

Castro v 31st Ave. Assoc. LLC
2020 NY Slip Op 32708(U)
August 13, 2020
Supreme Court, Kings County
Docket Number: 510681/2017
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 13th day of August 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

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ADRIAN GABRIEL GONZALEZ CASTRO,
Plaintiff,

Index No. 510681/2017
Cal. No. 8, 9, 10 MS 4, 5, 6

Against

31st AVENUE ASSOCIATES LLC and
PARK CONSTRUCTION CORP.,
Defendants.

DECISION AND ORDER

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31st AVENUE ASSOCIATES LLC and
PARK CONSTRUCTION CORP.,
Third-Party Plaintiffs,

Against

JV & J INC.,
Third-Party Defendant.

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<u>Papers</u>	<u>Numbered</u>
MS 4	Docs. #: 32-42, 57-68, 91-94, 98-99
MS 5	Docs. #: 43-56, 60-62, 69-71, 100
MS 6	Docs. #: 72-88, 96-97

Upon the foregoing cited papers, the decision and order on the above-cited motions for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries he allegedly sustained from an unguarded blade on a miter, or "chop," saw he was operating in the course of his employment

with JV&J Inc. (JV&J), on May 16, 2017, at a construction site located at 21-13 31st Avenue in Queens, New York. JV&J was the carpentry subcontractor at the construction site. The premises was owned by 31st Avenue Associates LLC (31st Avenue) and Park Construction Corp. (Park) was the general contractor.

On the date of his accident, plaintiff was using a chop saw that had been given to him by JV&J to cut lumber. He testified he complained to Jose, the owner of JV&J, and Angel, JV&J's foreman, that the guard was missing and was told to use it carefully. Plaintiff used the saw for a few hours prior to his accident and was aware that the blade would continue to spin for approximately one minute after the activator switch was released. Plaintiff's accident occurred when he raised the saw to an upright position and reached for a piece of cut wood with his right hand before the blade stopped spinning.

Plaintiff sought partial summary judgment (MS 4) against Defendants 31st Avenue and Park on the issue of liability pursuant to Labor Law 241 (6) on the grounds that defendants violated sections 23-1.12 (c) (1), (2) and 23-1.5 (c) (3) of the Industrial Code and plaintiff's comparative negligence, if any, is insufficient to defeat summary judgment. 31st Avenue and Park opposed arguing that there is no evidence to indicate that the owner and general contractor had actual knowledge of the use of the defective saw, or that it was in use for such a period of time that they should have become aware of its use and had a reasonable opportunity to remedy the condition.

Labor Law 241 (6) imposes a nondelegable duty on all contractors and owners to provide reasonable and adequate protection and safety to persons employed in construction work, and to comply with the specific safety rules and regulations set forth in the Industrial Code regardless of whether they supervise or control the work (*Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695

[2d Dept 2010], citing *see Galarraga v City of New York*, 54 AD3d 308 [2008]; *Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Forschner v Jucca Co.*, 63 AD3d 996 [2009]).

Here, plaintiff alleged defendants violated sections 23-1.12 (c) (1), (2) and 23-1.5 (c) (3) of the Industrial Code. Section 23-1.12 (c) requires power-driven saws to be equipped with guards to protect the user from contact with the saw blade. Industrial Code § 23-1.12 (c) sets forth specific, and not general, safety standards, and is therefore sufficient to maintain a claim alleging a violation of Labor Law § 241 (6) (*see Mugavero*, 69 AD3d at 695; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). Accordingly, plaintiff's motion for summary judgment (MS 4) on the issue of liability, pursuant to Labor Law § 241 (6), against defendants 31st Avenue and Park is granted.

31st Avenue and Park cross-moved (MS 5), pursuant to CPLR 3212, for summary judgment against JV&J on the grounds that JV&J agreed, pursuant to the December 14, 2016 subcontract and indemnity agreement, to indemnify and hold harmless the owner and general contractor for any liability arising from its work, breach of contract, and common law indemnity and contribution. JV&J opposed and cross-moved (MS 6) for summary judgment, pursuant to CPLR 3212, to dismiss the third-party claims for common law indemnity and/or contribution with prejudice. 31st Avenue and Park opposed the cross-motion.

