Evangelista v A. Tuosto Masonry & Landscapes Corp.
2019 NY Slip Op 34354(U)
October 1, 2019
Supreme Court, Nassau County
Docket Number: Index No. 0575/2017
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

FRANK EVANGELISTA,

Plaintiff,

-against-

A. TUOSTO MASONRY AND LANSCAPES CORP., T & T PLUMBING AND HEATING CORP. and JOHN B. MECHANICAL, INC.,

Defendants.

Index No. 0575/2017

Motion Submitted: 06/10/19
Motion Sequence: 002,003,004

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... XXX
Answering Papers..... XXX
Reply..... XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants T&T Plumbing and Heating Corp. ("T&T Plumbing") and John B. Mechanical, Inc. ("Mechanical")[1] move this Court for an Order granting them summary judgment and dismissing plaintiff's complaint. (Motion Sequence 002). Defendant A. Tuosto Masonry and Landscaping Corp. ("Tuosto") has not submitted opposition to the motion.

Plaintiff opposes Defendants' motion and cross-moves for an Order granting him summary judgment. (Motion Sequence 004). Defendants oppose plaintiff's motion. Tuosto has not submitted opposition to plaintiff's motion.

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[1] T&T Plumbing and Mechanical are, collectively, "Defendants."

Tuosto also moves this Court for an order granting it summary judgment. (Motion Sequence 003). Defendants did not oppose the motion. While plaintiff opposed the grounds on which Tuosto seeks summary judgment, he does not object to the Court granting Tuosto's application. Accordingly, there being no opposition, Tuosto's motion for summary judgment is granted. The complaint and all cross-claims against Tuosto are hereby dismissed.

Plaintiff alleges he was injured on November 18, 2015. On the date of the accident, plaintiff was employed as a Plumbing Inspector for the Town of North Hempstead and went to 2 Corn Crib Lane, Roslyn Heights, New York ("Premises") to conduct a plumbing inspection. Plaintiff was escorted by Giovanni Bono, Mechanical's owner, to the backyard where gas and domestic water pipes were laid in a trench. There were dirt piles that were approximately one and a half to two feet high on each side of the trench. Plaintiff stood atop one of the dirt piles and looked down to inspect the piping. As plaintiff was turning to leave, the side of the trench and dirt pile he was standing on gave way causing plaintiff to slide into the trench, which was covered in rocks. Plaintiff twisted his ankle and landed on his left knee resulting in injuries.

The complaint and Verified Bill of Particulars allege claims against the named defendants for negligence and New York State Labor Law ("Labor Law") liability pursuant to §§ 200, 240(1), and 241(6) for violating Rule 23 of the New York Industrial Code ("Industrial Code"), specifically §§ 23—3.2 and 23-4.4.

It is well settled that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving parties. (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See*, ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. (***Alvarez***; ***Zuckerman***).

In support of their motion, Defendants submit the pleadings, Verified Bill of Particulars, Amended Bill of Particulars, the transcript of plaintiff's April 20, 2018 examination before trial, the transcript of Giovanni Bono, who testified for Mechanical on

June 7, 2018, the transcript of Antonio Aufiero, who testified for T&T Plumbing on September 17, 2018, the transcript of Angelo Tuosto, who testified on behalf of Tuosto on June 27, 2018, and the Certification Order dated October 3, 2018.

In their moving papers, Defendants contend that there are no issues of fact warranting a trial in this matter because, among other reasons, Defendants did not have notice of a defective or dangerous condition that caused the accident for the purposes of plaintiff's negligence claim and Defendants did not supervise, direct or control the plaintiff's work for the purposes of plaintiff's Labor Law §200 claim. Defendants asserts they are not liable under Labor Law §240(1) because plaintiff did not fall from a height and was not struck by a falling object. As to the alleged Industrial Code violations supporting the Labor Law claim asserted under §241(6), Defendants aver that plaintiff failed to prove thier applicability because he was not performing demolition work and Defendants were not required to shore or brace the trench because were not the owners or general contractors for the Premises.

In opposition to Defendants motion, and in support of his motion for summary judgment for his claims against Defendants pursuant to Labor Law §§ 240(1) and 241(6), plaintiff argues Defendants failed to provide him with an adequate safety device to perform the plumbing inspection and failed to shore and/or brace the trench. Plaintiff submits, among others, the pleadings, his deposition transcript, Mr. Bono's deposition transcript, Mr. Aufiero's deposition transcript, his sworn affidavit, and an expert affidavit from Thomas R. Parisi, P.E.

In the case at bar, plaintiff testified that, as a plumbing inspector for the Town of North Hempstead, his job duties included inspecting jobs where permits are taken out to ensure the piping conforms with relevant codes and the contractors performed the work correctly. His role at a worksite was to observe the work performed instead of performing the physical work himself.

