

Carvalho v Sunrise Mall LLC
2017 NY Slip Op 31915(U)
September 8, 2017
Supreme Court, Suffolk County
Docket Number: 006817/2012
Judge: John H. Rouse
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INDEX NO. 006817/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 04/12/2017
ADJ. DATE: 08/23/2017
Mot. Seq. 004-MG

MOTION DATE: 04/12/2017
ADJ. DATE: 08/23/2017
Mot. Seq. 005-MG

MOTION DATE: 07/12/2017
ADJ. DATE: 08/23/2017
Mot. Seq. 006-MD

LUIS CARVALHO

Plaintiff

-against-

Index No. 006817/2012

SUNRISE MALL LLC, PROJEX GENERAL CONTRACTORS &
CONSTRUCTION MANAGERS, INC. and JP MORGAN CHASE & CO.,

Defendants

**AMENDED DECISION
AND ORDER**

PROJEX GENERAL CONTRACTORS & CONSTRUCTION MANAGERS,
INC.,

Third Party Plaintiff

-against-

Third Party Index No.
76-275

A. ULIANO & SON LTD. and PARAMOUNT CONCRETE STRUCTURES,
INC.

Third Party Defendants

TO:

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The Court previously issued a decision and order on motions 004 and 005 dated June 28, 2017 that was scanned and e-filed on July 10, 2017. However, the motions had been adjourned by the parties and had not been fully briefed and submitted. Accordingly, the prior decision and order is vacated and this amended decision and order is issued.

Mot. 004:

A. Uliano & Son LTD., Third-Party Defendant's Notice of motion for summary judgment on Plaintiff's claims made pursuant to Labor Law § 240(1), Labor Law § 241(6), and Labor Law § 200, dated February 27, 2017, the Affirmation in Support of Third-Party Defendant A. Uliano & Son LTD's motion for summary judgment by Alyson L. Knipe, Esq. affirmed on February 27, 2017 with Exhibits A-S attached thereto; Affirmation in Reply to Plaintiff's Opposition to Third-Party Defendant A. Uliano & Son LTD.'s; Affirmation in Reply to Plaintiff's Opposition, and in Opposition to Plaintiff's Cross Motion for Summary Judgment filed on July 28, 2017

Mot. 005:

Defendants Sunrise Mall LLC, Projex General Contractors & Construction Managers, Inc. and JP MORGAN CHASE & CO., Notice of Motion dated March 7, 2017 for summary judgment on all claims by the Plaintiff in the main action, Affirmation of Susan D. Smodish, Esq. Affirmed on March 7, 2017 with Exhibits A-X with five Affidavits attached thereto, Memorandum of Law for Defendants Sunrise Mall LLC, Projex General Contractors & Construction Managers, Inc. and JP MORGAN CHASE & CO.; Affirmation in Partial Opposition to "Projex" Motion for Summary Judgment filed on March 23, 2017.

Mot. 006:

Plaintiff Luis Carvalho's Notice of Cross Motion dated June 20, 2017 for partial summary judgment, Affirmation in Opposition to Motions for Summary Judgment and in Support of Cross Motion for Summary Judgment (Partial on Liability) by Michael S. Levine, Esq. Affirmed on June 20, 2017, filed on July 14, 2017, Plaintiff's Memorandum of Law filed on July 24, 2017; Reply Affirmation for Plaintiff by Michael S. Levine, Esq. Affirmed on August 22, 2017 and filed on August 23, 2017.

ORDERED the previously issued a decision and order on motions 004 and 005 dated June 28, 2017 that was scanned and e-filed on July 10, 2017 is hereby vacated; and it is further

ORDERED the motion (004) by A. Uliano & Son Ltd., for summary judgment on Plaintiff's claims is granted to the extent that Plaintiff's claims against this Defendant as based upon Labor Law § 241(6) and Industrial Code §§ 23-4.1; 23-4.2; and 23-4.4 are dismissed, in all other respects the motion is denied.

ORDERED the motion (005) by Defendants Sunrise Mall LLC, Projex General Contractors & Construction Managers, INC. and JP Morgan Chase & Co. for summary judgment is granted to the extent that Plaintiff's claims against these Defendants as based upon Labor Law § 241(6) and Industrial Code §§ 23-4.1; 23-4.2; and 23-4.4 are dismissed, in all other respects the motion is denied.

ORDERED the cross motion (006) by Plaintiff for summary judgment is denied in every respect; and it is further

ORDERED that the parties are directed to appear before this Court located at 1 Court Street, Part 12, located on the Second Floor of the Court Annex, in Riverhead, NY on **Wednesday, October 4, 2017 at 2:00 o'clock** in the afternoon for the purposes of a pre-trial conference and the **parties are directed to bring with them the materials required by the rules of this part.**¹

DECISION

Plaintiff's Allegations

Plaintiff commenced this action by filing a summons and verified complaint on February 28, 2012. Plaintiff, a union carpenter, alleges that on July 12, 2010 he was working on a construction site at the Westfield Shopping Center in Massapequa. Plaintiff alleges in his bill of particulars that "*plaintiff was working with a compactor in the vicinity of a ditch when the wall of the ditch gave way, causing the plaintiff to lose his balance and fall into the ditch, and thereafter have the compactor fall on top of him.*" Plaintiff brings this action based upon alleged violations of Labor Law §§ 200, 240(1) and 241(6) with violations of the Industrial Code §§ 23-4.1; 23-4.2; 23-4.3 and 23-4.4 to recover for the injuries he sustained. Defendant Sunrise Mall was the owner of the property where the injury occurred, a portion of this site had been leased to JP Morgan Chase to erect a bank. Defendant Projex General Contractors was the general contractor for the construction of the bank and Third-Party Defendant, A. Uliano & Son, Ltd., was hired to provide drainage, sewers, excavation and concrete work. Non-party Trek Site Development was a concrete subcontractor for Third-Party Defendant, A. Uliano & Son, Ltd., and it employed the Plaintiff.

