Murray v Eastern Suffolk BOCES
2016 NY Slip Op 32522(U)
October 3, 2016
Supreme Court, Suffolk County
Docket Number: 20917-2015
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 20917-2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:
HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Date: 6/23/16
Adjourn Date: 7/28/16
Motion Seq #: 001 MG, CASE DISP.

Motion Date: 7/1/16
Adjourn Date: 7/28/16
Motion Seq#: 002 MG, CASE DISP.

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RUSSELL MURRAY,

Plaintiff,

-against-

EASTERN SUFFOLK BOCES, THE TOWN OF ISLIP, THE COUNTY OF SUFFOLK, THE VILLAGE/HAMLET OF SAYVILLE & SCHOOL CONSTRUCTION CONSULTANTS INC.

Defendants.

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Upon the following papers numbered read the pending Motions for Summary Judgment; Notice of Motion pursuant to CPLR 3212 and Affirmation in Support of Michael S. Congdon, Esq. dated June 1, 2016, Exhibits A – G; Notice of Motion pursuant to CPLR 3212 and Affirmation in Support of Christopher A. Jeffreys, Esq. dated May 19, 2016; Memorandum of Law in Support, Exhibits A – G; Affirmation in Opposition of Robert G. Abruzzino, Esq. dated April 25, 2016, Exhibits A – C; Affirmation in Opposition of Joseph M. Puzo, Esq. dated May 12, 2016; Reply Affirmation in Further Support of Michael S. Congdon, Esq. dated May 17, 2016; Reply Affirmation of Christopher A. Jeffreys, Esq. dated July 20., 2016, Exhibit A; it is,

ORDERED that the separately noticed motions pursuant to CPLR 3212 seeking summary judgment by defendants Eastern Suffolk BOCES and County of Suffolk are **GRANTED** for the reasons stated below.

Plaintiff Russell Murray brought this Labor Law negligence action stemming from an accident and injuries suffered which occurred on December 22, 2014 while working on a construction site located at 100 Greene Avenue, Sayville, New York. Murray employed as a structural steel fabricator and erector for Waverly Iron Corp., a subcontractor hired by general contractor School Construction Consultants, Inc. was engaged in welding steel joists to a concrete block wall forming the foundation for an extension construction project for a building leased by Eastern Suffolk BOCES ("BOCES"). The project was anticipated to provide an extension onto the building for a girl's athletic locker room. While attempting to negotiate the joist to obtain measurements before welding, Murray fell 11 feet onto a concrete pad floor, sustaining injuries to his left ankle, wrist, and exacerbating preexisting back injuries.

Murray filed a claim with New York State Worker's Compensation which is still pending. He also brought the instant action filing a summons and complaint on December 7, 2015 against defendants BOCES, Suffolk County, Town of Islip, Village or Hamlet of Sayville, and School Construction Consultants, Inc. Issue was joined with BOCES interposing its answer on January 8, 2016, Suffolk on January 4, 2016, and Islip on February 2, 2016 respectively. Thereafter, BOCES filed a cross-claim against defendants Suffolk and Islip, which was also answered. To date, neither Sayville nor School Construction Consultants, Inc. have appeared or answered in this action.

Presently pending before the Court are motions by BOCES and Suffolk seeking summary judgment dismissing the Complaint. BOCES argues that since it leased, and did not own the building comprising the situs of plaintiff's accident, it is entitled to summary judgment it did not hire the contractors employing plaintiff at the time of the incident; it did not control, manage or direct the work performed; it did not derive any benefit of the construction; the construction, which was for the purpose of creating an extension on BOCES' leased premises was outside the scope of its lease arrangement with premises owner, Sayville Union Free School District. Suffolk moves for much the same reason arguing that since it did not own or occupy the premises leased by BOCES, it owed plaintiff no duty of care, and like BOCES, since Sayville School District owned the premises, it too had no involvement in the construction extension project causing or contributing to plaintiff's alleged injuries. Both parties submit affidavits which taken together establish that neither BOCES nor Suffolk County owned 100 Greene Avenue, nor hired the contractors who performed the construction.

Further, BOCES has proffered its lease agreement stating that use of athletic ballfields and facilities was the province and prerogative of the premises owner and lessor Sayville School District. Suffolk on its part has provided a copy of the construction agreement between plaintiff's employer, non-party Waverly Iron Corp. and general contractor School Construction Consultants, Inc., which on its first page expressly denotes the Board of Education, Sayville Union Free School District as premises owner.

