

<b>Hunter v Metro N. Gardens Hous. Dev. Fund</b>
2016 NY Slip Op 31416(U)
July 22, 2016
Supreme Court, New York County
Docket Number: 155541/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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JEROME HUNTER,

Index No.: 155541/12

Plaintiff,

-against-

METRO NORTH GARDENS HOUSING DEVELOPMENT  
FUND and SAFEWAY WRECKING CORP.,

Defendants.  
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JOAN A. MADDEN, J.

In this action arising out of an accident at a construction site, defendant Safeway Wrecking Corp (“Safeway”) moves for summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiff and defendant Metro North Gardens Housing Development Fund (“Metro North”) oppose the motion.

Background

Plaintiff alleges he was injured on April 16, 2012, while working at 250 East 105<sup>th</sup> Street in Manhattan (“the premises”), which is owned by Metro North. Plaintiff was employed by non-party Citi Structure LLC (“Citi Structure”), which was performing renovations at the premises at the time of the accident. The accident occurred when a ramp being used by plaintiff to dispose of a dumpster full of garbage collapsed, causing the dumpster to fall on plaintiff’s foot. The complaint alleges causes of action based on violations of Labor Law §§ 200, 241(6) and 240(1), and for negligence.

After some discovery had been conducted, but no depositions had been taken, Safeway moved for summary judgment, arguing that it is not subject to liability under Labor Law as it is

not an owner, contractor or an agent of an owner or contractor. Safeway also argued that the negligence allegations in both plaintiff's bill of particulars and interrogatory responses concern defects in the ramp and not the dumpster or container supplied by Safeway.

In support of its motion, Safeway submitted the affidavit of its President, Anthony Grigoli and an affidavit of Ravi Reddy, a principal of Citi Structure. Both Mr. Grigoli and Mr. Reddy state that Safeway's only role at the premises was to rent out dumpsters to Citi Structure and then truck away the dumpsters that had been filled with construction debris and garbage. They also stated that Safeway was not responsible for supervising any work or performing actual construction work and had no role in constructing the ramp. Safeway also attached its contract with Citi Structure to support its position that its role at the site was limited to renting and picking up the containers/dumpsters.

Metro North opposed the motion as premature, arguing that it was entitled to discovery as to Safeway's claim that it had no role with respect to the subject ramp. Metro North further argued that the statements in the affidavits of Mr. Grogoli and Mr. Reddy were conclusory and without factual support. Metro North pointed out that Mr. Grogoli admitted in his affidavit that he never went to the site, and that Safeway's only employee there was the truck driver who delivered and picked up the dumpsters. Metro North also argued that the contract between Safeway and Citi Structure is not dispositive of what actually happened at the site. Plaintiff also opposed the motion based on Metro North's arguments.

By interim order dated August 12, 2015, the court adjourned the summary judgment motion, directed that plaintiff and Metro North be deposed on or before September 15, 2015, and

provided dates for the submission of supplemental papers following depositions. The depositions have now been held and the supplemental papers submitted.

At his deposition, plaintiff testified that on the accident date he was working as a laborer employed by Citi Structure, and that his duties were to throw out the garbage and debris, push the dumpsters, sweep and do general cleaning (Pl. Dep, at 9-10). To get the dumpsters ready for pick up, plaintiff would fill them up in the backyard of the premises where he would “put them in a storage spot lining them up” (Id, at 11). The truck that picked up the dumpsters came to the front of the premises (Id). Plaintiff testified that he would not empty the dumpsters and that his job was to fill them and take them to the truck. (Id, at 12). Plaintiff testified that his work was supervised by “Darrin” and “Ron” who were both employed by Citi Structure, and that no one from Safeway supervised his work (Id, at 19-20).

According to plaintiff, the only Safeway employee at the premises at the time of the accident was its truck driver, and that he spoke to the truck driver to say good morning (Id, at 20). Plaintiff also testified that the dumpsters belonged to Safeway, and had Safeway’s name on them. (Id, at 21, 45-46). He also testified that the ramp used to push the dumpsters to the truck belonged to Safeway, and that he observed Safeway’s truck driver bring the ramp, place it and remove it ramp, although on the date of the accident he did not observe the truck driver placing the ramp since he was doing another job in the back at the time the ramp would have been placed. (Id, at 39-40). He testified that the ramp was made of metal and was about three feet long and three feet wide, and that the ramp sat on the curb that was approximately six inches high (Id, at 34-35).

