

Oliver v North Queensview Homes Inc.

2020 NY Slip Op 32141(U)

June 29, 2020

Supreme Court, Kings County

Docket Number: 511406/16

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
STACEY OLIVER,

Plaintiff,

Index No: 511406/16

-against-

DECISION AND ORDER

NORTH QUEENSVIEW HOMES INC., BAILEY’S
ENGINEERING, PC, and ANTONUCCI & ASSOCIATES
ARCHITECTS & ENGINEERS LLP,

Defendant ,

NORTH QUEENSVIEW HOMES INC.,

Third-party Plaintiff,

-against-

PROTO RESTORATION CONSTRUCTION,

Third-party defendant.
_____X

Recitation as required by CPLR 2219(a), of the papers considered in this motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	2; 3
Reply Papers.....	4
Memoranda of law.....	5

Upon the foregoing cited papers, the Decision/Order on this motion:

In this action to recover damages for personal injuries, defendant/third-party plaintiff North Queensview Home Inc. [Queensview] moves for an order pursuant to CPLR 3212 granting it summary judgment and dismissing plaintiff Stacey Oliver’s

[Oliver] Labor Law §§ 240(1), 241(6) and 200 causes of action¹. Queensview also seeks an award of summary judgment on its claim against third-party defendant Proto Construction Corp. [Proto] for contractual indemnification.

On December 16, 2015 at approximately 7:58 AM, Oliver, a truck driver employed by Proto was allegedly injured when he fell while attempting to climb to the top of a sidewalk shed located at 33-60 21st Street, Long Island City. The shed, which was approximately 8- to 10-feet in height, was erected by Pronto in conjunction with a façade restoration project pursuant to its contract with Queensview, the owner of a 7-building cooperative complex.

Testimony of Stacey Oliver

Oliver testified that on the date of this accident he had been working as a truck driver for Proto for approximately 7 months, delivering/retrieving sidewalk shed/scaffolding material to and from various jobsites. His duties also included helping the workers at the sites load and unload materials, and occasionally he would also assist in dismantling the sidewalk sheds/scaffolding. Prior to the date of this accident, Oliver had only helped with any dismantling from ground level.

On the morning of his accident, Oliver went to the Long Island City site to pick up sidewalk shed material as he had done approximately 10 times previously and to help dismantle the shed. When Oliver arrived that morning at approximately 7:30 AM, he asked and received permission from Vernon, his supervisor, and Fernando, a laborer, to go to the top of the shed to help remove nails from the planks. To get to the top of the shed, Oliver climbed the shed's attached ladder. When he reached the next to the last step, Oliver placed both hands flat on the shed's roof and began to hoist himself up at which point, a beam gave way causing him to fall to the ground below and sustain injuries.

Testimony of Vernon Drepaul

Vernon Drepaul, Proto's scaffold erector, testified that he was the supervisor/foreman in charge of the sidewalk shed part of this project and was the only person who directed Oliver's work at the jobsite. Oliver had been employed by Proto as a truck driver for approximately 2 months before this accident and his duties included delivering/picking up and loading/unloading sidewalk shed materials. Oliver was not responsible to assist in the erection and demolition of the sidewalk sheds and he never asked Vernon if he could perform that work. Safety meetings were held every Monday morning and during those meetings Vernon instructed Oliver not to climb the sidewalk

¹ Pursuant to a stipulation dated September 5, 2018, the action and all cross-claims as against defendants Bailey's Engineering, PC, and Antonucci & Associates Architects & Engineers LLP were discontinued with prejudice.

shed as he did not have the requisite training certificate. Oliver was also informed during those meetings that if he did climb the sidewalk shed, he would be terminated.

The work hours at the jobsite were from 8AM to 4:30PM. The men were not permitted to begin working until Vernon arrived. If Vernon was going to arrive after 8:30/9AM he would call Fernando and tell him what he and the rest of the men should start doing; something he did not do on the morning of the accident. On the date of the accident, the sidewalk shed had not yet been fully erected and the planned work was to continue extending the shed on the sidewalk. Each morning the workers would attach a ladder to the sidewalk shed to provide access to the top of the shed. The ladder was metal, had handrails, and when attached, extended at least 3 feet above the top for fall protection. The ladder would be removed at the end of the work day for safety purposes and stored in Oliver's truck.

Vernon arrived at the jobsite that morning after Oliver had already had his accident. Vernon testified that when he asked Oliver what happened, Oliver responded that he fell off the sidewalk bridge. After he spoke to Oliver, Vernon went to the shed and observed the beam lying on the ground below the sidewalk shed. Aside from the beam, no other part of the sidewalk shed had broken nor collapsed. The ladder had not yet been installed and was still in Oliver's truck. Vernon testified that he was told by the workers who witnessed the accident that Oliver stood on a bench and attempted to climb the side of the shed by holding onto a junior beam, trying to force himself up on top of the shed. As he was holding onto the beam, the beam slipped out and both he and the beam fell to the ground.

Testimony of Donna Digilio-Arrufat

Donna Digilio-Arrufat, Queensview's property manager, testified that Queensview is a 7-building cooperative located on approximately 5 acres of land in Long Island City. Each of the buildings has its own separate address, with building number 7 located at 33-60 21st Street, the address of the alleged accident site. In the spring of 2015, the cooperative undertook a repair and renovation project to the facades of its buildings. Proto was hired as the contractor pursuant to a written contract between Proto and the cooperative. Initially, the project called for façade restoration work to buildings 1, 2, and 3. If Queensview was satisfied with Proto's work on the first phase, the contract provided for Proto to continue working on the remaining buildings. At the time of the accident, the work was already into its second phase, which would have been buildings 4-7.

None of Queensview's personal employees performed any work on the façade project. Donna testified that her involvement with the project included scheduling and notification. She would get updates from Proto as to where the work was being performed and then would notify the shareholders to shut their windows, etc. Donna

further testified that she was not involved on a day-to-day basis in monitoring the actual work and neither she nor the board members would go to a particular building to see what was being done. Moreover, neither she nor anyone else from Queensview ever instructed Proto workers on how do their work. For this particular project Proto had erected sidewalk shed protection around the buildings. Depending on where the work was being done, the sidewalk sheds were sometimes erected around several buildings at the same time.

Labor law §240(1)

“Labor Law § 240(1) imposes ‘upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work’ for failure to provide proper protection from elevation-related hazards” (*Aslam v. Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 2d Dept 2016] quoting *Barreto v. Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries (*see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Proof that the plaintiff’s own negligence was also a proximate cause is not a defense and will not defeat the claim (*see Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]). However, if it is established that the plaintiff’s own negligence was the sole proximate cause of the injuries, the defendant may not be held liable (*see Cahill* at 39).

Here, in view of the conflicting versions of the accident, triable issues of fact exist as to whether Oliver was authorized or instructed to work on the top of the sidewalk shed at the time of the accident (*see Benavidez-Portillo v G.B. Const. and Dev. Inc.*, 149 AD3d 681 [2d Dept 2017]). In addition, if Oliver was so authorized, triable issues of fact exist as to whether there was a failure to properly construct and secure the sidewalk shed, and/or a failure to provide adequate safety devices, and whether these failures, if any, were the proximate cause of Oliver’s injury (*see Probst v 11 West 42 Realty Investors, LLC*, 106 AD3d 711 [2d Dept 2013]).

Labor Law §241(6)

Labor Law § 241(6) imposes on owners, contractors, and their agents a nondelegable duty to “provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Lopez v. New York City Dept. of Env’tl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]). In order to establish liability under Labor Law §241(6), “a plaintiff or claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). The predicate Industrial Code provision must “set[] forth specific safety

standards” (*Hricus v. Aurora Contrs., Inc.*, 63 A.D.3d 1004, 1005 [2d Dept 2009] [internal quotation marks omitted]).

Here, Oliver’s verified bill of particulars indicates that his Labor Law §241(6) cause of action is predicated upon alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(d)(e)(2); 23-1.8(c)(2); 23-1.16; 23-1.30, 23-2.1; 23-2.3 and 23-5 et seq. including 23-5.1(e)(f)(g) and (j). Queensview contends that these provisions are insufficient and/or inapplicable to the facts of this case and therefore, may not serve to support Oliver’s Labor Law §241(6) claim. In opposition to the motion, Oliver only addresses the alleged violation of Industrial Code §23-5.1(e)(f)(g) and (j). Oliver’s failure to address any of the other regulations indicates that he has abandoned these provisions as bases for liability (*see Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]).

Queensview establishes establishes prima facie entitlement to judgment as a matter of law dismissing Oliver’s Labor Law §241(6) cause of action to the extent that it is based upon an alleged violations of §23-5.1(f) (“Scaffold Maintenance and Repair”) because that provision sets forth a general, rather than a specific, safety standard (*see Klimowicz v Powell Cover Assocs, LLC*, 111 AD3d 605 [2d Dept 2013]). However, with respect to §§ 23-5.1(e) (“Scaffold Planking”) and 23-5.1(g) (“Scaffold Lumber”), 23-5.1(j) (“Safety Railings”), Queensview fails to establish prima facie that these provisions are inapplicable to the instant matter, or that the alleged violations of these provisions were not a proximate cause of the Oliver’s injuries (*see Treu v. Cappelletti*, 71 AD3d 994 [2d Dept 2010]).

Labor Law §200

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see Chowdhury v Rodriquez*, 57 AD3d 121 [2d Dept 2008]). “A cause of action sounding in violation of Labor Law §200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed” (*Pilato v 866 U.N. Plaza Assocs., LLC*, 77 AD3d 644, 645 [2d Dept 2010]). Where injury is caused, as alleged in the instant case, by defects or dangers in the methods or material of the work, recovery against the owner cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). “A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears responsibility for the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008])

Here, Oliver abandoned his Labor Law §200 claim against Queensview by failing to oppose that part of the motion seeking dismissal of this claim (*see Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449 [1st Dept 2020]). Nevertheless, because the

testimony establishes that Oliver's work was directed and controlled solely by Proto, and that Queensview had no authority to exercise supervisory control over the work, Queensview is entitled to summary judgment dismissing this claim (*see Kearney v Dynege, Inc.*, 151 AF3d 1037 [2d Dept 2017]).

Contractual Indemnification

Queensview seeks contractual indemnification from Proto based upon the indemnification provision contained in the parties' contract. The specific provision provides in relevant part:

"To the fullest extent permitted by law, [Proto] shall indemnify and hold harmless [Queensview] ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work..."

The term "Work" is defined in the contract to mean:

"...the construction and services required by the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by [Proto] to fulfill [Proto's] obligations. The Work may constitute the whole or a part of the Project."

The parties contract also included a provision in contemplation of Proto performing additional façade repair work. . Specifically, the contract provided:

"If Queensview shall engage Proto to perform similar façade work as set forth in this Agreement on Queensview's four (4) buildings not included under "Project" (the "Additional Work"), which Additional Work shall commence either while the Work is being performed or immediately after the Work is contemplated, then Proto agrees to (a) keep the unit prices the same as under this Agreement and (b) waive the sidewalk shed rental fees on those four (4) buildings."

Despite Proto's argument to the contrary, the "phase two"/"Additional Work", which appears to have been the work in progress at the time of Oliver's accident, was work contemplated in the contract and was subject to the terms and provisions that were applicable to the "phase one"/ "Work". Even assuming the contract expired at the completion of the "phase one"/ "Work", the parties continued performance evidences their mutual assent to a new contract embracing the same provisions and terms as their prior contract (*see Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505 [2d Dept 2008]). Accordingly, the contract obligating Proto to indemnify Queensview was in effect at the time of Oliver's injury.

Nonetheless, Queensview fails to establish prima facie entitlement to summary judgment on its contractual indemnification claim against Proto. In view of the

conflicting accounts of the accident, triable issues of fact exist as to whether Oliver's accident arose out of or resulted from the performance of the work, pursuant to the terms of the indemnification provision contained in the parties' contract (*see McCoy v Medford Landing, L.P.*, 164 AD3d 1436 [2d Dept 2018]).

Accordingly, it is hereby

Ordered, Queensview's motion for summary judgment dismissing plaintiff's Labor Law §240(1) claim is denied, and it is further


Ordered, Queensview's motion for summary judgment dismissing plaintiffs' Labor Law §241(6) is granted **except** to the extent it is predicated upon alleged violations of Industrial Code §§ 23-5.1(e), (g) and (j), and it is further

Ordered, Queensview's motion for summary judgment dismissing plaintiff's Labor Law §200 claim is granted, and it is further

Ordered, Queensview's motion for summary judgment on its contractual indemnification claim against Proto is denied.

This constitutes the decision/order of the court.

Dated: June 29, 2020

Enter,


Karen B. Rothenberg
J.S.C.