

Valentine v City of New York

2020 NY Slip Op 33577(U)

October 28, 2020

Supreme Court, New York County

Docket Number: 151397/18

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ERIC VALENTINE

INDEX NO. 151397/18

- v -

MOT. DATE

MOT. SEQ. NO. 002

THE CITY OF NEW YORK et al.

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a labor law action arising from personal injuries sustained on a construction site. Specifically, plaintiff seeks to recover for injuries he sustained when he cut his hand on a metal grinder he was operating. Defendants The City of New York (the "City") and The City of New York Department of Design and Construction ("DDC") now move for summary judgment dismissing plaintiff's complaint. Plaintiff opposes the motion and cross-moves for leave to amend his bill of particulars to assert another violation of the Industrial Code in connection with his Labor Law § 241[6] claim, for partial summary judgment on liability as to his Labor Law § 241[6] premised upon a violation of Industrial Code § 23-1.5[c][3] as well as to dismiss defendants' affirmative defenses based upon comparative fault and/or culpable conduct. Defendants oppose the cross-motion. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff's accident occurred on June 7, 2017 at approximately 3am. On that date, plaintiff was employed as a union laborer for Primer Construction ("Primer") working on the FDR 81st Street bridge reconstruction project (the "project"). The City had retained Primer as the general contractor for the project and as defense counsel explains, DDC "is the agency that oversees maintenance, renovation and construction of the libraries, police stations, roads and all City structures."

Before his accident, plaintiff was installing railing. Specifically, plaintiff testified at his 50-h hearing that he was told by his foreman, Jose Tineco, "to cut the steel grate wider." In order to do so, plaintiff stated that he had to kneel and "reach between the wooden temporary railing ... to cut the steel grate." In the moments preceding the accident, plaintiff stated that he was reaching through a temporary railing, holding the grinder with his right hand and stabilizing himself with his left hand. Then the "railing [] failed and slipped" ... "and/or gave away, [plaintiff's] left hand went straight down and hit the blade, the spinning blade." No one witnessed the accident.

Dated: 10/28/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

At his deposition, plaintiff further testified as follows:

- Q. You were holding the railing and reaching under and grinding?
A. Yes.
Q. What happened when it broke?
A. I almost fell and when I fell, my hand came in contact with the grinder.
...
Q. The middle rail cracks and your body moves forward and your right hand comes in contact with the grinder?
A. My left hand.
...
Q. Then what happened?
A. I got up. I took my glove off which is when I saw I was cut. I knew I might have had a problem then I saw the laceration...

When asked why and how the railing broke, plaintiff explained at his 50-h hearing:

- A. Because they use the railing multiple times, the same lumber over and over when they screw in and out, in and out throughout the months that we were there, the railing became rot and failed and it slipped causing me to have my left hand that was on the railing go straight down towards the grinder.
..
Q. Can you tell me where the guardrails were holding onto the wood? Did they break, what happened?
A. Yes, it did break. The wood was cracked and its been used so many times that it was splintered and they're right on the water there, the salt water, so I think it had something to do with the deterioration.

Plaintiff described the temporary railing as "horizontal, mid-rail" and "[t]wo by four railing, wooden 6 railing. I think ten foot in length probably. It was screwed upright, whatever spacing the post would be, so it would be like eight feet or something like that." Plaintiff further testified at the 50-h hearing:

- Q. What was present? Describe the post that was present where you were?
A. There would be two of them, the stainless steel post and wooden post on top of that and the wooden post would be so you can install the horizontal post so you can screw them into something.
Q. And the horizontal post or rails, those were guardrails?
A. Yes.
Q. Those were temporary?
A. Temporary.
Q. So when those would be removed, that would be replaced with something?
A. Stainless steel.
Q. Once the stainless steel is in and the upright post were put in, then you put the stainless steel on top of it?
A. Yes.

At his 50-h hearing, plaintiff testified that Primer installed the wooden railing:

- Q. Who installed that wooden temporary railing?
A. The laborers and/or Jose Tinoco. They would remove and replace it nightly.