On the morning of the accident, which was on a Monday, plaintiff prepared the dumpsters, which had been filled the Friday before, for lining them up and pushing them out (Id, at 28-29). The dumpsters were already full and his job was to bring the dumpsters to the top of the ramp and then push them down the ramp in order for Safeway to unload them (Id, at 29-30). The dumpsters had four wheels, one in the front, two on the side, and one in the back (Id, at 42-43). Plaintiff testified that at the time of the accident, he was pushing the dumpster when the ramp collapsed (Id, at 52). Specifically, plaintiff testified that he was “[p]ushing the dumpster from the sidewalk to the street when the platform (i.e. the ramp) fell out, it pulled me over and the dumpster fell on my foot” (Id, at 45, 81-82). Additionally, plaintiff responded “yes,” when asked whether when he said the ramp fell out, he meant “the ramp actually dropped to the street” (Id, at 45-46). When asked what he meant by the ramp collapsing, he testified that when he went “down the ramp, the ramp move[d] when it moves, the dumpster tumbled over” (Id, at 74). In response to a question as for whether any part of the dumpster was on the ramp at the time of the accident, he replied “one wheel, the front wheel” (Id, at 42). He further testified that at the time the ramp collapsed, “it fell over so the weight of it pulled me and it pulled me to the side and the dumpster fell on my foot on the side” (Id., at 53). Plaintiff’s left foot got caught under the dumpster and it stayed there for three or four seconds (Id, at 55). Plaintiff testified that the ramp was not broken or defective, but that it “could have been placed on the curb better than it was” (Id, at 84). He also testified that he had observed the ramp fall on four or five prior occasions and that at least one of those times he observed the Safeway driver “reset the ramp” (Id at 88, 93).

Jose Velez, the superintendent of the premises, testified on behalf of Metro North. According to Velez, at the time of the accident Citi Structure was renovating certain apartments at the premises (Velez Dep, at 20). He knew plaintiff as a Citi Structure employee who was hired to clean and move containers containing construction debris (Velez Dep, at 22). He identified Safeway as a private carting company hired to remove the garbage that was placed in "mini containers," which he described as approximately four feet long and two feet wide with four wheels; the mini-containers had Safeway written on them (Id, at 23-26). He testified that the mini-containers arrived at the premises when the construction project began and that there were 35 to 40 such containers at the premises on the accident date (Id, at 27, 31).

According to Velez, Safeway picked up the debris once or twice a week (Id, at 36). He testified that plaintiff and other Citi Structure employees would bring the containers from the sidewalk to the roadway, and the truck driver would place the metal plate of the curb and on the roadway to act as a ramp, and the truck driver had an area in the truck where he would get the metal plate and then put it back (Id, at 44-46). Velez testified that he had observed the metal ramp fall from the curb to the roadway about 20 times before the accident date (Id, at 49), He later clarified that he had not seen the plate fall but that he had observed the truck driver set the plate down about 20 times before the accident (Id, at 86-87).

In its supplemental opposition, Metro North argues that there are triable issues of fact as to whether the actions of Safeway, including placing the metal plate used as a ramp, caused or contributed to plaintiff's injuries. Metro North also argues that evidence that Safeway brought and selected the metal plate used as a ramp and determined the location where the containers

would be lowered to the street from the sidewalk is sufficient to raise issues of fact as to whether Safeway is an agent of an owner or contractor for the purposes of Labor Law §§ 240(1) and 241(6).

As for plaintiff, in his supplemental opposition he argues that issues of fact exist as to whether Safeway is a statutory agent of the owner or contractor in connection with the collection and removal of the debris. In support of its position, plaintiff asserts that under its contract with Citi Structure, Safeway was obligated not only to supply the mini containers used for debris removal but also was to access the mini containers and remove debris and, in support of his position, points to the deposition testimony of plaintiff and Velez as to Safeway's role in selecting, placing and removing the ramp. As for Labor Law § 240(1), plaintiff further argues that the statute applies since plaintiff was engaged in a covered activity at the time of his injuries and that the accident occurred as the result of an elevation risk.

In reply, Safeway argues that the deposition testimony of plaintiff and Velez are insufficient to raise an issue of fact as to whether its truck driver placed the ramp on the accident date, noting that plaintiff testified that on the morning of the accident, he did not see the truck driver place the ramp. Safeway also argues that plaintiff has not demonstrated that the placement of the ramp was a proximate cause of his injuries, noting that plaintiff testified that the six prior times that he used the ramp, it was not placed any differently than it was on the date of the accident. Safeway further argues that the six inch height differential from the street to the sidewalk did not create an elevation risk for the purposes of Labor Law § 240(1).

## Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Under Labor Law §§ 240(1) and 241(6), the duties of protection expressly apply to "[a]ll contractors and owners and their agents." See Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 (1981). At issue here is whether the record raises an issue of fact as to whether Safeway is an "agent" of the owner, Metro North, or the general contractor, Citi Structure. With regard to liability of a contractor or other third party as a statutory agent, the Court of Appeals has written that:

Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections... the duties themselves may in fact be delegated..... When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these

provisions.

Id. at 317-318.

Thus, whether a contractor is a statutory agent under sections 240(1) and 241(6) depends on whether such contractor has the authority to supervise and control the work giving rise to a plaintiff's injuries. Here, Safeway has provided evidence showing that Safeway did not have authority to supervisor or control plaintiff's work and did not exercise such supervision or control. In particular, Safeway points to plaintiff's testimony that he was supervised exclusively by his employer Citi Structure, and that the only employee from Safeway who was at the premises was its truck driver, who did not supervise or control his work.

