

**Busey v 1714 Linden, LLC**

2016 NY Slip Op 32074(U)

October 13, 2016

Supreme Court, Queens County

Docket Number: 5658/14

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

DRUSUS BUSEY and SHABANA AHMAD,

Plaintiffs,

-against-

1714 LINDEN, LLC and RANCO CAPITAL,  
LLC,

Defendants.

Index No: 5658/14

Motion Date: 6/14/16

Motion Seq. No.: 4

1714 LINDEN, LLC

Third-party Plaintiff,

-against-

C. PERSAUD CONSTRUCTION CORP.,

Third-party Defendant.

The following papers numbered 1 to 9 read on this motion by defendant, 1714 Linden, LLC (defendant) for summary judgment in its favor dismissing the complaint pursuant to VCPLR 3212 and dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is determined as follows.

In this action alleging negligence and violation of Labor Law §§ 200, 240(1) and 241(6), plaintiff seeks to recover for injuries he sustained on March 25, 2014 while employed as a laborer/helper for C. Persaud Construction, Inc.(Persaud) on a construction/renovation project at the premises owned by

defendant 1714 Linden, LLC (Linden). Linden hired Persaud to perform construction/renovation at the subject premises.

Plaintiff asserts that, on the day of the accident, Mr. Persaud, told him to work with a skilled laborer, also an employee of Persaud, who was framing out spaces in the basement and installing metal tracking along the floor and walls. A Hilti nail gun was used to mount the metal tracking to the concrete floor. The plaintiff alleges that the skilled worker after demonstrating how to use the Hilti gun, reloaded the Hilti gun and handed it over to plaintiff. Plaintiff maintains that while he was on his knees, bent over the metal track and upon firing the Hilti gun for the fourth time, a nail or shrapnel flew up into his eye. Plaintiff alleges that he was not provided with any safety devices including eye protection.

Defendant now moves for summary judgment dismissing all causes of action asserted in the complaint.

The branch of the defendant's motion to dismiss the plaintiff's cause of action based upon the alleged violation of Labor Law § 240(1) is granted on consent and this claim is dismissed.

The branch of the defendant motion to dismiss the plaintiff's Labor Law § 241(6) cause of action based on the ground that plaintiff has failed to allege the violation of any specific provision of the Industrial Code in support of this claim is denied.

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents regardless of whether they exercised supervision or control over the work site 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 Rizzuto v L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]; Ross v Curtis Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993] ). To prevail on a Labor Law § 241(6) claim, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (see Ross v Curtis-Palmer Hydro-Elec. Co., supra at 503-505). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (see Rizzuto v L.A. Wenger Contr. Co., supra at 349).

It is undisputed that the plaintiff did not set forth the

specific sections of the Industrial Code he relies upon to support his Labor Law §241(6) claim in either his Verified Complaint or Verified Bill of Particulars. However, the failure to do so is not fatal to such a claim (see Klimowicz v Powell Cove Assoc., LLC, 111 AD3d 605, 606 [2013]; Galarraga v City of New York, 54 AD3d 308, 310 [2008]).

In opposition to the defendant's motion the plaintiff demonstrated that the facts alleged in the bill of particulars together with the deposition testimony of the plaintiff are sufficient to put the defendants on notice of the substance of the plaintiff's claims, i.e. failure to provide personal protection equipment, including eye protection. In addition, plaintiff submitted proof that on May 16, 2016 he served a Further Bill of Particulars citing the violation of Industrial Code § 23-1.5 and § 23-1.8 et. seq., and that he expressly reserved the right to do so in his Verified Bill of Particulars.

Defendant's objection, in reply, to consideration of the Further Bill of Particulars on the ground that it was served without leave of court, after the note of issue was filed and only after defendant moved for summary judgment is without merit.

The defendant is correct in that plaintiff should have sought leave from the court prior to serving the supplemental pleading (see CPLR 3025[b]; CPLR 3042[b]; Rosse-Glickman v Beth Israel Medical Center, 309 AD2d 846 [2003]; Barrera v City of New York, 265 AD2d 516 [1999]). However, where, as here, no new factual allegations or theories of liability are raised, the defendant had knowledge of the facts and circumstances of the plaintiff's claim and had an opportunity to conduct discovery regarding this claim, and defendant has failed to demonstrate any actual prejudice resulting from the delay in pleading, the court may consider alleged Industrial Code violations raised for the first time in opposition papers to a summary motion or may, sua sponte, grant plaintiff leave to amend his or her bill of particulars to add such allegations (see Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]; Klimowicz v Powell Cove Assoc., LLC, supra at 607; Latino v Nolan and Taylor-Howe Funeral Home, 300 AD2d 631, 633-634 [2002]; Kelleir v Supreme Indus. Park, 293 AD2d 513, 514 [2002]).

