Scarano v Pelham Union Free Sch. Dist.
2020 NY Slip Op 35041(U)
March 19, 2020
Supreme Court, Westchester County
Docket Number: Index No. 55092/2018
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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THOMAS SCARANO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 55092/2018
Seq. # 1

PELHAM UNION FREE SCHOOL DISTRICT, PELHAM UNION FREE SCHOOL DISTRICT #1, PELHAM PUBLIC SCHOOLS, THE BOARD OF EDUCATION OF THE PELHAM UNION FREE SCHOOL DISTRICT, SAVIN ENGINEERS, P.C., and MACE CONTRACTING CORP.,

Defendants.

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The following papers were read on a motion by the defendant, Mace Contracting Corp. ("Mace"), for an order granting summary judgment dismissing the complaint and all cross claims against it:

Notice of Motion/Affirmation/Exhibits A-N	1-16
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FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Thomas Scarano, (the "plaintiff/Scarano") commenced this action by filing a summons and verified complaint on April 9, 2018, seeking to recover for alleged personal injuries sustained on August 9, 2017, during the course of his employment as a journeyman for Clean Air Quality Services ("Clean Air"), while working on a ladder performing duct removal work in connection with demolition and reconstruction of the boys locker room located at Pelham Memorial High School, located at 575 Colonial Avenue, Pelham, Westchester County. The plaintiff alleges that the Pelham Union Free School District ("the District"), Savin Engineers, P.C. ("Savin"), and Mace are negligent as a matter

of law and violated New York Labor Law §§ 240[1] and 241[6] and that Savin and Mace violated New York Labor Law § 200.

By Stipulation and Notice of Partial Voluntary Discontinuance Without Prejudice, the parties stipulated to discontinue the action against the defendants, Pelham Union Free#1, Pelham Public Schools, and The Board of Education of the Pelham Union Free School District. The plaintiff asserts that at the time of the incident, the District was the owner of the building, Savin was the construction manager and Mace was the general contractor. Clean Air was hired to perform the HVAC work and provided the A frame ladders the plaintiff was using to work, two of which were 10 or 12 feet and one 8 feet.

Mace now files the instant motion seeking dismissal of the complaint and all cross-claims against it arguing that Mace is a prime contractor without the authority to direct and control the plaintiff's work and therefore, is not liable. Mace also argues that the plaintiff's common law negligence claims are without merit, since Mace did not create the alleged condition, which caused the plaintiff's fall. Mace further argues that it did not direct or supervise the means and methods of the plaintiff's work and was not a general contractor on the job. Mace also argues that the plaintiff fails to sufficiently specify any industrial code violation which proximately caused his injury.

In opposition, Scarano's attorney argues that dismissal is inappropriate and summary judgment should instead by granted in the plaintiff's favor with respect to his claims pursuant to Labor Law §§ 200, 240[1], and 241[6]. The attorney argues that, with regard to Labor Law §§ 240[1] and 241[6], the evidence establishes that Mace was responsible for tasks of the nature that are generally performed by, or delegated to, a general contractor or agent of the premises, thereby imposing liability on it for failing to provide safety devices necessary for the protection of workers. The plaintiff's attorney further argues that Mace admitted to hiring non-party subcontractor Concrete Cutters, who, together with Mace, performed demolition work in the room where the incident occurred, the day before the plaintiff's incident, despite Savin explicitly having directed Mace to discontinue demolition until shoring was installed, which was not done until eight days after the incident.

The plaintiff's attorney also argues that specific violations of New York State Industrial Code are properly pled and established and that dismissal of Labor Law § 200 is inappropriate because Mace and/or its direct subcontractor, Concrete Cutters, whom Mace supervised, directed and controlled, had actual and/or constructive notice of the dangerous condition of the premises and actually created the dangerous condition, by demolishing a load-bearing masonry wall, which necessarily led to structural weakness and failing to remove the demolished wall with its exposed piping and other debris in the workspace, irrespective of whether Mace supervised the plaintiff's work.

Savin also opposes Mace's motion, arguing that it takes no position on Mace's legal arguments, however, opposes Mace's factual arguments regarding Savin's responsibilities in connection with the project. Savin argues that it was retained by the District only to render construction management services on the project and its scope of work was limited to furnishing administrative and coordination services for onsite activities related to the project and involved ensuring that the various contractors were present at the premises at the required times to satisfy their respective agreements with the owner and to protect the interests of the owner through construction. Savin argues that it is not the owner of the premises and did not operate, maintain, or control the project at any time and was not an agent of the owner of the premises.

Savin argues that it was not retained to perform any actual construction work at the project, did not hire any laborers to perform work, was not retained to furnish any construction equipment, construction materials, or safety devices for the project and was not retained to be, and was not a site safety consultant, nor a site safety manager on the project. Savin contends that it did not have responsibility to develop or implement any site safety plans, nor any responsibility to supervise the implementation of any site safety plans on behalf of any contractor or subcontractor.

In reply, Mace argues that the plaintiff's motion and opposition fail to establish a question of fact with respect to Mace's liability. Mace reiterates that it is a prime contractor with the same duties and responsibilities of the other three non-party prime contractors and it did not direct and control the plaintiff's work, did not have notice of the condition which caused the plaintiff's fall and is not the owner or general contractor.

Mace also argues that the plaintiff failed to create a question of fact with respect to Labor Law §§ 240[1] and 241[6], since Mace was not a general contractor, Mace's work had nothing to do with the duct coming loose and striking the ladder, the ladder was not owned nor provided by Mace, and Mace was not responsible for site safety. Mace asserts that the plaintiff failed to show violation of any industrial codes.

The District also opposed all summary judgment motions. With regard to Mace, the District argues that, as per Dean Sproch ("Sproch"), the senior construction manager for Savin, Mace acted like a general contractor and was responsible for the demolition in the Boy's Locker Room, including the walls containing the piping that Mace left exposed and later injured the plaintiff. Sproch testified that the pipes should have had some protection, like being capped and they were not on the day of the accident.

In reply to Savin's opposition, Mace asserts that, contrary to Savin's assertions, Mace was not a general contractor on the project, but was retained by the District to perform the construction trade work at the job site and the contract between Mace and the District is identical to the other contracts the District had with the various contractors by trade. Mace further asserts that Savin's duties are clearly outlined in its contract with the District, which provides that Savin is to supervise all of the work on the project, including scheduling.

In reply to the plaintiff's motion and opposition, Mace reiterates that it was not a general contractor on this project and did not direct and control the plaintiff's work. Mace proffers that the testimony establishes that Mace neither caused the duct work to fall nor cut the pipes on which the plaintiff landed, and therefore, is not liable under Labor Law § 200. Mace states that the plaintiff fails to oppose the motion as to Labor Law § 240[1] and contends that, regardless of an Industrial Code violation, there can be no liability to Mace under Labor Law § 241[6] because Mace is not in privity of contract with Clean Air and did not have the authority to oversee or control the activities of the plaintiff. In addition, Mace also assert that it did not violate any of the provisions of the Industrial Codes alleged by the plaintiff.

DISCUSSION

"[T]he proponent of a summary judgment motion 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," (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Id.*).

Here, the testimony and evidence established that Mace did not supervise the plaintiff's work, nor did it provide the equipment for the work. There is no evidence that Mace had authority to exercise supervision and control over the work that the plaintiff performed. Therefore, the plaintiff cannot satisfy the requisite elements to maintain the claims under Labor Law § 200 with regard to Mace.

With regard to common law negligence, the Court also finds that Mace did not create nor had notice of an alleged dangerous condition, which caused the plaintiff's fall. The evidence and testimony established that Mace was not responsible for providing the plaintiff with equipment with which to perform his job. The ladder and any safety equipment was to be provided by the plaintiff's employer and Mace had no authority over the plaintiff's employer, Clean Air. Further, the piping on which the plaintiff landed, was not left on the ground by Mace, since Mace was not responsible for removing the piping in the wall, it was only responsible for the masonry demolition. The plaintiff testified that there was no debris on the ground before he started the work and Mace avers that the pipes were still to be removed and were standing, and not removed for the plaintiff to fall upon when it completed its part of the demolition of the wall. Furthermore, the proximate cause of the plaintiff's fall was not any piping or demolition material left on the ground, but instead the falling of the duct onto the plaintiff, causing him to fall off the ladder.

Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees", states in pertinent part that:

> All contractors and owners and their agents, ..., in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed (NY Labor Law § 240[1]).

"Labor Law § 240(1) imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*see McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15 [2d Dept 2015]). "Absolute liability is imposed upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation related hazards, and where such failure is a proximate cause of the accident (*Id*.).

"[P]rime contractors that are not general contractors are not contractors within the meaning of the statute as to the work that has not been delegated to them" (*Walls v Turner Const. Co.*, 4 NY3d 861 [2005]). Here, Mace was not a general contractor on this project and indeed had the same contract as other contractors on the job. It did not hire the contractors on the job, with the exception of the contractor it hired to help complete its portion of the job. It did not have the ability to control or supervise the plaintiff's work, nor did it provide the equipment for the work. Therefore, the Court finds that Labor Law § 240 is not applicable to Mace.

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*see Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 983 [2d Dept 2014]). "The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the

Commissioner of the Department of Law" (*Id.*). Here, as previously stated, "[t]here can be no recovery since Mace had no control over the plaintiff's work.

In addition, the plaintiff alleges violation of Industrial Code provisions found at 12 NYCRR 23. Specifically, the plaintiff asserts violation of codes 12 NYCRR 23-1.5 [a-c], 1.7[a][b], 1.16, 1.21[b], 3.3[b][c], and 2.1. The Court finds that these codes are either inapplicable or not specific enough to permit recovery under Labor Law 241(6) against a non-supervising prime contractor and do not impose an affirmative duty on Mace to correct any defect upon discovery or actual notice of the unsafe condition (*see Misicki v Caradonna*, 12 NY3d 511, 518-519 [2009]). Additionally, there is no evidence that even if there was an affirmative duty, that WestPark and Nine West had any actual or constructive notice of the unsafe condition. Also, violations of OSHA standards do not provide a basis for liability under Labor Law § 241[6] (*see Vernleri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995]).

Therefore, the Court finds that Mace has made 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 and the opposing parties have failed to set forth evidentiary proof in admissible form, establishing the existence of a material issues of fact.

Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment seeking dismissal of the complaint and all cross-claims against Mace, is granted.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 19, 2020

HON. SAM D. WALKER, J.S.C.