Johnson v CPS Fee Co., LLC.
2019 NY Slip Op 32304(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 157948/2016
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

----------X

KELSEY JOHNSON,

Plaintiff,

- v -

CPS FEE COMPANY, LLC., LEND LEASE (US) CONSTRUCTION LMB, INC.,

Defendants.

----------X

INDEX NO. 157948/2016

MOTION DATE 04/02/2019, 04/02/2019

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 64, 66, 70, 71, 72, 73, 77, 78, 80, 82, 83

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 67, 68, 69, 74, 79, 81, 84, 85

were read on this motion for SUMMARY JUDGMENT.

Ross and Hill, Esqs. (Julie P. Lee of counsel), for plaintiff Kelsey Johnson.
Malapero Prisco & Klauber LLP (Mary B. Harmon of counsel), for defendants CPS Fee Company, LLC and Lend Lease (US) Construction LMB Inc.

Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by a concrete laborer on January 19, 2016 when, while performing stripping work on columns at a construction site located at 250 South Street in New York County (the Premises), a plastic PVC pipe shattered, causing a piece of debris from the pipe to strike his left eye.

In motion sequence 002, defendants CPS Fee Company, LLC (CPS) and Lend Lease (US) Construction LMB Inc. (Lend Lease) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them. In motion sequence 003, plaintiff Kelsey Johnson moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 241 (6) claim against defendants, which is predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.8 (a). Motion sequences 002 and 003 are consolidated here for disposition.

BACKGROUND

On the day of the accident, CPS was the owner of the Premises where the accident occurred. CPS hired Lend Lease, pursuant to a construction management agreement, to serve as the construction manager on a project at the Premises, which entailed the construction of a 72-story mixed use commercial and residential high-rise building (the Project). Lend Lease hired nonparty Pinnacle Industries II, LLC (Pinnacle) to perform certain concrete work related to the superstructure for the Project. Plaintiff was employed by Pinnacle as a concrete laborer.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was working on the Project as a concrete laborer for Pinnacle, and that Pinnacle's supervisor/foreman solely supervised and directed his work. Plaintiff testified that his work entailed, among other things, stripping ceilings, scaffolds and columns at the site. In addition to advising plaintiff as to how to perform his work, Pinnacle also provided the necessary tools for plaintiff to perform said work. These tools included his safety harness, clear plastic safety glasses and a helmet. Plaintiff provided his own hammer and gloves.

Plaintiff further testified that Lend Lease also provided him with a pair of safety glasses "[a]fter a safety orientation meeting," which were "the same [kind of] glasses" as supplied to him by Pinnacle (plaintiff's tr at 24-25). Plaintiff used the glasses that were supplied by Pinnacle and the glasses supplied by Lend Lease interchangeably. Plaintiff never noticed any problems with either pair, nor did he ever complain about either of them. When asked as to which pair of safety glasses he was using at the time of the accident, plaintiff replied, "I'm not sure. I think Pinnacle gave [them] to me" (*id.* at 26).

Plaintiff described the glasses at issue as extending upward to his eyebrows and down to the bottom of his eyes. The glasses were a "one size fits all" type and did not contain any scratches or other defects (*id.* at 57). However, the glasses did not fit snugly to his face, as there was a space between the lenses and his face. Plaintiff stated, "There was space. Stuff always gets in your eyes no matter what" (*id.* at 65). Plaintiff also asserted that there were no other types of safety glasses available at the site other than the kind that were provided to him by Pinnacle and Lend Lease. Plaintiff stored the two pairs of glasses in his own bag, which he kept inside Pinnacle's shanty.

Plaintiff testified that in order to perform his stripping work, he used a crowbar, a hammer and a wrench to break forms off concrete and to dismantle scaffolds. Plaintiff explained that just prior to the accident, his supervisor instructed him to break certain plastic PVC pipes off of their columns. As it was necessary to wear safety glasses for said work, plaintiff retrieved his two pair of safety glasses from the shanty. As he was working, plaintiff wore one of the pairs of safety glasses over his eyes, while at the same time, he wore the other identical pair under his hat. As plaintiff was bending over with straight legs and hammering a pipe, the pipe shattered, causing a piece of the pipe to come at him from above his safety glasses and strike him in the left

eye, injuring it. After the accident, plaintiff threw away the safety glasses that he was wearing at the time of his accident.

Plaintiff's Affidavit

In his affidavit, plaintiff stated that "[a]t the time of [his] accident, [he] was wearing one of two safety glasses which [he] had been provided with for use on [the] job site" (plaintiff's notice of motion, exhibit J, plaintiff's aff). Plaintiff explained that "[o]ne [pair of safety glasses] was provided by Pinnacle and the other by Lend Lease" (*id.*). Plaintiff described the two pairs of glasses as "identical," as both "were made of clear plastic and neither pair had a layer of padding around the frame to create a seal around [his] eyes" (*id.*).

Plaintiff maintained that on other jobs that he worked on, he was provided with safety glasses with a padding around the frames, which created a seal around his eyes. Plaintiff asserted that these glasses "completely prevented debris and dust particles from coming into contact with [his] eyes" (*id.*).

Plaintiff also stated that, "[a]lthough [he] discarded the actual glasses that [he] wore at the time of the accident right after the accident, [he has] since obtained glasses which are identical to the glasses that [he] was wearing when the accident happened" (*id.*). Plaintiff annexed a photograph of those glasses to his affidavit.

