Sicha v Hamlet Estates at St. James Homeowners Assn., Inc.
2021 NY Slip Op 33234(U)
June 25, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609065-2017
Judge: Jerome C. Murphy

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

CARLOS SICHA,

Plaintiff,

- against -

THE HAMLET ESTATES AT ST. JAMES HOMEOWNERS ASSOCIATION, INC. COUNTRY WOODS AT ST. JAMES DEVELOPMENT CO., LLC, and ST. JAMES DEVELOPMENT CORP.,

Defendants.

COUNTRY WOODS AT ST. JAMES DEVELOPMENT CO., LLC, and ST. JAMES DEVELOPMENT CORP.,

Third-Party Plaintiffs,

-against-

TOM MACHIN CONTRACTING, INC. and TOM MACHIN, individually,

Third-Party Defendants.

TRIAL/IAS PART 7
Index No. 609065-2017
Motion Date: 4/28/21
Sequence No.: 002

DECISION AND ORDER

The following papers have been read on this motion:

Notice of Motion, Affirmation and Exhibits	1
Statement of Material Facts	2
Response to Statement of Material Facts	3
Memorandum of Law in Support	4
Affirmation in Opposition	5
Affirmation in Reply	6

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PRELIMINARY STATEMENT

Defendants, Country Woods at St. James Development Co., LLC and St. James Development Corp., move, pursuant to CPLR §3212, for an Order granting Country Woods at St. James development Co., LLC and St. James Development Corp. summary judgment and dismissal of plaintiff, Carlos Sicha's, ("plaintiff"), Complaint and for such other and further relief as this Court shall deem to be just and proper. Opposition and reply have not been submitted.

BACKGROUND

Plaintiff commenced this action under §§ 241(6) and 200 (common law negligence) by filing a summons and verified complaint dated August 31, 2019. Plaintiff alleges that on May 20, 2017, at the premises known as 5 Hamlet Woods Dr., St. James, NY, while in the course of his employment, while applying plastic siding to the premises, construction debris was propelled into his unprotected right eye. He was employed as a laborer for a construction company known as "COS Siding." The plastic siding which he was installing was 16 to 18 feet in length, and plaintiff was using a circular saw, belonging to his employer, to cut the sheets as needed. As he was using the saw, the plastic splintered and damaged his right eye. Both on prior occasions, and on the morning of this accident, he experience the same blundering problem. Plaintiff testified that he had previously asked his supervisor, Fabian, for glasses/goggles, but he did not take it seriously.

Defendants submitted an Answer dated February 25, 2019, which included 31 Affirmative Defenses and to Cross-claims against the Hamlet Estates at St. James Homeowners Association, Inc. The action against the homeowners association was discontinued with prejudice and there are no counterclaims or cross-claims remaining.

DISCUSSION

Relevant Labor Law Provisions

Labor Law § 200 (1) provides as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of

> all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.
> § 241(6)

This statute sets forth the general duty of owners and general contractors, or their agents, to protect the health and safety of employees is a codification of the common-law duty to provide workers with a safe work environment. (*Everit v. Nozkowski,* 285 A.D.2d 442 [2d Dept. 2001]). Liability for a § 200 violation " . . . generally falls within two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at work." (*Abelleira v. City of New York,* 120 A.D.3d 1163, 1164 [2d Dept. 2014]).

In order to establish liability for a Labor Law § 200 violation, " a plaintiff must demonstrate that the defendants exercised supervision and control over the work performed, or had actual or constructive notice of an allegedly unsafe condition." (*Pitch v. Bd. of Educ.,* 27 A.D.3d 711, 713 [2d Dept. 2006]). In *Ortega v. Puccia,* 57 A.D.3d 54, 60 (2d Dept. 2008), the Court acknowledged that Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provided workers with a safe place to work, and noted that cases involving Labor Law § 200 fall into the two broad categories as noted above: (1) where workers are injured as a result of dangerous or defective premises condition at the work site; and (2) those involving the manner in which the work is performed. Where a premises condition is at issue, property owners may be held liable if the owner either created the dangerous condition that caused the accident, or had actual or constructive notice of the dangerous condition that caused the accident.

By contrast, when the manner of work is at issue, " 'no liability will attach to the owner solely because [he or she] may have notice of the allegedly unsafe manner in which work was performed' " (*id.* at 61, quoting *Dennis v. City of New York,* 304 A.D.2d 611, 612 [2d Dept. 2003]). In a somewhat controversial comment, the Court stated that no liability would be found against an owner or general contractor under § 200 "unless it is shown that the party to be

charged had the authority to supervise or control the performance of the work." This, on its face, may be different from actual supervision.

Lombardi v. City of New York, 175 A.D.3d 1521 (2d Dept. 2019) provided some clarification of the concept of "authority to supervise". Lombardi was employed as a foreman by nonparty New York Paving, a contractor hired by defendant Brooklyn Union Gas Company, and doing business as National Grid N.Y., for the removal of metal plates and restoration of the roadway of East 17th Street, between Avenue M and Cedar Street, in Brooklyn. Defendants City of New York and New York City Department of Transportation were the owners of the roadway. Plaintiff was injured when a metal plate, used to cover an excavated trench, struck him as it was being removed from the roadway surface.

