

Clotaire v Richard & Linda Marrone, Inc.

2020 NY Slip Op 33075(U)

July 27, 2020

Supreme Court, Kings County

Docket Number: 507146/2019

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of July, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

-----X
PIERRE CLOTAIRE,

Plaintiff,

Index No.: 507146/2019
Decision and Order

-against-

RICHARD & LINDA MARRONE, INC.,

Defendants,

-----X

The following papers NYSCEF Doc #'s 2 to 17 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	2-8
Opposing Affidavits (Affirmations) _____	9-15
Reply Affidavits (Affirmations) _____	17

After having heard Oral Argument on July 8, 2020 and upon review of the submissions herein the court finds as follows:

Defendant move pursuant to 3211(a) dismissing the plaintiff's complaint. (MS#1).

Plaintiff opposes the same.

ARGUMENTS

Defendants contend that their motion should be granted because the accident occurred almost one month after the completion of work on the defendants premises

and the accident occurred on site at the plaintiff's employer's premises not at the construction site. Plaintiff opposes the same contending the defendants motion is defective¹ as it does not state which section of the CPLR 3211 they are moving under. Plaintiff further contends that the plaintiff incorrectly states that the accident occurred after the completion of work on the premises. Plaintiff also contends that the accident not occurring at the work site does not bar the labor law claim and due to the violation of NYCRR 23-1.12 the property owner can be held liable for failing to have a guard on the saw plaintiff was using at his place of employment.

BACKGROUND/FACTS

This action arises from an alleged incident occurring on January 20, 2017 wherein plaintiff alleges that while in the course of his employment for Lo Gozzo Brothers Construction Corp he was caused to sustain severe personal injuries as a result of using a Milwaukee saw while on the Defendant premises located at 9615 Flatlands Avenue and 9617 Flatlands Avenue, Brooklyn, New York.. It is alleged that said saw did not have a guard and as a result plaintiff suffered severe injuries to his hand.

Specifically, it is alleged by the plaintiff that on January 20, 2017, at approximately 6:00am he arrived at work at LoGozzo Brothers. It is alleged plaintiff was instructed by the brother of Dominick LoGozzo to go to Home Depot and buy Masonite board, go back to the shop to cut it and then afterwards to bring it over to the property of the defendants, for the purpose of finishing a project performed in December. It is alleged when plaintiff arrived back at the LoGozzo location on Strickland Avenue,

¹ This contention is without merit as paragraph 8 of defendants moving papers clearly states that the pre-Answer motion to dismiss is pursuant to CPLR §3211(a)(1). Therefore, the court will not address this contention.

Brooklyn, New York, plaintiff started to cut the Masonite Board with a handsaw that was owned by LoGozzo Brothers. It is alleged the saw that plaintiff was using had a guard on it that was kept open with a piece of material wedged in place so the saw would be easier and faster to use. It is alleged this is how LoGozzo provided plaintiff the saw and they wanted plaintiff to use it in this fashion. It is further alleged as plaintiff was cutting the Masonite Board with his right hand and his left hand holding the Masonite Board, the saw kicked back and there was no guard to protect his left hand, and as a result of the saw coming in contact with plaintiff's left hand, his left index finger and left pinkie finger were amputated. Plaintiff's left middle finger and left ring finger also had been cut off but they were fortunately reattached. As a result plaintiff has suffered serious injuries to his left hand.

Dominick Logozzo was plaintiff's employer at the time of the accident. His Affidavit indicates the subject accident occurred on the premises of LoGozzo Brothers Construction Corp. on January 20, 2017 at 6095 Strickland Avenue, Brooklyn, New York and not the defendants address. Mr. Logozzo further confirms in the Affidavit that all work was completed for Richard & Linda Marrone, Inc. on December 28, 2016. Pursuant to the Concrete Bid Proposal which is attached with the cancelled check as EXHIBIT 1 to EXHIBIT C of the moving papers, and full payment of \$8,000.00 was to be made upon completion of work. The handwritten markings on the proposal indicate said payment was made on December 28, 2016, the cancelled check evidences the same as well.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see,

CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **“The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **“[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion”** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). **“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss”** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977)).

Labor Law 241(6)

“Labor Law 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers,

and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable ." (*Fusca v. A & S Construction, LLC*, 84 AD3d 1155, 1156 [2d Dept 2011]).

"The threshold question that must be answered is whether the plaintiff was engaged in a type of work which falls within the scope of Labor Law § 241(6), specifically, whether the injury occurred in an area "in which construction, excavation or demolition work is being performed" (Labor Law § 241[6]). "Though this language differs significantly from the far more encompassing language of Labor Law § 240(1) which covers "the erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure", the courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13) which defines construction work expansively: "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (12 NYCRR 23-1.4[b][13]; see also, e.g., *Kesselbach v. Liberty Haulage*, 182 A.D.2d 741, 582 N.Y.S.2d 739); quoting *Vernieri v. Empire Realty Co.*, 219 A.D.2d 593, 595, 631 N.Y.S.2d 378, 380 (1995)

In the present case, it is clear that at the time and the place where plaintiff was allegedly injured, there was no "construction, excavation or demolition work" (Labor Law § 241[6]) being performed in the building. The plaintiff was fabricating and transporting materials to be used in connection with work at a construction site where work was completed almost a month prior to the accident. Contrary to plaintiff's contentions the present case is distinguishable from the *Gerrish v. 56 Leonard LLC*, 147 AD3d 511,

513, 48 NYS3d 32, 34 (2017), aff'd, 30 NY3d 1125, 94 NE3d 899 (1st Dept. 2018), case because in the present case the property owners did not control the off-site premises. Another difference with *Gerrish* is the fact that in the present case there was no specific language within the contract that required the defendant to be responsible for any offsite temporary facilities. Additionally, the project in *Gerrish* involved contractors that owned off site locations. In the present case, the defendant did not own the location where the plaintiff's accident occurred, had no responsibility to provide reasonable and adequate safety for workers on the site of the plaintiff's employer and had no responsibility for off-site facilities pursuant to a contract. Therefore, *Gerrish* is not applicable to the case at bar.

The present case is more like that of the *Flores* case, wherein the court found "working at a construction site for purposes of Labor Law § 241(6) (see *Mosher v. State of New York*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 [1992] [repaving project]) are distinguished from fabricating and transporting materials to be used in connection with ongoing work at a construction site. Dispositive is that at the time of his injury, plaintiff was engaged in the fabrication and loading of steel at his employer's Bronx facility, not in performing construction work at the Queens site" (*Jock v. Fien*, 80 NY2d 965, 967, 590 NYS2d 878, 605 NE2d 365 [1992] [fabrication not involving any construction activity at the time of injury]; *Dahar v. Holland Ladder & Mfg. Co.*, 79 AD3d 1631, 914 NYS2d 817 [2010] [worker engaged in normal manufacturing process at employer's facility]; see also *Pirog v. 5433 Preston Ct., LLC*, 78 AD3d 676, 910 NYS2d 167 [2010] [stockpiling pipes at storage facility was neither construction work nor work performed in a construction area]; cf. *Nagel v. Metzger*, 103 AD2d 1, 8, 478 NYS2d 737 [1984]

[hoisting and land clearing constitute construction work under Labor Law § 241(6)]; quoting, *Flores v. ERC Holding LLC*, 87 AD3d 419, 420, 928 NYS2d 7, 8–9 (2011). The present case, is also similar to *the Adams v. Pfizer, Inc.*, 239 AD2d 291, 740 NYS2d 315 (1st Dept.2002), *lv. denied* 99 NY2d 511, 760 NYS2d 102, 790 NE2d 276 (2003) case, wherein the plaintiff was injured on his employer's premises while working on a mock-up design being constructed by his employer in connection with renovations to be completed at the defendant Pfizer's premises (*id.* at 292, 740 N.Y.S.2d 315).

In present case, the documentary evidence of the cancelled check and payment in full for the work that was contracted to be completed was tendered on December 28, 2016, demonstrates that the work done on the defendants premises was completed prior to the date of the plaintiff's accident and also that the subject accident occurred at a completely different address than alleged by the plaintiff in his complaint. At best the work the plaintiff was doing at his place of employment could be considered manufacturing or fabrication not work at a construction site. Thus, "at the time of the accident, the plaintiff was not engaged in construction work within the meaning of Labor Law § 240(1) and was not working in a construction area within the meaning of Labor Law § 241(6)" (*see also Pirog v. 5433 Preston Ct., LLC*, 78 A.D.3d at 677, 910 NYS2d 167), *see also Flores v. ERC Holding LLC*, 87 AD3d 419, 421, 928 NYS2d 7, 9 (2011).

Accordingly, defendants motion to dismiss is hereby granted, for the reasons stated above. (MS#1).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
July 27, 2020

Richard Velasquez
HON. RICHARD VELASQUEZ

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Hon. Richard Velasquez

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