

Berman-Rey v Gomez
2015 NY Slip Op 32742(U)
June 5, 2015
Supreme Court, Queens County
Docket Number: 13230 2007
Judge: Jr., Rudolph E. Greco, Jr.
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.

IA PART 32

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GERSON BERMAN-REY,

Index No: 13230 2007

Motion Date: February 25, 2015

Plaintiff,

Mo. Seq. No. 6

FILED

-against-

JUN 18 2015

SIGIFREDO GOMEZ and LILIANA GOMEZ,

COUNTY CLERK
QUEENS COUNTY

Defendants.

The following papers numbered 1 to 16 read on this motion by plaintiff Gerson Berman-Rey for an order restoring the within action to the trial calendar. Defendants Sigifredo Gomez and Lilian Gomcz cross move for an order dismissing the complaint pursuant to CPLR 3404; and in the alternative dismissing the complaint pursuant to CPLR 3212; and in the alternative dismissing the complaint due to plaintiff's continued, contumacious and willful failure to comply with court ordered discovery.

	Papers Numbered
Notice of Motion-Affirmation.....	1-3
Opposing Affirmation-Exhibits.....	4-6
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Upon the foregoing papers the motion and cross motion are determined as follows:

As the last note of issue was vacated by an order dated November 6, 2013, and the matter was restored to pre-note of issue status, CPLR 3404, does not apply to this case (see *Melendez v Plato Gen. Contr.*, AD3d , 2015 NY Slip Op 03812, 2015 NY App Div LEXIS 3781 [2015]; *Goodman v Lempa*, 124 AD3d 581 [2d Dept 2015] ; *Diemer v Eben Ezer Med. Assoc.*, 120 AD3d 614 [2d Dept 2014]; *Pucar v L.H. Charney Assocs., LLC* 79 AD3d 996, 997 [2d Dept 2010]). Therefore that branch of the cross motion which seeks to dismiss the complaint pursuant to CPLR 3404, is denied, and plaintiff's motion is granted to the extent that the action is restored to active status.

To the extent that defendants assert that plaintiff has failed to prosecute this action, defendants, in the notice of cross motion, do not seek dismissal of the complaint on this ground. Furthermore , such relief is not available as defendants have not served a 90-day demand upon the

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plaintiff pursuant to CPLR 3216. In addition, "the doctrine of laches does not provide [a] basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216(b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable" (*Arroyo v Board of Educ. of City of N.Y.*, 110 AD3d 17, 20[2d Dept 2013]; *Melendez v Plato Gen. Contr.*, *supra*).

Plaintiff was allegedly injured in an accident that occurred on June 14, 2006, at a construction project located at 149-17 12th Road, Queens, New York and owned by defendants Sigifredo Gomez and Liliana Gomez. Plaintiff alleges that he was struck by part of a construction fence as he was attempting to lock the fence. The subject real property is owned by defendants Sigifredo Gomez and his wife Liliana Gomez, and they reside in the one-family home that is located at said property. At the time of plaintiff's accident, the existing one-family home was partially demolished, and a portion of the property was excavated. The defendants were in the process of renovating and expanding their house and resided elsewhere.

Plaintiff, in his bill of particulars, alleges that at the time of the accident he was employed by Image Ironworks. At his deposition, plaintiff testified that he was hired by Henry Gomez as a driver and helper or assistant, and that he drove a van or truck supplied by Henry Gomez. Defendant Sigifredo Gomez testified that he is the sole shareholder and president of Image Ironworks, Inc., and that he hired Henry Gomez to open and close the construction site and to inspect it on a daily basis. It is noted that there is some evidence that plaintiff has received Workers' Compensation benefits. However, no documentary evidence has been submitted which identifies his employer on the date of the accident.

Plaintiff testified that at the time of the accident there was no work being performed at this job site due to a stop work order, and that he and Henry Gomez had gone to the site in order to retrieve tools and equipment for use at another job site. He stated that there was a wooden construction fence or gate in front of the project. He described the fence as made of wood with metal pieces between the wood, with 15 foot door wooden door or gate on wheels that slid open and closed. There was a lock on the gate, and the keys were kept in a mailbox. He stated that he had previously been to the site 5 or 6 times, and that the gate inclined and would sometimes stick while sliding. Plaintiff stated that he had previously informed Henry Gomez and Sigifredo Gomez that the gate "had difficulties" in that it "inclined" and that when it was "sliding it would sometimes stick" (Tr 81).

Plaintiff stated that on the date of the accident he parked the truck in front of the premises, unlocked the gate, and made 3 or 4 trips with Henry Gomez from the site to the truck where they loaded tools, extension cords and two hard hats. Henry then returned to the vehicle. Plaintiff stated that as he was about to lock the gate, it fell and struck him, knocking him to the ground. He stated that he was struck in the head and left side, that he may have lost momentarily consciousness and when he regained his consciousness, Henry helped him to get up from beneath the gate, as it was too heavy for Henry to lift. Plaintiff stated that he felt nervous and rested in the truck for awhile; that Henry called Sigifredo and that they told him they would take him to a doctor. However, he did not

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go to a doctor at that time, and he and Henry proceeded to the other job site. He continued to work for the next eight weeks. Plaintiff stated that he was working at another job site when he began to feel bad and began to bleed and vomit. He stated that Henry gave him money to take a taxi to a doctor, but that he took two buses to his apartment instead. After he got off the second bus, he felt an intense pain in his head, vomited and fell in front of his apartment building. A neighbor called an ambulance and he was taken to New York Hospital Queens where he was treated for five days and released. He was thereafter treated at Elmhurst Hospital for pain, vision problems, and knee and back injuries.

Defendant Sigifredo Gomez testified that he and his wife purchased the subject real property in 2004 with the intention of living there; that prior owner continued to reside in the premises until December 2005; and that beginning in April 2006, construction commenced at the premises. Defendant Gomez stated that a portion of the house was demolished over the course of months; that an excavation company had commenced work in May 2006; and that the house was being expanded in order to create additional rooms. He stated that Image Ironworks was the general contractor for the construction work performed at the job site and also performed the demolition work in stages over a period of three months.

Defendant Gomez stated that he was the safety manager for this project; that Image Ironworks hired subcontractors to perform certain work at the job site, including the excavation work. A week prior to plaintiff's accident the Department of Buildings issued a stop work order due to the presence of asbestos in the house. Sigifredo Gomez stated that he was required to hire an asbestos cleaning company and remove the asbestos before he could continue with the excavation and demolition work at the site. The asbestos removal did not commence until some date after plaintiff's accident.

Defendant Gomez stated that Image Ironworks installed the plywood construction fence and that it was required to maintain it. He described the fence as made of pieces of plywood, attached to each other through a steel frame that was not visible from the street; that door to the fence ran on an iron on the bottom of the fence, with a wheel for sliding the door. He stated that he had opened the door 20 times and never observed the fence leaning out towards the sidewalk or getting stuck. He stated that the door consisted of four sheets of plywood, approximately 16 feet wide, on three sets of wheels. He stated that prior to the accident he never experienced the wheels coming off the track and never received any complaints about the wheels coming off the track, or that the fence door did not open smoothly, or that the fence door was leaning out towards the sidewalk.

Defendant Sigifredo Gomez stated that he saw the plaintiff at the job site on three occasions prior to the accident and that he did not have any conversations with him. He stated that he gave instructions to Henry Gomez on the first two occasions regarding the work that was being performed, and that Henry never made any complaints about the construction fence door. He stated he was not at the subject property on June 14, 2006, and did not witness plaintiff's accident. Defendant stated that Henry Gomez told him that he was closing the gate when an L-shaped steel hook that keeps the door on the track came off, and that the hook and a portion of the construction fence came off due

to the wind. He stated that Henry did not tell him that any one had been injured, and that Image Ironworks's employee Samuel Escobar repaired the fence the same day.

Mr. Escobar has submitted an affidavit in which he states he was formerly a supervisor employed by Image Ironworks; that there was no construction work being performed at the property on June 14, 2006 due to a stop work order; that he was called to the property by Sigifredo Gomez to repair the gate surrounding the property; that the gate was constructed of steel and plywood; that the steel Ls framed the gate and four plywood sheets were affixed to the steel Ls; and that the gate hung from a steel track and rolled on wheels. He states that the gate always worked perfectly and that he never encountered any problems with it, and was not aware of any complaints or problems with the gate. He stated that when he arrived at the property, the gate was tilting inward towards the property and that it could not have fallen outward towards the curb, due to the way it was constructed; and that a section of fence would have to be completely removed in order for it to fall towards the curb.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact requiring a trial of the action by producing evidentiary proof in admissible form, in support of his position (*see Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

With respect to plaintiff's claims under the common law and Labor Law §200, where, as in this case, the injury resulted from an alleged dangerous condition, an owner or contractor may be held liable in common-law negligence and under Labor Law §200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Azad v 270 Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007]; *see Russin v Louis N. Piccado & Son*, 54 NY2d 311 [1981]; *Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; *Kehoe v Segal*, 272 AD2d 583 [2d Dept 2000]). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (*Curiale v Sharrots Woods, Inc.*, 9 AD3d 473, 475 [2d Dept 2004]; *see Lal v Citing Po Ng*, 33 AD3d 668 [2d Dept 2006]).

Here, there is no evidence that defendant Lilia Gomez exercised any control over the work site or the plaintiff's work, and or that she created the alleged dangerous condition or had actual or constructive notice of the alleged dangerous condition. With respect to Sigifredo Gomez, there is no evidence that this defendant created or had actual or constructive notice of the alleged dangerous condition (*see Pilato v 866 U.N. Plaza Associates, LLC*, 77 AD3d 644 [2d Dept 2010]; *Ortega v Puccia, supra*). Defendant Sigifredo Gomez testified that the construction fence was erected and maintained by Image Ironworks; that he personally opened and closed it many times and never

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experienced any problems; that the construction fence did not lean out towards the sidewalk; and that he never received any complaints about the construction fence or the gate. Although plaintiff testified that he informed Henry Gomez and defendant Sigifredo Gomez that the fence door inclined, and would sometimes stick when sliding, this is insufficient to establish that the defendant Sigifredo Gomez had actual or constructive notice that the fence's gate could come off its track or was in danger of collapsing and falling to the ground. Therefore, that branch of the defendants' motion which seeks to dismiss plaintiff's negligence and Labor Law §200 claims, is granted.

Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (see *Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280[2003]).

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, 348 [1988]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983-984 [2d Dept 2014]). 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, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). 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 (see *Misicki v Caradonna*, 12 NY3d at 515; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 504-505; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d at 983-984).

"Labor Law § 240 (1) and § 241 (6) contain identical language exempting from the statutes owners of one and two-family dwellings who contract for but do not direct or control the work" (*Chowdhury v Rodriguez*, 57 AD3d 121, 126 [2d Dept 2008] [internal quotation marks omitted]). This homeowner's exemption "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" (*Acosta v Hadjigavriel*, 18 AD3d 406, 406 [2d Dept 2005]). To receive the benefit of this homeowner's exemption, a defendant must demonstrate that the work was performed at a one-or two-family dwelling, and that the defendant did not direct or control the work (*Pavon v Koral*, 113 AD3d 830, 831 [2d Dept 2014]; *Morocho v Marino Enterprises Contracting Corp.*, 65 AD3d 675 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d at 126).