Arguing in opposition to BOCES' motion, plaintiff contends that the application is premature since paper discovery has not yet been exchanged nor depositions held. Plaintiff additionally argues that signage on the building forming the construction extension worksite displayed that Eastern Suffolk BOCES owned or operated the premises, constituting a triable issue of fact precluding

summary judgment. Stated more specifically, Murray asserts that the signage present at the worksite stands in sharp contrast and direct contravention of BOCES' affidavit testimony denying ownership, requiring discovery to probe the nature of the BOCES-Sayville School District relationship vis-à-vis the extension construction project. Islip Town separately opposes BOCES's motion on the same grounds.

The proponent on a motion of summary judgment 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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

In relevant part, CPLR 3212(b) provides that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (***Andre v. Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*Id; see also,* ***Henderson v. City of New York,*** 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated. (***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013); ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015][A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

Under CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (***Juseinoski v. New***

York Hosp. Med. Ctr. of Queens, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006); ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***FamilyBFriendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 AD3d 855, 856, 988 NYS2d 226, 227-28 [2d Dept 2014]).

This notwithstanding, it has been made equally true and important that "[t]o speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on [a] summary judgment motion" (***Orange Cty.-Poughkeepsie Ltd. P'ship v. Bonte***, 37 AD3d 684, 687, 830 NYS2d 571, 574 [2d Dept 2007]).

In pertinent part, Labor Law § 240(1) imposes a nondelegable duty on "[a]ll contractors and owners and their agents ... in the ... repairing ... of a building or structure" who do not "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding" that does not "give proper protection to a person so employed" (Labor Law § 240[1]; *see* ***Ross v. Curtis–Palmer Hydro–Elec. Co.,*** 81 NY2d 494, 499–500). Labor Law § 241(6) holds "owners and contractors and their agents" liable for failing to comply with rules promulgated by the Commissioner of the Department of Labor (Labor Law § 241 [6]; *see* ***Misicki v. Caradonna,*** 12 NY3d 511, 515; Industrial Code [12 NYCRR]). With respect to both statutes, the term "owner" encompasses a "person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit" (***Copertino v. Ward,*** 100 AD2d 565, 566, 473 N.Y.S.2d 494; *see* ***Kwang Ho Kim v. D & W Shin Realty Corp.,*** 47 AD3d 616, 618, 852 NYS.2d 138). Notably, "owner" includes a lessee who has "the right or authority to control the work site, even if the lessee did not hire the general contractor" (***Zaher v. Shopwell, Inc.,*** 18 AD3d 339, 340, 795 NYS2d 223; ***Allan v. DHL Exp. (USA), Inc.***, 99 AD3d 828, 830, 952 NYS2d 275, 278 [2d Dept 2012]).

"Generally to succeed on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her resulting injuries. Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" (***Garcia v. Mkt. Associates***, 123 AD3d 661, 662–63, 998 NYS2d 193, 196 [2d Dept 2014]).

Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (***Ortega v. Puccia***, 57 AD3d 54, 60–61, 866 NYS2d 323, 329 [2d Dept 2008]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work" (***Garcia supra.*** 123 A.D.3d at 664). To be held liable under

Labor Law § 200 and for common-law negligence arising from the manner in which work is performed at a work site, an owner or general contractor must have authority to supervise or control the work performed at the site. More specifically, an owner or general contractor must have had the authority to control the activity bringing about the injury so as to enable it to avoid or correct an unsafe condition (*see* ***Hurtado v. Interstate Materials Corp.***, 56 AD3d 722, 722–23, 868 NYS2d 129, 130 [2d Dept 2008]).

"A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done at the location [a] plaintiff [is] injured" (***Esteves-Rivas v. W2001Z/15CPW Realty, LLC***, 104 AD3d 802, 804, 961 NYS2d 497, 499–500 [2d Dept 2013]). Lessees who hire a contractor and have the right to control the work being done are considered "owners" within the meaning of the statutes (*see* ***Guclu v. 900 Eighth Ave. Condo., LLC***, 81 AD3d 592, 593, 916 NYS2d 147, 148 [2d Dept 2011]).

Put differently, a party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*see* Labor Law §§ 200, 241[6]; ***Russin v. Picciano & Son***, 54 NY2d 311, 318). To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*id.*). It is not a defendant's title that is determinative, but the amount of control or supervision exercised (*see Aranda v. Park E. Constr.*, 4 A.D.3d 315, 772 N.Y.S.2d 70; ***Damiani v. Federated Dep't Stores, Inc.***, 23 AD3d 329, 331–32, 804 NYS2d 103, 106 [2d Dept 2005]). In instances where a worker at a job site is injured as a result of a dangerous or defective premises condition, a defendant moving for summary judgment must establish prima facie that it neither created the allegedly dangerous condition nor had actual or constructive notice of it (***Carey v. Five Bros.***, 106 AD3d 938, 941, 966 NYS2d 153, 157 [2d Dept 2013]).

For plaintiff to recover under Labor Law § 241(6), he must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific, applicable safety standards (*see* ***Ross v. Curtis–Palmer Hydro–Elec. Co.***, 81 NY2d at 503–505; ***Weingarten v. Windsor Owners Corp.***, 5 AD3d 674, 774 N.Y.S.2d 537; ***Ventimiglia v. Thatch, Ripley & Co., LLC***, 96 AD3d 1043, 1047, 947 NYS2d 566, 571 [2d Dept 2012]).

A lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law. The term of art "owner" may well apply to a lessee where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor", however the dispositive question is whether the defendant-lessee had the right to insist that proper safety practices were followed (***Alfonso v. Pac. Classon Realty, LLC***, 101 AD3d 768, 770, 956 NYS2d 111, 114–15 [2d Dept 2012][Appellate Division holding that motion court should have granted defendant-lessee's motion for summary judgment where it was established *prima facie* that lessee did not own the premises at the time of the plaintiff's accident]; *accord* ***Garcia supra.***, 123 A.D.3d at 665 [interpreting Labor Law §§ 200, 240[1], 241[6]defendant demonstrated *prima facie* entitlement to judgment as a matter of law dismissing the complaint establishing that, although it was a lessee, it neither contracted for nor supervised and controlled the demolition work on the premises, and, therefore, was not an owner or agent within the meaning of the Labor Law]).

Summary judgment has been found appropriate by the Second Department where it is established, as a matter of law, that defendant did not own the property, control the property, or control the work and, therefore, owed no duty to the plaintiff which could give rise to a cause of action sounding in common-law negligence (***Ryba v. Almeida***, 27 AD3d 718, 719, 815 NYS2d 623, 624 [2d Dept 2006]). Further, this *prima facie* showing may be made in affidavit form. (***Martens v. Cty. of Suffolk***, 100 AD3d 839, 840, 956 NYS2d 61, 63 [2d Dept 2012][affirming grant of summary judgment to defendant finding not triable issue of fact existed where County demonstrated, *prima facie*, that it did not own, operate, manage, or control the area in question]).

Reviewing the parties evidentiary submissions both in support and in opposition to the pending motions, it is evident to the Court that defendants BOCES and Suffolk have met their *prima facie* burdens of establishing entitlement to judgment as a matter of law dismissing the Complaint as against them, given that plaintiff has not met his burden of establishing the existence of a triable issue of fact to preclude summary judgment. The record supports a finding that neither BOCES nor Suffolk owned, operated, controlled or maintained the premises. Neither party hired the general or subcontractors employed to complete the extension construction work. Rather, the affidavits, lease agreement, and construction agreement, taken together as a whole, demonstrate that Sayville School District, not a party to this litigation, is the owner of the accident premises, and engaged the contractors to do work, which pursuant to its lease with BOCES, was to benefit its use of the athletic facilities present at the Eastern Suffolk BOCES Sayville Academic Learning Center at 100 Greene Avenue.

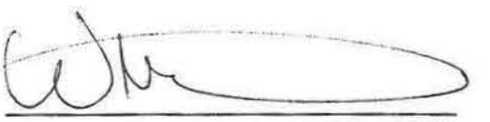
Plaintiff has neither shown nor explained to the satisfaction of this Court, sufficient facts to rebut the presumption in defendant's favor. Nor has the plaintiff shown why discovery is necessary to any of the points raised here, or anything that is exclusively in the care, custody or control of these defendants, and especially since it's own employer's agreement with the Sayville School District makes abundantly clear that the school district lessor, hired the contractors for the extension and owns the property.

Therefore defendants' motions for summary judgment are **GRANTED** and the Complaint is dismissed against them; and it is further

ORDERED that the parties shall serve a copy of this decision and order with notice of entry within 30 days.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 3, 2016



HON. WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** ___ **NON-FINAL DISPOSITION**