

Antunes v Skanska Koch, Inc.
2017 NY Slip Op 30090(U)
January 12, 2017
Supreme Court, New York County
Docket Number: 161324/14
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

ANGELINO ANTUNES,

Plaintiff,

-against-

Index No: 161324/14
DECISION/ORDER
Motion seq. 1

SKANSKA KOCH, INC.,
KIEWIT INFRASTRUCTRE CO., and
SKANSKA KOCH/KIEWIT joint venture,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' summary-judgment motion.

Papers	Numbered
Defendants' Notice of Motion	1
Plaintiff's Affirmation in Opposition.....	2
Defendants' Reply Affirmation	3

Sacks & Sacks, LLP, New York (Edward W. Ford of counsel), for plaintiff.
Goldberg Segalla LLP, New York (Brendan T. Fitzpatrick & Theodore W. Ucinski of counsel), for defendants.

Gerald Lebovits, J.

Defendants, Skanska Koch, Inc., Kiewit Infrastructure Co., and Skanska Koch/Kiewit joint venture move under CPLR 3212 for summary judgment.

Plaintiff, Angelino Antunes, alleges that he suffered personal injuries on May 15, 2013 (the accident date), at about 9:15 a.m., while working at a project at the Bayonne Bridge near Staten Island. At the time of his accident, plaintiff was working for Ahern Painting Contractors, Inc. (Ahern), as a third-year apprentice/assistant. At Ahern, plaintiff carried paint, mixed paints, and assembled "regal" scaffolds. Plaintiff testified that before his accident, his supervisor at Ahern was John Redmond.

On the accident date, plaintiff was on the Bayonne Bridge, on a platform located below the level of moving cars, approximately 100 feet from the beginning of the Staten Island side of the bridge. Plaintiff had been working at the location for four months before his accident. Plaintiff was working with four other workers from Ahern. Redmond had asked plaintiff to use a hose to suck up sand that had fallen on the platform after a sandblast. The platform on which plaintiff was working ran the entire length of the bridge, from one side to another; it was constructed from aluminum plates. On the accident date, plaintiff was wearing a hard hat and gloves.

Plaintiff testified that while he was using the hose to remove the sand, a piece of hardened sand fell down from above to where he was working, striking his foot. He maintains that the hardened sand was about a foot and a half long and that it fell more than 100 feet before the impact. Before this accident, he had not witnessed any other hardened sand fall. Plaintiff maintains that after feeling a pain in his right boot, he asked his coworkers to help him because he could not put his foot down on the platform. When he removed the boot, his foot was full of blood and he had a cut on his right calf. Plaintiff lay down on the platform before leaving the area. Plaintiff was taken to Bayonne Medical Center. Plaintiff was told that the hardened sand had fallen from a scaffold in which other people were working.

In his verified bill of particulars dated March 20, 2015, plaintiff alleges that because of the accident, he suffered a broken fifth toe. He has severe pain and tenderness, restricted motion, weakness, inability to bear weight, loss of function, and pain when he is in motion. He has aggravated/exacerbated a degenerative condition that was asymptomatic at the time of the accident. The verified bill of particulars provides that plaintiff requires further surgical intervention.

In his affidavit of March 21, 2016, David Murawski, vice president of operations at Skanska Koch, Inc., and project manager for the Bayonne Bridge project, states that Skanska Koch and Kiewit Infrastructure Co. entered into a joint venture agreement (Skanska/Kiewit) to bid on a project known as “Bayonne Bridge-Replacement of Main Span Roadway and Approach Structures.” On May 10, 2013, the Port Authority of New York and New Jersey (Port Authority) forwarded an award notice to Skanska/Kiewit advising it that its bid was accepted under contract number AKB-264.039. As the job’s project manager, Murawski states that he was involved with the preliminary work needed to organize and mobilize the equipment and labor for the project. At the time of the award notice, Skanska/Kiewit was setting up for the project at its home office in Carteret, New Jersey. He states that it took several months to prepare before any joint venture employees would go to the Bayonne Bridge to work under the contract.

Murawski states that Skanska Koch, Inc. played the “active role” in the joint venture and that Kiewit Infrastructure Co. had no employees on the project. Murawski states that no Skanska/Kiewit workers or any employees of the joint venture were present at the site on the accident date. Skanska/Kiewit did not begin to work under contract AKB-264.039 at the location until early fall 2013.

Murawski states that because the contract was awarded on May 10, 2013, it would have been impossible for Skanska/Kiewit to have started on-site operations at the Bayonne Bridge by the accident date. He maintains that, although Skanska/Kiewit subcontracted painting work to Ahern, this subcontract was not signed until September 3, 2013. Murawski states that he was advised that plaintiff was injured while working for Ahern under contract number AKB173, a lead-abatement project, over which Skanska/Kiewitt had no authority and played no role in it.

Plaintiff filed his complaint on November 13, 2014, alleging that defendants violated Labor Law §§ 200, 240 (1), and 241 (6).

DISCUSSION

A movant on summary-judgment motion “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. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].)

Defendants argue that plaintiff’s claims for violations of Labor Law §§ 200, 241 (6), and 240 (1) must be dismissed because Skanska/Kiewit is not a proper Labor Law defendant: It was hired by Port Authority under a contract that had nothing to do with plaintiff’s work. Defendants contend that, while plaintiff was injured on May 15, 2013, and was working for Ahern under contract number AKB173, Skanska/Kiewit did not contract for the work. Defendants maintain that Port Authority had hired Skanska/Kiewit under a separate contract, contract number AKB-264.039, dated May 10, 2013. Defendants contend that Murawski’s affidavit states that the joint venture needed to organize its equipment and labor for months before it commenced work. Defendants also contend that Skanska/Kiewit’s contract with Ahern was not signed until September 3, 2013, four months after the incident, and that Skanska/Kiewit did not have any employee at the subject site until months after plaintiff’s accident.

Defendants also maintain that the contract did not provide Skanska/Kiewit with the authority to control plaintiff’s work and that Skanska/Kiewit had no ownership interest in the property.

Plaintiff contends that despite defendants’ assertions, issues of fact exist about whether Skanska/Kiewit was present at the site on the accident date; therefore, any determination by this court that defendants violated Labor Law §§ 200, 240 (1), and 241 (6) is premature.

In opposition to defendants’ motion, plaintiff submits his affidavit stating that

“[p]rior to the date of my accident, which occurred on May 15, 2013, I had been working for Ahern Painting Contractors, Inc., for approximately four months at the Bayonne Bridge. During those four months, I had seen employees of Skanska/Kiewit working at the Bayonne Bridge on a daily basis. Skanska employees would hold safety meetings, check to ensure that the work was being performed in a safe manner, and walk the bridge on a daily basis. I have been told by my attorney that a representative of Skanska/Kiewit has submitted an affidavit stating that no Skanska employees were working on the Bayonne Bridge at the time of my accident. This is false, as I witnessed Skanska employees on the Bayonne Bridge on a daily basis. During my deposition which took place on March 22, 2016, I was never asked if I witnessed any Skanska employees on the Bayonne Bridge at any time leading up to my accident” (Plaintiff’s aff, ¶ 1.)

Plaintiff argues that his affidavit contradicts Murawski affidavit in that Murawski alleges that Skanska/Kiewit did not have workers at the site on the accident date.

Plaintiff also argues that defendants' summary-judgment motion is premature because relevant disclosure has not been exchanged and because defendants have failed to produce any witness for an examination before trial (EBT). Plaintiff maintains that he demanded from the defendants the contract between Port Authority and Skanska/Kiewit that was in effect on the accident date but that defendants responded that no contract existed. Plaintiff contends that defendants' assertion made during disclosure that no contract exists contradicts Murawski's allegation that Port Authority entered into a contract with Skanska/Kiewit on May 10, 2013, five days before the accident date. Plaintiff has also demanded that defendants produce meeting minutes, safety manuals, and plans or programs for 90 days preceding the accident date. Plaintiff argues that defendants have not provided this disclosure.

Plaintiff also argues that defendants have not produced any witness for an EBT. Plaintiff contends that based on his affidavit, issues of fact exist about whether workers from Skanska/Kiewit were present on the accident date and whether they were working.

On a summary-judgment motion, a court may not determine credibility issues, but a court may decide whether factual issues exist. (*S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *accord Psihogios v Stavropoulos*, 269 AD2d 295, 296 [1st Dept 2000] [holding that trier of fact decides credibility issues].)

A conflict exists between plaintiff's and Murawski's affidavit about whether Skanska/Kiewit was present at the site on the accident date. Plaintiff states that "Skanska employees would hold safety meetings, check to ensure that the work was being performed in a safe manner, and walk the bridge on a daily basis." But Murawski states that no Skanska/Kiewit workers or employees of the joint venture were present at the site in May 2013 and that Skanska/Kiewit did not begin to work under contract AKB-264.039 at the Bayonne Bridge until early fall 2013, several months after the accident.

Although Skanska/Kiewit's contract with Ahern was signed in September 2013, plaintiff alleges that defendants' workers were working on May 13, 2013. Issues of fact exist about whether the parties contracted orally before they signed the contract in September 2013. The court is unsure whether defendants' workers, if any, were responsible for the hardened sand that struck plaintiff.

The court also notes that based on the disclosure-conference orders, defendants' EBTs were scheduled for June, 24, 2015, and then rescheduled for October 30, 2015, and December 10, 2015. Despite these three agreed-upon dates, defendants EBTs have not yet taken place.

Because defendants' EBTs have not yet taken place and because of the conflicting affidavits, an issue of fact exists about defendants' presence and role at the site on the accident date. Defendants' summary-judgment motion is denied. It is premature for this court to decide whether defendants violated the Labor Law.

Accordingly, it is

ORDERED that defendants Skanska Koch, Inc., Kiewit Infrastructure Co., and Skanska Koch/Kiewit joint venture's summary-judgment motion is denied; and it is further

ORDERED that plaintiff serve a copy of this decision with notice of entry on all parties; and it is further

ORDERED that defendants' EBT must be scheduled within 45 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the parties appear for a status conference on April 26, 2017, at 11:00 a.m., in Part 7, room 583, at 111 Centre Street.

Dated: January 12, 2017



J.S.C.

HON. GERALD LEBOVITS

J.S.C.