Here, the court need not determine whether defendants exercised the requisite degree of direction and control over the renovation of their home to impose liability under Labor Law §§ 240 (1) and 241 (6). The Labor Law § 240(1) cause of action must be dismissed because the collapse of a completed construction fence is not the type of elevated-related accident that Labor Law § 240(1) is intended to guard against (*Misseritti v Mark IV Contr. Co.*, 86 NY2d 487 [1995]; see *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 [2001]). Furthermore, the falling door of a construction

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fence is not a falling object under Labor Law § 240(1) as it was not a object being hoisted or a load that required securing that was left unsecured (*cf. Outar v City of New York*, 5 NY3d 731 [2005]). In opposition to this branch of the cross motion, plaintiff has failed to raise a triable issue of fact. Plaintiff's argument that this case falls under a falling object case is without merit. Here, there is no evidence that the wall collapsed due to a failure to provide a protective device or that the fence was improperly secured (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]). Therefore, that branch of the cross motion which seeks to dismiss plaintiff's cause of action for a violation of Labor Law § 240(1), is granted.

In order to establish his Labor Law § 241(6) claim, plaintiff must demonstrate a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In his particulars plaintiff alleges violations of 12 NYCRR 23-1.7(a)(1 & 2), 23-1.7(b), 23-1.7(d), 23-1.7(e), 23-1.21 (a-f), 23-3.1, 23-3.2, 23-3.3, 23-5.1(a-k), and 2.3.

Defendants have established, *prima facie*, that 12 NYCRR 23-1.7 (a) (1) and (2) are inapplicable to the facts of this case because the area where the accident occurred was not normally exposed to falling material or objects. In opposition, the plaintiffs failed to raise a triable issue of fact (*see Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]).

12 NYCRR 23-1.7(b) is inapplicable here as plaintiff did not fall or step into a hazardous opening. 12 NYCRR 23-1.7(d) is inapplicable as plaintiff's accident was not caused by a slippery condition. 12 NYCRR 23-1.7(e) is inapplicable as plaintiff's accident was not caused by the accumulation of dirt and debris, or other obstruction or condition that could be considered a tripping hazard. 12 NYCRR 23-21(a-f) is inapplicable as plaintiff's accident did not involve the use of a ladder.

12 NYCRR 23-3.1 provides that "[a]ny method of demolition of any building or other structure not named or described in this Subpart shall not be used unless granted special approval." This section is inapplicable as plaintiff does not allege that he was performing demolition of kind that is not named in this subpart.

12 NYCRR 23-3.2 is inapplicable, as plaintiff has not alleged that he was injured because of defendants' inadequate preparation of the work site prior to the demolition, nor does he claim that his alleged accident was due to defendant's failure to protect an adjacent structure, or that the accident arose out of defendants' failure to provide proper barricades or fences at the demolition site, or control the dust at the premises.

12 NYCRR 23-3.3 is inapplicable, as plaintiff does not allege that his accident arose out of a demolition by hand.

12 NYCRR 23-5.1 which establishes the standards for scaffolds is inapplicable as defendant

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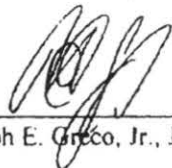
was not using a scaffold and was standing on the sidewalk at ground level when the accident is alleged to have occurred.

12 NYCRR 23-2.3 is inapplicable, as plaintiff's accident did not arise during the placing of structural steel members or the hoisting of steel panels.

Defendants have established prima facie, that none of the provisions of the Industrial Code relied upon by plaintiff are applicable to the facts and circumstances of this action. Plaintiff, in opposition has failed to raise a triable issue of fact. Therefore, that branch of the defendants' cross motion which seeks to dismiss plaintiff's Labor Law §241(6) claim, is granted.

Accordingly, plaintiff's motion is granted to the extent that the within action is restored to the active calendar, and upon restoration defendants' cross motion to dismiss the action pursuant to CPLR 3404 is denied. That branch of the defendants' cross motion which seeks, in the alternative, summary judgment dismissing the complaint in its entirety is granted. That branch of the cross motion, which seeks in the alternative, to dismiss the complaint pursuant to CPLR 3126, is denied as moot.

Dated: June 5, 2015


Rudolph E. Greco, Jr., J.S.C.

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