Citing *Ortega v. Puccia* the *Lombardi* Court, supra at 1523, reiterated that where " 'a claim arises from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation' " (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 [1993]). Quoting from *Ortega v. Puccia*, 57 A.D.3d at 62, the Court stated that "[a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." However, " 'mere general supervisory at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*id.*).

Labor Law § 241(6), upon which plaintiff also relies, provides as follows:

> 6. All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to succeed on a § 241(6) claim, plaintiff must allege violation of a "'specific, positive command'" (*Gasques v. State of New York,* 15 N.Y.3d 869 [2010], quoting *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343. 340 [1998]). None of the Industrial Code regulations set forth in the Verified Bill of Particulars, §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21,23-1.24, 23-3.2, 23-5.2. 23.5.3, and 23-5.9 include specific positive commands, or are applicable to the circumstances of this action. Plaintiff served a Supplemental Bill of Particulars (NYSCEF DOC. NO. 77) in which he identifies § 23-1.8(a) of the Industrial Code of the State of New York as serving as a basis for the imposition of liability under § 241(6) of the Labor Law. It provides as follows:

> (a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

Plaintiff's claims under Labor Law § 200 is dismissed. Cases under this section "fall into two broad categories: namely, those where the workers are injured as a result of dangerous or defective premises condition at the work site, and those involving the manner in which the work is performed." (*Ortega v. Puccia,* 57 A.D.3d 54, 61-62 [2d Dept. 2008]). Where the condition of premises is at issue, property owners or general contractors may be held liable for a violation of Labor Law § 200 where they created the dangerous or defective condition, or if they had actual or constructive notice of its existence. (*Lombardi v. City of New York,* 175 A.D.3d 1521, 1523[2d Dept. 2019]).

The issue in this case does not involves a dangerous or defective condition of the premises; rather, it is the manner in which the work was performed, and defendants may only be held responsible under § 200 if they exercised supervisory control over the work in which plaintiff was engaged. There is no evidence that defendants exercised supervisory control.

With respect to plaintiff's claims under § 241(6), defendants contend that it was plaintiff's failure to purchase and wear goggles or other suitable eye protection while engaged in the process of cutting the plastic siding. Defendant cites *Barshay v. Eberhaart, L.P. #1,* 69

A.D.3d 779 (2d Dept. 2010) and *McCormack v. Universal Carpet & Upholstery Cleaners,* 29 A.D.3d 542 (2d Dept. 2006) in support of his position.

In *Barshay,* plaintiff's § 241(6) claim was based upon an alleged violation of 12 NYCRR 23-1.8(a), but during the opening statement, counsel for plaintiff admitted that plaintiff was wearing protective eye gear just prior to the accident, but chose to remove the eye gear in order to clean it. After he removed it, he was struck in his left eye by flying debris. *McCormack* also involved a situation in which plaintiff was engaged in removing a nail from flooring with a hammer, a piece of the nail broke off and struck him in the eye. While he owned protective goggles, he chose not to bring them, or wear them whenever he performed flooring work. The Court held that "the plaintiffs' proof established, as a matter of law, that the injured plaintiff's actions were the sole proximate cause of his injury.

In this case, plaintiff was neither provided with, or otherwise owned protective eye gear. A viloation of the Industrial Code is not, in and of itself, sufficient to impart liability, while a violation of the Labor Law § 241(6) is itself a finding of negligence. But § 241(6) requires an additional finding that the violation showed a lack of reasonable care. (*Baptiste v. RLP-East, LLC* [1st Dept. 2020], citing *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 [1998], and *Allen v. Croutier Constr. Corp.,* 44 N.Y.2d 2440 [1978]).

Plaintiff testified at his deposition that in the last few weeks he did not consider purchasing goggles despite using a device to cut siding (NYSCEF DOC. NO. 64, at p.33, lines 1 - 13). During his deposition of August 7, 2018, plaintiff testified that on prior occasions, he had requested goggles from his supervisor, Fabian, but "he did not take it seriously." He never purchased his own goggles. (Exh. "F" to motion at p. 52, lines 11-22). Defendant acknowledges in his Reply Affirmation (NYSCEF DOC. 77, at p. 8, para. 13 " ... it is for the jury to determine whether plaintiff's failure to provide for his own safety was the sole proximate cause of his injury."

Without a separate motion, plaintiff requests that the Court search the record and grant partial summary judgment to plaintiff. CPLR § 3212(b) provides in pertinent part that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the Court may grant such judgment without the necessity of a cross-motion.

In this case, plaintiff is not entitled to summary judgment, as there exists questions of fact as to whether the claimed violation of § 241(6) showed a lack of reasonable care, and whether plaintiffs failure to obtain protective eye gear was the sole proximate cause of his injury. Plaintiff's request for partial summary judgment is denied as is the defendants' request for summary judgment.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
June 25, 2021

ENTER:

Jerome C Murphy

JEROME C. MURPHY, J.S.C.

ENTERED
Jun 30 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE