

Gonzalez v City of New York
2016 NY Slip Op 30689(U)
April 1, 2016
Supreme Court, Queens County
Docket Number: 1219/14
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

CHRISTOPHER GONZALEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index
Number 1219/14

Motion
Date January 21, 2016

Motion Seq. No. 3

Motion Cal. No. 48

The following papers numbered 1 to 14 read on this motion by defendants seeking summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1- 8
Answering Affirmation - Exhibits	9- 11
Reply Affidavit - Exhibits	12- 14

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment seeking dismissal of the complaint, pursuant to CPLR 3212, is determined as follows:

Plaintiff, an apprentice lather employed by nonparty, Presco Contracting, LLC (Presco), allegedly sustained serious personal injuries while working at a school construction project located at 88-08 154th Street, Queens, New York, on July 8, 2013. Defendant, School Construction Authority (SCA) was the owner of the premises, which hired defendant, Silverite Construction Company, Inc. (Silverite) to be general contractor on the job. Silverite hired Presco to install reinforcing material for concrete. Plaintiff alleges he was injured when, at the direction of his foreman, while moving rebar located on a dirt hill at the job site, he stepped into a hole, injuring his left knee. Defendants seek

summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212, which complaint claims violations of Labor Law §§ 200, 240, 241, and common-law negligence.

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]).

Plaintiffs' complaint contains a cause of action for violations of Labor Law § 240 (1). Defendants have established that such statute is inapplicable to the instant accident, and plaintiff has failed to oppose such contentions. Consequently, such facts are admitted, and defendants' motion is granted with regard to plaintiff's claims based upon Labor Law § 240 (1) (see, *Giliya v. Warren*, 30 AD3d 420 [2006]; *Mascoli v. Mascoli*, 129 AD2d 778 [1987]).

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 Contr. 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 v. Cataletto*, 117 AD3d 974 [2014]; *Reyes v. Arco Wentworth Management Corp.*, 83 AD3d 47 [2011]; *Ortega v. Puccia*, 57 AD3d 54 [2008]).

Defendants' 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, defendants, being the owner and general contractor at the subject workplace, have a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of defendants (*see, St. Louis v. Town of North Elba*, 16 NY3d 411 [2011]). To prevail on summary judgment under this section, defendants must establish 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 §§ 23-1.5 (a) and (c); 23-1.7 (b), (d) and (e); and 23-2.1; along with all "applicable" OSHA regulations; provisions of the Rules of the Board of Standards and Appeals; and provisions of the Administrative Code of the State of New York, either do not apply, were not violated, or cannot serve as the

basis for a Labor Law § 241 (6) claim herein. Plaintiffs' opposition has either failed to address such contentions, or has failed to convince the court otherwise. Consequently, such facts as presented by defendants are admitted, and defendants' motion is granted with regard to the above-alleged statutory violations (*see, Giliya v. Warren*, 30 AD3d 420; *Mascoli v. Mascoli*, 129 AD2d 778).

However, defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Defendants have failed to eliminate all triable issues of fact as to whether defendants created the hazardous condition; whether they had, or should have had, notice of the hazardous condition on the premises in reasonable time to correct same; whether defendants conducted reasonable inspections of the area; when the last such inspection of the area was performed; for how long said condition existed; and whether the condition which allegedly caused the accident should have been apparent upon a proper visual inspection of the 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]). Further, contrary to what defendants' characterize their own submitted photograph of the accident site to depict, due to the poor quality of the photocopies submitted, the court is unable to discern the condition portrayed therein. The "interpretation of the photographs in evidence ... are the essence of the jury's function" (*Somersall v New York Telephone Co.*, 52 NY2d 157, 167 [1981]; *see, Maresca v. Lake Motors, Inc.*, 32 AD2d 533 [1969]), and the court will not usurp that prerogative in the instant matter.

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 defendants' motion for summary judgment seeking dismissal of plaintiff's claims alleging violations of Labor Law § 240 (1), and all alleged Industrial Code, Administrative Code, Rules of the Board of Standards and Appeals, and OSHA provisions, pursuant to Labor Law § 241 (6), is granted. The branches of defendants' motion for summary judgment seeking dismissal of plaintiff's claims arising from alleged violations of Labor Law § 200 and common-law negligence, are denied.

Dated: April 1, 2016

Howard G. Lane, J.S.C.