Plaintiff and Metro North fail to controvert this showing. First, evidence that Safeway brought and selected the metal plate used as a ramp and determined the location where the containers would be lowered to the street from the sidewalk is insufficient to raise an issue of fact as to whether Safeway had authority to supervise and control plaintiff's work. See Serpe v. Eyris Productions, Inc., 243 AD2d 375, 380 (1<sup>st</sup> Dept 1997)(noting that "the determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed" [internal citations omitted]); Sabato v. New York Life Ins. Co., 259 AD2d 535 (2d Dept 1999)(subcontractors working on a project to build a chimney were not liable as a statutory agents where they did not exercise any supervisory authority or control over plaintiff's work).

Next, with respect to plaintiff's argument that the terms of the contract between Citi Structure and Safeway do not give rise to triable issues of fact as to whether Safeway had the

authority to supervise and control plaintiff's work, such argument is without merit. The contract, which consists of a one page proposal on Citi Structure's letterhead signed by a Safeway representative, provides the project location, the pricing for the delivery and removal of the mini container and trucks, and further provides as terms and conditions that "Safeway ...shall not be held accountable for any damages or claims that may arise from the rental of any dumpster or mini container placed and the above project location." Notably, the contract imposes no obligation on Safeway to control, direct or supervise the work of plaintiff or any employee of Citi Structure. Compare Tuccillo v. Bovis Lend Lease, Inc., 101 AD3d 625 (1<sup>st</sup> Dept 2012)(contractor was a statutory agent for the purposes of the Labor Law where its contract gave it the authority to supervise and control the work performed by the plaintiff). Furthermore, plaintiff's apparent argument that Safeway's authority to supervise and control plaintiff's work can be implied from absence of any terms in the contract requiring such supervision or control by Citi Structure is without legal basis. Accordingly, as Safeway is not a statutory agent for the purposes of section 240(1) and 241(6), these claims must be dismissed against Safeway and the court need not reach the other arguments raised by the opposing parties, including whether the accident was caused by an elevation risk.

The claims asserted against Safeway under Labor Law § 200 must also be dismissed. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor (and their agents) to provide construction site workers with a safe place to work' [citation omitted]" Cruz v Toscano, 269 AD2d 122, 122 (1<sup>st</sup> Dept 2000).

Labor Law § 200 (1) states, in pertinent part, as

follows:

“1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition. See McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 (2d Dept 2007). “Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor [or an agent] created the condition or had actual or constructive notice of it.” Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (1<sup>st</sup> Dept 2012). In contrast, in order to find liability under Labor Law § 200 for defects or dangers arising from a subcontractor’s methods or materials, it must be shown that the defendant exercised some supervisory control over the injury-producing work. Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993)(no Labor Law § 200 liability where plaintiff’s injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved).

Here, the injury producing condition arose out of the means and methods of the work, as opposed to an existing defect or dangerous condition, so that to impose liability under section 200, it must be shown that the defendant had supervisory control over method and manner of the work. DeSimone v. Structure Tone, Inc., 306 AD2d 90 (1<sup>st</sup> Dept 2003). As stated above in

connection with the dismissal of the Labor Law §§ 240(1) and 241(6) claims, the record is devoid of evidence that Safeway controlled or supervised plaintiff's work, and therefore the Labor Law § 200 claims must be dismissed as against Safeway.

On the other hand, "[a] subcontractor may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area." Ortiz v. I.B.K. Enterprises, Inc., 85 AD3d 1139, 1139 (2d Dept 2011) (internal citations and quotations omitted). "An award of summary judgment in favor of a subcontractor on a negligence claim is improper where the evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries." Erickson v. Cross Ready Mix, Inc., 75 AD3d 519, 523 (2d Dept 2010), lv dismissed, 16 NY3d 794 (2011)(internal citations omitted).

Here, the record raises issues of fact as to whether Safeway created the condition on which plaintiff fell based on evidence that its employee placed the metal ramp used to access the truck. Specifically, plaintiff testified that as he was moving the dumpster towards the ramp, the ramp moved and dropped to the street, causing the dumpster to fall, and plaintiff's foot got caught under the dumpster. Plaintiff further testified that although on the date of the accident, he did not see Safeway's driver position the ramp, in the past, such employee had done so, and that, on the accident date, when plaintiff returned from the rear of the building with the dumpsters, the ramp was in position. In addition, Velez testified that he observed Safeway's driver place the ramp at least 20 times. Based on this evidence, an inference can be drawn that the Safeway

employee positioned the ramp, and issues of fact exist as to whether Safeway was negligent in the manner and location in which its employee placed the ramp, and/or whether the ramp's configuration and composition with respect to the weight of the dumpsters caused the accident. Accordingly, Safeway is not entitled to summary judgment dismissing the common law negligence claim against it.

Conclusion

In view of the above, it is

ORDERED that Safeway's motion for summary judgment is granted to the extent of dismissing the claims against it alleging violations of Labor Law sections 240(1), 241(6), and 200, and is denied with respect to the common law negligence claims asserted against; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 22 2016

  
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J.S.C.

HON. JOAN A. MADDEN  
J.S.C.