Industrial Code 23-1.8(a) cited in the plaintiff's Further Bill of Particulars is sufficiently specific to support plaintiff's Labor Law § 242(6) claim (see Montenegro v P12, LLC, 130 AD3d 695 [2015]) and defendant failed to submit any evidence to establish, prima facie, that this provision is inapplicable to this case or that it was not violated (see Kun Yong Ke v Oversea

Chinese Mission, Inc., 49 AD3d 508 [2008]). However, to the extent that plaintiff relies upon Industrial Code § 23-1.5, this provision merely sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (see Ulrich v Motor Parkway Properties, LLC, 84 AD3d 1221, 1224 [2011]).

Accordingly, the defendant's motion to dismiss the plaintiff's claim based upon the alleged violation of Labor Law § 241(6) predicated upon the alleged violation of Industrial Code § 23-1.8 is denied. However, insofar as this claim is predicated upon the violation of Industrial Code § 23-1.5 it is granted.

The branch of the defendant's motion to dismiss the plaintiff's Labor Law § 200 claim is granted.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor to maintain a safe construction site ( see Rizzuto v L.A. Wenger Contr. Co., supra at 352; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Where, as here, the claim arises out of the means, and methods of the work, the owner may be held liable only if the owner had the authority to supervise or control the performance of the work, even where the owner does not actually exercise this authority ( see Cody v State, 82 AD3d 925, 927 [2011] citing Ortega v Puccia, 57 AD3d 54, 62 n. 2 [2008]; Clavijo v Universal Baptist Church, 76 AD3d 990 [2010]). However, general supervisory authority, including the authority to review or stop the contractor's work if a safety violation is noted, or for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability Labor Law § 200 (see Harrison v State, 88 AD3d 951, 953 [2011]; Ortega v Puccia, 57 AD3d 54, 62 [2008]; Capolino v Judlau Contracting, Inc., 46 AD3d 733, 735 [2007]; Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" ( Cody v State, supra at 927 quoting Ortega v Puccia, supra at 62).

The defendant made a prima facie showing that it neither directly controlled nor supervised plaintiff's work, or had any input into how plaintiff and his co-worker built the partitions in the basement, so as to impose liability pursuant to Labor Law § 200 or common law negligence.

In support of this branch of the motion the defendant submitted the deposition testimony of Isaac Rosenberg,

defendant's manager, who testified that although the building was being renovated it was partially occupied by tenants and he went to the project every couple of days. He further testified that he never gave the workers any instructions and if he observed any unsafe or dangerous condition he would tell Mr. Persaud. He also testified that he observed that the workers did not wear hard hats or eye protection during the project.

The plaintiff testified that he always met Mr. Persaud at his home and then Mr. Persaud took him to a specific construction site and told him where and with whom to work. On the day of his accident, Mr. Persaud took him to the subject location and directed him to work with the skilled laborer in the basement. Plaintiff's testimony shows that he received all his instructions as to where and with whom to work from Mr. Persaud and neither Mr. Rosenberg nor the individual owner present at the site direct or control the means or methods of the work performed by plaintiff.

In opposition, plaintiff failed to raise a triable issue of fact. The plaintiff's deposition testimony that one or more of the individual owners would come to the work site every day "Looking over how the work was done and make sure the work is done properly" and tell him to make sure the garbage goes out, everything was clean, that the walkways were clear is insufficient to raise a triable issue of fact. Such conduct is merely the owner's general supervisory authority over the construction site and is not a sufficient basis for imposing liability pursuant to Labor Law § 200 (see Ortega v Puccia, supra at 62; Capolino v Judlau Contracting, Inc., supra at 735). With respect to the defendant's regarding the lack of safety equipment such as hard hats and eye protection, liability pursuant to Labor Law § 200 will not be imposed on an owner solely because it may have had notice of the allegedly unsafe manner in which work was performed (see Comes v New York State Elec. & Gas Corp., supra at 877).

The branch of the defendant's motion to dismiss this action as being barred by Worker's Compensation Law §11, on the ground that the defendant was the plaintiff's employer is denied.

"In general, workers compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury arising out of and in the course of employment" ( Billy v Consolidated Mach. Tool Corp., 51 NY2d 152, 156 [1980]; Maropakakis v Stillwell Materials Corp., 38 AD3d 623, 623 [2007]; see Workers' Compensation Law §§ 11, 29[6]). "Since primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in

the Workers' Compensation Board, it is inappropriate for the courts to express views with respect thereto pending determination by the board " (Siekkeli v Mark Mariani, Inc., 119 AD3d 766, 768 quoting Monteiro v Rasraj Foods & Catering, Inc., 79 AD3d 827, 829 [2010], quoting Botwinick v Ogden, 59 NY2d 909, 911 [1983][internal quotation marks omitted]). Thus, the issue of whether the defendant was the plaintiff's employer is an issue of fact that is properly resolved in the first instance by the Workers' Compensation Board (see Monteiro v Rasraj Foods & Catering, Inc., 79 AD3d at 829; O'Rourke v Long, 41 NY2d 219, 224, 227-228 [1976]).

Dated: October 13, 2016  
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J.S.C.