- Q. Wouldn't a temporary railing that was at the location where you were working when your accident happen, did you install that? Did you work on that installation?
- A. No.
- Q. So it was Jose and who else?
- A. It would be Jose and the other laborer Ricardo. They were generally the two guys that would take off the railing...

Finally, plaintiff also testified that the grinder he used didn't have a guard at his 50-h hearing:

- Q. Describe the grinder that you were using?
- A. It was a four inch grinder outfit with a six inch blade and they had no guard on that grinder so they could use the larger blade.
- Q. Did someone remove the guard from the grinder in order to use the larger blade?
- A. Yes, I was instructed to use this grinder with no guard. I had mentioned that, where is the guard, they says we can't use it because you have to use the larger blade.
- Q. Who did you say that to?
- A. Jose Tinoco.
- Q. When did you say that to him?
- A. That night.
- Q. When he directed you to use that grinder?
- A. Yes.
- Q. What specifically did you say to 6 him? .
- A. I says where's the guard.
- Q. What did he say?
- A. He said, we can't use it because you need to use the larger blade to get inside the grate.
- Q. So there was originally a guard affixed to the grinder?
- A. Yes.
- Q. Who removed it?
- A. There's other grinders on the site with no guards. If I recall, that guard, that one had never had a guard. I thought you were talking in general. Those grinders are supposed to have a guard.
- ...
- Q. Who provided that grinder?
- A. Jose and/or Primer.
- Q. Do you know who actually removed the guard from the grinder?
- A. No.
- Q. What's the function of the guard?
- A. The guard is to protect you from getting injured.
- Q. Describe it if you can?
- A. It would be considered a steel that covers the blade in the event that the blade jumps. It's a piece of steel attached to the grinder to protect you from the blade. It's hard to explain.
- ...
- Q. Did you attempt and say, no, I'm not going to do this job unless there is a guard on this grinder?
- A. No.
- Q. Is there some reason you did not do that?
- A. Yeah.
- Q. Why?
- A. I want to keep my job.
- ...

- Q. Do you know how it came to be that there were guards at the site after your accident?
- A. Jose realized he made a mistake.
- Q. How do you know that?
- A. It's just common sense.
- Q. I'm asking what you remember for a fact?
- A. I don't know anything for a fact what's in his mind. I know they showed up for a day afterwards, but they weren't put on and then two days later they were off again if they even were on. at all. There was grinders there on site after with no guards.
- Q. After your accident?
- A. Yes.
- Q. How do you know that?
- A. I'm standing there. I took the 4 pictures with my hand wrapped up watching them do it again and that's when I said, you got to be kidding me.

The City produced Kalpesh Patel, a DDC engineer, for a deposition. Patel testified that he visited the project every two weeks where he walked around and checked its progress. He also stated that the City retained REI/STV, a resident inspection services company, to supervise the project and STV was at the project every day.

Patel claimed that he never saw any laborers using grinders without a guard, and that he would have instructed them to stop using the grinder and put the guard on if he had. Patel stated that it was unsafe to operate a grinder without a guard, "but the laborer that are using themselves sometimes they remove."

Patel had the authority to stop work if there was an unsafe condition or practice. He explained:

- Q. ... In addition to stopping the work, did you have to notify the REI or do something else?
- A. It depends how severe is the case, but if it is a guard, then we tell them to stop work until you install the guard and resume the work.
- Q. Did you have any supervision of the method or the manner of the work of Primer Construction?
- A. The means and methods of construction is contractors, and they submit the HASP, the health and safety plan, that how they intend to proceeded work during the course. And before they starts the work, they submit their HASP to our safety division which they call Q-A-C-S, quality assurance and safety services division, and they approve the healthy and safety plan.
- Q. Did you know that Primer Construction was using grinders on this jobsite without guards on the cutting wheel of those grinders?
- A. No.
- Q. You came to learn that after this accident, correct?
- A. That is correct.

