Builes v City of New York
2020 NY Slip Op 30734(U)
March 9, 2020
Supreme Court, New York County
Docket Number: 153255/2015
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **IAS MOTION 52EFM**

Justice

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JAIME BUILES, MARIELENA BOLIVAR

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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INDEX NO. 153255/2015

MOTION DATE 03/04/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 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

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

This action arises out of alleged injuries sustained by plaintiff when a plate was moved by a backhoe and struck him in the ankle and leg. The plate was being moved from an 8 to 12-inch stack at street level. Plaintiff was standing at street level. Defendant, Consolidated Edison Company of New York Inc. (Con Ed) moves for summary judgment dismissing plaintiff's Labor Law §§240, 241(6) and 200 claims. Plaintiff opposes and cross-moves for summary judgment. For the reasons set forth below Con Ed's motion is granted in part and plaintiff's motion is denied.[1]

Facts

On April 25, 2014, immediately prior to the accident, plaintiff, employed by a company called Hallen Construction, was standing with a co-worker at a Con Ed construction site, receiving instructions as to what they were going to do the following Monday. Steel plates,

[1] The Court would like to thank Dorothy Spingarn for her assistance in this matter.

used for closing a trench, were stacked, approximately 4 feet behind him. Plaintiff was standing between the trench and the curb in front of 60 East 96th Street, looking North. A backhoe machine started moving plates, to close the trench, plaintiff then felt one of the plates fall on his foot.

Labor Law § 200

Con Ed has established its entitlement to judgment as a matter of law with respect to the Labor Law § 200 claims. Con Ed has established that did not have anyone present on site when the accident happened, it did not provide any material or equipment to the workers and it did not control or direct the work that was being performed by Hallen Construction, plaintiff's employer, at the time of the accident. Furthermore, there is no evidence nor any allegation of any defective condition on site that caused the accident. Plaintiff does not appear to oppose this portion of Con Ed's motion. Accordingly, plaintiff's Labor Law § 200 claim is dismissed.

Labor Law § 240(1)

It is well established law that "an accident alone does not establish a Labor Law § 240 (1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]) Rather, there must be shown that a safety mechanism failed for there to be liability pursuant to Section 240(1). *See* id. Neither moving party has established its entitlement to judgment as a matter of law on this issue.

Plaintiff has failed to establish that there was a deficiency or failure of any device that may have caused the happening of the accident. Defendant has failed to make out their *prima facie* showing as a matter of law that the accident was not caused by such a deficiency or failure. The plaintiff's testimony is the only testimony in the record with respect to the happening of the accident. Plaintiff did not see what happened just prior to the accident, and therefore, cannot

establish what occurred. Accordingly, with respect to a Labor Law § 240 (1), the Court finds that there is a question of fact.

Labor Law § 241(6)

It is well settled law that for there to be liability pursuant to Labor Law Section 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute). Plaintiff argues that a violation of Industrial Code (12 NYCRR) § 23-9.5(c) occurred in the underlying incident.[2]

Plaintiff contends that because he was not licensed nor trained and because there was no evidence given by defendants that the plaintiff was either authorized or directed to give signals, the plaintiff cannot be considered part of the excavation crew. Plaintiff further argues that if the plaintiff was not part of the excavation crew then Industrial Code (12 NYCRR) § 23-9.5(c) was violated. Defendant contends that plaintiff was a member of the excavation crew and therefore, Industrial Code (12 NYCRR) § 23-9.5(c) was not violated.

Industrial Code (12 NYCRR) § 23-9.5(c) states that only the pitman and the excavation crew shall be permitted to stand in the range of a power shovel or within range of the swing from a dipper bucket with the shovel is in operation. *See* 12 NYCRR 23-9.5(c).

Plaintiff's argument seems to be based in the idea that plaintiff was not a member of the "operating crew" at the time of the incident. *See Scott v. Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]. In *Scott v Westmore Fuel Co., Inc*, the plaintiff was riding on the back of a backhoe at the time of the accident. There the court held that because the plaintiff was not

[2] With respect to alleged violations of the Industrial Code (12 NYCRR) §§ 23-4.2(k) and 23-9.4(h)(4), plaintiff conceded during oral argument that those sections of the Industrial Code are insufficiently specific to sustain a Labor Law §241(6) claim.

authorized to operate a backhoe, Industrial Code (12 NYCRR) § 23-9.5(c) was violated. The facts of the case here do not lend themselves to the same conclusion.

While true that the plaintiff here was not authorized to operate a backhoe, or similar machinery, plaintiff was not interacting with any such machinery at the time of the accident. In *Scott v. Westmore Fuel Co., Inc*, it was admitted that the plaintiff's responsibilities were primarily excavation work, but the violation came from the operation and interaction with a backhoe. Here, the plaintiff was not operating any machinery that he was not authorized to operate. Additionally, plaintiff testified that he did excavation and sweeping. *See* NYSCEF Doc. 63 at page 16, line 14.

Plaintiff consistently refers to the notion that the plaintiff was not a member of the "operating crew." However, the statute refers to the excavation crew, rather than an operating crew. Although perhaps insignificant semantics, the meaning behind these two words have drastic effects on the outcome of this issue. Plaintiff was not operating anything, nor was he supposed to, and therefore would not have been considered part of an operating crew. However, as previously stated, plaintiff did do excavation, and therefore would be considered part of the excavation crew. Although *Scott v. Westmore Fuel Co., Inc*, references an "operating crew" the facts of that case do not comport with the facts here and the statute explicitly states, "excavation crew".

Plaintiff's secondary argument that he was not selected or directed by his employer, *see Cunha v Crossroads II*, 131 AD3d 440, 442 [2d Dept 2015], fails as well. Plaintiff testified that there was a foreman at the scene instructing him where to dig. *See* NYSCEF Doc. 63 at page 31, lines 13-19. As the plaintiff was chosen by his employer to excavate and work at the scene, plaintiff is part of the permitted class. *See Sawicki v AGA 15th St., LLC*, 143 AD3d 549, 550 [1st

Dept 2016]. That the plaintiff was not excavating at the time of the accident is immaterial as well. The statute does not require that the individual be actively excavating at the time of the accident, only that they be part of the excavation crew. Therefore, summary judgment is granted for defendant on this issue. Accordingly, it is hereby

ORDERED that Consolidated Edison Company of New York Inc.'s motion for summary judgment is granted in part and plaintiff's Labor Law Section 200 and Section 241(6) claims are dismissed as to that defendant only; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied in its entirety.

3/9/2020
DATE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK 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