On September 16, 2018, Dr. Lenzo opined that plaintiff "would be left with significant dysfunction within the hand with a loss of function of the fingers and thumb" based on his

examination findings including “contractures of the fingers of the right hand as well as weakness of the opponensplasty and numbness in the median nerve distribution,” “considerable hypersensitivity within the hand due to the nerve injury and marked stiffness in the fingers.” On December 12, 2018, Dr. Keilson opined that plaintiff’s right hand was functionally useless. His findings on examination included hypersensitivity in the hand, patches of numbness on the forearm and wrist, some degree of a claw hand at rest, the ability to flex digits four and five of the right hand with some strength but otherwise no movement, inability to make a fist, straighten the fingers, or flex or extend the wrist. Dr. Head reported, on November 1, 2019, that plaintiff stated that he could still answer the telephone with his right hand and can move his right little finger in a normal fashion.

JV&J argued for dismissal of the third-party claims for common law indemnity and contribution on the ground that plaintiff did not suffer a total loss of use of his right hand and therefore did not suffer a grave injury. 31st Avenue and Park argued plaintiff suffered a total loss of use of his right hand, and as such, has suffered a “grave injury.” They averred the three doctors determined that the plaintiff’s three fingers and thumb are useless, his wrist cannot move in any direction, the hand is hypersensitive to touch, and the injuries are permanent. They further argued even if the Court determines plaintiff has not lost “total use of his hand,” it is beyond dispute that he has permanently lost the use of three fingers, including the index finger and thumb, which qualifies as a “grave injury” under the statute as a “loss of multiple fingers” or “loss of an index finger.”

The list of grave injuries provided in Workers’ Compensation Law § 11 is intended to be exhaustive, not merely illustrative, and includes only those injuries which are listed in the statute and determined to be permanent (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 416 [2004]; *Dunn v Smithtown*

Bancorp, 286 AD2d 701 [2d Dept 2001]). “Grave injury is defined in pertinent part as permanent and total loss of use or amputation of an arm or hand, loss of multiple fingers, or loss of an index finger (see Workers’ Compensation Law § 11). Partial loss is insufficient” (*Kraker v Consolidated Edison Co., Inc.*, 23 AD3d 531, 532 [2d Dept 2005], citing see *Rubeis*, 3 NY3d at 416; *Castro v United Container Mach. Group*, 96 NY2d 398 [2001]; *Blackburn v Wysong & Miles Co.*, 11 AD3d 421, 422 [2d Dept 2004]). “. . . [A]nything less than a ‘total’ loss of use of an arm or hand will not qualify as a grave injury under the statute (*Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1147 [4th Dept 2006], citing Workers’ Compensation Law § 11; see e.g. *Kraker*, 23 AD3d 531 [2005]; *Aguirre v Castle Am. Constr.*, 307 AD2d 901 [2003], *lv denied* 1 NY3d 501 [2003]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452, 453 [2003]). Where a plaintiff retains only “passive movement” of the hand or arm, such may qualify as a total loss of use of the hand or arm (*Millard*, 28 AD3d at 1147, citing *Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 120 [1st Dept 2003]; see *Sexton v Cincinnati Inc.*, 2 AD3d 1408 [4th Dept 2003]).

Here, there is no evidence that plaintiff retained only passive movement of his right hand. The evidence demonstrates that plaintiff has significant dysfunction of his right hand, he was able to flex digits four and five of the right hand with some strength, move his pinky finger in a normal fashion, and answer a phone with his right hand. Therefore, the evidence here does not establish that plaintiff suffered a grave injury as defined in Workers’ Compensation Law § 11 (see e.g. *Kraker*, 23 AD3d at 532).

Moreover, the Court rejects the argument these injuries constitute the loss of the index finger or multiple fingers under the statute. Workers' Compensation Law § 11 provides an exhaustive list of grave injuries and the statute does not equate the loss of a finger with the loss of use of a finger (*see Rubeis v Aqua Club, Inc.*, 3 NY3d at 416; *Dunn v Smithtown Bancorp*, 286 AD2d 701). Under Workers' Compensation Law § 11, an employer will not be liable for contribution or indemnification to a third party for injuries sustained by an employee acting within the scope of his or her employment unless that employee sustained a grave injury (*Millard*, 28 AD3d at 1147). Accordingly, JV&J's motion (MS 6) is granted and the third-party claims for common law indemnification and contribution against it are dismissed. The branch of 31st Avenue and Park's motion for summary judgment on the issue of common law indemnification and contribution is denied as moot.

31st Avenue and Park also sought summary judgment for contractual indemnification on the ground that they were not negligent. They argued that while Park Construction did, in fact, have overall supervision of the jobsite, and did have the right to stop unsafe work practices or stop the use of unsafe or defective tools, there is no evidence that Bruno Cerrone, their site superintendent, knew, or should have known, that the saw which plaintiff was using, for little more than an hour, had been brought onto the jobsite to replace a properly equipped saw and given to plaintiff by his foreman.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in

admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad*, 64 NY2d at 853; *Zuckerman*, 49 NY2d at 562).

Here, there is a question of fact as to whether the circumstances leading to plaintiff's accident existed for a sufficient period of time such that Mr. Cerrone should have known. Although movants averred plaintiff used the saw for less than one hour prior to his accident, plaintiff testified that he had used the saw for a few hours prior to the accident. He testified he began using the saw after lunch and his accident happened around 4:00 PM, just prior to end of his shift. Accordingly, defendants are denied summary judgment on their claims for contractual indemnification and contribution.

Finally, 31st Avenue and Park sought summary judgment against JV&J for breach of the subcontract on two grounds. They averred JV&J failed to procure and maintain liability insurance providing contractual liability and additional insured coverage in favor of 31st Avenue and Park. They further averred JV&J violated the safety provisions set out in paragraph 4.3.1 of the contract by providing plaintiff with a dangerous and defective saw.

Movants conceded JV&J obtained insurance coverage, but averred that coverage was denied on the grounds that the work performed by plaintiff at the time of the accident was not a covered activity. They argued, therefore, JV&J materially breached its contractual obligation to procure and maintain insurance that covers 31st Avenue and Park as additional insureds.

It is well-settled, a proponent of summary judgment must establish entitlement with evidentiary proof in admissible form sufficient to establish there are no material and triable issues

of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). The unsubstantiated affirmation of an attorney is insufficient to establish such (*see Alvarez*, 68 NY2d at 325, citing *Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]). Here, the breach of contract claim alleged in counsel's affirmation was unsubstantiated by any documentation including an affidavit by a person with personal knowledge or the alleged denial of plaintiff's claim. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez*, at 324, citing *Winegrad*, 64 NY2d at 853).

Here, JV&J opposed the cross-motion by producing an insurance policy issued by Illinois Union Insurance Company, issued on December 16, 2016, bearing policy number CONNYF112443734. This document included "Form Number: BP0451, Edition: 0713, Title: ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - WITH ADDITIONAL INSURED REQUIREMENT IN CONSTRUCTION CONTRACT." They averred this policy made 31st Avenue and Park additional insureds and therefore JV&J met its obligations under the subcontract. Nowhere in this document are movants specifically named as additional insureds and no proof was produced to rebut movants' claim that coverage was denied. Nevertheless, movants failed to establish their entitlement to summary judgment on this breach of contract claim with sufficient evidence. Accordingly, this branch of the motion is denied.

As to movants' other breach of contract claim, JV&J did not proffer an argument in opposition to its alleged violation of paragraph 4.3.1 of the subcontract by providing its employee with a dangerous and defective saw. It also did not argue in opposition to plaintiff's allegations that JV&J provided him with the defective saw and failed to remedy the defect when plaintiff

complained. Accordingly, 31st Avenue and Park are granted summary judgment to the extent JV&J is liable for breach of paragraph 4.3.1 of the subcontract.

It is, therefore, ordered:

Plaintiff's motion for summary judgment (MS 4) on the issue of liability, pursuant to Labor Law § 241 (6), against defendants 31st Avenue and Park is granted.

31st Avenue and Park's motion for summary judgment (MS 5) is granted to the extent JV&J is liable on the issue of breach of paragraph 4.3.1 of the subcontract.

JV&J's motion for summary judgment (MS 6) is granted and the third-party claims for common law indemnification and contribution against it are dismissed.

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Honorable Reginald A. Boddie
Justice, Supreme Court

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