McBride v E.W. Howell, Co., LLC
2018 NY Slip Op 34449(U)
March 27, 2018
Supreme Court, Nassau County
Docket Number: Index No. 604426-15
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

MATTHEW McBRIDE,

Plaintiff,

- against -

E.W. HOWELL, CO., LLC,

Defendant.

TRIAL/IAS PART 14
Index No.: 604426-15
Motion Date: 1/2/18
Sequence Nos.: 001, 002
MG, MD
DECISION AND ORDER

XXX

The following papers were read on this motion:

Sequence No. 001:
Notice of Motion, Affirmation and Exhibits.....1

Sequence No. 002:
Notice of Cross-Motion, Affirmation and Exhibits.....2
Expert Affidavit.....3
Affirmation in Opposition.....4
Reply Affirmation of E.W. Howell, Co., LLC.....5
Reply Affirmation of Matthew McBride.....6

PRELIMINARY STATEMENT

In Sequence No. 001, defendant brings this application for an order: (1) pursuant to CPLR § 3212, granting summary judgment on the issue of liability dismissing the plaintiff's complaint against defendant for alleged violations of New York State Labor Law §§ 200, 240(1) and 241(6), and for common law negligence; and (2) for such other and further relief as the Court deems just, necessary and proper.

In Sequence No. 002, plaintiff brings an application for an order pursuant to CPLR § 3212 granting plaintiff summary judgment on the issue of liability of the Labor Law of the State of New York and denying defendant's motion to dismiss plaintiff's causes of action under §§ 200, 240(1), 241(6), and common-law negligence; and for such other and further relief as the Court deems just and proper.

BACKGROUND

This is an action for personal injuries allegedly sustained by Matthew McBride, on November 12, 2014 as a result of a workplace accident at the State University of New York at Stony Brook University Children's Hospital, Stony Brook, New York. McBride commenced this action by filing a Summons and Verified Complaint on February 3, 2015. The matter was transferred from Supreme Court, New York County to Nassau County. In his Bill of Particulars, McBride stated that defendant E. W. Powell Co. violated, New York Labor Law §§ 200, 240 (1) and 241 (6), due to alleged violations of the New York Industrial Code Regulations 23 – 1.5, 23 – 1.7, 23 – 1.8, 23 – 2.1, 23 – 2.3, 23 – 6, 23 – 8 and Article 26 of OSHA.

On November 12, 2014, McBride was working as a journeyman ironworker for A. J. McNulty, his employer. His assignment on that day was going to the ninth floor to signal a crane operator. The crane was hoisting oxyacetylene tanks to the ninth floor for use by steelworkers. This job involved hoisting two tanks, a larger oxygen tank, and a smaller acetylene tank, onto a cart. The cart was then attached to a crane hook by what is known as a braided cable or a steel choker. These two tanks would be brought up at the same time and each would have a separate choker attached to the hook.

The ninth floor was made of Q-decking, all galvanized steel. On the same floor with McBride was a coworker, Mike Basso, also an employee of A.J. McNulty. As the two tanks were being lowered to the floor, McNulty was standing in the middle of the ninth floor. By the time McBride arrived on the ninth floor, Basso had placed the first set of tanks on the Q-deck. In other words, they were not in an elevated position. McBride went to the second set of tanks, which were also placed onto the Q-deck. These sets of tanks were adjacent to one another. As McBride said that he had his hand on the second set of tanks, then he felt pain from something coming into contact with his hand. As was later determined, it was the first set of tanks that had been on the

Q-deck which had contacted his hand. As a result of this contact, McBride suffered an amputation of the index finger on his hand.

Defendant's position is that there is no evidence that the defendant had notice of any alleged dangerous condition, nor did they direct, control or supervise the plaintiff's work. They claim there is no evidence of any common law negligence, nor of a violation, pursuant to § 200(1), and both claims must therefore be dismissed. They also contend that Labor Law § 240 (1) requires a falling object. The plaintiff must demonstrate the existence of a hazard contemplated under the statute, and the failure to use, or that there was an inadequacy of, a safety device of the kind enumerated in the statute. They contend that there must be evidence to demonstrate that at the time the object fell, it was either being "hoisted or secured", or "required securing for the purpose of the undertaking". They also assert that claims under Labor Law § 241(6) requires plaintiff to plead and prove a violation of a specific section of the New York State Industrial Code. They assert that none of the Industrial Code citations are applicable to the facts of this case.

Plaintiff, on the other hand, testified that two carts, each with a separate choker, were hooked to the same hook of the crane. As the carts came up he realized that there were two loads attached to a single hook of the crane and that they were different in that one of the carts had a steel divider with a lifting log, which the other did not contain. He also testified that when he worked as a hooker on, the normal procedure would be to put taglines on the load, and that the load should come up individually and not two loads at one time, which is unsafe. A tagline would assist in the lowering and placement of the load. He stated that the load was being hoisted approximately 20 feet above the ninth floor and then lowered. They came down to him in an awkward fashion and the loads were striking one another as they were being lowered to the work floor.

Basso had already placed the first load on the deck. Then the evidence demonstrates that the first load, which was already on the flooring tipped over and caught plaintiff's hand. McBride testified in his deposition that the second load came in contact with the deck before the injury occurred. In other words, both loads were on the decking when the accident occurred and neither load was elevated.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial" (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' "*(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

It is clear that E.W. Howell Co., LLC had no role in directing or supervising the process of placing the oxygen and acetylene on the roof. Plaintiff claims that the requirement of E.W.

Howell that the tanks be removed and replaced on a daily basis constituted a form of supervision, which constitutes a violation of § 200(1). This section is a codification of the common law, imposing a duty on an owner or general contractor to provide a safe place to work.

Labor Law § 200 cases involve either a dangerous or defective premises condition at the worksite, or involving the manner in which the work is performed. There is no evidence that defendant either created or had actual or constructive notice of a dangerous condition which caused the accident. Rather this is an issue involving the manner in which the work was performed. While defendant may have had general supervisory authority at the worksite for the purpose of overseeing the progress of work and inspecting the sufficiency of the work, mere general supervisory authority is not sufficient to substantiate a finding of negligence under § 200 (*Natale v. City of New York,* 33 A.D.3d 772, 773 [2d Dept. 2006]).

Defendant's motion for summary judgment dismissing both of plaintiff's claims under Labor Law § 200 and for negligence is granted.

Labor Law § 240(1) provides exceptional protection to workers against special hazards which arise when the worksite itself is either elevated or is positioned below the level where the materials will load while being hoisted or secured (*Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 267-268 [2001]). "These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. "Rather, they are limited to such specific gravity related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Natale v. City of New York,* 33 A.D.3d 772 [2d Dept. 2006], quoting *Gonzales v. Turner Constr. Co.,* 29 A.D.3d 630, 631 [2d Dept. 2001]).

"The fact that the force of gravity was involved is not enough, by itself, to support the plaintiff's claim." (*Id.,* quoting *Zdunczyk v. Ginther,* 15 A.D.3d 574, 575 [2d Dept. 2005]). "[T]o establish liability under Labor Law § 240(1) a plaintiff must show more than simply that an object fell, thereby causing injury to a worker (see *Blake v. Neighborhood Hous. Servs. Of N.Y. City,* 1 N.Y.3d 280, 288-289 [] . A plaintiff must show that 'the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' " (*Id.* citing *Turczynski v. City of New York,* 17 A.D.3d 450, 451, quoting *Narducci v. Manhasset Bay Assoc., supra* at 288).

As in *Natale,* supra, the hazard McBride encountered was not related to an elevation differential as contemplated by the statute. *Natale* involved an injury sustained while he was installing a gas line and a co-worker of his employer was digging a three-foot deep trench with a backhoe, when a falling segment of a concrete walk slab fell and struck him. In this case, the tanks which Basso had already placed on the deck, tipped over and struck the hand of McBride, which was holding onto the second of the tank deliveries. Significantly, McBride testified at his deposition that the second cart, in which the tanks were loaded, had already been on the deck when the first set of tanks tipped over, and struck his hand. There was no elevation differential between McBride and the tanks when he suffered his injury *(See, Biofora v. City of New York,* 27 A.D.3d 506 [2d Dept. 2006]).

Plaintiff has submitted affidavits to the effect that the tanks were improperly hoisted, in that the hooker on should have attached only one cart at a time, that the load was unbalanced, and that there should have been taglines to assist in stabilizing the carts as they were being lowered on to the deck. Whether or not such testimony would be admissible, the bottom line is that the incident was not caused while the tanks were being lowered on to the deck. It occurred while both carts were on the deck, and defendant's motion for summary judgment dismissing the claim under Labor Law § 240(1) is granted. There is no violation of § 240(1) which could be considered the proximate cause of this accident. Plaintiff's cross-motion for summary judgment on the claim under § 240(1) is denied.

Defendant's motion for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) is also granted. In order to succeed on such a claim, a plaintiff must establish that a violation of the New York Industrial Code was involved. Defendant has argued, and plaintiff has not opposed, the claims that Industrial Code 23-1.5, 23-1.7, 23-1.8, and 23-6 are inapplicable. 23-1.5 relates to "General Responsibility of Employers" and does not support a § 241(6) claim. 23-1.7 relates to workers in the area of overhead hazards or near a hazardous opening. Neither are applicable to the facts of this matter. Nor is there any evidence that plaintiff was not provided with personal protective equipment, nor was he working in a passageway, thus rendering 23-1.8 irrelevant. 23-2.1(a) provides for the storage of material in an orderly and stable manner, and not blocking a passageway. The tanks were not being stored at the time of the incident. 23-2.3 relates

to structural assembly, which plaintiff was not doing.

23-6, entitled "Material Hoisting", excludes material hoisting done by cranes, derricks, aerial baskets, excavating machines used for material hoisting and for lift trucks. The material in this action were hoisted by crane, and, in any event, as the hoisting was actually completed at the time of the incident. Similarly 23-8.1 deals with accidents which occur while the load was being hoisted. While affidavits have been submitted as to the imbalance of the carts, and the fact that hoisting should be limited to one cart at a time, the carts were successfully hoisted to the ninth floor deck and the manner of preparation for hoisting did not cause the first set of tanks to tip into the second set. The injury occurred after the hoisting was complete (*Decaire v. New York City Health & Hosp. Corp.*, 57 A.D.3d 823 [2d Dept. 2008]).

23-8 deals with requirements for "Mobile Cranes, Tower Cranes and Derricks". But nothing to do with the operation of the crane in this action led to the happening of the event. 23-8.2(c) (2) requires the use of a tag line where rotation of the load may cause a hazard. No such lines were attached to the two carts carrying the tanks, but rotation of the load did not rotate, or present a hazard of doing so. Lastly, the OSHA provisions do not create a non-delegable duty and cannot form the basis for a violation of Labor Law § 241(6) (*Shaw v. RPA Associates, LLC*, 75 A.D.3d 634 [2d Dept. 2010]). In summary, there were no violations of § 241(6) that were the proximate cause of the plaintiff's accident.

Accordingly, all of the plaintiff's claims must be dismissed.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 27, 2018

ENTERED

MAR 30 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.