Defendants have provided a copy of an accident report prepared in connection with the underlying incident. The report states in pertinent part that plaintiff was injured by a 6 inch grinder with a 6 inch blade, there is no mention of whether the grinder had a guard and Tineco states that the grinder fell out of plaintiff's hands and into the river below. The grinder was never recovered. In a separate employee statement, plaintiff allegedly wrote that the incident accident occurred "when the 2x4 railing using as support shifted/failed causing me to lose balance. Left hand came into contact w/ cutting wheel." Plaintiff further wrote that the tools/equipment were in "working order/ using larger blade to access deeper cut. all tools and equipt. Working – using 6" blade for 6" grinder –"

Plaintiff has brought claims against the City for negligence and violation of Labor Law § 200 as well as violation of Labor Law § 241 premised upon Industrial code §§ 23- 1.5[a], [c][1] and [c][3]; 23- 1.12[c][1]; and 23-9.2[a], [b][1] and [d].

Discussion

The court will first consider plaintiff's cross-motion to amend his bill of particulars to assert a violation of Industrial Code § 23-1.11(a), entitled, Lumber and nail fastenings, which provides as follows:

(a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.

Plaintiff argues that there will be no prejudice in allowing him to amend his bill of particulars to include an alleged violation of Industrial Code § 23-1.11(a). Plaintiff cites a number of cases including *Tuapante v. LG-39, LLC*, 151 AD3d 999 [2d Dept. 2017]). Meanwhile, defendants maintain that the amendment should be denied because plaintiff is asserting a new theory based upon the temporary railing and this is "prejudicial and surprising." The court disagrees with defendants.

Plaintiff may amend his bill of particulars, even though note of issue has already been filed, where the amendments "entail no new factual allegations, raise no new theories of liability and cause no prejudice (*Alacon v. UCAN White Plains Housing Development Fund Corp.*, 100 AD3d 431 [1st Dept 2012]). *Tuaponte* is squarely on point, where the Second Department affirmed the trial court because the additional Industrial Code violations were not based upon new facts or new theories of liability. The Appellate Division noted that the Mr. Tuaponte had described in detail how his accident occurred.

Plaintiff clearly testified at numerous times during both his 50-h hearing and his deposition that the accident was caused in part by the failure of the temporary railing. Therefore, the court rejects defense counsel's assertion that "[n]owhere in this record does plaintiff ever say the temporary railing was the cause of his accident." Further, just as in *Tuaponte*, the defendants here are fully aware of how plaintiff claims that his accident occurred and have known since the earliest stages of this litigation that it was caused, in part, by the failure of the temporary railing. Therefore, the court rejects defendants' claim of prejudice or surprise. Asserting a new Industrial Code violation is not tantamount to a new theory of liability, and the claimed violation is not based upon any new facts. Therefore, the cross-motion to amend is granted.

The court now turns to the parties' arguments as to summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Defendants argue that the Labor Law § 200 and common law negligence claims fail since plaintiff's accident occurred arose from the means and methods of the work and the defendants did not supervise, control or have notice of the manner in which the work was being performed. The defendants fur-

ther argue that Labor Law § 241(6) was not violated as a matter of law because “the numerous Industrial Code rules alleged to have been breached were not applicable or were not the proximate cause of the plaintiff’s accident.” In his affirmation in support of the motion, defense counsel clarifies that defendants seek dismissal of Section 241[6] claim premised upon the following provisions of the Industrial Code: “part 23, sections 1.5(a) and (c) (1); 1.12(c) (1); and 9.2(a), (b) (1) and (d).”

Meanwhile, plaintiff argues that since he was given a grinder without a guard, he should be granted summary judgment on his Labor Law §241(6) cause of action, to the extent predicated upon the violation of NYCRR 23-1.5[c][3]. Plaintiff further seeks dismissal of defendants’ affirmative defenses based upon plaintiff’s culpable conduct and comparative fault. Plaintiff maintains that the accident report is not in admissible form and otherwise cannot raise a triable issue of fact and that defendants have failed to meet their burden in opposition to the cross-motion.

Finally, plaintiff asserts that if leave to serve his proposed amended bill of particulars, there is a question of fact as to the applicability of Industrial Code § 23-1.11[a] which precludes an award of summary judgment in favor of defendants as to that regulation.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

On this record, it is clear that plaintiff was only supervised by his employer. Further, the defendants have established that they neither caused or created the dangerous conditions leading to plaintiff’s accident nor had notice of them. Indeed, plaintiff has seemingly failed to advance any argument in opposition to defendants’ motion as to these claims. Accordingly, defendant’s motion is granted to the extent that plaintiff’s Labor Law § 200 and common law negligence claims are severed and dismissed.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll 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 scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). By failing to mount any opposition to defendants’ motion as to the Industrial Code provisions other than § 23- 1.5[c][3], plaintiff has abandoned those claimed violations. Accordingly, his Section 241[6] claim premised upon all but Section 23-1.5[c][3] and the newly added § 23-1.11[a] is severed and dismissed and defendants’ motion as to those claims is granted.

12 NYCRR § 23-1.5[c][3] provides:

[3] All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Plaintiff argues that he is entitled to partial summary judgment on liability as to this alleged Industrial Code violation and cites *Becerra v. Promenade Apartments Inc.* (126 AD3d 557 [1st Dept 2015]), *Perez v. 286 Scholes St. Corp.* (134 AD3d 1085 [2d Dept 2015]) and *Tuapante, supra*. The court disagrees for the reasons that follow. It is true that plaintiff testified that the grinder he was told to use did not have a guard. He claims that he and others were routinely told to use grinders without guards, even after his accident occurred.

Defendants argue that there is a triable issue of fact as to whether the grinder had a guard. They point to an accident report, which is not properly authenticated and is therefore inadmissible. While defense counsel criticizes plaintiff's failure to make a complaint about the use of grinders without guards, the Labor Law imposes nondelegable duties on defendants, not plaintiff, to ensure that "equipment in use shall be kept sound and operable..."

Defense counsel points to Patel's testimony, arguing that "he never saw laborers using grinders at this jobsite but, if he saw a laborer using a grinder without a guard, the laborer was instructed to stop and put the guard on the cutting tool." Patel's testimony is of no moment as to whether Section 23-1.5[c][3] was violated because Patel went to the work site once every two weeks and otherwise lacked sufficient personal knowledge to raise a triable issue of fact as to whether the grinder which injured plaintiff was "kept sound and operable". Moreover, there can be no dispute that the removal of a guard from the grinder rendered it damaged, requiring defendants to ensure that the grinder was either "immediately repaired or restored or immediately removed from the job site."

Defendant successfully argues, however, that "even assuming the guard was missing, the purported missing guard was not the proximate cause of his accident." Absent from plaintiff's papers is sufficient proof, such as an expert affidavit, which would establish that the absence of a guard on the grinder was the cause of plaintiff's accident. In other words, plaintiff has failed to show that if the grinder had a guard, his hand wouldn't have been cut when the temporary railing he was supporting himself on broke and his hand fell towards the grinder. Indeed, on this record, it is just as plausible for a factfinder to determine that even if the grinder had a guard, plaintiff would have still cut his hand.

Since plaintiff has failed to establish through admissible evidence that the missing guard was a proximate cause of his accident, he is not entitled to partial summary judgment on liability as to this claim. Accordingly, the balance of plaintiff's cross-motion is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's cross-motion is granted to the extent that the court grants plaintiff leave to serve the amended bill of particulars annexed to his motion papers as NYSCEF Doc No. 59; and it is further

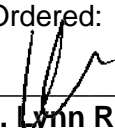
ORDERED that plaintiff's cross-motion is otherwise denied; and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claim as well as his Labor Law § 241[6] claims premised upon all but the violation of Industrial Code §§ 23-1.5[c][3] and 23-1.11[a] are severed and dismissed; and it is further

ORDERED that defendant's motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/28/20
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.