Adam Feit's Deposition Testimony (Lend Lease's Superintendent)

Adam Feit testified that he was Lend Lease's superintendent on the day of the accident, and that Lend Lease served as the construction manager on the Project. As such, he was tasked with hiring subcontractors, overseeing the Project's field operations and dealing with day-to-day construction site issues. Lend Lease hired an outside consultant to manage site safety for the Project. Feit was not aware of anyone from Lend Lease monitoring the equipment used by the subcontractors on the Project, and he never had any discussions regarding the type of safety glasses used by the Pinnacle workers. In addition, he was not aware of any "written protocols regarding safety equipment to be used on [the] job site" (Feit tr at 18). Feit asserted that Pinnacle was solely responsible for making sure that its workers "had adequate safety equipment" (*id.* at 19).

Affidavit of Robert Fuchs, MSME, PE, CFEI, CSP (Plaintiff's Expert)

In his affidavit, Robert Fuchs, MSME, PE, CFEI, CSP, stated, "It is well known within the construction, engineering and safety industries that PVC is a brittle material that will shatter and fracture into pieces when broken" (plaintiff's notice of motion, exhibit K, Fuchs aff, ¶ 8). In addition, he asserted that plaintiff's "risk for exposure to flying debris would have been relatively high" when performing his demolition work on the subject pipe. He further stated that "the glasses that Plaintiff was wearing provided only minimum protection to flying debris due to the gap that exists around the perimeter of the frame" (*id.* ¶ 9). He noted that, in order for plaintiff to

be safe from flying debris while performing his work, it was necessary for him to be provided with eye wear containing foam padding around the inside perimeter of the frame of the glasses, so as to eliminate any gaps and provide a protective seal around the eyes.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Common-Law Negligence and Labor Law §§ 200 and 240 (1) Claims Against Defendants

Initially, defendants move for dismissal of the common-law negligence and Labor Law §§ 200 and 240 (1) claims against them. As plaintiff does not oppose those parts of defendants' motion which seek to dismiss these claims, these unopposed claims are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 240 (1) claims against them.

The Labor Law § 241 (6) Claim Against Defendants

Plaintiff moves for partial summary judgment in his favor on the Labor Law § 241 (6) claim, which is solely predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.8 (a). Defendants move for dismissal of said claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate

> protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Industrial Code 12 NYCRR 23-1.8 (a)

Industrial Code 12 NYCRR 23-1.8 (a) states, as follows:

> "*Personal protective equipment.* (a) *Eye protection.* Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

Industrial Code 12 NYCRR 23-1.8 (a) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*Buckley v Triborough Bridge & Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]).

Initially, as the owner of the Premises where the accident occurred, CPS may be liable for plaintiff's injuries under Labor Law § 241 (6). However, it must be determined as to whether Lend Lease, as the construction manager of the Project, may also be liable for plaintiff's injuries as an agent of the owner or general contractor. As to Lend Lease, it is important to note that

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). But "Labor Law § 240 (1) does not make each subcontractor liable for all injuries occurring on a jobsite in the absence of the subcontractor's ability to direct, supervise and control the work giving rise to the injury" (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]).

As discussed previously, the accident was caused by the fact that the safety glasses that were provided to plaintiff were not designed in such a way as to protect his eyes during his stripping operations. Here, issues of fact exist as to whether Lend Lease may be held liable under Labor Law § 241 (6) as an agent of the owner/general contractor. Although Lend Lease did not

supervise and/or control plaintiff's stripping work, plaintiff's testimony in this case, wherein he states that he used the two pairs of safety glasses interchangeably, and wherein he could not state definitely which pair he was using at the time of the accident, creates issues of fact as to whether Lend Lease provided the safety glasses that caused his eye injury, and whether Lend Lease determined and/or dictated the type of safety glasses to be used by the Pinnacle workers for their demolition work.

Thus, as a question of fact exists as to whether Lend Lease is a proper Labor Law defendant, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 241 (6) claim against Lend Lease, and Lend Lease is not entitled to dismissal of said claim against it. Therefore, in the remainder of this decision, the Labor Law § 241 (6) claim will be addressed in regard to CPS only.

Here, Industrial Code section 23-1.8 (a) applies to the facts of this case because at the time of the accident, plaintiff was involved in a chipping/cutting operation that could foreseeably damage his eyes, and the type of safety glasses that were provided to him, i.e., glasses that did not fit snugly to his face, failed to properly protect his eyes while performing this work.

It should be noted that defendants argue that plaintiff is not entitled to judgment in his favor on the ground of spoliation of evidence because he threw away his safety glasses after the accident, and, as such, defendants and their expert were denied the opportunity to inspect them.

> As the Court noted in *De Los Santos v Polanco* (21 AD3d 397 ([2d Dept 2005]): "The Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence. Because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading. A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense

(*id.* at 397-398 [internal citations omitted]; *Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2d Dept 2003]; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2d Dept 2001]).

However, the relevant information that defendants seek can be ascertained through the photographic and testimonial evidence contained in the record. "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (*Klein v Ford Motor Co.*, 303 AD2d at 377).

Thus, plaintiff is entitled to summary judgment in his favor on the Labor Law § 241 (6) claim as against CPS, and CPS is not entitled to dismissal of said claim against it.

Accordingly, it is hereby

ORDERED that the branches of CPS and Lend Lease's summary judgment motion to dismiss the common-law negligence and Labor Law §§ 200 and 240 (1) claims against them is granted, and these claims are dismissed as against defendants; and it is further

ORDERED that the branch of CPS and Lend Lease's summary judgment to dismiss the Labor Law § 241 (6) claim against them is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment in his favor on the Labor Law § 241 (6) claim as against CPS is granted; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied.

7/30/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE