

Radoveshi v Off White Corp.
2020 NY Slip Op 34154(U)
December 15, 2020
Supreme Court, New York County
Docket Number: 150419/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

INDEX NO. 150419/2018

SELAUDIN RADOVESH, MELIJA RADOVESH,

MOTION DATE N/A, N/A

Plaintiff,

MOTION SEQ. NO. 007 008

- v -

OFF WHITE CORP., LIBERTY READY MIX, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

OFF WHITE CORP.

Third-Party
Index No. 595601/2019

Plaintiff,

-against-

LIBERTY READY MIX INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 98, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 116

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence numbers 007 and 008 are consolidated for disposition.

The motion (MS007) by plaintiff Selaudin Radoveshi for partial summary judgment on his Labor Law § 241(6) claim is granted in part.

The motion (MS008) by defendant Off White Corp. (“Off White”) for summary judgment dismissing plaintiff’s complaint is granted in part and denied in part.

Background

Plaintiff testified that he was working for AW General Contractors, a company run by his son, on April 28, 2015 (NYSCEF Doc. No. 88 at 10). He was tasked with laying concrete; he admitted that he had worked with concrete on numerous prior occasions (*id.* at 19-20). Plaintiff was given gloves and knee pads for the job (*id.* at 21). He explained that the “knee pads are for—because when you lay on the concrete, you have to go forward with your knees to level the concrete. You have to bend your knees on the floor, otherwise you can’t reach the concrete if you’re standing (*id.* at 24-25). The knee pads were provided by his son’s company (*id.* at 39). Plaintiff was also wearing jeans for the job (*id.* at 40). After about two to three hours in the wet concrete, his knees started to hurt and soon he said he was unable to move them (*id.* at 41-47). Plaintiff then went to the hospital (*id.* at 47). He required skin grafts for burns from the concrete.

Plaintiff attaches the affidavit of a purported expert, an engineer, who claims that plaintiff should have worn waterproof knee pads for the Portland cement he was working with (NYSCEF Doc. No. 92). He claims that the third-degree burns were the result of defendants’ violation of Industrial Code sections 23-1.7(h) and 23-1.8(c)(4).

In opposition, defendant Off White blames plaintiff’s son. It claims that plaintiff’s employer did not properly warn plaintiff about working with concrete and that plaintiff’s son decided to hire defendant Liberty (who has not appeared) for the concrete rather than hand mixing it. Off White argues that it was plaintiff’s son who provided the knee pads. It argues that plaintiff has comparative negligence because he knew concrete was corrosive and worked with it anyway.

In motion sequence 008, defendant Off White moves for summary judgment dismissing plaintiff’s complaint in its entirety. It claims that Labor Law § 240(1) is inapplicable because

plaintiff did not suffer a gravity-related injury. It also argues that Labor Law § 200 is inapplicable because Off White did not control plaintiff's work. With respect to 241(6), Off White seeks dismissal of all of the Industrial Code sections upon which plaintiff relies.

Off White's essential argument is that plaintiff intentionally put himself in the concrete and that plaintiff cannot recover. It emphasizes that plaintiff's son exercised the only supervision of plaintiff's work and provided all of the equipment.

In opposition, plaintiff concedes that his Labor Law §§ 200 and 240(1) claims do not apply and agrees to withdraw those claims. However, plaintiff argues that there are clear violations of Industrial Code sections 23-1.8(c)(4) and 23-1.7(h) because plaintiff was working with a corrosive substance and was not provided with the proper protective equipment. He stresses that he had boots that only went up to his calf and his knee pads were not waterproof. This caused plaintiff to suffer severe burns from the concrete.

In reply, Off White stresses that it did not supervise or control plaintiff's work and did not have notice of the tight working condition that required plaintiff to submerge his knees in wet concrete. It concludes that plaintiff was the sole cause of his injuries and that it complied with the Industrial Code.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law §§ 240(1) and 200

Plaintiff agreed to withdraw these claims. Accordingly, they are severed and dismissed.

Labor Law § 241(6)

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

“Since section 241(6) imposes a nondelegable duty on property owners, plaintiff need not show that defendants exercised supervision or control over the work site in order to establish a

right of recovery under section 241(6). Nonetheless, comparative negligence remains a cognizable affirmative defense to a section 241(6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413-14, 923 NYS2d 391 [2011] [internal quotations and citations omitted]).

As an initial matter, the Court observes that Off White’s arguments about not supervising plaintiff’s work has no bearing on the 241(6) analysis. This provision of the Labor Law imposes a non-delegable duty on Off White, the owner of the premises. That the contractor, plaintiff’s employer, may have departed from some agreement might provide a basis for a claim between Off White and plaintiff’s employer. But it does not affect the 241(6) claim asserted by plaintiff.

The Court also rejects Off White’s reliance on a comparative negligence defense to dismiss plaintiff’s complaint. This is not a case where plaintiff was provided with the right equipment and he declined to use it. Rather, Off White blames plaintiff’s employer and appears to argue that plaintiff did not have proper training. But that is not sufficient to implicate the sole proximate cause defense to either grant Off White’s motion or to deny plaintiff’s motion on Labor Law §241(6).

Section 23-1.8(c)(4)

This Industrial Code section provides that “Protection from corrosive substances. Every employee required to use or handle corrosive substances or chemicals shall be provided with and shall be required to wear appropriate protective apparel as well as approved eye protection.”

There is no dispute that concrete qualifies as a corrosive substance. Instead, Off White claims that there cannot be a claim under this section because the work did not require plaintiff to kneel in the wet concrete. Its expert claims that the “PPE provided by AW was adequate and reasonable. Lastly, there is no type of PPE to protect against the ignorance of the effects of the wet concrete” (NYSCEF Doc. No. 109, ¶ 20). But this conclusion makes no sense. The fact is

that plaintiff was working with concrete and the knee pads that were provided did not prevent him from getting severe burns. Plaintiff claims, and Off White does not contest, that the knee pads provided to plaintiff were not waterproof.

Off White's arguments about plaintiff's contribution to his injuries, such as how he did not need to kneel, might reduce the amount of damages awarded to plaintiff at trial. But it does not provide an adequate defense to a violation of this Industrial Code section. The Court grants the branch of plaintiff's motion to the extent it was based on this Industrial Code.

Section 23-1.7(h)

This Industrial Code Section states that "All corrosive substances and chemicals shall be so stored and used as not to endanger any person. Protective equipment for the use of such corrosive substances and chemicals shall be provided by the employer."

Similar to the analysis above, the Court grants this branch of plaintiff's motion. Plaintiff was not given adequate protective equipment to protect him from getting injured from the concrete. Off White's assertion that it was not responsible for providing the PPE is of no moment because the Labor Law imposes a non delegable duty on Off White to comply with this Industrial Code section. The undisputed evidence presented in this case is that plaintiff suffered severe burns from working in concrete and was not provided with the requisite protection, such as waterproof knee pads, that would have prevented his injuries.

Accordingly, it is hereby

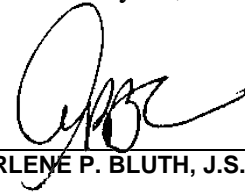
ORDERED that the motion by plaintiff (MS007) for summary judgment on its Labor Law §241(6) is granted to the extent the motion is based on Industrial Code Sections 23-1.7(h) and 23-1.8(c)(4) and denied as to the remaining relief requested; and it is further

ORDERED that the motion by defendant Off White Corp. (MS008) for summary judgment is granted only to the extent that plaintiff's Labor Law §§ 200 and 240(1) claims are severed and dismissed and plaintiff's Labor Law § 241(6) claim is dismissed to the extent it relied on Industrial Code sections other than 23-1.7(h) and 23-1.8(c)(4); and it is further

ORDERED that plaintiff shall file a note of issue on or before January 22, 2021.

12/15/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE