Sullivan v City of New York
2020 NY Slip Op 32981(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 151221/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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BRENDAN SULLIVAN,

Plaintiff,

-against-

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY (CAPTIAL CONSTRUCITON COMPANY) and TUTOR PERINI BUILDING CORP.,

Defendants.
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DECISION AND ORDER

Index Number

151221/2018

FRANK P. NERVO, J.S.C.

Defendants move for summary judgment, pursuant to CPLR § 3212, contending that plaintiff's Labor Law §§ 200 and 341(6) claims should be dismissed in their entirety. The MTA defendants also seek summary judgment dismissing "all industrial code violations alleged," as well as the common law negligence claims. Plaintiff opposes dismissal of the Labor Law §§ 200 and 241(6) claims and reiterates that defendant Tutor Perini concedes triable issues of fact related to plaintiff's negligence claim against it. This motion was initially returnable November 18, 2019 but was repeatedly adjourned by the parties to September 4, 2020 (see e.g. NYSCEF Doc. 52, 54, 87, 101).

Background

Plaintiff was employed as a Sandhog by non-party Frontier Kemper and performed work on the Eastside Access Project. Plaintiff alleges that on October 18, 2017, he was thrown several feet into the air after he was struck in the back by a lull, a forklift type of machinery, operated by an employee of defendant Tutor Perini. Plaintiff

further alleges that he was wearing a reflective jacket and other personal protective equipment (PPE) provided to him. He claims that he was standing, stationary, and that the lull did not have functioning headlights and did not sound its horn when it struck him. Plaintiff further claims that no flaggers or spotters, workers assigned to assist the lull operator, were present at the time of the accident, and a few workers appearing to be flaggers appeared only after the accident. Plaintiff additionally alleges that the lighting was poor at the time of the accident. Plaintiff suffered, inter alia, a fractured spine.

Defendants contend that plaintiff was not injured by the lull, as the lull operator does not believe he struck plaintiff, and that the job site was otherwise safe. Specifically, defendants dispute that the lighting was poor, that unsafe machinery was used, or that the operation of the lull was otherwise unsafe.

Summary Judgment

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing

requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Labor Law § 200

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). It provides, in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons

(Labor Law § 240).

The party responsible under Labor Law § 200 must, therefore, have the control over the activity bringing about the injury (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]). Accordingly, a breach of Labor Law § 200 is, effectively, a breach of the common law duty to maintain a safe work site (*Allen v. Cloutier Constr. Corp.*, 44 NY2d at 299). If the dangerous condition or defect arises from the contractor's methods, the owner will not be liable under § 200 or the common law, absent a showing the owner exercised some control or supervision over the operation (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). However, where the plaintiff's injuries arise from a dangerous condition on the premises not caused by the contractor's methods, liability will attach if the property owner had control over the work site and notice of the dangerous condition (*Bradley v.*

HWA 1290 III LLC, 157 AD3d 627 [1st Dept 2018]; *Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, there is no evidence that the MTA defendants or landowner exercised supervisory control, or otherwise had input into the method of performing work on the Eastside Access project, including the methods by which lulls were operated. Nor is there any evidence they created the alleged dangerous condition or had notice of same. In any event, plaintiff does not proffer any argument opposing the dismissal of the Labor Law § 200 action as against these defendants, and as such it is deemed abandoned (*Ng v. NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]; *Leveron v. Prana Growth Fund I, L.P.*, 2020 NY Slip Op 01568 at 2 [1st Dept 2020]). Accordingly, the Labor Law § 200 claim is dismissed against the City of New York, Metropolitan Transportation Authority, The New York City Transit Authority, and Metropolitan Transit Authority (Capital Construction Company).

However, plaintiff opposes dismissal of the Labor Law § 200 claim as against defendant Tutor Perini. As Tutor Perini concedes that issues of fact preclude summary judgment on plaintiff's common-law negligence claim against them, so too Tutor Perini concedes summary judgment is inappropriate on the Labor Law § 200 claim, as § 200 represents a codification of the general contractor's common-law duty to maintain a safe work site. A reasonable jury could find that Tutor Perini had the authority and/or control to correct the unsafe conditions claimed by plaintiff (*see Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]). Accordingly, summary judgment dismissing the Labor Law § 200 claim against defendant Tutor Perini is denied.

Labor Law § 241(6)

Labor Law § 241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 878). It provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractor and their agents for such work except owners of one and two-family dwelling who contract for but do not direct or control the work, shall comply therewith

(Labor Law § 241[6]).

Here, plaintiff contends that, inter alia, the lighting, lack of flaggers or spotters, and operation of the lull without headlights violated Labor Law § 241(6). He claims that defendants violated Industrial Code § 23-1.30 (12 NYCRR 23-1.30) by failing to provide illumination greater than 10 foot candles in an area where he was required to work, and as such violated Labor Law § 241(6). Plaintiff, however, does not oppose defendants' motion with respect to the other Industrial Code violations alleged. Defendants contend Industrial Code § 23-1.30 is inapplicable here, as the lighting was sufficient, and that plaintiff's expert's opinion belies belief. Thus, defendants contend, plaintiff's entire § 241(6) claim should be dismissed, and they should be awarded summary judgment.

