Wadolowski v 1070 Park Ave. Corp.
2017 NY Slip Op 32120(U)
October 4, 2017
Supreme Court, New York County
Docket Number: 161276/13
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

BOGDAN WADOLOWSKI et al.

INDEX NO. 161276/13

MOT. DATE

- v -

MOT. SEQ. NO. 004 and 005

1070 PARK AVENUE CORP. et al.

The following papers were read on this motion to/for vacate NOI and for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

This is an action for personal injuries sustained on a construction site. In motion sequence number 004, defendant/third-party plaintiffs move to vacate note of issue. Plaintiffs oppose that motion. In motion sequence number 005, defendant/third-party plaintiffs move for summary judgment dismissing plaintiffs' complaint and on their third-party claim for contractual indemnification. In turn, plaintiffs cross-move for summary judgment in their favor and oppose the motion-in-chief. Defendant/third-party plaintiffs oppose the cross-motion. The third-party defendant has not submitted any papers in response to either the motion or cross-motion.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motion for summary judgment and cross-motion were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Many relevant facts are in dispute. What is not in dispute is that plaintiff Bogdan Wadolowski ("Wadolowki" or plaintiff), a carpenter who was employed by third-party defendant George & Jerzy Contracting Corp. at the time of his accident, sustained injuries to his left hand while operating a table saw on August 23, 2013. For at least a month prior to plaintiff's accident, the table saw did not have a guard. At that time, Wadolowki was working at a construction project at 1040 Park Avenue, New York, New York (the "building"), Apartment 4D (the "apartment") which was undergoing a complete renovation.

Wadolowki's accident occurred while he was attempting to cut hinges into a long piece of wood on the table saw. According to his deposition testimony, Wadolowki was cutting the hinges into the wood for the purposes of extending the door frame. Wadolowki was going to place this piece of wood on the then-existing door frame and match it with the decorative panel that was going to be placed on top of the existing frame. Wadolowki described how his accident occurred as follows.

... I cut a long piece of wood on the table saw, and one side of the wood – I mean

Dated: 10/4/17

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

there was some object on the way of the one side of the wood, and it pulled up the end of the wood, and wood shake on the table saw because that not lay straight on the table saw.

So I tried to hold down this piece of wood.

So I put my left hand on the wood and behind the blade to try to hold down this piece, then I take my right hand from the front of the blade – from the wood, and tried to off the switch, off the power from the saw.

At that moment, the blade pulled the wood to the side where I shouldn't stand, and pulled with my hand, my left hand.

It is undisputed by the parties that the wood could not have been cut as plaintiff intended if there had been a guard on the table saw.

Plaintiffs are Wadolowski and his spouse, Anna Wadolowski. Wadolowski seeks to recover for violations of Labor Law §§ 241[6] and 200 as well as common law negligence against 1070 Park Avenue Corp. (the "owner"), the owner of the building and Stephen Wilson and Elizabeth White Wilson (the "Wilsons"), lessees of the apartment. George & Jerzy Contracting, Corp., the third-party defendant, was Wadolowski's employer on the date of the accident.

In motion sequence number 004, defendants argue that plaintiffs' note of issue should be stricken so that an order compelling the third-party defendant to appear for a deposition can be entered. That motion is denied. Previously, plaintiffs moved to compel the third-party defendant to appear for a deposition or in the alternative, to strike its answer. Neither defendants nor the third-party defendant opposed the motion. In a decision/order dated October 12, 2016, the Honorable Joan Kenney struck the third-party defendant's answer and directed plaintiffs to file note of issue immediately. Plaintiffs complied with that order.

As plaintiffs correctly argue now in opposition to defendants' motion to strike note of issue, defendants waived their right to obtain discovery from the third-party defendant. Plaintiffs did not make any misrepresentations as to the status of discovery in this case when note of issue was filed and defendants have wholly failed to demonstrate that they are entitled to post-note of issue discovery. Accordingly, motion sequence number 004 is denied in its entirety.

The court now turns to the motion for summary judgment. Defendants argue that the claims against the Wilsons must be dismissed because they are the owners of a single-family dwelling where Wadolowski's work originated and that they exercised no direction or control over the work plaintiff performed. As for the owner, defendants contend that: [1] the Labor Law § 200 and common law negligence claims must be dismissed because the owner did not exercise direction or control over Wadolowski's work; [2] the Labor Law § 241[6] claim must be dismissed because the alleged Industrial Code provisions are inapplicable to the facts; and [3] that plaintiffs' claims must be dismissed because Wadolowski was the sole proximate cause of his accident.

In turn, plaintiffs argue that they are entitled to summary judgment on the Labor Law § 241[6] claim because Industrial Code §§ 23-1.12[c][2], 23-1.12[c][3], 23-1.5[c][1] and 23-1.5[c][3] are concrete and applicable. Plaintiff urges the court to reject defendants' argument that plaintiff could have used other tools to accomplish the subject work. Finally, plaintiffs contend that there is a question of fact as to the scope of defendants' supervision at the construction site. Plaintiffs point to the testimony of John Fitzpatrick, the owner's resident manager.

Plaintiffs have provided the affidavit of Les Witner, a professional engineer. Mr. Winter explains how the accident occurred in more technical terms as follows:

> Plaintiff was attempting to make a notch in a length of trim by performing a plunge cut. He lowered the saw's blade so that it was below the table top. He laid the board over the blade opening, started the saw, and began to raise the blade ("plunge") into the workpiece. As he then fed the workpiece forward, the leading end contacted part of an air filter. The air filter was unrelated to the saw and was sitting on the floor. When the workpiece encountered the air filter it was deflected. One or more teeth of the rotating saw blade became embedded in the workpiece as a result of the deflection. The workpiece was thrown at plaintiff. His left hand, holding down the workpiece on the far side of the blade (at its rear) was pulled backwards, into the blade, causing his injury.

Defendants oppose the cross-motion and have provided the affidavit of George H. Pfreundschuh, a licensed professional engineer. Pfreundschuh opines that, *inter alia*, the method by which plaintiff was cutting the wood, called a "plunge cutting method" was neither a "simple or fast method" and "that using your hand to hold the work piece while raising the sawblade is also contrary to a multitude of safety warnings provided on the subject saw and in its Operator's Manual." Pfreundschuh claims that a router and clamps were available at the project for plaintiff to use which would have prevented the accident. Pfreundschuh further claims that using a hammer and chisel alone to create the notches on the wood would have been sufficiently precise. Pfreundschuh also states that third method was available to plaintiff, to wit, a jigsaw which was available on site.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

There is no dispute that the apartment was a single-family home. Further, plaintiffs do not argue that the Wilsons exercised direction or control over the work plaintiff performed. Labor Law § 241 expressly provides that it does not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work..." Therefore, plaintiff's Labor Law § 241[6] claim against the Wilsons must be dismissed.

Further, defendants have established that they are entitled to summary judgment on the third party claims for common law and contractual indemnity and contribution against the third-party defendant insofar as the third-party defendant's answer was stricken and it has not opposed defendants' motion. Accordingly, that branch of the motion is granted on default.

The court now turns to the balance of the motion. Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be

liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

However, where the dangerous or defective condition arises from the subcontractor's methods, and the owner exercised no supervisory control over the injury-producing work, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (*Comes v. New York State Elec. & Gas Corp.*, *supra*).

Defendants argue that the Labor Law § 200 claim must be dismissed because neither the owner nor the Wilsons exercised supervisory control over plaintiff's work. In turn, plaintiff points to the deposition testimony of Fitzpatrick, who stated that he was at the jobsite every day and had the authority to direct the workers to stop working at any time and make sure the workers operated within the scope of their work. The court rejects plaintiffs' argument, since Fitzpatrick's testimony was that he exercised general supervision over the common areas of the building and supervised the work that was performed so that it did not exceed the scope of the work that had been agreed upon. Fitzpatrick did not testify that he supervised the means or method by which the plaintiff's injury-producing work was performed. The court finds that the defendants have met their burden with respect to the Labor Law § 200 and common law negligence claims against the owner and plaintiff has failed to a raise a triable issue of fact. Relatedly, for the same reasons *supra*, plaintiffs' Labor Law § 200 and common law negligence claims against the Wilson must also be dismissed.

With respect to the remaining claim, Labor Law § 241[6] against the owner, plaintiffs' cross-motion must be granted on the issue of liability and defendants' motion to dismiss said claim denied. At the outset, the court rejects defendants' contention that plaintiff was the sole proximate cause of his accident. While there were other tools available to plaintiff in order to cut the wood, defendants have not established that the table saw was the "wrong tool for the job" (cf. *Scoz v. J&Y Elec. & Intercom Co. Inc.*, 137 AD3d 535 [1st Dept 2016]). Defendants have not established that the plaintiff took the guard off the table saw or otherwise "jury-rigged" it. (*Id.*) While defendants argue that other tools were available to plaintiff to make the requisite cuts into the wood, this only raises a question of comparative fault.

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that the following Industrial Code provisions were violated: 12 NYCRR §§ 23-1.12[c][2], 23-1.12[c][3], 23-1.5[c][1] and 23-1.5[c][3].

12 NYCRR § 23-1.12[c][2] and [3] provides:

> (2) Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth. In operation, such guard shall rise automatically by pressure from the material being cut or shall be so adjusted that as the saw cuts the material, the distance from the material to the underside of the guard does not exceed one-half inch. The exposed teeth of the saw blade beneath the table shall be effectively guarded. Every such saw shall be provided with a cut-off switch within easy reach of the operator without his leaving the operating position.

...

(3) Every table circular saw used for ripping shall be provided with a spreader securely fastened in position and with an effective device to prevent material kickback.

12 NYCRR § 23-1.5[c][1] and [3] provides:

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

...

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

It is undisputed that the table saw did not have a guard for at least a month prior to the accident and that plaintiff used the unguarded table saw nearly every day prior thereto (see *Bajor v. 75 E. End Owners Inc.*, 89 AD3d 458 [1st Dept. [2011]; see also *Ortega-Estrada v. 215-219 W. 145th St. LLC*, 118 AD3d 614, 615 [1st Dept. 2014]).

Further, the court rejects defendants' general argument that 12 NYCRR § 1.5[c][3] is not sufficiently concrete to support a Labor Law § 241[6] claim (see *Becerra v. Promenade Apartments Inc.*, 126 AD3d 557 [1st Dept. 2015]; see also *Perez v. 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept. 2015]). Accordingly, plaintiffs are entitled to partial summary judgment on the issue of the owner's liability with respect to the Labor Law § 241[6] claim premised upon violations of 12 NYCRR § 23-1.12[c][2] and [3] and 12 NYCRR § 1.5[c][3]. The court does not find that 12 NYCRR § 23-1.5[c][1] sets forth specific parameter sufficient to support a Labor Law § 241[6] claim. Accordingly, that branch of the Labor Law § 241[6] claim is dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendant's motion to vacate note of issue (motion sequence number 004) is denied in its entirety; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence number 005) is granted to the following extent:

[1] plaintiffs' claims against the Wilsons are severed and dismissed; and

[2] plaintiff's Labor Law § 200 and common law negligence claim against the owner are severed and dismissed; and

[3] plaintiff's Labor Law § 241[6] claim premised upon a violation of 12 NYCRR § 23-1.5[c][1] is severed and dismissed; and

[3] defendants are entitled to summary judgment on their third-party complaint against the third-party defendant; and it is further

ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted to the extent that plaintiff is entitled to partial summary judgment on the issue of the owner's liability with respect to the Labor Law § 241[6] claim premised upon violations of 12 NYCRR § 23-1.12[c][2] and [3] and 12 NYCRR § 1.5[c][3]; and it is further

ORDERED that plaintiff's cross-motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/4/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.