I.

Third-Party Defendant, A. Uliano & Son LTD.'s Motion for Summary Judgment (Mot. Seq. 004)

A.

Upon its motion for summary judgment, Third-Party Defendant contends that the accident was not an elevation related injury covered by Labor Law § 240(1). In support of its motion

¹https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Rouse.pdf

Defendant offers the deposition testimony of the Plaintiff from July 9, 2013.² The movant contends that Plaintiff's own testimony reveals that the Plaintiff was moving a soil compactor down a six foot wide dirt "ramp" to the floor of the ditch to be compacted when the accident occurred. Defendant contends that such a fall on a ramp is not covered by Labor Law § 240(1) and cites *Williams v. White Haven Mem. Park*, 227 A.D.2d 923 (4th Dept. 1996) for this proposition. However, in this deposition Plaintiff did not agree with counsel's characterization of the incline he was using to move the soil compactor as a "ramp." Defendants also argue that *Edwards v. C & D Unlimited, Inc.*, 289 A.D.2d 370 mandates dismissal of the action. However, in *Edwards*, a fall into a ditch on a construction while doing work that did not require him to travel over or into the excavation site where he fell. That is not the case as alleged here. The Court, cannot, as a matter of law, grant summary judgment to Defendant as there remain questions of fact with respect to the nature and sufficiency of ingress into the "trench" where the Plaintiff had been directed to compact the soil and whether it proximately caused the Plaintiff's alleged fall and injuries.

B.

Third-Party Defendant moves for summary judgment on the Plaintiff's claims brought under Labor Law § 241(6) based upon alleged violations of the Industrial Code §§ 23-4.1; 23-4.2; 23-4.3 and 23-4.4. Defendant argues that the regulations cited do not apply to the facts of this case.

In opposition Plaintiff does not challenge the Defendant's motion with respect to Industrial Code §§ 23-4.1; 23-4.2; and 23-4.4, but argues that Defendant violated Industrial Code § 23-4.3 which provides:

23-4.3 Access to excavations

Ladders, stairways or ramps constructed in compliance with this Part (rule) **shall be provided in every excavation more than three feet in depth** for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel.

Does apply and was violated.

Defendant upon its motion argues that there is an absence of evidence that it violated to Industrial Code § 23-4.3 and it must therefore must prevail on the motion. Industrial Code § 23-4.3 incorporates the requirements of 23-1.23.

²This deposition was stopped prior to its conclusion based upon Defendants counsel's concern that Plaintiff, whose native language is Portugese, might later contend he did not understand the questions propounded without the aid of a translator. Plaintiff and his counsel contended he understood the questions. There was also pointed colloquy between counsel about the proper conduct of a deposition and intervention by counsel that might lead the witness. See page 64 lines 13-22, and 22 NYCRR § 221.1 (b) and 221.3

Industrial Code 23-1.23 Earth ramps and runways, provides in pertinent part:

(a) Construction. Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive unevenness.

(b) Slope. Earth ramps and runways shall have maximum slopes of one in four (equivalent to 25 percent maximum grades).

Upon a motion for summary judgment the movant in the first instance bears the burden of proof. In this case, whether the “trench” where the Plaintiff fell was more than three feet deep remains a question of fact, and whether the grade of the ramp was sufficient remains a question of fact.

Accordingly, Third-Party Defendant’s motion is granted insofar as Plaintiff’s claims are based upon Industrial Code §§ 23-4.1; 23-4.2; and 23-4.4. However, Plaintiff’s claim based upon Industrial Code §§ 23-4.3 can not be dismissed as there is a question of fact with respect to the depth of the “trench” as alleged by Plaintiff in his deposition testimony and the grade of the earthen ramp.

C.

Third-Party Defendant moves for summary judgment on Plaintiff’s cause of action based upon Labor Law § 200. The movant contends that other equipment was available to move the soil compactor into the trench but that Plaintiff was under the control of his employer, Trek Site Development, and it and the Plaintiff elected to choose the method by which he performed his work.

The Plaintiff’s action is based upon the site conditions with respect the proper means of ingress and egress into a trench that he alleges was more than three feet deep. Defendant has not provided *prima facie* evidence that it had no supervisory authority with respect to the earthen ramp at issue in this case. Accordingly, Third-Party Defendant’s motion for summary judgment on the claim founded upon Labor Law § 200 is denied.

II.

Defendants Sunrise Mall LLC,
Projex General Contractors & Construction Managers, Inc.
and JP MORGAN CHASE & CO.
Motion for Summary Judgment (Mot. Seq. 004)

Defendants in the main action move for summary judgment on the same grounds as the Third-Party Defendant. They point out the substantial deviation from the Plaintiff’s bill of particulars

from his deposition testimony as bear upon how the alleged accident and injury occurred. This weighs upon the Plaintiff's credibility and inquiry can be made upon cross examination of the Plaintiff at trial. Accordingly, the Defendants' motion for summary judgment is granted in part and denied in part.

III.

Plaintiff cross moves for summary judgment. The Plaintiff, upon his cross motion, has failed to make out a *prima facie* case that the Defendants are liable for the injuries he is alleged to have suffered, and, in any event there are significant questions of fact, and this includes Plaintiff's own credibility which is plainly in issue given the divergence of his bill of particulars from the testimony Plaintiff gave in his examination before trial. Accordingly, Plaintiff's cross motion is denied.

Dated: September 8, 2017



JOHN H. ROUSE, Acting J.S.C.

NON FINAL DISPOSITION