DiCasimirro v Port Auth. of N.Y and N.J.
2019 NY Slip Op 32544(U)
July 5, 2019
Supreme Court, Bronx County
Docket Number: 300563/2012
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 300563/2012
Motion Calendar No. 5
Motion Date: 4/1/19

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JOHN DiCASIMIRRO,
SANDRA WILSON DiCASIMIRRO,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, BOVIS LEND LEASE LMB, INC., and LEND LEASE (US) CONSTRUCTION, INC.,

Defendants.

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Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Exhibits Thereto	**1**
Notice of Cross-Motion, Affirmation in Support, Exhibits thereto.....	**2**

Motions decided as follows: Upon deliberation of the application duly made by the defendants THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY (hereinafter "PORT AUTHORITY"), BOVIS LEND LEASE LMB, INC. and LEND LEASE (US) CONSTRUCTION, INC. (hereinafter "BOVIS")(PORT AUTHORITY and BOVIS collectively hereinafter "defendants") by **NOTICE OF MOTION,** and all the papers in connection therewith, for an Order, pursuant to CPLR §2221, granting defendants leave to renew their previous motion for summary judgement, and upon renewal, granting their application for summary judgement, dismissing plaintiff's Complaint, is heretofore granted in part. Upon deliberation of the application duly made by plaintiff herein, by **NOTICE OF CROSS-MOTION**, and all the papers in connection therewith, for an Order: (1) pursuant to CPLR §2221, granting leave to renew and reargue plaintiff's Cross-Motion for Summary Judgement and, upon renewal, granting plaintiff summary judgement on the issue of liability pursuant to Labor Law §241(6) and pursuant to CPLR §3025(b)(c) to permit plaintiff to supplement/amend the Supplemental Verified Bill of Particulars and Affidavit, is granted in part.

This is an action for personal injuries allegedly sustained by plaintiff JOHN DiCASIMIRRO (hereinafter "DiCASIMIRRO" or "plaintiff") on January 31, 2011 as a result of a slip/trip and fall on a snowy and icy condition on a stairwell located at the World Trade Center Memorial Site. Plaintiff alleges violations of Labor Law §§200 and 241(6), Industrial Code 23-1.5, 23-1.7(d) and (e) and 23-1.15, Article 1926 of OSHA and common law negligence.

Dwayne Fitzpatrick, testified at an Examination Before Trial (hereinafter "EBT") on behalf of BOVIS and is employed by same as an Environmental, Health & Safety Manager. Non-Party witness, Daniel Costanza, testified as plaintiff's co-worker, but did not witness the accident. Non-Party witness, Daniel Fitzsimmons, testified as a non -eyewitness Shop Steward with plaintiff's Union. He was made aware of the slip and fall on snow and ice incident by plaintiff, but did not generate a report.

On the date of the accident in question, plaintiff was employed with 4Js Mechanical and was working at the World Trade Center Memorial as a Plumber. BOVIS was the construction manager at the site and PORT AUTHORITY was the owner of the site. Plaintiff was assigned to work in the "A pump room," located one (1) story down from the reflecting pool. Plaintiff testified that upon reporting to work, he was reporting to the 4Js changing shanty, located on the same level as the A pump room. Plaintiff testified at his EBT that he entered through the Liberty Street and Greenwich Gate and then walked west to arrive at the stairs that lead down to the shanty. While walking towards the shanty and A pump room, plaintiff slipped on an icy and snowy condition on the concrete landing between the first and second flight of stairs. Plaintiff testified that he was injured after he planted his left foot on the landing and was in the process of moving his right foot when he slipped on an approximately two-foot patch of snow-covered ice and fell backwards.

According to Mr. Fitzpatrick, BOVIS was responsible for maintenance, including snow removal, from the primary entrances into the World Trade Center Memorial Site. According to Mr. Fitzpatrick, plaintiff was injured on the "Grand Stair" which was covered inside and exists within a building, and would never have been exposed to ice, snow, wind, sleet, rain, or any weather element, because the building was built and enclosed before the stair was put in. He testified that there is no Pump Room A, that the B stair is the nearest to the pump room. He also testified that there is no "West Gate." According to Mr. Fitzpatrick, the BOVIS snow removal protocol included, when BOVIS knew of an upcoming weather event, laborers would arrive at the site on the day of the event and would do what was necessary to clean up so people could arrive with no barriers. Mr. Fitzpatrick testified that if there was snow and ice on the B stair, BOVIS would have removed it.

Denise Fallon testified on behalf of PORT AUTHORITY. Ms. Fallon is a Program Manager at PORT AUTHORITY and responsibilities include overseeing contracts for video surveillance at the World Trade Center and performing close-outs of construction projects when they are complete. In January, 2011, Ms. Fallon was a Site Manager with Port Authority at the WTC construction site, and she managed the Security Guard contracts, overseeing the contracts that provided perimeter security and security guards. She testified that the Liberty Street entrance for construction workers, would have needed a Site Access Card to scan and enter the site. She testified that the Liberty Street entrance was known as Gate C. She testified that Robert Grant, for the Port Authority, would have been responsible for snow and ice removal in January, 2011. She also testified that snow and ice removal would have been performed by a contractor or sub contactor. She was not aware of any snow or ice related removal complaints in 2011.

Mr. Costanza testified that he was working for 4J's Plumbing on the day in question. He was a half dozen steps in front of plaintiff when he heard a "noise" and turned around to see plaintiff

"picking himself up." He did not see plaintiff fall. Mr. Costanza testified that the subject stairwell was concrete, and was an open stairwell at the top and then covered as you descend. Mr. Costanza testified that the stairs appeared to be "wet with something," but he did not specify snow or ice. Mr. Costanza recalled he went down the stairs "gingerly."

By Decision/Order dated January 7, 2019, this Court denied defendants summary judgement motion and plaintiff's cross-motion for summary judgement and to amend with leave to renew, demonstrating proof of service in compliance with Court's rules. It appears that both plaintiff and defendants have complied with this Court's directives and demonstrated that the underlying motions were timely made. As such, both applications to renew are heretofore granted and heretofore considered.

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See Zukerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

Labor Law §200 is a codification of the common-law duty imposed on an owner or general contractor to maintain a safe work site. *See* Rizzuto v. L.A. Wenger Contr. Co. 91 N.Y.2d 343 (1998). Defendants move to dismiss plaintiff's Labor Law §200 cause of action as the claim that plaintiff cannot establish the purported location of the accident, or that defendants had control over the subject location or had notice of the alleged hazardous condition.

Defendant's application to dismiss plaintiff's Complaint for failure to properly identify the location of the fall is heretofore denied. On the surface there appears to be a conflicting description as to where plaintiff fell in plaintiff's Notice of Claim, Complaint, EBT Testimony, Bill of Particulars and Supplemental Bill of Particulars, Affidavit and So Ordered Stipulation. More specifically, it appears that the Notice of Claim, Complaint, Bill of Particulars and So Ordered Stipulation identify the stairwell at issue by the street entrance, and the end destination of the stairwell from the street location entrance. Only until the plaintiff's Supplemental Bill of Particulars, dated nearly three (3) years after Notice of Claim, did plaintiff apparently misidentify the location of the snow and ice on Stairway D as opposed to Stairway B. Defendants have not been able to identify any actual prejudice as a result of this apparent mistake by plaintiff to identify the transient condition on the wrong stairwell in their Supplemental Bill of Particulars three (3) years after the accident in question. If anything, it creates an issue of fact to be determined at the time of trial. Therefore, defendant's application to dismiss the Complaint for plaintiff's failure to properly identify the location of the fall is heretofore denied. Moreover, issues as to whether plaintiff was working at the time of the alleged accident are clearly issues of fact to be determined by a jury.

Moreover, plaintiff's application to amend their Supplemental Bill of Particulars pursuant to CPLR §3025(b)(c) is heretofore granted absent the showing of any prejudice to defendants.

Plaintiff must serve their annexed Second Supplemental Verified Bill of Particulars within (20) days of service of the instant Decision and Order with Notice of Entry.

Defendants have failed to make a *prima facie* showing of entitlement to summary judgement with respect the plaintiff's Labor Law §200 claim. Defendants have failed to attach the contract indicting the duties of PORT AUTHORITY and BOVIS. Moreover, defendants have failed to attach any inspection records by BOVIS or PORT AUTHORITY for the date in question or any weather reports indicating what, if any precipitation, fell on the date in question. Therefore, defendants cannot, as a matter of law and for the purposes of summary judgement, demonstrate lack of control of the subject worksite or lack of notice of the alleged hazardous condition.

Defendants' application to dismiss plaintiff's Labor Law §241(6) claim is heretofore granted in part and plaintiff's cross-motion for summary judgement on liability with respect to his Labor Law §241(6) claim is heretofore denied. The only specific opposition plaintiff makes to defendants' motion to dismiss concerns industrial code 12 NYCRR 23-1.7(d) which provides as follows:

> (I) Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Plaintiff moves for summary judgement with respect to liability as to 12 NYCRR 23-1.7(d). This section has been held to be violations of specific provision to impose liability pursuant to Labor Law §241(6). *See* Reynoso v. Bovis Lend Lease LMB, Inc., 125 A.D.3d 740, 4 N.Y.S.3d 55. However, clear issues of fact exist as to the existence of a hazardous condition, not just as to notice thereof, which precludes the granting of summary judgement at this time as to Labor Law §241(6) exclusively with respect to 12 NYCRR 23-1.7(d).

Accordingly, it is:

ORDERED that the application by plaintiff and defendants to renew pursuant to CPLR §2221, is heretofore granted. It is further

ORDERED that defendants' application for summary judgement, pursuant to CPLR §3212, dismissing plaintiff's Labor Law §200 cause of action is heretofore denied. It is further

ORDERED that defendant's application for summary judgement, pursuant to CPRL §3212, dismissing plaintiff's Labor Law §241(6) cause of action, is heretofore denied exclusively as to 12 NYCRR 23-1.7(d). It is further

ORDERED that plaintiff's application to amend their Supplemental Bill of Particulars, pursuant to CPLR §3025, is heretofore granted. It is further

ORDERED that plaintiff must serve the annexed Amended Supplemental Bill of Particulars within twenty (20) days of the service of this Order with Notice of Entry. It is further

ORDERED that plaintiff's motion for summary judgement, pursuant to CPLR §3212, is heretofore denied. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this order.

The forgoing constitutes the Decision and Order of the Court.

Dated: July 5, 2019

Hon Wilma Guzman, JSC