Sumba v Verizon N.Y. Inc.
2016 NY Slip Op 30680(U)
March 4, 2016
Supreme Court, Bronx County
Docket Number: 307940/2011
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
JUAN SUMBA,

Plaintiffs,

-against-.

VERIZON NEW YORK INC., CORBEL COMMUNICATIONS INDUSTTRIES, LLC, PROSPECT AVENUE APARTMENTS LIMITED PARTNERSHIP, and STERLING CORPORATE SERVICE INC.,

Defendants X

Index No. 307940/2011

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to 7 read on this motion **for summary judgment**

No On Calendar of **December 7, 2015**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 5**
Answering Affidavit and Exhibits	**2, 3, 6, 7**
Replying Affidavit and Exhibits	**4**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, Verizon New York, Inc., (Verizon), and Corbel Communications Industries, LLC, (Corbel), move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's claims and cross-claims as against them. Defendants, Prospect Avenue Apartments Limited Partnership, (Prospect), and Sterling Corporate Services, Inc., (Sterling), cross-move pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims as against them.

It is undisputed that Prospect's cross-motion was made in excess of 120 days from the filing of the note of issue, which is therefore untimely pursuant to CPLR 3212(a). *Kershaw v. Hosp. for Special Surgery*, 114 A.D.3d 75 [1st Dept 2013]). Accordingly, Prospect's cross-motion is denied.

This action arose as a result of personal injuries sustained by plaintiff when a piece of a drill bit, embedded in a concrete floor, broke off and struck plaintiff in the eye. Plaintiff was

Serv., 249 AD2d 210, 210-211 [1998]; *Pacheco v South Bronx Mental Health Council*, 179 AD2d 550, 551 [1992], *lv denied* 80 NY2d 754 [1992]; *see also Brezinski v Olympia & York Water St. Co.*, 218 AD2d 633, 634-635 [1995]).

(*Artiga v Century Management Co.*, 303 AD2d 280 [1st Dept 2003]).

Accordingly, the Labor Law 200 and Common Law negligence Claims of plaintiff are dismissed as against Corbel and Verizon.

LABOR LAW 241(6)

Labor Law 241(6) is violated when a specific Industrial Code is violated. *Ross v Curtis-Palmer* 8 NY 2d 494 (1994). Plaintiff claims one violation of the industrial code, Section 23-1.8(a).

Section 23-1.8(a) provides that:
(a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

It is clear that plaintiff was not performing any of the three enumerated activities, chipping, cutting or grinding that would require eye goggles to be worn under section 23-1.8(a). However, there is scant evidence of whether plaintiff's activity in attempting to free the drill bit was "engaged in [an] operation which may endanger the eyes." Plaintiff's co-worker, Bruno Dejesus, (Dejesus), testified that googles were worn during new construction which this was not, or worn when "banging on stuff." (Transcript p. 53). While plaintiff denied banging on the drill bit in his testimony, DeJesus testified that plaintiff told him he was banging on the drill bit with a hammer. Clearly, there is an issue of fact as to whether plaintiff should have been provided eye protection under Section 23-1.8(a).

Defendants also argue that plaintiff was not engaged in construction, demolition or excavation at the time of plaintiff's injury citing to *Sarigul v. New York Tel. Co.,* 4 A.D.3d 168

(1st Dept 2004). However, in *Sarigul* the wire was already installed and was being modified, unlike in the facts at bar where the cable was a new installation. The facts of this case are more similar to *Joblon v. Solow,* 91 N.Y.2d 457, 465 [1998]). "Bringing an electrical power supply capable of supporting the clock to the mail room, which required both extending the wiring within the utility room and chiseling a hole through a concrete wall so as to reach the mail room is more than a simple, routine activity and is significant enough to fall within the statute." *Id.*

Accordingly, that branch of Corbel and Verizon's motion that seeks dismissal of the Labor Law 241(6) cause of action is denied.

CONTRACTUAL AND COMMON LAW INDEMNIFICATION

"Common-law indemnification requires that the one made subject to the obligation be a primary or principal wrongdoer; for his negligence he is held liable to one who has been cast in damages to the injured party." *Allman v Siegried Const. Co., Inc.*, 49 AD2d 357, 360 (4th Dept 1975). (Citations omitted).

As was held above, plaintiff's claims for common law negligence as against Verizon and Corbel were dismissed. Therefore, the cross-claim of Prospect Avenue Apartments Limited Partnership, (Prospect), for common law indemnification is dismissed.

With respect to that branch of Verizon and Corbel's motion seeking to dismiss Prospect's claim for contractual indemnification, the contract between Verizon and Prospect cannot be found in Verizon and Corbel's moving papers. Moreover, Verizon and Corbel argue for dismissal of the contractual indemnification claims against them in a mere two conclusory paragraphs of the moving affirmation (par. 50 and 51), without any reference to the exhibit in which the contract was submitted. Accordingly, the motion is denied with respect to dismissal of the contractual indemnification claims.

attempting to remove the drill bit from the floor. Plaintiff was employed by non-party, CRHMDU. CRHMDU was a sub-contractor for Corbel, which, in turn, was a subcontractor of Verizon. Plaintiff and his supervisor, Mr. Dejesus, a CRHMDU employee, were installing micro-duct for FIOS wiring in apartment 2C in the subject premises.

Plaintiff alleges common law negligence, and violations of Labor Law 200 and 241. An allegation of violation of Labor Law 240 was alleged in the complaint but not the Bill of Particulars. Furthermore, Labor Law 240 is not briefed in the motion papers. It is clear under the facts of this case that Labor Law 240 was not violated and thus is dismissed.

COMMON LAW NEGLIGENCE AND LABOR LAW 240

> 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.

(Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 877 [1993]) (citations omitted).

There is no opposition to the portion of Corbel's motion that seeks dismissal of Common Law negligence and Labor Law 200 claims as against Corbel.

With respect to any supervision regarding the removal of the drill bit, plaintiff testified that he told a Verizon technician that he had to remove the drill bit stuck in the concrete, and further testified that the Verizon technician had no response. (Transcript, page 45). Moreover, plaintiff testified that no one from Corbel nor Verizon ever told him how to do his work or the means and methods to perform his work. (Transcript, p. 47.) Plaintiff testified that all of the equipment needed to do the job were provide by CRHMDU. (Transcript, page 46).

> [M]ere oversight of the timing and quality of the work performed is not equivalent to direct supervision and control and is thus insufficient to support the imposition of liability under Labor Law 200. (*See Gonzalez v United Parcel*

CONCLUSION

The Labor Law 200 and Common Law negligence claims of plaintiff are dismissed as against Corbel and Verizon. The cross-claims of Prospect for common law indemnification are dismissed as against Corbel and Verizon. The branch of Verizon and Corbel's motion that seeks dismissal of the Labor Law 240(6) claims against them is denied. That branch of Verizon and Corbel's motion that seeks to dismiss the cross-claim of Prospect for contractual indemnification is denied. Prospect's cross-motion is denied.

The foregoing shall constitute the decision and order of the Court.

Dated: MAR 04 2016

KENNETH L. THOMPSON JR. J.S.C.