

Williams v Defoe Corp.
2018 NY Slip Op 30925(U)
April 4, 2018
Supreme Court, Kings County
Docket Number: 500852/2014
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of April, 2018.

PRESENT:
HON. CARL J. LANDICINO,

Justice.

-----X
HEIME A. WILLIAMS and MINERVA WILLIAMS,
Plaintiffs,

Index No: 500852/2014

- against -

**DEFOE CORP. And DEFOE CONSTRUCTION
CORP.**
Defendants.

DECISION AND ORDER

Motion Sequence #3, #4

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4.</u>
Opposing Affidavits (Affirmations).....	<u>5.</u>
Reply Affidavits (Affirmations).....	<u>6, 7</u>
Memorandum of Law	<u>8.</u>

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KINGS COUNTY CLERK
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After oral argument and a review of the submissions herein, the Court finds as follows:

This is an action brought pursuant to NYS Labor Law, whereby the Plaintiffs Heime Williams and Minerva Williams (hereinafter “the Plaintiffs”) allege damages as a result of an alleged injury sustained by Heime Williams on May 19, 2011. Plaintiff Heime Williams, an employee of non-party Moretrench American Corp. (hereinafter “Moretrench”), alleges that he was injured when he was struck by a man-lift operating at a construction site located at 45th Avenue between 108th Street and 111th Street in the County of Queens, State of New York.¹ Defendants Defoe Construction Corp. and Defoe Corp.² (hereinafter collectively “Defendants

¹ Plaintiff Minerva Williams sues derivatively for loss of services as the spouse of Plaintiff Heime Williams.

²Defendant Defoe Corp. avers that there is no such entity as Defoe Construction Corp.

Defoe") purportedly entered into a contract with non-party Long Island Rail Road to excavate, renovate and repair walls at the aforementioned location. Defendant Defoe thereafter retained Moretrench as a subcontractor.

The Plaintiffs now move (motion sequence #3) for an Order pursuant to CPLR §3212 granting partial summary judgment in their favor on the issue of liability pursuant to New York State Labor Law §241(6). The Plaintiffs argue that summary judgment in their favor is appropriate because the injury at issue occurred when Plaintiff Heime Williams was struck by a man-lift that was being utilized for the performance of excavation work at the construction site. Specifically, the Plaintiffs argue that the claim pursuant to Labor Law §241(6) against the Defendants is based upon the violation of Industrial Code N.Y.C.R.R. 23-4.2(k) which specifically protects workers engaged in the excavation work alleged.

Defendants Defoe oppose the Plaintiffs' motion and cross-move (motion sequence #4) for an order pursuant to CPLR §3212 granting summary judgment in their favor and dismissing all causes of action against them. Defendant Defoe Construction Corp. also seeks to be removed from the caption. Specifically, Defendants Defoe argue that they did not have supervisory control over the Plaintiff and did not have notice of the alleged dangerous condition that led to the incident at issue. Defendants Defoe argue that as they had no supervisory role in relation to the work performed by the Plaintiff Heime Williams those causes of action arising from claims of negligence or based upon Labor Law §§ 200, 240(1), and 241 should be dismissed. Defendants Defoe also argue that the Plaintiffs' cause of action under Labor Law §241(6) should also be dismissed and argue that the §241(6) cause of action cannot be sustained because the work at issue does not qualify as excavation work as such term is defined by the Industrial Code.

As an initial matter, the Plaintiffs do not otherwise oppose the motion by the Defendants Defoe as it relates to 1) dismissal of the Plaintiffs' claims against Defendant Defoe Construction Corp. or 2) those claims based on a) Labor Law §240(1), b) Labor Law §241 and c) Labor Law §241(6) relating to sections 12 NYCRR 23-1.29(b), 12 NYCRR 23-9.2(b)(1) and 12 NYCRR 23.97(d). Accordingly, the remainder of this Decision and Order will relate to the Plaintiffs' claims as against Defendant Defoe Corp. based upon Labor Law §200 and that aspect of the Plaintiff's Labor Law §241(6) claim relating to Industrial Code N.Y.C.R.R. 23-4.2(k). Accordingly, Defendant Defoe's motion is granted 1) as to Defendant Defoe Construction Corp. and 2) as it relates to Plaintiff's claims against Defendant Defoe Corp. concerning Labor Law §§240(1), 241, and 241(6) except for the Plaintiffs' claim relating to a violation of N.Y.C.R.R. 23-4.2(k).

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989].

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 241(6)

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty “to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed.” *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; *Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010]. Within that context, “12 NYCRR 23–4.2(k) provides a sufficient predicate for a Labor Law § 241(6) cause of action.” *Cunha v. Crossroads II*, 131 A.D.3d 440, 441, 15 N.Y.S.3d 153, 155 [2nd Dept, 2015]; *see also Torres v. City of New York*, 127 A.D.3d 1163, 1166, 7 N.Y.S.3d 539, 543 [2nd Dept, 2015]. What is more, it is not necessary for the Plaintiff to have been in a trench at the time of the injury to make a claim based upon 12 NYCRR 23–4.2(k) and a Plaintiff can state a claim after being injured working on a retaining wall. *See Garcia v. Silver Oak USA, Ltd.*, 298 A.D.2d 555, 555,

748 N.Y.S.2d 674, *opinion amended on reargument sub nom. Garcia v. Silver Oak USA, Ltd.*,
754 N.Y.S.2d 549 [2nd Dept, 2002].

Turning to the merits of the Defendants' motion for summary judgment in relation to the Plaintiffs' remaining claim made pursuant to Labor Law §241(6), the Court finds that the Defendants Defoe have provided sufficient evidence to meet their *prima facie* burden that the Plaintiffs' claim as to a violation of 12 NYCRR 23-4.2(k) does not lie. In support of their motion, Defendant Defoe relies primarily on the EBT testimony of Plaintiff Heime Williams and the EBT of Defendant Defoe Corp. employee Robert Colella. During his deposition, the Plaintiff testified (See Plaintiff's Motion, Exhibit "J" page 45) that he was injured by a man-lift while working on an LIRR retaining wall in Corona, Queens. In his EBT, the Plaintiff states (Defendant's Motion, Exhibit "F," Page 70) that the man-lift was used by two of his co-workers to drill holes in the retaining wall at different heights. The Plaintiff Heime Williams testified (Defendant's Motion, Exhibit "F," Page 71) that one co-worker would control the man-lift and that he would hand the drill bit to another co-worker who would be on the man-lift and would drill the holes into the retaining wall. In his EBT, Defendant Defoe Corp. employee Robert Colella stated (Defendant's Motion, Exhibit "J," Pages 7 and 8) that at the time of the accident he was General Superintendent which meant that he supervised several job sites and would coordinate equipment and staffing. Mr. Colella also testified (Defendant's Motion, Exhibit "J," Page 28) that the man lift was used in order to permit the workers to access the higher portions of the retaining wall.

The Court agrees with Defendant Defoe that an injury caused by a man-lift does not satisfy the explicit language of 12 NYCRR 23-4.2(k). 12 NYCRR 23-4.2(k) provides in relevant part that:

“Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.”

The Court finds that there is no support for the conclusion that a man-lift constitutes excavation equipment. Moreover, in those situations where a piece of equipment was at issue in the application of 12 NYCRR 23–4.2(k), the statute has been strictly applied and limited to those situations in which an excavator or a similar piece of equipment such as a backhoe have been utilized at the work site. *See Zaino v. Rogers*, 153 A.D.3d 763, 763, 59 N.Y.S.3d 770, 771 [2nd Dept, 2017]; *Cunha v. Crossroads II*, 131 A.D.3d 440, 441, 15 N.Y.S.3d 153, 155 [2nd Dept, 2015]; *see also Torres v. City of New York*, 127 A.D.3d 1163, 1166, 7 N.Y.S.3d 539, 543 [2nd Dept, 2015]; *Ferreira v. City of New York*, 85 A.D.3d 1103, 1105, 927 N.Y.S.2d 100, 102 [2nd Dept, 2011]. In *Zaino*, *Cunha* and *Torres*, the Plaintiff in each case was injured by an excavator, while in *Ferreira* the Plaintiff was injured by a backhoe. All of these cases involved equipment used for excavation; the actual movement of earth or other similar material (i.e. sand).

What is more, while not in relation to a claim made pursuant to 12 NYCRR 23–4.2(k), the Court in *Ferreira* held that a Labor Law 241(6) claim made pursuant to 12 NYCCRR 23-9.5(c) should be denied because it did not relate to a “power shovel” or “dipper bucket” as such terms are explicitly referenced in the statute. *See Ferreira v. City of New York*, 85 A.D.3d 1103, 1106, 927 N.Y.S.2d 100, 103 [2nd Dept, 2011]. The *Ferreira* decision argues against the broad reading of 12 NYCRR 23–4.2(k) that the Plaintiff supports. The Plaintiff seeks to have a determination that an injury caused by a man-lift would satisfy the requirement of it being “excavation equipment” because it was generally utilized during the performance of the excavation work. There is no support for such a contention. The man-lift in this case was used to

elevate the workers and permit their access to the work area. It is not excavation equipment. Accordingly, the Court finds that the Defendants have provided sufficient proof to meet their *prima facie* burden. In opposition, the Plaintiffs have failed to raise an issue of fact that would prevent the Court from granting summary judgment. As a result, the Defendants application for summary judgment as against the Plaintiffs' remaining Labor Law §241(6) claim is granted. As such, the Plaintiffs' application for summary judgment (Motion Sequence #3) on their Labor Law 241(6) claim is denied.

Labor Law § 200

Liability under Labor Law § 200, for injuries arising from the manner in which work is performed, must be premised upon one having the authority to exercise supervision and control over the work. *See Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Hernandez v Pappco Holding Co.*, 136 AD3d 981, 982 [2nd Dept, 2016]; *Torres v City of New York*, 127 AD3d 1163, 1165 [2nd Dept, 2015]; *Gallelo v MARJ Distribs. Inc.*, 50 AD3d 734, 735 [2nd Dept, 2008]. "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2nd Dept, 2013] quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2nd Dept, 2008]. "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence." *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709 [2nd Dept, 2015], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], *affd.* 15 NY3d 869 [2010].

Turning to the merits of the Defendants' motion in relation to the Plaintiff's Labor Law §200 claim, the Court finds that the Defendants have provided sufficient evidence to meet their *prima facie* burden in relation to the dismissal of Plaintiffs' claim. The Defendants argue that they cannot be held liable for the Plaintiffs' injuries pursuant to Labor Law §200 given that they contend that they did not supervise or control the work of the Plaintiff. "When the methods or materials of the work are at issue, 'recovery against the owner or general contractor cannot be had ... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work.'" *Messina v. City of New York*, 147 A.D.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept, 2017], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2nd Dept, 2008].

In support of their application, the Defendants rely primarily on the testimony of the Plaintiff Heime Williams and Defendant Defoe Corp. employee Robert Colella. When asked (See Defendants Motion, Exhibit "F," page 75) during his EBT whether he had ever heard of Defoe Construction Corp. or Defoe the Plaintiff simply answered "No." Defoe employee Robert Colella testified at his deposition (See Defendants Motion, Exhibit "J," page 35) that "Moretrench had their own health and safety plan, so they would have followed their own health and safety plan on the project." When asked whether when he "saw something he felt was a problem with one of the subcontractors did he have authority to say something about it?" Mr. Colella stated (See Defendants Motion, Exhibit "J," page 44) "Yes." In addition, Mr. Colella also stated (See Defendants Motion, Exhibit "J," page 45) that Defoe would report such a problem first to Moretrench but that if the condition continued he would report the problem to his superior at Defendant Defoe.

This testimony suggests that while Defendant Defoe did have the authority to generally supervise the work performed by the Plaintiff and stop work if a safety violation was noted, Defendant Defoe's role at the work site did not amount to supervision or control of the work site such that Defendant Defoe would be liable for any negligence of a contractor such as Moretrench who performed and oversaw its own day-to-day operations. *See Goldfien v. Cty. of Suffolk*, 157 A.D.3d 937, 938 [2nd Dept, 2018]; *Messina v. City of New York*, 147 A.D.3d 748, 46 N.Y.S.3d 174 [2nd Dept, 2017]. *Guallpa v. Canarsie Plaza, LLC*, 144 A.D.3d 1088, 1092, 42 N.Y.S.3d 293, 298 [2nd Dept, 2016]. In response, the Plaintiff has failed to raise a material issue of fact regarding whether Defendant Defoe had the authority to supervise and regulate the Moretrench employees. Accordingly, this aspect of Defendant Defoe's motion related to the Plaintiffs' Labor Law §200 claim is also granted.

Based upon the foregoing, it is hereby Ordered that:

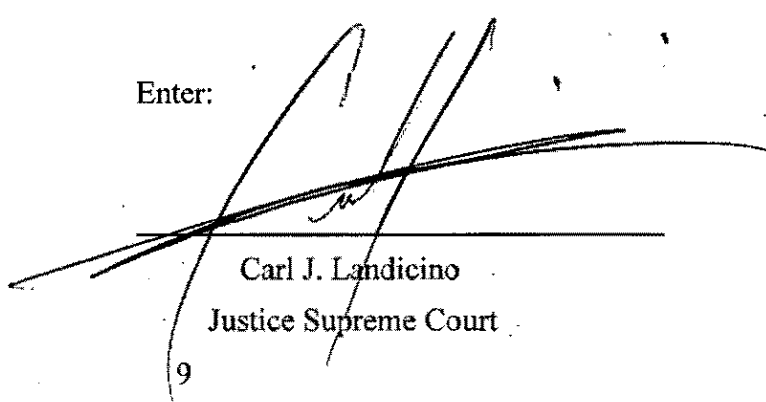
Defendants' motion for summary judgment (Sequence #4) is granted and the clerk is directed to enter judgment accordingly dismissing the complaint as against the Defendants.

The Plaintiffs' motion (Sequence # 3) is denied.

The foregoing constitutes the Decision and Order of the Court.

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April 4, 2018



Carl J. Landicino
Justice Supreme Court

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