: that P.A. Painting's cross-motion is untimely because it was not made within 60 days from the filing of the Note of Issue. See Brill v City of New York, 2 NY3d 648, 652 (2004) ("'good cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy."). However, an untimely cross-motion could be considered if "it sought relief on the same issues as were raised in defendants'

timely motion." Conkin v Triborough Bridge and Tunnel Auth., 49 AD3d 320, 321 (1st Dep't 2008). P.A. Painting's cross-motion for dismissal of common law indemnification was submitted one week late, without good cause, and was not based on the same summary judgment issues submitted by Seadyck, and should not be considered. Thus, P.A. Painting's cross-motion is denied as untimely and on the merits.

Conclusion

Defendant Seadyck's motion for summary judgment is granted to the extent of dismissing plaintiff's general negligence and Labor Law § 200 claims, *only*. The separate cross-motions by P.A. Painting, for dismissal of the third-party complaint, and Plaintiff, for summary judgment, are denied.

Dated: July 30, 2015

Arthur F. Engoron, J.S.C.