Lyons v New York City Economic Dev. Corp.
2018 NY Slip Op 31212(U)
June 14, 2018
Supreme Court, New York County
Docket Number: 160496/15
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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RICHARD LYONS AND JODY LYONS,

Plaintiff,

-against-

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CITY OF NEW YORK,

Defendants.

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Index Nº.: 160496/15
Motion Seq. Nos. 002

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants New York City Economic Development Corporation and City of New York, s/h/i as New York City Department of Environmental Protection (collectively, the City defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

This action arises out of the Staten Island Siphon Project, involving the construction of a subaqueous water siphon. The siphon, running beneath the Upper New York Bay between Brooklyn and Staten Island, is designed to deliver 5 million gallons of water, daily, to Staten Island, and to replace to existing siphons.

The City defendants hired a joint venture between Tully Construction Co. and the Spanish engineering firm, Obrascón Huarte Lain (OHL), as the general contractor on the project. Plaintiff Richard Lyons (plaintiff), at the time of the accident, worked as a Chief Survey Engineer for OHL, and he was in charge of surveying for the Staten Island Water Syphon

project. On September 4, 2014, the day of his accident, plaintiff, to reach the underground/subaqueous tunnel where the project was, used an elevator hoist, or "Alimak," which took him, along with other workers, approximately 60 to 80 down (plaintiff's 50-h hearing tr at 37). After descending on the Alimak, plaintiff would wait for a mining train to take him into the tunnel (*id.*). The mining train was used to "transport the workers in and out of the tunnel, to bring in supplies, and to dispose of the muck, which is mud that is mined out, in order to build the tunnel" (*id.*).

Plaintiff testified that there was only one track going into the tunnel, but, "[t]hen it split, in the middle, to what they call California Switch, which allowed two trains to sit simultaneously, and one was able to go in, at one time, and one would be able to go in the opposite direction, out" (*id.* at 38). As OHL made progress on the tunnel, the site of the California switch would move further into the tunnel (*id.*). The mining train took plaintiff to, approximately, halfway between Staten Island and Brooklyn (*id.* at 43).

At the time of his accident, plaintiff was doing "sets of angles," which he described as "measuring for the location of the tunnel (*id.* 44). To do this work, plaintiff used a prism, which is used for precision levelling, and a Leica Instrument, a computer which maps the job (*id.* at 41). More specifically, plaintiff was walking "to put a prism on a bracket" (*id.* at 44). Plaintiff walked along steel mesh that was placed, as a walkway, between the rails of the mining train (*id.*). "The mesh," plaintiff testified, "sat on top of the spreaders,[1] to make a walking path for anybody that was going in and out of the tunnel, or working on the tunnel" (*id.* at 44-45). Plaintiff testified

[1] Plaintiff testified that "[t]he rails are held together by spreaders, which go across" (plaintiff's 50-h hearing tr at 44).

that the steel mesh walkway was installed by OHL "sandhogs," as tunnel laborers are called (*id.* at 45).

Plaintiff testified that: "I was walking to put a prism up ... and as I was walking on the steel mesh, I stepped on a piece of the mesh, which gave way, and jammed my right knee, and caused me to fall" (*id.* at 44). Plaintiff ties the failure of the steel mesh resource allocation on the project. He alleges that "[t]here was a point where the project was being delayed, and some corners were being cut" (*id.* at 46). Plaintiff's passive construction leaves out which party, whether the City defendants or OHL, was allegedly cutting corners. In any event, plaintiff believes that, as the project went on OHL began using a less thick steel wire, and that the use of this cheaper material led to the walkway failing and his accident (*id.*).

Plaintiff filed his Summons on October 14, 2015, alleging that the City defendants are liable to him for negligence (the first cause of action), Labor Law § 241 (6) (the second cause of action), and Labor Law § 200 (the third cause of action). Additionally, Jody Lyons, plaintiff's wife, brings a derivative claim against the City defendants for loss of consortium (the fourth cause of action). As to the section 241 (6), the complaint alleges that the City defendants violated 12 NYCRR 1.7 (e) (1), which is entitled "Protection from general hazards; Tripping and other hazards; Passageways. Plaintiff's served a Verified Bill of Particulars dated February 29, 2016, which alleges, among other allegations that overlap with the Complaint, that the City defendants violated Labor Law § 240 (1).

In this motion, the City defendants argue: that the section 240 (1) claim, such as it is, should be dismissed as plaintiff's accident is not a gravity-related risk; that the section 241 (6) claim should be dismissed as 12 NYCRR 1.7 (e) (1) is inapplicable; and that the section 200 and

common-law negligence claims should be dismissed as they did not have supervisory control over plaintiff's work, and they did not have any notice of a dangerous condition on the premises. Plaintiff, in opposition, makes no reference to section 240 (1). As plaintiff has abandoned any allegation that the City defendants violated section 240 (1) (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]), and as, in any event, plaintiff's accident did not arise from a gravity-related risk contemplated by the statute, the branch of the motion seeking dismissal of plaintiff's section 240 (1) must be granted.

Plaintiff opposes the motion on the general ground that it is premature as discovery is not yet complete. As to section 241 (6), plaintiff argues that alleged Industrial Code regulation is applicable, and, as to section 200 and common-law negligence, plaintiff argues that there is a question of fact as to whether the City defendants had notice of a defect involving the steel mesh, and discovery should be allowed to go forward to flesh out the issue.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101

AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Labor Law 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All 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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of

Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

12 NCYRR 23-1.7 (e)(1), entitled "Protections from general hazards; Tripping and other hazards; Passageways" provides that:

> "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

Courts have held this regulation is sufficiently specific to serve as a predicate for section 241 (6) liability (*see e.g. Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [1st Dept 2005]). Thus, the City defendants argue not that the regulation is insufficiently specific, but that it is inapplicable because plaintiff's accident did not occur in a passageway.

When there is ambiguity as to whether a worker's accident took place in a passageway, courts generally allow juries to make that determination and for section 241 (6) claims premised on 12 NYCRR 23-1.7 (e) (1) to survive motions for summary judgment (*see e.g. Aragona v State of New York*, 74 AD3d 1260 [2d Dept 2010]; *Bopp*, 19 AD3d 348). In *Aragona*, where the

plaintiff tripped on a padeye on a work barge, "as he was carrying materials along a corridor created by lumber and construction material" (74 AD3d at 1260). The Court held that the defendant "failed to demonstrate that 12 NYCRR 23-1.7 (e) (1) was inapplicable," as it "failed to show the absence of triable issues of fact as to whether the claimant tripped in a passageway" (*id.* at 1261). Similarly, in *Bopp*, where the plaintiff allegedly "slipped on a piece of cable while walking through a corridor to the area where he was working," the First Department held that there was "a triable issue of fact as to whether the plaintiff was injured in a passageway, thus whether 12 NYCRR 23-1.7 (e) (1) was violated" (19 AD3d at 350).

Here, plaintiff's accident took place on a narrow walkway that plaintiff was obliged to traverse to do his surveying work. There is, at least, a question of fact as to whether this constitutes a passageway. The City defendants rely on two trial court decisions in asking the court to determine, as a matter of law, that plaintiff's accident did not take place in a passageway: *McAllister v Phoenix Constructors, JV* (33 Misc 1227 [A] [Sup Ct, NY County 2011, Stallman, J.]) and *Ambrose v City of New York*, 2013 NY Misc. LEXIS 424 [Sup Ct, 2013, Stallman, J.]). These cases are readily distinguishable.

In *McAllister*, the plaintiff was building a scaffold inside a subway tunnel as part of the World Trade Center Transportation Hub Project when his accident took place. Specifically, he testified that "as he was lifting one end of [a] beam, he slipped sideways on grease or creosote that was on the concrete subway floor and fell" (33 Misc 1227 [A] at 2). The court in *McAllister* did not analyze 12 NYCRR 23-1.7 (e) (1), except to note that the plaintiff did not argue that it was applicable *(id.* at 8). In any event, *McAllister* is distinguishable from the present facts

because the plaintiff there was not injured in a passageway that was intended for workers to move from one part of the worksite to another.

In *Ambrose*, the plaintiff tripped and fell "while performing construction work on a tunnel boring machine in connection with the East Side' Access Project" (2013 NY Misc LEXIS at 1). More specifically, the plaintiff was working with a drill on a metal platform on the tunnel boring machine when he tripped over a hose and metal wire cables, and he fell and got caught in the drill (*id.* at 1-2). Without elaborating, the court held that it agreed "with defendants that 12 NYCRR 23-1.7 (e) (1) does not apply because plaintiff's accident did not occur within a 'passageway'" (*id.* at 16). *Ambrose* is distinguishable from the present facts because the plaintiff was working on tunnel boring machine at the time of his accident, rather than walking on a path from one part of the jobsite to another.

McAllister and *Ambrose* are broadly consistent with other cases that analyze this regulation, which have found that it is not applicable where plaintiffs are performing work in a set area, rather than moving from one part of the jobsite to another (*see e.g. Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]). In *Rajkumar*, the First Department noted that the plaintiff "described the main lobby in which his accident occurred as a big open space" and concluded "that such an area would not fit within the term of '[p]assageway,' as set forth in subdivision (e) (1)" (*id.* at 595). Here, plaintiff's accident occurred in a narrow path of steel mesh set out, between the rails of an underground tunnel, specifically so that workers could travel from one part of the jobsite to another. In such circumstances, the City defendants fail to make a *prima facie* showing of entitlement to judgment on this issue by arguing that plaintiff's accident did not occur in a passageway.

The City defendants also argue that 12 NYCRR 23-1.7 (e) (1) is inapplicable because plaintiff's accident was not caused by "dirt or debris or a sharp projection" and because the steel mesh pathway was "an integral part of the worksite." As to the first point, it is plain that plaintiff is not alleging that he tripped on "dirt or debris or a sharp projection." However, 12 NYCRR 23-1.7 (e) (1) applies not only to "dirt or debris" or "sharp projections" but also to "any other obstructions or conditions which could cause tripping" (compare with 12 NYCRR 23-1.7 (e) (2) [although the two subsections have similar language, subsection (e) (2) lacks the catch-all for other tripping hazards]). Here, plaintiff alleges that he tripped because the infirmity of the steel mesh caused it to give way, which, broadly speaking, would constitute a condition that can cause tripping. Thus, the City defendants fail to make a *prima facie* showing of entitlement to summary judgment simply by arguing that plaintiff did not trip on dirt, debris, or a sharp projection.

The City defendants' argument that the steel mesh pathway constituted an integral part of the jobsite is similarly misplaced. In *Singh v 1221 Ave. Holdings, LLC*, the First Department held that the plaintiff's section 241 (6) claim "predicated upon an alleged violation of 12 NYCRR 23-1.7 (e) (2) was properly dismissed since the screw over which plaintiff fell was an integral part of the raised tile floor system and other work performed on the renovation project" (127 AD3d 607, 607 [1st Dept 2015]). As to subsection (e) (1), the Court came to different result: "Although the court properly found that plaintiff raised a triable issue as to whether his accident occurred in a 'passageway' or an open area, it erred in dismissing the section 23-1.7 (e) (1) claim on the ground that the screw constituted an integral part of the work being performed" (*id.* at 607-608). The Court reasoned that "[d]ismissal on such ground is warranted only to claims under section 23-1.7 (e) (2) (*id.* at 608, citing *Thomas v Goldman Sachs Headquarters*, LLC, 109 AD3d 421

[1st Dept 2013]). Thus, the City defendants fail to make a *prima facie* showing as to the inapplicability of the regulation through its argument that the steel mesh pathway was an integral part of the worksite. Accordingly, as they have failed to show that 12 NYCRR 23-1.7 (e) is inapplicable, the branch of the City defendants' motion that seeks dismissal of plaintiff's Labor Law § 241 (6) must be denied.

Labor Law § 200 and Common-law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*) (emphasis omitted).

The City defendants offer evidence to show their lack of section 200 liability on either a method and or manner basis, or a dangerous condition basis. As to the former, the City Defendants submit, among other things, plaintiff's own testimony that he took orders only from

other OHL employees (plaintiff's 50-h transcript at 64-65). Other than its general argument as to prematurity, plaintiff does not offer any arguments or evidence suggesting that the City defendants had supervisory control over his work.

[T]he mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery" is insufficient to defeat a motion for summary judgment (*Washington v New York City Bd. Of Educ.*, 95 AD3d 739, 740 [1st Dept 2012]). Here, as to the method and manner branch of its section 200 claim, plaintiff offers nothing but hope that something other than what he testified to will be uncovered through the discovery process. Thus, the City defendants are entitled to dismissal of any allegations that plaintiff's accident was caused by the method and manner of his work.

As to the dangerous condition branch of the claim, the City defendants offer affidavits from Brian Larsen (Larsen), a vice president for defendant New York City Economic Development Corporation (EDC), and James Garin (Garin), a director of engineering for the New York City Department of Environmental Protection (DEP). Larsen testified that:

> "I was responsible for visiting the project on behalf of the [EDC]. In September 2014, I would periodically visit the Project about twice a month. I never saw any accidents involving the steel metal mesh walkway. I was never advised of any accidents concerning the steel mesh walkway. I was never told of any complaints regarding the thickness or grade of steel used in the construction of the steel metal mesh walkway.
>
> Pursuant to contract with the City of New York, [EDC], a non-profit corporation, is responsible for the implementation of contracts on behalf of the City of New York, including the Project that is the subject of this litigation. As such, I have personal knowledge as to the City of New York's role in the Project. No one from the City of New York maintained a daily presence at the Project. The City of New York was not responsible for overseeing, directing, controlling, or supervising the work of OHL. The City of New York did not attend any site safety meetings conducted at the Project. The City of New York never performed any repairs to

> the steel metal mesh walkway. The City of New York was never advised of any defects, issues or complaints regarding the thickness or grade of steel used in the construction of the steel metal mesh walkway. The City of New York has no knowledge as to the thickness or grade of steel used in the construction of the steel metal mesh walkway"

(Larsen aff, ¶¶ 7-8).

DEP's Garin stated that:

> "I, from time to time, would visit the Project on behalf of NYCDEP to monitor design issues with regard to water and sewer services above ground. [DEP] did not perform any work inside the tunnel .... In September 2014, I visited the Project on a limited basis .... I never went inside the tunnel and never saw any accidents involving the steel metal mesh walkway. I was never told of any complaints regarding the thickness or grade of steel used in the construction of the steel mesh walkway.
>
> No one from [DEP] maintained a daily presence at the Project. [DEP] did not install the steel metal mesh walkway in the tunnel at the Project. [DEP] never performed any repairs to the steel metal mesh walkway. [DEP] was never advised of any defects, issues or complaints regarding the thickness or grade of steel used in the construction of the steel metal mesh walkway. [DEP] has no knowledge as to the thickness or grade of steel used in the construction of the steel metal mesh walkway .... [DEP] did not conduct any site safety meetings conducted at the Project"

(Garin aff, ¶¶ 7-8).

Plaintiff argues that he should be able to further probe the issue of whether the City defendants had actual or constructive notice of a pathway constructed of defectively thin metal mesh. At this stage, only plaintiff's 50-h hearing has gone forward and paper discovery and other depositions remain outstanding. To provide a basis for further inquiry into this issue, plaintiff submits his own deposition testimony, in which he

testified that he complained to Kevin Cremin (Cremin), the project's safety officer,[2] about the quality of the metal mesh walkway prior to his accident: "I remember," he testified, "complaining about the mesh, specifically, because I had to walk great distances on it" (plaintiff's 50-h at 78-79). Plaintiff testified that his complaints were made in July 2014 and that he told Cremins "that the mesh was not up to standards" (*id.* at 79).

However, there is no evidence that Cremins shared plaintiff's complaints about the steel mesh pathway with the City defendants. In fact, the City defendants have made an unrebutted showing that they did not have actual notice of such complaints. Thus, as the City defendants make an unrebutted showing that they had neither actual or constructive notice of the alleged defect, and as plaintiff offers nothing but mere hope that further discovery will uncover further relevant information on this issue, the City defendants are entitled to dismissal of plaintiff's section 200 and common-law negligence claims.

CONCLUSION

Accordingly, it is

ORDERED that the branches of defendants New York City Economic Development Corporation and City of New York's motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim, as well as plaintiff's Labor Law § 200 and common negligence claims as against them is granted; and it is further

[2] Although not specified by plaintiff, Cremin presumably worked for the Tully/OHL joint venture that was the general contractor of the project.

ORDERED that the branch of defendants New York City Economic Development Corporation and City of New York's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claims against them is denied.

ORDERED that counsel for defendants New York City Economic Development Corporation and City of New York is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

DATE: June 14, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.