To the extent that defendants rely on the U.S. Supreme Court's decision in *Kumho Tire*, for the proposition that this Court must exercise its "gate keeping obligation" and reject plaintiff's expert's conclusions, such reliance is misplaced (526 US 137 [1999]). New York has long followed the *Frye* rule for admissibility of novel scientific evidence (*People v. Forte*, 279 NY 204 [1938], adopting *Frye* general acceptance standard of *Frye v. United States*, 293 F. 1013 [1923]; *see also People v. Wesley*, 83 NY2d 417 [1994] New York continues to follow *Frye* standard despite other jurisdictions following *Daubert v. Merrell Dow Pharm. Inc.*, 509 US 579 [1993]). Defendants claim that plaintiff's expert's opinion is "speculative guess work... not based upon engineering or scientific standards" (reply affirmation at ¶ 19) conflates the requirement that expert "opinion evidence must be based on facts in the record or personal knowledge" with that of admissibility determined after a *Frye* hearing (*Santiago v. New York City Tr. Auth.*, 271 AD2d 675, 677 [1st Dept 2000]). Defendants have not sought a *Frye* hearing and, in any event, a determination of the admissibility of plaintiff's expert's methodology is inappropriate on this summary judgment motion.

Smillarly, defendants cite several appellate decisions where plaintiff's expert testified and the Appellate Division or Court of Appeals found such testimony speculative, in order to disprove his theories in this matter. However, those cases are inapposite, as they address different legal issues or arise under facts not found in the instant matter, and they warrant no further discussion. That defendants do not believe plaintiff's expert is of no consequence. The proper standard of review on a summary judgment motion is whether defendants are entitled to judgment as a matter of law and have shown no material facts are in dispute.

Defendants urge the Court to disregard plaintiff's testimony alleging inadequate lighting and accept the lull driver's testimony and photo of the cavern from plaintiff's 50-H hearing to establish that lighting was adequate. Defendants contend that the lull operator testified that "the lighting was not an issue that while he was driving the lull through the caverns" (reply affirmation at ¶ 23). At best, defendants mischaracterize the lull operator's testimony regarding lighting. The lull operator testified that the lighting was "terrible" at the time of the alleged accident, that the lulls were often operated without functioning headlights, and that the lighting depicted in the photograph of the accident site -upon which defendants rely- did not accurately reflect the lighting on the day of the alleged accident (NYSCEF Doc. No. 50 - deposition of Mr. Magiapia at p. 31-32, 38-40, 62). Furthermore, plaintiff submitted an affidavit from a fellow construction worker on the project who averred that the lighting was "extremely poor," and he would be unable to properly read a newspaper or blueprints in the area where the accident occurred (NYSCEF Doc. No. 58 – affidavit of James Fitzsimmons). Consequently, the evidence submitted on this summary judgment motion does not establish that defendants are entitled to judgment as a matter of law under Labor Law § 241(6), as it is not contradicted that the lighting was poor at the time of the accident.

Assuming, *arguendo*, that the evidence regarding lighting was truly contradictory, it is beyond cavil that conflicting testimony creates a triable issue of fact that cannot be resolved by the Court on a summary judgment motion.

As to the remainder of the Industrial Code violations alleged by plaintiff, they are either inapplicable to the facts herein[1] or fail, as a matter of law, to form a separate basis to find liability under Labor Law § 241(6).[2] The Court notes that plaintiff does not oppose the dismissal of these alleged violations.

Accordingly, summary judgment in defendants' favor on the Labor Law § 241(6) claim is denied. However, the violation of industrial codes is dismissed, except for Industrial Code § 23-1.30 (12 NYCRR 23-1.30).

Plaintiff's Summary Judgment

To the extent that plaintiff, in opposition, seeks summary judgment in his favor, the same issues of fact which preclude summary judgment in defendants' favor, *supra*, prevent summary judgment in plaintiff's favor.

Conclusion

Accordingly, it is

OREDERED that defendants' motion is granted solely to the extent of dismissing the Labor Law § 200 claim against City of New York, Metropolitan Transportation Authority, The New York City Transit Authority, and Metropolitan Transit Authority

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[1] 12 NYCRR 23-9.2(c), 23-9.2(d), 23-9.2(e), 23-9.2(f), 23-9.2(g), 23-9.2(h), 23-9.2(i), 23-9.8(a), 23-9.8(b), 23-9.8(c), 23-9.8(d), 23-9.8(f), 23-9.8(g), 23-9.8(h), 23-9.8(i), 23-9.8(j), 23-9.8(k), 23-9(l); relating to, inter alia, forklift capacity, brakes, refueling, and exhaust; moving gears/parts of machinery; protections for forklift operators; improperly carrying passengers on machinery; requiring horns or similar be installed on forklifts; and prohibiting operating forklifts with forks higher than necessary.

[2] *Guallpa v. Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]; *Quinlan v. City of New York*, 293 AD2d 262 [1st Dept 2002]; *Hricus v. Aurora Contrs., Inc.*, 63 AD3d 1004 [2d Dept 2009]).

(Capital Construction Company) and the Industrial Code violations except 12 NYCRR 23-1.30, and otherwise denied; and it is further

ORDERED that to the extent plaintiff's opposition seeks summary judgment in his favor, that relief is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Sept. 10, 2020

ENTER:

Hon. Frank P. Nervo, J.S.C.