

Cullinan v New York Univ.

2019 NY Slip Op 33442(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 159762/2016

Judge: Robert R. Reed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

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PATRICK CULLINAN, GERALDINE CULLINAN,

Plaintiff,

- v -

NEW YORK UNIVERSITY, NYU SCHOOL OF MEDICINE,
NYU HOSPITALS CENTER, NYU LANGONE MEDICAL
CENTER, TURNER CONSTRUCTION COMPANY,

Defendant.

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INDEX NO. 159762/2016
MOTION DATE 03/04/2019
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

Plaintiff commenced this action after suffering injuries on or about November 19, 2013, when, while crossing the street to deliver materials at a construction site, he was hit by an oncoming vehicle. Defendant Turner Construction Company (Turner) now moves, pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint because Turner is not a proper labor law defendant in this action and owed no duty to plaintiff otherwise, or, in the alternative, (2) dismissing plaintiffs' claims under Labor Law 240 (1), and/or (3) dismissing plaintiffs' Labor Law 241 (6) claims because the Industrial Code sections plaintiff alleges were violated are inapplicable to the facts herein, and/or (4) dismissing plaintiffs' common law negligence and Labor Law 200 claims because Turner did not supervise, direct or control the means and methods of plaintiff's work nor did it create or have notice of any allegedly defective condition. Defendants New York University, NYU School of Medicine, NYU Hospitals Center, and NYU

Langone Medical Center and plaintiff oppose, arguing substantially that Turner's motion is premature due to the early stages of discovery.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Hospital*, 68 NY2d 320). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact (*id.*).

For a defendant to be liable for a violation of Labor Law 200, the defendant must have had (1) authority or control over the work a plaintiff was involved in when he was injured or over the conditions in which it was carried out or (2) notice of a hazard and sufficient authority or control to ensure the hazard could be corrected (*Martinez v. Hitachi Const. Mach. Co.*, 15 Misc 3d 244, *supra*). In the instant matter, it is undisputed that Turner was hired as a construction manager for a construction project at an NYU location. Turner, however, in its moving papers, asserts that it did not supervise, control, or direct the means and methods of plaintiff's work and that it had no notice of a defective condition and therefore cannot be held liable under Labor Law 200. Turner's assertions, ultimately, prove unconvincing. Turner's moving papers and oral argument leave the court unclear as to what Turner's duties, actions, and obligations were as a construction manager at the construction site. Critically, Turner's papers and argument leave unclear what Turner's role was -- if any -- in controlling egress and ingress to the construction site and whether it took on a responsibility for providing safe passage within the broad ranging jobsite. Turner argues that, as a construction manager and not an owner, contractor or agent, it falls outside of the ambit of individuals or entities that can be held liable

under Labor Law 200. Construction managers, though, have been found to be contractors within the meaning of the Labor Law based upon the duties that were contracted to be performed (*see Carroll v. Tishman*, 109 Misc 2d 506). Thus, in this instance, it is the duties that Turner contracted to perform that are controlling -- and not any particular title Turner held. Under these circumstances, in this court's view, Turner has failed to tender sufficient evidence to demonstrate that there is an absence of material issues of fact with respect to Turner's potential liability for common negligence and/or under Labor Law 200. This seems particularly so here, in light of the lack of significant discovery thus far in this litigation. Summary judgment seems, at a minimum, premature as it relates to plaintiff's common law negligence and Labor Law 200 claims (CPLR 3212[d]).

Turner also seeks dismissal of plaintiffs' Labor Law 240 (1) claim. Section 240 (1) provides that "all contractors and owners and their agents ... who contract for but do not direct or control the work, 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 import of N.Y. Lab. Law 240 (1) is undeniably salutary, requiring owners and contractors to provide proper protection to workers employed on a construction site. However, not every hazard or danger encountered in a construction zone falls within the scope of 240 (1) as to render the owner or contractor liable for an injured worker's damages" (*Misseritti v. Mark Constr. Co.*, 86 NY2d 487). Labor Law 240 (1) was aimed only at elevation-related hazards and, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the

absence of a required safety device (*id.*; see also *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494).

In the matter at bar, it appears beyond dispute that plaintiff, when hit by the oncoming vehicle, was not engaged in an elevation-related task, and thus, did not face an elevation-related hazard as contemplated by Labor Law 240 (1). Plaintiff was crossing the street to deliver materials to a work site. There were no elevation differential challenges or gravity-related hazards faced by plaintiff at the time of his accident. “Section 240, known as the ‘Scaffold Law’ has historically been construed in the context of workers injured as a result of inadequate or missing safety equipment at elevated work sites. It is in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites that Section 240 (1) prescribes safety precautions for workers laboring under unique gravity-related hazards” (*Misseritti v. Mark*, 86 NY2d, at 490; see also *Sarnoff v. Charles Schad, Inc.*, 22 NY2d 180; *DeHaen v. Rockwood Sprinkler Co.*, 258 NY 350). Turner has, by admissible evidence, demonstrated the lack of any evidence or even substantive allegations of conduct covered by Section 240 (1), establishing prima facie entitlement to summary judgment dismissing such claim. Plaintiff in opposition has failed to proffer to the court, evidence in support of his burden of production to establish that there is a triable issue of fact as it relates to his cause of action under Labor Law Section 240 (1).

Turner also seeks dismissal of plaintiff’s Labor Law 241 (6) claim. Labor Law Section 241 (6) requires owners and contractors to provide adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Department of Labor. The Labor Department Commissioner’s safety rules are set forth in the New York State Industrial Code (see *Misicki v. Caradonna*, 12 NY3d 511). To support a Labor Law 241 (6)

claim, a plaintiff must articulate an Industrial Code provision affirmatively mandating specific, concrete conduct or conditions that apply to the work at the plaintiff's work site and that defendant violated" (*Martinez v. Hitachi Const. Mach. Co.*, 15 Misc 3d 244). Plaintiff here cites numerous Industrial Code provisions Turner allegedly violated. Turner, however, establishes prima facie that the regulations relied upon by plaintiff are either inadequately specific in nature or plainly inapplicable to the facts of this case. Plaintiff has failed to present evidence to convince the court that the alleged violated regulations are applicable to the facts of the case before us. Plaintiff cites, *inter alia*, 12 NYCRR: 23-1.7(a)(1) and (2), 23-1.7(b)(1)(i)(ii) and (iii)(a)(b), and 23-1.7(d) and (e). Said safety regulations refer to overhead hazards, falling hazards and secure openings, and slippery passageways, respectively. The safety regulations alleged to have been violated do not apply in any way to the work plaintiff was engaged in at the time of his accident and, in the court's opinion, any potential violation thereof by Turner could not reasonably be found to have contributed to plaintiff's accident.

Accordingly, it is

ORDERED that the portion of the motion of defendant Turner Construction Company seeking summary judgment and dismissing plaintiffs' claims under Labor Law 240(1) is granted; and it is further

ORDERED that the portion of the motion of defendant Turner Construction Company seeking summary judgment and dismissing plaintiffs' Labor Law 241(6) claims is granted; and it is further

ORDERED that the portion of the motion of defendant Turner Construction Company, seeking summary judgment and dismissing plaintiffs' claims because Turner Construction


Company is not a proper labor law defendant in this action and owed no duty to plaintiff is denied; and it is further

ORDERED that the portion of the motion of defendant Turner Construction Company seeking summary judgment dismissing plaintiffs' common law negligence and Labor Law 200 claim is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 43, at Room 412 at 60 Centre Street, on January 9, 2020 at 11:00 a.m.

This constitutes the Decision and Order of the court.

11/19/2019
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE