

<b>Padilla v Skanska USA Bldg., Inc.</b>
2015 NY Slip Op 32536(U)
July 23, 2015
Supreme Court, Queens County
Docket Number: 25651 2012
Judge: Duane A. Hart
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The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also, *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor to provide construction site workers with a safe place to work (see *Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 [1998]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]; *Nicoletti v Iracane*, 122 AD3d 811 [2014]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2013]). To be entitled to summary judgment on plaintiff's claims based on Labor Law § 200 and common-law negligence, defendant must demonstrate that there is no evidence in this action that defendant exercised supervisory control or had any input into how plaintiff was to perform his work, or that defendant created the alleged condition or had actual or constructive notice of the alleged dangerous condition in time to correct it, and failed to do so (see *DiMaggio c Cataletto* 117 AD3d 974 [2014]; *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47 [2011]; *Ortega v Puccia*, 57 AD3d 54 [2008]).

Defendant's motion also seeks dismissal of plaintiff's cause of action based on Labor Law § 241 (6), which imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343; *Linkowski v City of New York*, 33 AD3d 971 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626 [2005]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290). Thus, defendant, being the general contractor at the subject workplace, has a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of defendant (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]). To prevail on summary judgment under this section, defendant must establish that either that the Industrial Code sections allegedly violated cannot serve as a predicate for liability pursuant to Labor Law § 241 (6), because they merely set forth a general standard of care for employers, and did not involve a violation of a "specific, positive command" of the Industrial Code, which was a proximate cause of plaintiff's accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2013]; *Forschner v Jucca Co.*, 63 AD3d 996 [2009]), or that such sections did not apply in this case or were not violated (*see Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221 [2011]).

Defendant has demonstrated that Industrial Code §§ 23-1.2, 23-1.5, 23-1.7 (b) (1), 23-1.15, 23-1.33, 23-2.1 (a) (2), 23-2.1 (b) and 23-2.2, Administrative Code §§ 26-288, 27-127 and 27-128, and all claimed OSHA violations, either do not apply, were not violated, or cannot serve as the basis for a Labor Law § 241 (6) claim herein. Plaintiff has failed to oppose defendant's contentions. Consequently, such facts are admitted, and defendant's motion is granted with regard to the above-alleged statutory violations (*see Giliya v Warren*, 30 AD3d 420 [2006]; *Mascoli v Mascoli*, 129 AD2d 778 [1987]).

However, defendant has failed to establish its prima facie entitlement to summary judgment as a matter of law dismissing plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6), with respect to Industrial Code §§ 23-1.7 (e) and 23-2.1 (a) (1), claims. Defendant has failed to eliminate all triable issues of fact as to whether defendant exercised control over the work site; whether defendant had, or should have had, notice of the hazardous condition on the premises; whether defendant conducted reasonable inspections of the area; when the last such inspection of the area was performed; whether the condition which allegedly caused the accident should have been apparent upon a visual inspection of the area; whether defendant designated the area where the materials would be stored; whether the place of the accident was a "passageway," "walkway," or "thoroughfare"; whether the place of the accident was a "work area"; and whether the place of the accident was a "storage area" (*see generally Caiazzo v Mark Joseph Contracting, Inc.*, 119 AD3d 718 [2014]; *Creese v Long Island Lighting Co.*, 98 AD3d 708 [2012]; *White v Village of Port Chester*, 92 AD3d 872

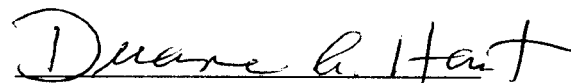
[2012]; *Conway v Beth Israel Med. Ctr.*, 262 AD2d 345 [1999]), obviating the granting of summary judgment (see *Alvarez v. Prospect Hospital*, 68 NY2d 320; *Winegrad v. New York Univ. v. Medical Center*, 64 NY2d 851; *Reinoso v Ornstein Layton Management, Inc.*, 19 AD3d 678 [2005]).

As defendant has failed to substantiate its *prima facie* burden in the first instance, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (see *Artis v. Lucas*, 84 AD3d 845 [2011]; *Ianello v. Vazquez*, 78 AD3d 1121 [2010]).

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of defendant's motion for summary judgment seeking to dismiss plaintiff's claims alleging violations of Industrial Code §§ 23-1.2, 23-1.5, 23-1.7 (b) (1), 23-1.15' 23-1.33, 23-2.1 (a) (2), 23-2.1 (b) and 23-2.2, Administrative Code §§ 26-288, 27-127 and 27-128, and all claimed OSHA provisions, pursuant to Labor Law § 241 (6), is granted. The branches of defendant's motion for summary judgment seeking dismissal of plaintiff's claims, arising from Labor Law §§ 200, common-law negligence, and Industrial Code §§ 23-1.7 (e) and 23-2.1 (a) (1), are denied.

Dated: July 23, 2015

  
J.S.C

**FILED**

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