On the day of the incident, plaintiff was tasked with inspecting plumbing work that was done in relation to the construction of an outdoor canopy. When plaintiff arrived at the Premises the plumbing work was already completed. No other work was being performed other than another contractor grading the ground on the other side of the backyard.

Plaintiff further testified that he is unaware of who dug the trench, which measured approximately two feet wide, forty feet long and at least four feet deep. He also did not know who created the dirt mounds along the sides of the trench, which were approximately one and one half to two feet high at its highest point. Plaintiff initially told Mechanical the piping laid at the Premises failed inspection. He was standing on one of the piles of dirt when the dirt gave way as he was turning to leave area. There were no railings along the sides of the trench.

During Mechanical's deposition, Mr. Bono testified Mechanical was hired directly by the owner, not another contractor. Mechanical did not dig the trench, nor did Mr. Bono discuss digging the trench with the owner of the Premises or other contractors. In addition, Mechanical could not perform the work because it did not own an excavator. Mr. Bono testified that the trench was waist high at its deepest point, and the mounds were well below eye level at their highest point, if a person were standing in the trench.

The owner of the Premises did not give Mechanical direction as to how the work should be performed. Moreover, the owner was not present when Mechanical laid the pipes.

Mr. Bono acknowledged being at the Premises while plaintiff performed the inspection. Mr. Bono's back was turned when plaintiff fell. Mr. Bono did not observe plaintiff in the trench after he fell. Rather, plaintiff was lying on his side at ground level above the pipes. Mr. Bono noted that plaintiff continued with the inspection after he fell.

During T&T Plumbing's deposition, Mr. Aufiero testified that T&T Plumbing did not perform any physical work at the Premises. Mr. Aufiero was never in contact with or retained by the owner or general contractor. The only work T&T Plumbing performed was to obtain permits at Mechanical's request. However, T&T Plumbing was not paid for this service. Mr. Aufiero further testified that while he does not know who dug the trench at the Premises, he knows it was not T&T Plumbing who did it. T&T Plumbing does not perform excavations, trench work or backfilling as part of its usual contracts.

The Court will address Defendants' application to dismiss plaintiff's claims of negligence under Labor Law §200. Labor Law §200 is a codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work. (***Rizzuto v. L.A. Wenger Contracting Co., Inc.*** 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998); ***Comes v. New York State Electric and Gas Corp.***, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 [1993]). An implicit precondition to this duty "is that the party charged with responsibility have the authority to control the activity bringing about the injury." (***Russin v. Louis N. Picciano & Son***, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]).

Cases involving Labor Law §200 generally fall into two categories: those where workers are injured because of a dangerous condition at a work site, and those involving the manner in which work was performed. (***LaGiudice v. Sleepy's Inc.***, 67 A.D.3d 969, 890 N.Y.S.2d 564, 2009 WL 4068527 (2d Dept., 2009); ***McFadden v. Lee***, 62 A.D.3d 966, 967, 880 N.Y.S.2d 311 (2d Dept., 2009); ***Ortega v. Puccia***, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2d Dept., 2008]). When a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. (***Ortega v. Puccia***, 57 A.D.3d 54, 866 N.Y.S.2d 323, 2008 N.Y. App.

Div. LEXIS 8140, 2008 NY Slip Op 8305, 240 N.Y.L.J. 89). Where the injury arises out of dangers in the methods or materials of the work, recovery against the owner/general contractor cannot be had under Labor Law §200 and for common-law negligence unless it is shown that the owner/general contractor had the authority to supervise or control the performance of the work. (***LaGiudice***; ***McFadden*** at 967; ***Ortega*** at 61). Evidence of general supervisory authority to oversee the progress of the work, to inspect the work product, and/or make aesthetic decisions is insufficient to impose liability under Labor Law §200. (***McFadden*** at 967; see ***Orellana v. Dutcher Ave. Bldrs, Inc.***, 58 A.D.3d 612, 614, 871 N.Y.S.2d 352 (2d Dept., 2009), 12 N.Y.3d 804 (2009); ***McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints***, 41 A.D.3d 796, 839 N.Y.S.2d 164 [2d Dept., 2007]).

Under the circumstances of this case, there is no evidence in the record demonstrating Defendants owned the Premises. However, the record is unclear as to who the general contractors of the project were. It is for a jury to determine who possessed the authority to supervise or control the trench work. Further, there is a question of fact as to whether Mr. Bono's shoveling six inches of dirt over the pipes after they passed inspection demonstrates Mechanical was in control of maintaining the trench or is merely evidence that Mechanical possessed general authority to oversee the inspection of the piping. Accordingly, that branch of Defendants' motion seeking to dismiss plaintiff's negligence claim under Labor Law §200 is denied.

The Court turns next to plaintiff's claim under Labor Law §241(6). "Labor Law §241(6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority." (***Ross v. Curtis-Palmer Hydro-Electric Company***, 81 NY2d 494, 503 [1993]). "Our cases hold that the statute imposes a nondelegable duty on owners and contractors to comply with those 'specific detailed rules.' Thus, the statute creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and only where, a 'specific, positive command' or a 'concrete specification' of a regulation promulgated by the Commissioner pursuant to the statue has been violated" (internal citations omitted). (***Toefer v. Long Island Rail Road***, 4 NY3d 399, 409 [2005]). "The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case." (***Forschner v. Jucca Company***, 63 AD3d 996, 998 [2d Dept 2009]).

Plaintiff's Bill of Particulars asserts Defendants' liability under Labor Law §241(6) stems from violations of §§23-3.2(a) and 23-4.4 of the Industrial Code. Plaintiff also claims violations under Industrial Code §23-1.7(b)(1)(i)(ii) in his moving papers.

Industrial Code §23-3.2(a) provides that certain safety precautions be taken before a building or other structure is demolished, including removing glass from exterior openings, and sealing and/or protecting gas, steam, electric and water lines.

It is clear from the record that the pipes had already been laid at the time plaintiff performed the inspection. There was no building or structure to be demolished. Rather an outdoor structure was being erected. Thus, Industrial Code §23-3.2(a) is inapplicable to the instant matter. Accordingly, that branch of Defendants' motion seeking dismissal of plaintiff's claim deriving from violations of Industrial Code §23-3.2(a) is granted.

Industrial Code §23-4.4 provides "[w]here any excavation is not protected by sloped sides or banks . . . any person in such excavation shall be protected by sheeting, shoring and bracing." (*12 NYCRR §23-4.4)*. The statute further provides the shoring requirements apply to excavation depths that are greater than five feet.

The Court cannot determine if sheeting, shoring or bracing was required because there is a question of fact as to how deep the trench and surrounding dirt piles were at the time of the accident based on plaintiff's and Mr. Bono's conflicting testimony. Therefore, those branches of Defendants' and plaintiff's motions seeking summary judgment on plaintiff's claims arising under Industrial Code §23-4.4 are denied.

Industrial Code §23-1.7(b)(1)(i)(ii) requires that every hazardous opening into which a person may step or fall be covered or have a safety railing installed. Where the work is in progress and the opening must be accessed, a safety railing with gate that swings away from the hazardous opening is required.

Although the record establishes there were no railings installed around the trench, there is a question of fact as to who the general contractor responsible for the trench work was. Determining whether Defendants were the general contractors for the project is the *sine qua non* to finding Defendants liable for failing to install a safety railing. Therefore, those branches of Defendants' and plaintiff's motions seeking summary judgement for plaintiff's claims under Industrial Code §23-1.7(b)(1)(i)(ii) are denied.

Last, the Court will consider the arguments in favor of summary judgment pursuant to Labor Law §240(1). The contemplated hazards for which Labor Law §240(1) offers protection are those related to the effects of gravity or elevation. (***Rocovich v. Consolidated Edison Co.***, 78 N.Y.2d 509, 514, 583 N.E.2d 932 [1991]).

"[A]ll contractors and owners . . . 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." (***Carlton v. City of New York***, 161 A.D.3d 930, 931, 77 N.Y.S.3d 445, 448, 2018 N.Y. App. Div. LEXIS 3481, 2018 NY Slip Op 03500, 2018 WL 222531). Liability under Labor Law §240(1) "depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in §240(1) protect against. The single decisive question in determining whether Labor Law §240(1) whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.*)

While it is true plaintiff was performing the inspection of the piping at an elevation, the Court finds plaintiff's work was merely investigatory and, therefore, is not protected by Labor Law §240(1). Specifically, plaintiff was not actively engaged in the erection or demotion of the backyard structure at the time of the inspection. The trench was already excavated, and the pipes were laid when plaintiff was injured. Moreover, plaintiff did not work for a company that was contracted to perform construction and alteration activities covered by Labor Law §240(1). (***Prats v. Port Auth.***, 100 N.Y.2d 878, 800 N.E.2d 351, 768 N.Y.S.2d 178, 2003 N.Y. LEXIS 3312). Accordingly, that branch of Defendants' motion seeking dismissal of plaintiff's claims under Labor Law §240(1) is granted. That branch of plaintiff's motion seeking summary judgment under Labor Law §240(1) is denied.

Plaintiff's opposition did not address Defendants' application to dismiss all cross-claims against them. As such, with no opposition, that part of Defendants' motion seeking dismissal of all cross-claims against them is granted.

The foregoing constitutes the Order of this Court.

Dated: October 1, 2019
Mineola, NY

Karen V Murphy
J.S.C.

ENTERED

OCT 04 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE