Saraiva v State of New York
2021 NY Slip Op 33676(U)
June 3, 2021
Court of Claims
Docket Number: Claim No. 128269
Judge: Debra A. Martin

STATE OF NEW YORK COURT OF CLAIMS

MARIO SARAIVA,

Claimant,

DECISION AND ORDER

-v-

STATE OF NEW YORK and NEW YORK STATE THRUWAY AUTHORITY,

Claim Nos. 128269
128270
Motion Nos. M-96008
M-96009
CM-96524

Defendants.

BEFORE: HON. DEBRA A. MARTIN
Judge of the Court of Claims

APPEARANCES: For Claimant:
LAW OFFICES OF LAWRENCE PERRY BIONDI, P.C.
BY: JULIO CESAR ROMAN, ESQ.

For Defendants:
GOLDBERG SEGALLA, LLP
BY: RAUL E. MARTINEZ, ESQ.

The following papers were read on defendants' motions for summary judgment and claimant's cross-motion for partial summary judgment:

1. Notice of Motion (M-96008) with Affirmation of Raul E. Martinez, Esq., with attached exhibits, filed October 13, 2020;

2. Expert Affidavit of Steven Paul Thomsen, sworn to October 6, 2020;

3. Memorandum of Law, dated October 9, 2020;

4. Notice of Motion (M-96009) with Affirmation of Raul E. Martinez, Esq., with attached exhibits, filed October 13, 2020;

5. Expert Affidavit of Steven Paul Thomsen, sworn to October 6, 2020;

6. Memorandum of Law, dated October 9, 2020;

"A"

7. Supplemental Expert Affidavit of Steven Paul Thomsen, sworn to April 6, 2021;

8. Notice of Cross-Motion (CM-96524) with Affirmation of Julio Cesar Román, Esq., with attached exhibits, filed March 4, 2021;

9. Reply Memorandum of Law, dated April 7, 2021;

10. Affirmation in Reply of Julio Cesar Román, Esq., with attached exhibits, filed May 13, 2021;

11. Filed papers: Claim, Answer (Claim No. 128269) and Claim, Answer (Claim No. 128270).

FACTS

Before the Court are the defendants' motions for summary judgment and claimant's cross motion for partial summary judgment arising out of claimant's injury at a construction site owned by defendants and caused by alleged violations of Labor Law §§ 200 and 241 (6), and common law negligence.[1]

On June 29, 2016, claimant was employed by Erie Painting & Maintenance, Inc. (Erie), which had a contract with defendant New York State Thruway Authority (NYSTA) to sandblast and paint 10 bridges over the Thruway. At the time of the accident, claimant was working as a "blaster" using a sandblasting unit, or ARS Unit. The blaster controlled the flow of pressurized grit through a series of hoses to the nozzle held by the blaster. The force of the spray of grit removed the old paint and rust from the bridge in preparation for painting. There was a dead man's switch on the nozzle and a light that illuminated the direction of the spray. A separate vacuum attached to the ARS Unit, also operated by Erie employees, removed the spent grit and

[1] Claimant filed identical claims against both defendants but has agreed to discontinue against the State of New York, Claim No. 128269.

debris through a series of PVC pipes and hoses to a recycling machine. The Unit was the size of a tractor trailer and was powered by a diesel-fueled generator; both the Unit and the generator were located some distance from the workers, but were connected to the equipment used by them with a series of hoses, PVC pipes and electric cords. Claimant was blasting while standing on a platform installed by Erie under the bridge, outfitted in protective hood, gloves and boots, and full body suit, when his gloved hand accidently contacted the PVC pipe of the vacuum. With this contact, he allegedly received a strong static shock that caused him to fall onto the platform and be injured.

Pete Toptsidis, the Erie supervisor, testified at his deposition that minor shocks from contact with the PVC pipes were common, a point confirmed by the deposition testimony of claimant and co-worker Benvenutti. However, none were familiar with the significant shock felt by claimant except Benvenutti, who testified he experienced that two days before claimant's accident when his foot contacted the PVC pipe. He testified that he complained to Toptsidis before claimant's accident because he knew it was not normal and thought something must be wrong with the equipment, and Toptsidis replied that he would make sure it was fixed and properly grounded. Toptsidis denied knowledge of anyone experiencing significant static shocks before claimant's accident.

After claimant's unwitnessed accident, Toptsidis inspected the area and found nothing amiss. He photographed the ground wire and said the PVC pipes contained material that grounded it, so it did not need to be separately grounded.

In addition to contracting with Erie to perform the blasting and painting, defendant NYSTA also contracted with RAVI Engineering (RAVI) to monitor Erie's work with daily

inspections and to ensure the work complied with the contract specifications. RAVI subcontracted with KTA Tator (KTA) to perform some of the inspections. All the equipment, materials, and tools were provided by Erie, and Pete Toptsidis directed and supervised the Erie workers. Bill Taylor, the construction supervisor for NYSTA, relied on the RAVI and KTA inspectors to perform the necessary directions and inspections, and to provide reports of the progress of the bridge project. Taylor managed other NYSTA projects and was only on site once every one to two weeks.

Erie's contract with the NYSTA required that Erie supervise its employees, and to submit a safety plan identifying all safety and health concerns, including the safety requirements to meet those hazards. The contract specifications stated that the submission of the Project Safety and Health Plan did not relieve Erie from its responsibility to "adequately protect the safety and health of all workers." (ex F, §107-05 [B].) Erie conducted regular safety meetings and set the agendas for them. Neither the RAVI, KTA inspectors, nor the NYSTA were responsible to make sure the equipment met applicable safety standards. The inspectors would make sure workers were wearing hardhats and safety vests in the roadway, and the inspectors and NYSTA had stop-work authority. However, neither RAVI/KTA nor Taylor had electrical engineering expertise, experience with the grounding of electrical equipment, or responsibility to make sure Erie's equipment was properly grounded. Taylor was not informed of any issues with static shocks experienced by anyone before claimant's accident.

DECISION

Defendant NYSTA's Motion for Summary Judgment

1. Labor Law § 200 and common law negligence claim

The caselaw strongly supports defendants' motions dismissing these claims. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law." (*Lombardi v Stout*, 80 NY2d 290, 295 [1992][citations omitted].) Furthermore, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the [contractor's] own plant, tools and methods, or through negligent acts of the [contractor] occurring as a detail of the work." (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965][citations omitted].) Since claimant alleges a safety violation in the grounding of Erie's equipment, this is an allegedly dangerous condition created by Erie, for which defendants are not responsible.

Claimant cited to the inspector's daily reports prepared by Paul Dudlry, project engineer, and Jeremy Moyer, both with RAVI/KTA, as evidence of their supervision of Erie's work. However, a close review of those documents shows details of the work performed at specific locations in the context of the progression of the project, not with supervision of the manner and methods used by Erie employees. Neither § 200 or common law negligence liability attaches to defendants' general supervision and presence at the work site to check on the progress of the work and compliance with building specifications, nor to defendants' ability to issue a stop-work order. (*see Lazo v New York State Thruway Authority*, UID No. 2019-029-018 [Ct Cl, Mignano, J. Mar. 13, 2019]; *Gasques v State of New York*, 59 AD3d 666 [2d Dept 2009], *certified question answered, order affd*, 15 NY3d 869 [2010]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 798 [2d Dept 2007]; *Riley v Stickl Consl. Co.*, 242 AD2d 936, 937 [4th Dept 1997], *abrogated on other grounds by McKay v*

Weeden, 148 AD3d 1718 [4th Dept 2017].) These arguments are insufficient to defeat defendants' argument with respect to this section of the Labor Law or common law negligence.

2. Labor Law § 241 (6)

The analysis of a defendants' liability under this statute is significantly different than that for Labor Law § 200.

> "[W]e have repeatedly recognized that section 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein. Thus, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault."

(*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998] [internal citations omitted].) Furthermore, claimant need not prove that defendant exercised supervision or control over his worksite. (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 502 [1993].) And, "[s]ince an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant...." (*Rizzuto* at 352.) Finally, a violation of Industrial Code, "while not conclusive on the question of negligence, would thus constitute *some evidence of negligence* and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances." (*Rizzuto* at 351.)

Claimant alleged the following Industrial Code violations in his claim and bill of particulars: 12 NYCRR 23-1.5; -1.8; -1.10; -1.13; -1.26; -1.33; -2.1; -2.8; -3.2; -3.3; -9.2; and -11.2. However, in opposition to defendants' motions and in support of his cross motion, claimant raised only violations of 12 NYCRR 23-1.5 (c) (3) and -9.2 (a), without addressing the others. Therefore, the Court finds that claimant abandoned claims based in the other sections of the Code.

Since "[t]he interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court", the Court must decide the applicability of these two sections of the Code to the facts of this case. (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002][citations omitted].)

Section 23-1.5 of the Code entitled "General responsibility of employers" provides that.

> "These general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule).
>
> ...
>
> (c) Condition of equipment and safeguards.
>
> ...
>
> (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."

In relying on this section, claimant must prove that it is more than just a general statement but "gives a specific, positive command, and is applicable to the facts of the case." (*Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014][citation omitted].) As conceded

by defendants, this section of the Code does support a § 241(6) claim. (see *Shaw v Scepter, Inc.*, 187 AD3d 1662 [4th Dept 2020]; *Salerno v Diocese of Buffalo, NY*, 161 AD3d 1522, 1524 [4th Dept 2018].) However, defendants argued that this section only applied in situations in which a protective guard or safety feature was missing or in disrepair, and that the PVC pipe that allegedly shocked claimant was not a safety device or safety related equipment. This interpretation is too narrow. Granted, many cases in which this section was discussed dealt with malfunctioning or absent safety features, but others involved allegedly defective machinery and tools that caused injury (*e.g. Shaw v Scepter, Inc.*, 187 AD3d 1662 [4th Dept 2020] [defective winch]), and a plain reading of the section references "sound and operable" equipment. Here, claimant argued that the PVC pipe (a component of the vacuum equipment) was not properly grounded (a safety device). Therefore, this section is applicable and supports a Labor Law § 241 (6) claim.

Section 23-9 of the Code, entitled "Power-Operated Equipment", provides

> "Section 23-9.1. Application of this Subpart
>
> The provisions of this Subpart shall apply to power-operated heavy equipment or machinery used in construction, demolition and excavation operations..."
>
> "Section 23-9.2 (a) General Requirements for Power-Operated Equipment
>
> (a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. *Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.* The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest." (emphasis added.)

The Court of Appeals held that the third sentence of the regulation "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" and that "[t]he next two sentences of the regulation describe requirements for servicing and repairing the equipment." (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009].) Defendants argued that this section is only applicable to "heavy equipment" which does not describe the PVC pipe. However, this limitation ignores that fact that the PVC pipe was a component of the ARS Unit, an enormous piece of equipment that powered both the grit blaster and vacuum for the spent debris, operated by at least 4 workers at the same time. Although the Industrial Code does not define "power-operated equipment", the Unit being used by claimant was power-operated and Section 23-9.2 (a) applies to "all" such equipment. The categories of equipment for which there are specific regulations in Sections 23-9.3 through 9.11 do involve activities such as material handling, excavating, and earthmoving, which defendants argued are very different from the machinery involved in claimant's accident. However, courts have applied a less rigid standard. (see *Golec v Dock St. Constr., LLC*, 186 AD3d 463, 464 [2d Dept 2020] [crushed by the pump in a pumper truck]; *Piccolo v St. John's Home for the Aging*, 11 AD3d 884, 885 [4th Dept 2004] [a blast of air emitted from the hose on a flush truck that caused plaintiff to be lifted into the air and to fall to the ground]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 147 [1st Dept 2012] [stationary wet saw].) Interestingly, the Court of Appeals avoided deciding whether Section 23-9.2 (a) applied to an electrically-powered hand tool because the issue was not raised. (*Misicki v Caradonna*, 12 NY3d 511, 520 [2009].) Therefore, this section is applicable and supports a Labor Law § 241 (6) claim.

The Court finds that defendant's expert electrical engineer, Steven Thomsen, focused most of his report to addressing the issue of whether the alleged shock was due to exposure to a live electric power circuit. After analyzing all the potential sources of an electric current, he concluded that there was no such exposure and briefly turned to the issue of the static electricity in the PVC pipe. He conceded "[t]he used grit returning to the ARS Unit, which passed through the PVC pipe, could cause a buildup of static electric charge, which would have dissipated and shocked Mr. Saraiva, when he touched the PVC pipe." He did not opine on the potential force of the shock or if it could have been prevented, and his silence on these issues is critical, leaving the Court no alternative but to deny the motions based on Labor Law § 241 (6) without the burden shifting to claimant.

Claimant's Cross Motion for Summary Judgment

Claimant's motion is supported by the affidavit of James Orosz, electrical engineering expert, who opined that the PVC pipe was not properly grounded, leading to the accumulation of a significant static charge that was sufficient to knock claimant off his feet. Defendant argued that this opinion should be rejected because Mr. Orosz failed to provide a basis for his opinion and relied upon an inapplicable regulation. The Court agrees. His affidavit consisted of restating claimant's description of how the shock knocked him to the ground, with the statement that PVC piping can accumulate static charge that can knock a man down, but he failed to offer a scientific explanation for that occurrence. He referenced a federal OSHA regulation, 49 CFR 192[2].

[2] Since OSHA regulates only the relationship between employers and employees, it imposes no duty on an owner or general contractor upon which to base Labor Law § 241(6) liability. (*Pellescki v City of Rochester*, 198 AD2d 762, 763 [4th Dept 1993].)

pertaining to the transport of gas by pipeline facilities, which is obviously not applicable, and a random chart from an uncited study at Ohio State University, which offered no value to his opinion. Since his reliance on the method recommended by 49 CFR 192 is without foundation, his affidavit presented no basis for the conclusion that the PVC piping was unsafe or defective, or how it should have been grounded.

Claimant's submissions in further support of his motion and the supplemental affidavit of Mr. Orosz is also unavailing. He focused on how the LED light could have exploded but did not provide any support, beyond speculation, for his premise that claimant sustained a significant shock caused by improper grounding. In this affidavit, he relied upon the same OSHA standard and introduced National Fire Protection Association (NFPA) standards. Without authority for relying upon NFPA standards in a 241(6) claim, governed by the Industrial Code, this Court finds these standards to be inapplicable.

Furthermore, claimant argued that Erie was notified of the static shock potential when a co-worker complained of it to the Erie supervisor, Toptsidis, a fact Toptsidis denied. So, there are issues of fact whether the PVC pipe was defectively or improperly grounded and, if so, whether Erie had the requisite notice of the defect. (*Shavi v Scepter, Inc.*, 187 AD3d 1662 [4th Dept 2020]; *Salerno v Diocese of Buffalo*, 161 AD3d 1522, 1523 [4th Dept 2018].) There are also questions of fact whether the methods and equipment used by Erie provided "reasonable and adequate protection and safety for workers" given the infrequency of similar incidents and applicable safety rules and regulations promulgated by the Commissioner of the Department of Labor. (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501–502 [1993].)

Therefore, it is hereby

ORDERED, defendants' motions for summary judgment of the Labor Law § 200 and common law negligence claims in Claim No. 128270 is granted and these causes of action are dismissed from the complaint; and it is further

ORDERED, defendants' motions for summary judgment of the Labor Law § 241(6) in Claim No. 128270 is denied; and it is further

ORDERED, claimant's cross-motion for summary judgment in Claim No. 128270 is denied.

Rochester, New York
June 3, 2021

DEBRA A. MARTIN
Judge of the Court of Claims