Dossantos v Church of St. Paul the Apostle, N.Y. City
2019 NY Slip Op 31489(U)
May 28, 2019
Supreme Court, New York County
Docket Number: 156548/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARCOS A. MACIEL DOSSANTOS,

Plaintiff,

-against-

THE CHURCH OF ST. PAUL THE APOSTLE, NEW YORK CITY, THE MISSIONARY SOCIETY OF ST. PAUL THE APOSTLE, IN THE STATE OF NEW YORK and THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK,

Defendants.

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Index No. 156548/16
Motion Seq. No. 004

DECISION AND ORDER

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

In a Labor Law action, defendants The Church of St. Paul the Apostle, New York City (St. Paul's) and The Roman Catholic Archdiocese of New York (the Archdiocese) (together, Defendants, or St. Paul's and the Archdiocese) move, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint.

BACKGROUND

The Church of St. Paul the Apostle is located near the southwestern corner of Central Park. On October 18, 2015, Plaintiff was injured while working at the church for nonparty, John Tiedemann, Inc. (Tiedemann). The subject project involved the repair and painting of the Church's ceiling. Tiedemann specializes in projects in churches, and has fabricated its own devices -- consisting of a World War II Jeep, a bucket, and an extendable boom -- for reaching the high ceilings in houses of worship.

The project on which Plaintiff was injured involved, among other things, painting the ceiling of the church. Tiedemann was the only a contractor on the project. St. Paul's owns the

subject property, and contracted with Tiedemann for the subject work by a contract executed on August 6, 2015 (NYSCEF doc No. 66).

To operate the proprietary Tieddeman device, which is alternately referred to as boom lift, a man lift, and a moveable scaffold, one worker goes into the extendable bucket and the another worker steers the bucket from the shell of the converted Jeep. Plaintiff was the worker in the bucket. His colleague, William Connors (Connors) was the worker steering the bucket.

Plaintiff testified that, while at the height of a about four-stories, he received an electrical shock which propelled him out of the bucket (NYSCEF doc No 72). He testified further that when he alerted his colleague, Connors, by yelling "shock," Connors cut the electricity to the boom lift, which is electrically powered (*id.*). Plaintiff, who was dangling from rope harness, climbed onto the extendable boom. Connors, according to Plaintiff's testimony, then told Plaintiff to unhook for the rope harness and climb down the boom (*id.*). Plaintiff testified that, after making two movements downward, he fell from the boom, injuring himself (*id.*).

As to why Connors would have told him to unhook from his harness, Plaintiff testified that at the hospital on the day after his accident, Connors told him that he told Plaintiff to unhook to save his life, as the harness itself might have killed him, by cutting off his blood supply, while he dangled and waited for help to arrive (id.).

Connors gave two accounts of the accident, and they contradict each other as well as Plaintiff's account. According to the Tiedemann employee who filled out the accident report, Elizabeth Masiello (Masiello), she relied exclusively on Connors' account in producing the document (NYSCEF doc No. 85). The accident report states that Plaintiff was "[c]overing the altar platform with plastic to protect the surface around the altar" when "he fell down the stairs at altar (sic.)" (NYSCEF doc No. 82).

At his deposition, Connors testified that Plaintiff did receive a shock while in the bucket, but that he was only working at an elevation of 8 to 10 feet. Connors also testified that he did not direct Plaintiff to take off his harness, and that Plaintiff successfully made it down the boom and then, for some reason, jumped off the altar (NYSCEF doc No. 73).

Plaintiff filed his summons and complaint on August 5, 2016, alleging that Defendants are liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. As to the latter claim, Defendants argue that they cannot be liable under Labor Law § 200 and common-law negligence as they had no supervisory control. As to Labor Law §§ 240 (1) and 241 (6), Defendants, relying on Connors deposition testimony, arguing that Plaintiff's own recalcitrance was the sole proximate cause of his injuries. Defendants also argue, as to Labor Law § 241 (6), that none of the Industrial Code violations alleged by Plaintiff are applicable to his accident. Finally, Defendants argue that all Labor Law claims must be dismissed as against the Archdiocese, as it is neither an owner, a general contractor or an agent of either.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Common-law Negligence and Labor Law § 200

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.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, defendants make a showing that they did not have supervisory control over Plaintiff's work by submitting evidence that only other Tiedemann employees provided Plaintiff with direction. In opposition, plaintiff does not rebut, or even attempt to rebut this showing. Accordingly, Plaintiff has abandoned these claims and the branch of Defendants' motion seeking dismissal of the common-law negligence and Labor Law § 200 claims must be granted (*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]).

II. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Here, Defendants argue that Plaintiff was the sole proximate cause of his own accident. A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Under Plaintiff's version of events, a statutory violation is present (*see Cutaia v. Board of Managers of 160/170 Varick Street Condominium*, 2019 NY Slip Op 03458 [granting summary judgment as to liability on the plaintiff's section 240 (1) claim where the worker fell off of an improperly secured ladder after receiving an electrical shock]). Moreover, in Plaintiff's version of events, he was not recalcitrant, but instead complied with every directive given to him by Connors, including a directive to disconnect from his safety harness. Thus, Defendants fail to make a *prima facie* showing that they are entitled to summary judgment. Accordingly the branch of the motion that seeks dismissal of Plaintiff's Labor Law § 240 (1) claim must be denied.

III. 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).

Plaintiff alleges violations 12 NYCRR 23-1.13 (b) (3), 12 NYCRR 23-1.13 (c) (1) (ii), 12 NYCRR 23-1.16 (c), and 12 NYCRR 23-1.16 (b). The first two regulations relate to the electrical shock, while the second two relate to the safety harness.

Electrical Regulations

12 NYCRR 23-1.13 (b) is entitled "Electrical hazards; General." Its third subsection, which is cited by Plaintiff, is entitled "Investigation and warning," and it provides:

> "Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electrical power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken"

12 NYCRR 23-1.13 (c) (1) is entitled "Temporary electric power circuits at construction, demolition or excavation job sites; Temporary electric wiring." It provides:

> "All temporary wiring shall be supported on proper insulators and not looped over nails or brackets. No bare wires or other unprotected current-carrying parts shall be located within eight feet above any surface where persons may work or pass unless completely guarded by a fence or other barrier. Exception: Where qualified persons must make adjustments or measurements on an electrical device or circuit"

Its second subsection, which Plaintiff alleges a violation of, provides:

> "Electrical systems and current-carrying equipment shall be properly grounded except as provided for blasting circuits in this Part (rule). Where it is necessary to lay electrical wiring on the ground, such wiring shall be of the weather-proof type and heavy enough to withstand the wear and abuse to which it may be subjected. No conductor shall be used to carry a higher voltage than the manufacturer's rating."

In its moving papers, Defendants do not contend that either of these regulations are insufficiently specific to serve as a predicate to liability under section 241 (6) (*see Hernandez v Ten Ten Co.*, 31 AD3d 333 [1st Dept 2006] [noting that "12 NYCRR 23-1.13 … provides guidelines to protect workers against electrocution" and holding that it "is sufficiently specific to support a Labor Law § 241 (6) claim]). Instead, Defendants make one argument as to the applicability of both provisions: that both are inapplicable as Plaintiff was not working near power lines, power facilities or power circuits and breakers.

Here, there is clearly a question of fact as to whether Plaintiff was shocked by an electrical circuit that was not properly safeguarded (*see Lewis v New York Convention Ctr. Dev Corp*, 61 Misc 3d 1211[A] [Sup Ct, Kings Cty 2018] [denying the defendant summary judgment dismissing the section 241 (6) claim based on alleged violation of the 12 NYCRR 23-1.13 where the plaintiff "apparently received a jolt from a covered electrical box"]). Moreover, Defendants reliance on *Mondore v Stinson* (2009 NY MISC LEXIS 5909 [Sup Ct, Onondoga Cty 2009]) is unavailing, as the court found that a section 241 (6) violation could be sustained by an allegation that 12 NYCRR 23-1.13 was violated even in the absence of an electrical shock.

Defendants thus fail to make a *prima facie* showing that 12 NYCRR 23-1.13 is inapplicable to Plaintiff's accident. Accordingly, the branch of Defendants' motion that seeks summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim must be denied. For completeness, the court will discuss 12 NYCRR 23-1.16 (c) and 23-1.16 (b).

Regulations Relating to the Safety Harness

12 NYCRR 23-1.16 is entitled "Saftey belts, harnesses, tail lines and lifelines." Subdivision (c) of this regulation is entitled "Instruction in use." Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline." Subdivision (b) is entitled "Attachment required" and provides:

> "Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet"

12 NYCRR 23-1.16 has been held to be sufficiently specific to serve as a predicate to section 241 (6) liability (see e.g. Smith v Cari, 50 AD3d 879 [2d Dept 2008]). As to subsection (c), there is a question of fact as to its applicability, as Plaintiff has testified that he was not trained in how to use the subject harness. As to subsection (b), there is a question of fact as to whether the subject safety line was longer than the 5 feet permitted by the regulation. Accordingly, the branch of Defendants' motion seeking dismissal of Plaintiff's allegations relating to violations of 12 NYCRR 23-1.16 (c) and of 12 NYCRR 23-1.16 (b) must be denied. However, all of Plaintiffs allegations of Industrial Code violations other than 12 NYCRR 23-1.13 (b) (3), 12 NYCRR 23-1.13 (c) (1) (ii), 12 NYCRR 23-1.16 (c), and 12 NYCRR 23-1.16 (b) are dismissed as abandoned.

IV. The Archdiocese's Status Under the Labor Law

Aside from their arguments that the Labor Law was not violated, Defendants also argue that the Archdiocese is not a proper Labor Law defendant. Defendants contend that the

Archdiocese was not an owner of the subject property and that it did not contract with Tiedemann for the subject work.

In support, Defendants submit a contract executed on August 6, 2015 between St. Paul's and Tiedemann for the subject work. While "Achdiocese of New York" and "Aramark" appear in large font at the top of the document, the Archdiocese is not listed as a party to the contract (NYSCEF doc No. 66).

Plaintiff argues that the Archdiocese is an agent of St. Paul's. To show such agency, Plaintiff must show that the Archdiocese had "authority to supervise or control the job" (*Bautista v Archdiocese of New York*, 164 AD3d 450 [1st Dept 2018] [in a case involving an accident at a church rectory, the Court held that the Archdiocese was not an agent to the owner for Labor Law purposes, as it established that "it did not have authority to supervise or control the job"]).

Here, the pastor of St Paul's, Father Gilbert Martinez (Martinez), testified that nonparty Aramark assisted St. Paul's during the bidding process (NYSCEF doc No. 16 at 16). Moreover, Martinez testified that Aramark: "provide us contractor services, allowing us to review contracts, allowing us to undertake work that we may need. They find the contractors and bring them to us (*id.*). Moreover, Martinez testified that his "understanding is that [Aramark] are contracted by [the Archdiocese] to help individual parishes complete repair work or other contracting work on their buildings" (*id.*). As to the question oversight, Martinez testified that Aramark had some degree of oversight responsibilities:

Q: Does Aramark oversee in any capacity … the progress of the work?
A: Yes.
…
Q: Well, during the period of time of this particular project, how would you characterize Aramark's role, if any?
A: They would make regular visits, site visits to see the progress of the work.
…
Q: And I guess, do you know if [the Archiocese] has any written agreement in place

with Aramark that would speak to Aramark's duties with respect to this project?
A: I assume, but I don't know.
...
Q: Do you know if [Aramark's liaison to St. Paul's] had any duties with respect to the implementation of any safety precautions that may be required for the performance of this work?
A: I don't know.

Neither Defendants nor Plaintiff submit a copy of a contract between Aramark and the Archdiocese. At this juncture, where Defendants seek summary judgment, and all inferences must be afforded to Plaintiff, Martinez's testimony creates an issue of fact as to whether the Archdiocese had authority, through its agent, to supervise and control the job. Accordingly, the branch of Defendants motions that seeks dismissal of the Labor Law claims against the Archdiocese, as it is not a proper Labor Law defendant, must be denied.

From a judicial efficiency view, it may be tempting to see *Bautista* as a bright line rule establishing that the Archdiocese is not an agent of its individual parishes when the parishes do renovation projects. However, *Bautista* is not, by own terms, this broad and it is distinguishable from the present case, as there was no evidence before the court regarding the Archdiocese's relationship with Aramark or Aramark's oversight role in the rectory project in Bautista.

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted only to the following extent:

- Plaintiff's claims under Labor Law § 200 and common-law negligence are dismissed;
- Plaintiff's allegations relating to Industrial Code violations other than 12 NYCRR 23-1.13 (b) (3), 12 NYCRR 23-1.13 (c) (1) (ii), 12 NYCRR 23-1.16 (c), and 12 NYCRR 23-1.16 (b) are dismissed;

and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: May 28, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

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