

Mollica v Nanuet Fire Dist.

2020 NY Slip Op 34967(U)

April 28, 2020

Supreme Court, Rockland County

Docket Number: Index No. 32827/2017

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ROCKLAND COUNTY

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CHARLES MOLLICA,

Index No. 32827/2017

Plaintiff,

-against-

DECISION AND ORDER

NANUET FIRE DISTRICT, BOARD OF THE
COMMISSIONERS OF THE NANUET FIRE DISTRICT,
HUDSON DESIGN BUILD GROUP LLC and
FERRARI & SONS, INC.,

Defendants.

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NANUET FIRE DISTRICT, BOARD OF THE
COMMISSIONERS OF THE NANUET FIRE DISTRICT,
HUDSON DESIGN BUILD GROUP LLC,

Third-Party Plaintiffs,

-against-

FERRARI & SONS, INC.,

Third-Party Defendant.

-----X
Zugibe, J.

Upon considering the papers filed in this case (Motion Sequences **002**, Documents 67-78, 112-13, 114-18 **and** **003** Documents 79-99, 100-07, 108-11; 114—18, 119), the Court decides the motions as follows:

Factual Background

The basic facts surrounding the accident in this personal injury matter are relatively clear. Defendants and Third-Party Plaintiffs Nanuet Fire District (“the District”), and the Board of the Commissioners Of The Nanuet Fire District (“the Board”) were building a new fire district headquarters that included a firehouse.¹

Defendant Hudson Design Build (“Hudson”) was the general contractor overseeing the construction. Hudson was responsible for coordinating the various trades at the site. It also was required to provide laborers to clean up the site.

Defendant/Third-party Defendant Ferrari & Sons, Inc. (“Ferrari”) was performing masonry work, including installing cement block walls. Non-party United Roofing and Sheet Metal (“United”) employed plaintiff as part of its crew that was installing the roof. At the time the accident took place, on a Monday, Plaintiff was climbing down a ladder from the roof, where he had just delivered materials to the installers.

According to plaintiff, the construction site was strewn with construction debris. However, the area immediately around the ladder was free of debris as of the Friday before the accident. Plaintiff and other roofers complained to Hudson’s employee, “Manny,” who oversaw the site. Manny assured Plaintiff someone would clean up the site.

Suddenly, as Plaintiff attempted to descend to the ground from the first rung of the ladder, his foot contacted a piece of cement block debris. Plaintiff’s foot became stuck, and he fell, sustaining personal injuries.

The Motions

Plaintiff has moved, under motion sequence 002, for summary judgment on liability under Labor Law §§200, 240(1) and 241(6) against the District, the Board and Hudson (together

¹ The parties argue over which entity is properly sued here. For now, the Court holds this question in abeyance.

“the Defendants”), but, interestingly, not Ferrari. The Defendants all oppose. They also moved separately, under motion sequence 004, for summary judgment dismissing the complaint against them. In addition, the Defendants seek indemnification from Ferrari. Plaintiff and Ferrari oppose the Defendants’ applications as to them.

Discussion

The Court denies summary judgment to the District on its lack of ownership claim. There is evidence in the record to consider the District an “owner” as that term is contemplated in the Labor Law and common law. *See e.g. Matter of Schwindt v. County of Essex*, 60 A.D.3d 1248, 1249 (3d Dep’t 2009) (district was “equitable owner of the firehouse” in personal injury from firehouse roof fall); *Cannino v. Locust Val. Fire Dist.*, 241 A.D.2d 534, 535 (2d Dep’t 1997) (“there exist triable issues of fact with respect to the question of whether the **fire district** was the actual **owner** of the building or at least, may be treated as such for purposes of the application of Labor Law § 241 (6) liability”). As such, the Court considers each substantive claim against all three moving Defendants.

The Court grants summary judgment to all three moving Defendants on Plaintiff’s Labor Law §240 claims because a step from a height onto debris causing injury is not an elevation created risk that §240(1) contemplates. That section concerns elevation related injuries, and no such injuries have been made here. *Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914, 916 (“plaintiff is not entitled to Labor Law § 240 (1) protection because no true elevation-related risk was involved here.”). In a case very similar to this one, the Second Department said as much. *Rose v A. Servidone, Inc.*, 268 A.2.d 516, 517 (2d Dep’t 2000). There, the Plaintiff stepped “off the last step from a truck onto unlevel ground strewn with dirt, pebbles, blacktop and concrete....” The Court, *inter alia*, granted summary judgment

to the defendant on his Labor Law §240(1) claim. As the Court observed, “Stepping down from a truck onto unlevel ground littered with dirt, rocks, blacktop, and concrete from a road under reconstruction does not involve the elevation-related risks contemplated in **Labor Law § 240 (1).**” *Id.* The Court can discern no practical difference between the last step of a truck or a ladder, and between multiple debris sources and a single source. The Court therefore grants summary judgment dismissing the Labor Law §240(1) claim.

The Court grants partial summary judgment to the three moving Defendants as to Plaintiff’s Labor Law §241(6) claim. As the parties acknowledge, a violation of this section must be predicated on some Industrial Code violation. Here, plaintiff claims that both 12 NYCRR 23-1.7(e)(1) and (2) apply. The Court finds that the term “passageway” in subsection (1) simply does not apply here. The courts have regularly held that open areas where work is being done are not passageways as this subsection contemplates. *See Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 322 (2d Dep’t 2004) (rooftop an open work area, not a passageway); *Jones v 30 Park Place Hotel LLC*, 178 A.D.3d 604, 605 (1st Dep’t 2019) (trip while operating wheelbarrow over plywood covering a hole at site); *Desena v. N. Shore Hebrew Academy*, 119 A.D.3d 631, 634 (2d Dep’t 2014). Plaintiff’s accident took place in an open area, and thus subsection 12 NYCRR 23-1.7(e)(1) simply does not apply. The Court grants summary judgment to all three Defendants on this claim.

However, the same is not true as to 12 NYCRR 23-1.7(e)(2), and the Court therefore denies summary judgment to all three moving defendants. Subsection (2), mandating that “working areas” should remain free of “debris” appears to apply here. It is possible that Defendants may prevail at trial, especially considering that there is some question as to when the debris appeared at the base of the ladder. *See Robinson v. HVA 125 LLC*, 2020 N.Y. Slip Op

30243[U], *7 (Sup Ct. N.Y. 2020) (noting that debris caused by work being done at the time accident occurred not basis for subsection (2) claim but finding question of fact existed). Here, there is some question as to when the cinderblock debris in question was “created.” Ultimately the facts are sufficiently contested to mandate the case proceed to trial on the §241/12 NYCRR 23-1.7(e)(2) claim.

The Court grants summary judgment on Plaintiff’s Labor Law §200 and common law negligence claims to the owners, the Fire District and the Board, but denies it as to Hudson. “[W]here the injury arises out of defects or dangers in the methods or materials of the work, the property owner's potential liability hinges on his or her authority to supervise the work.” *Lundy v. Austein*, 170 A.D.3d 703, 705 (2d Dep’t 2019). The same is true as to common law owners’ negligence. *McKee v. Great Atl. & Pac. Tea Co.*, 73 A.D.3d 872, 873-74 (2d Dep’t 2010). Here, there is no evidence that the District or the Board directly supervised any work at the construction site. Thus, they are entitled to summary judgment on these causes of action.

The Court finds that Hudson must face trial on these claims because there is, at the very least, a question of fact whether Hudson acted as the general contractor here. First, the Court finds there is a question of fact whether Hudson is a general contractor. “In response to the movants' prima facie showing, the Plaintiff raised triable issues of fact regarding Worth's supervision, direction, and control over the safety of the job site.” *Roberts v. Worth Constr., Inc.*, 21 A.D.3d 1074, 1076 (2d Dep’t 2005). Here, there was ostensibly no general contractor. However, like “The man who mistook his wife for a hat,” the title story of a fascinating psychological tome by Dr. Oliver Saks, the mere fact that Hudson officially called itself something else does not mean it was not, in fact, the general contractor. Here, facts exist to warrant a finder of fact determine whether Hudson is a general contractor.

Second, this is a type of case the law is designed to cover. “A contractor may be held liable in common-law negligence and under Labor Law §200 for a dangerous condition on the premises if it had control over the work site and actual or constructive notice of the dangerous condition. *Simmons v. City of N.Y.*, 165 A.D.3d 725, 728 (2d Dept 2018). Further, “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed.” *McKee v. Great Atl. & Pac. Tea Co.*, 73 A.D.3d 872, 873 (2d Dep’t 2010). Here, facts exist as to these issues to allow Hudson’s liability to go to a factfinder. Testimony exists in the record as to the cinderblock and other debris on the site and complaints about the debris to Hudson personnel. While the Court finds the facts insufficient to grant plaintiff summary judgment, it also finds them sufficient to deny defendant Hudson the same relief.

The Court denies summary judgment on the three moving Defendants’ contractual indemnification claim. The basis for their motion is that Ferrari must be responsible for the concrete debris ending up at the base of ladder. But Ferrari has presented evidence that, while it may have been the only masonry company working the construction at the time, other trades used cinder block material during their parts of the construction, whether on the actual building or to aid in other activities, such as for planking supports. “Since it has not been determined whether [Plaintiff’s] injury was caused by any act or omission by [Ferrari], an award of summary judgment here would be premature.” *Builders Group*, 45 A.D.3d 522, 525 (2d Dep’t 2007). Contractual indemnification must await a trial adjudication.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 28, 2020
New City, New York

ENTER

Thomas Zugibe

THOMAS P. ZUGIBE
J.S.C.

To: All Parties
Via EFILE