Laxton v New York Racing Assn., Inc.
2017 NY Slip Op 30118(U)
January 18, 2017
Supreme Court, Suffolk County
Docket Number: 12-3452
Judge: James Hudson
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PUBLISH

SHORT FORM ORDER

INDEX No. 12-3452
CAL. No. 15-00931OT

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

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 10-21-15 (002)
MOTION DATE 12-2-15 (003)
ADJ. DATE 3-2-16
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - MG

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EDWARD LAXTON,

Plaintiff,

- against -

THE NEW YORK RACING ASSOCIATION, INC., NYRA INC., TUTOR PERINI CORPORATION and GENTING NEW YORK, INC,

Defendants.

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SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO PC
Attorney for Plaintiff
1140 Franklin Avenue, Suite 200
Garden City, New York 11530

McGAW ALVENTOSA & ZAJAC
Attorney for Defendants
Two Jericho Plaza, Suite 300
Jericho, New York 11753-1681

Upon the following papers numbered 1 to 33 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers 21 -27 ; Answering Affidavits and supporting papers 28 - 31 ; Replying Affidavits and supporting papers 32-33 ; Other ; it is.

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3212, granting partial summary judgment in his favor on the issue of liability on his cause of action for violation of Labor Law § 240 (1) is denied; and it is further,

ORDERED that the cross motion by defendants Tutor Perini Corporation and Genting New York, LLC for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserted against them, is granted.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on September 26, 2011 while constructing the Resorts World Casino New York ,located at 110-00 Rockaway Boulevard, South Ozone Park, New York, at the Aqueduct Racetrack. Plaintiff, an ironworker, was employed by M. Cohen & Sons, the metal subcontractor for the job, who was hired by

defendant Tutor Perini Corporation ("Tutor"), the general contractor for the job. The plaintiff was injured while removing, with his co-worker, an unsecured, unsupported 16-foot section of structural steel tread and riser ("stair pan") from a flight or run of pre-fabricated stairs. Plaintiff and his co-worker were removing the stair pan, and lowering it four feet to the concrete floor when the stair pan unexpectedly sprung out, fell to the ground, bounced off the concrete floor, and struck the plaintiff in the ankle. The construction site was owned and/or operated by defendants The New York Racing Association, Inc. ("NYRA"), NYRA, Inc., and/or defendant Genting New York, LLC ("Genting").

In his complaint and bill of particulars, the plaintiff asserts causes of action against the defendants for common-law negligence and violations of Labor Law §§ 200, 240 (1), 241 (6), as well as for violations of 12 NYCRR 23-1.7 (a), (b), and (d), 23-1.8, 23-1.10, 23-1.27, 23-1.32, 23-2.3 (a) (1), 23-2.3 (b), 23-3.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4, 23-8.5, and 29 CFR 1926. The plaintiff alleges that the defendants were negligent in, inter alia, failing to provide him with a safe place to work.

Plaintiff now moves for summary judgment in his favor against the defendants on his cause of action for violation of Labor Law § 240 (1), and defendants Tutor and Genting cross-move for summary judgment dismissing the complaint.

At the outset the court notes that a stipulation of discontinuance, dated November 24, 2015, was entered into between the plaintiff and defendants NYRA and NYRA, Inc., discontinuing the action as against those defendants.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Turning first to the plaintiff's motion for summary judgment, as a preliminary matter, the Court notes that it cannot consider the unsigned and unsworn deposition transcript of plaintiff's co-worker, nonparty witness Michael Owen, since it was submitted without an explanation as to why it was not signed or sworn to (*see* ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). After reviewing the evidence presented, including plaintiff's deposition testimony, and affidavit, the Court finds that the plaintiff failed to make out a prima facie showing of his entitlement to judgment as a

matter of law on the issue of liability on his cause of action for violation of Labor Law § 240 (1) as the plaintiff did not establish that the injury sustained by him was the type of elevation-related risk to which the statute applies (*see* ***Oakes v Wal-Mart Real Estate Bus. Trust***, 99 AD3d 31 948 NYS2d 748 [3d Dept 2012]; *see also* ***Rodriguez v Margaret Tietz Ctr. For Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994] [usual and ordinary dangers of a construction site and not extraordinary elevation risks where plaintiff was placing a 120-pound beam onto the ground from seven inches above his head with the assistance of co-workers]; ***Garcia v Edgewater Dev. Co.***, 61 AD3d 924, 878 NYS2d 134 [2009] [no elevation risk where drywall plaintiff was moving which fell on him was same level as plaintiff and not elevated above him]).

Here, the plaintiff testified at his deposition and states in his affidavit that on the day of the accident, he was employed as a union ironworker by M. Cohen & Sons, which was working on the construction of a casino called the Resorts World Casino, located on the grounds of the Aqueduct Raceway in South Ozone Park, New York. The plaintiff testified and states that on the day of the accident he was working with Michael Owen, his co-worker, erecting a steel staircase. The plaintiff also testified and states that he and Mr. Owen were removing a 16-foot steel step or stair pan that was approximately four feet above ground. According to the plaintiff, the run of stairs they were working on had been incorrectly fabricated off site in that it contained one stair pan too many. As a result, the extra stair pan had to be removed in order to attach the lower run of steps. Plaintiff testified and states that the two days prior to his accident, he removed an extra stair pan from another set of stairs on the job site with Mr. Owen and another co-worker. However, on the day of the accident, only he and Mr. Owen were assigned to complete the same job of removing the extra stair pan. Plaintiff testified and states that he was never provided with a hoist or fork-lift or blocks to stabilize the stair pan, and he had one less co-worker working with him on that job. The plaintiff testified and states that after the welds holding the stair pan between the stringers were cut, the stair pan had to be manually removed from between the stringers before it was lowered to the ground. The day before his accident, he and two other co-workers were able to manually remove the stair pan after cutting the welds, and place it on the ground. However, on the day of the accident, it was only he and Mr. Owen removing the stair pan. The plaintiff testified that he did not ask another person to help them because he did not think they needed another person as the stair pan came out so easily the day before. But, after the welds were cut on the day of the accident, the stair pan strung out from between the stringers, and he and Mr. Owen lost control of the stair pan, which weighed 200 pounds, and it fell four feet to the ground. After it fell to the ground, it bounced back toward the plaintiff and hit him in the right ankle causing his ankle to roll over.

The plaintiff further testified at his deposition that in past jobs where he was installing stairs, he used whatever was available to stabilize the stairs, which was either chain falls or a forklift. The plaintiff also testified that when he realized he had to remove an extra stair pan, he consulted with the super, Joe Moyoger, and foreman, Billy Hamilton, both employed by M. Cohen & Sons, before doing so. They both told him, "Do what needs to be done." He received all of his direction and supervision from his employer, M. Cohen & Sons. In order to move the stairs over to the area where he was installing them, he used a forklift. When he needed tools or equipment while at the job site, he got them out of the "gang boxes" which were owned by M. Cohen & Sons.

Additionally, the plaintiff annexes an affidavit from Thomas Parisi, a purported expert in engineering, in which he states that in his opinion defendants' failure to provide the plaintiff with safety devices such as hoists or blocking materials to stabilize and support the stair pan the plaintiff was trying to remove at the time of his accident was a violation of Labor Law § 240 (1), and was the proximate cause of the plaintiff's injuries.

The plaintiff also annexes the deposition testimony of Michael Hart, the safety coordinator employed by Tutor during the construction job, and Gary Finnegan, the director of facilities at Resorts World Casino employed by Genting. Both Mr. Hart and Mr. Finnegan testified at their depositions that neither Tutor nor Genting provided the plaintiff or M. Cohen & Sons with any tools, materials, or equipment with respect to the project. Mr. Finnegan further testified that Genting did not direct, supervise or control the work of Tutor or M. Cohen & Sons.

In support of their cross motion for summary judgment dismissing the complaint, and in opposition to the plaintiff's motion for summary judgment, defendants Tutor and Genting annexed a copy of signed written statement from the plaintiff's co-employee, Michael Owen. The Court notes that it cannot consider this statement as it is not notarized, and therefore, not in admissible form (***McDonald v Mauss***, 38 AD3d 727, *supra*). Defendants also annexed a copy of an affidavit from Jeffrey Schwalje, a purported expert in engineering, in which he states, with respect to the plaintiff's cause of action for violation of Labor Law § 240 (1), that in his opinion, no safety tool, device or equipment was necessary to secure the stair pan while the plaintiff and his co-worker attempted to manually remove it from the stringers. He states that a stair pan weighing 150-225 pounds can be safely manually handled by two ironworkers without the help or aid of a third person or any other device, tool, or equipment. Mr. Schwalje also states that the plaintiff and his co-worker, Mr. Owen, did not conduct their work in a safe and proper manner as they improperly manhandled or yanked the stair pan without maintaining control. Since the stair pan was being held tight between the stringers, and the welds were possibly not fully removed, it is reasonably expected that by pulling hard on the stair pan, the stair pan may likely jerk out towards them. Defendants further argue in support of their cross motion for summary judgment dismissing this cause of action that plaintiff was exposed to the usual and ordinary dangers of a construction site and not the extraordinary elevation risks envisioned by Labor Law § 240 (1).

Based on the foregoing, defendants have established their entitlement to summary judgment dismissing plaintiff's cause of action for violation of Labor Law § 240 (1) by demonstrating, through the plaintiff's deposition testimony and the affidavit of their expert, Mr. Schwalje, that the plaintiff was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation-related risks envisioned by Labor Law § 240 (1) (*see* ***Rodriguez v Margaret Tietz Ctr. For Nursing Care***, *supra*; ***Garcia v Edgewater Dev. Co.***, *supra*).

In opposition to defendants' cross motion regarding the cause of action for violation of Labor Law § 240 (1), the plaintiff has failed to demonstrate the existence of a triable issue of fact as to whether the work he was performing was the type of elevation-related risk to which the statute applies and was not the usual and ordinary dangers of a construction site (*see* ***Alvarez v Prospect Hosp.***, *supra*). The Court notes that while the plaintiff argues that defendants' cross motion is untimely, and should not be

considered, it is well settled that untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see* ***Whitehead v City of New York***, 79 AD3d 858, 913 NYS2d 697 [3d Dept 2010]).

With respect their cross motion for summary judgment dismissing plaintiff's causes of action for common law negligence and violation of Labor Law § 200, a cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either a dangerous or defective condition at a work site or the manner in which the work is performed (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Here, the injury did not arise from a defective condition inherent on the property but, rather, from the means utilized by the plaintiff to perform his work (*see* ***Cody v State of New York***, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; ***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]). According to the plaintiff's deposition testimony, he was injured while manually removing the stair pan with a co-worker when it sprung out and fell to the ground, injuring his ankle.

In order to be held liable for common-law negligence where, as here, the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (***Ortega v Puccia***, *supra* at 61, 866 NYS2d at 330; *see* ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Orellana v Dutcher Ave. Bldrs., Inc.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Here, the evidence established that Genting and Tutor, the owner of the premises and the general contractor, did not exercise any supervision or control over the plaintiff's work (*see* ***Paez v Shah***, 78 AD3d 673, 910 NYS2d 511 [2d Dept 2010]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Harper v Holland Addison, LLC***, 75 AD3d 495, 903 NYS2d 753 [2d Dept 2010]). The plaintiff testified at his deposition that he received all of his supervision and orders from his employer, M. Cohen & Sons, Inc. Thus, defendants established their prima facie entitlement to summary judgment dismissing plaintiff's causes of action for common-law negligence and violation of Labor Law § 200.

In opposition, the plaintiff did not address defendants' cross motion seeking to dismiss his common-law negligence claim as well as his claim for violation of Labor Law § 200. The plaintiff merely argued that defendants' cross motion was untimely with respect to those claims. Therefore, the plaintiff failed to raise a triable issue of fact with respect to said claims (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Turning to plaintiff's cause of action for violation of Labor Law § 241 (6), it is well settled that "[a] plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54, 56 [2d Dept 2012]). Here, the plaintiff cited New York Industrial Code Sections 23-1.7 (a), 23-1.7 (b), 23-1.7 (d), 23-1.8, 23-1.10, 23-1.27, 23-1.32, 23-2.3, 23-3.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4, 23-8.5, and Article 1926 of OSHA. It is well settled that alleged violations of regulations promulgated by OSHA do not provide a basis for liability under Labor Law § 241 (6) (*see* ***Shaw v RPA Assoc., LLC***, 75 AD3d 634,

906 NYS2d 574 [2010]). 12 NYCRR 23-1.7 (a) is inapplicable to the case at hand as it deals with "overhead hazards." The stair pan at issue was only four feet off of the ground while the plaintiff was working on it. 12 NYCRR 23-1.7 (b) deals with hazardous openings into which a person could fall and bridge or highway overpass construction. Thus, this section is likewise inapplicable. 12 NYCRR 23-1.7 (d) deals with slipping hazards, and therefore is also not applicable. 12 NYCRR 23-1.8 deals with eye protection, respirators, protective apparel, and cleanliness of personal protective equipment. Therefore, this section is also not applicable. 12 NYCRR 23-1.10 deals with safety involving hand tools. Thus, this section is also not applicable. 12 NYCRR 23-1.27 deals with mechanical, hydraulic, and pneumatic jacks, and is therefore also not applicable. 12 NYCRR 23-1.32 deals with imminent danger posters and warnings being posted on work sites. Thus, this section is likewise not applicable. 12 NYCRR 23-2.3 (a) (1) and (b) deals with structural steel assembly. Inasmuch as the stair pan was not a structural steel member/element as it did not support anything and was not a load bearing structural steel member, these sections are also not applicable. 12 NYCRR 23-3.3 deals with protection of persons passing by construction, demolition or excavation operations. Since plaintiff was not passing by but was working on the site, this section also does not apply to this case. Sections 23-8.1 through 23-8.5 deal with mobile cranes, tower cranes and derricks. Since none of this type of equipment was used on this job, those sections are also not applicable.

In opposition, the plaintiff did not address the defendant's cross motion seeking to dismiss his claim for violation of Labor Law § 241 (6). The plaintiff merely argued that the defendant's cross motion was untimely with respect to those claims. Therefore, the plaintiff failed to raise a triable issue of fact with respect to said claims (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Accordingly, the plaintiff's motion for summary judgment is denied, and defendants Tutor and Genting's cross motion for summary judgment dismissing the complaint insofar as asserted against them is granted.

Dated: Jan 18th, 2017

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION