

Samperi v City Safety Compliance Corp.

2021 NY Slip Op 34083(U)

August 11, 2021

Supreme Court, Kings County

Docket Number: Index No. 513163/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 513163/2017

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

SALVATORE SAMPERI,

Plaintiff,

against

CITY SAFETY COMPLIANCE CORP., NORTHEAST INTERIOR SPECIALISTS LLC, SITE 5 DSA OWNER LLC, BFC PARTNERS, LP, BFC PARTNER DEVELOPMENT LLC, DELANCEY STREET ASSOCIATES, BFC DELANCEY STREET ASSOCIATES LLC, AND BFC PHASE I DSA LLC,

Defendants.

Papers

Numbered
Notice of Motion and Affidavits Annexed... 1-6
Order to Show Cause and Affidavits Annexed...
Answering Affidavits... 7-13
Replying Affidavits... 12, 14-17
Exhibits...
Other ...

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Upon the foregoing papers¹, the motion for summary judgment filed by defendant Northeast Interior Specialists, LLC ("Northeast") (Seq. 008); Site 5 DSA Owner, LLC's ("Site 5") summary judgment motion (Seq. 010); the motion for summary judgment filed by BFC Partners, L.P., BFC Partner Development LLC., BFC Delancey Street Associates LLC, and BFC Phase I DSA LLC, (collectively, "BFC") (Seq. 011); plaintiff Salvatore Samperi's cross-motion for summary judgment on liability against defendant Site 5 only (Seq. 012); Site 5's motion to strike Mr. Samperi's bill of particulars (Seq. 013); and Mr. Samperi's cross-motion to amend his bill of particulars (Seq. 014) are decided as follows:

Introduction

Mr. Samperi commenced this action against City Safety Compliance Corp. ("City

¹ Mr. Samperi's replies in further support of his cross-motions for summary judgment and for permission to serve a second supplemental bill of particulars (Seq. 012 and 014) were not considered because such papers are not authorized by CPLR 2214.

Safety”), Northeast Interior, Site 5, and BFC for injuries he claims to have sustained as a result of an accident on November 22, 2016, at a construction site located at 145 Clinton Street, New York, NY caused by defendants' negligence and violations of New York Labor Law §§ 200 and 241(6).

Although Site 5 commenced a third-party action against Essex Crossing Buildings, LLC (“Essex”), Site 5 subsequently discontinued that action by stipulation.

Factual Background

Brandon Baron testified that he was one of three partners who operated under the name “BFC Partners” (Baron EBT at 8). Mr. Baron further testified that he was a “member” of an entity that was itself a partial owner of Site 5 (*id.* at 14-15, 19). Mr. Baron states in his affidavit that Site 5 owned the property where the subject construction project was located (Baron Aff at 2). The project involved “demolition of existing structures and construction of a mixed income residential and retail space” (*id.*). Mr. Baron states that Essex was created to serve as the general contractor for the project (*id.* at 4). He states that Essex contracted with City Safety to provide site safety management for the project (*id.* at 5). He further states that Site 5 contracted with Northeast to perform the demolition of the existing structures and to install perimeter fencing and gates (*id.* at 6).

Franco Caliendo, the owner of Northeast, testified that BFC hired Northeast to do demolition work (Caliendo EBT at 10-11). Mr. Caliendo further testified as follows: Northeast was tasked with installing a perimeter fence and entrance gates around the construction site before beginning demolition (*id.* at 15-16). Northeast installed a fence around the entire site with, he claims, rolling gates that would slide, and not gates that swung in or out (*id.* at 17-18).

Northeast did not perform any work at the job site or return there after leaving the premises in 2015 (*id.* at 25). Northeast left the fence and gate that it installed on the jobsite, which then became the responsibility of the owner (*id.* at 18-19).

Mr. Caliendo also submitted an affidavit stating that Northeast did not install any swinging gates (Caliendo Affidavit at 8-11). In addition, Mr. Caliendo attaches to his affidavit schematics for the fence and gates which, he claims, show that Northeast installed sliding gates on the project site (*id.* at Exhibit B).

Mr. Samperi testified that, on the day of the accident, he was working as a superintendent for Essex and was checking the brick work at the construction site (Samperi EBT at 15). Mr. Samperi further testified that, on that day, while standing on the sidewalk, near the perimeter fence, the wind blew open a swinging gate that struck him in the back and caused him to fall forward with his feet stuck under the gate (*id.* at 30-34). He testified that Nicola Caruso of City Safety was with him when the accident occurred (*id.*).

Nicola Caruso testified that he was employed by City Safety as a site safety manager (Caruso EBT at 16-17). Mr. Caruso testified that “BFC” was the general contractor and hired City Safety (*id.* at 17-18). Mr. Caruso further testified as follows: The gate was supposed to swing inward, not outward, and it was also supposed to be chained shut (*id.* at 14-15). Although the gate was chained, the chain became loose (*id.* at 42-43). During deliveries, the gate was staffed by flagmen employed by BFC (*id.* at 53-55), or by the subcontractor receiving the delivery, or the labor foreman (*id.* at 68-70). Mr. Caruso does not know who installed the subject gate but testified that BFC would know who installed the subject gate (*id.* at 56).

Mr. Caruso prepared an accident report that states “while standing on 400 Grand St.

sidewalk, due to high wind, one section of [a] metal gate open[ed] on the outside” and “Salvatore was knocked on [the] floor and [he] hurt both feet”. Mr. Caruso reported the accident to the New York City Department of Buildings which found that the subject gate violated New York City Building Code §3307.7.2 because the gate swung outwards over the sidewalk, and issued a violation (Caruso EBT at 63-66). The parties submit a copy of the Notice of Violation issued by the New York City Department of Buildings, as well as the determination of the violation by the Environmental Control Board.

Winthrop Wharton, the director of development at BFC Partners Development LLC, testified that BFC Partners Development performed “predevelopment” work for the subject project (Wharton EBT at 12-13). He explained that the work entailed “finding the site, figuring out what to build, meaning how many residential units, what percentage affordable, et cetera, et cetera, going to the banks, getting letters of credit, figuring out how to finance it, and then ultimately bring it through to the construction loan closing” (*id.*). He testified that he was not involved in the project once construction began (*id.* at 9, 13) and has no knowledge of any fence or gate at the project (*id.* at 37-38).

Analysis

The Motion to Amend and to Strike the Bill of Particulars (Seq. 013 and 014)

On or about February 12, 2021, Mr. Samperi filed a second supplemental bill of particulars. Site 5 moves to strike the second supplemental bill of particulars and plaintiff cross-moves to authorize the filing *nunc pro tunc*. A court may grant leave to amend or supplement a bill of particulars to identify the applicable code provisions, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves

no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant (*Kelly v City of New York*, 134 AD3d 676, 678 [2d Dept 2015]).

Site 5 objects to the second supplemental bill of particulars only to the extent that it identifies violations of New York City Building Code § 3307.7.2 and Administrative Code § 7-210 as bases for Mr. Samperi's negligence of claim. Section 3307.7.2 states, in relevant part, "Gates shall be sliding or shall swing into areas not accessible to the public" Section 7-210 states, in relevant part "It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition."

Site 5 first argues that the new bill of particulars improperly includes new claims and damages (*see e.g. Fuentes v City of New York*, 3 AD3d 549 [2d Dept 2004]; *Pearce v Booth Mem. Hosp.*, 152 AD2d 553 [2d Dept 1989]). However, *Fuentes* and *Pearce* are inapposite, as Mr. Samperi's new bill of particulars includes only new code provisions that clarify the principles of defendants' alleged liability, and not new facts or causes of action. Additionally, Mr. Samperi claims only that the gate hit him when it swung out over the sidewalk. He does not claim that any other condition on the sidewalk itself caused his accident. Accordingly, it is irrelevant that Site 5 conducted no discovery about the sidewalk itself.

Site 5 further argues that New York City Building Code § 3307.7.2 does not apply because Mr. Samperi was not a "pedestrian". The provision itself does not state that it applies only to "pedestrians". Rather, the title of the larger section 3307 is "Protection of Pedestrians". The term "pedestrians" is not defined and Site 5 does not reference any case that construed section 3307.7.2 as excluding construction workers. Certainly, the protection afforded by the

provision, which is to protect people from a door that swings outward, safeguards workers and non-workers alike. Accordingly, the provision applies to Mr. Samperi.

Site 5 also argues that section 7-210 does not protect against gates swinging outwards over a sidewalk. It does not appear that the Second Department has addressed this issue. However, the First Department in *Spielmann v 170 Broadway NYC LP* (187 AD3d 492 [1st Dept 2020]), held that an owner's duty to keep a sidewalk in reasonably safe condition included the danger posed by a door that swung out over the sidewalk. This court agrees with the First Department's reasoning.

Under the circumstances, the court will allow the new supplemental bill of particulars. Although Mr. Samperi waited a significant amount of time before seeking either supplementation or amendment of his bill of particulars, Site 5 has not demonstrated any prejudice arising from the identification of the two code provisions. Accordingly, Site 5's motion to strike the second supplemental bill of particulars is denied and plaintiff's cross-motion for retroactive approval of the second supplemental bill of particulars is granted.

Plaintiff's Claims against Defendants

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The Timeliness of the Summary Judgment Motions

Pursuant to Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, a

party must move for summary judgment within 60 days from the date of the filing of the note of issue. Plaintiff filed the note of issue on January 7, 2019. At that time, none of the parties had been deposed. The court's order, dated January 4, 2019 directed the following deposition on the following days: Mr. Samperi on February 21, 2019; City Safety on March 13, 2019; Northeast on April 3, 2019; Site 5 on April 8, 2019; and BFC on April 11, 2019. Mr. Samperi was deposed on February 21, 2019 as directed. Nicola Caruso of City Safety and Frank Caliendo of Northeast were both deposed on July 2, 2019. Brandon Baron of Site 5 was deposed on June 9, 2020. Winthrop Wharton of BFC was deposed on June 18, 2020.

Each of the summary judgment motions under consideration were filed after the sixty-day deadline. Northeast moved on January 21, 2020. Plaintiff was the last to cross-move on February 19, 2021. It is reasonable that the parties were waiting for the depositions of Mr. Baron and Mr. Wharton, which claim to have been delayed in part due to the pandemic. It does not matter that Northeast ultimately chose not to wait any longer and filed its motion. Furthermore, the parties reference these depositions in support and in opposition to the pending motions. Because relevant discovery was ongoing even after the note of issue was filed, there is good cause to consider these otherwise untimely motions (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Northeast's Summary Judgment Motion (Seq. 008)

Northeast seeks summary judgment dismissing plaintiff's claims for negligence and violation of Labor law §§ 200 and 241(6). Mr. Samperi does not oppose the portion of Northeast's motion that seeks dismissal of his section 241(6) claim. With regard to plaintiff's claims that sound in negligence, a subcontractor such as Northeast may be liable in negligence if

its work created the condition that caused the accident, even if it did not supervise the plaintiff's work (*Sledge v S.M.S. Gen. Contractors, Inc.*, 151 AD3d 782, 783 [2d Dept 2017]).

Northeast contends that it is not liable for the accident because, as Mr. Caliendo testified, it installed sliding gates and not swinging gates, and because it completed its work and left the premises months before the accident. Northeast also contends that Mr. Caliendo's testimony is buttressed by the fence drawings that show plans for sliding gates. Mr. Samperi and Site 5 contend that Mr. Caliendo does not claim to have seen the sliding gate personally. Indeed, Northeast presents no proof that it actually constructed a sliding gate. While the fence drawings suggest that Northeast may have installed a sliding gate, the drawing proves only that Northeast intended to install such a gate. Conversely, no one disputes that Mr. Samperi was hit by a swinging gate. It is possible that a different company installed a different gate in the year and-a-half between the time that Northeast left the project and the gate hit Mr. Samperi. However, there is no evidence of this, and so this remains an open question of fact.

Mr. Samperi and Site 5 argue that Northeast installed the gate that hit Mr. Samperi because Mr. Baron testified that the fence and gate were never moved or removed after installation.² However, Mr. Baron actually testified that he did not recall if fencing installed by the "demolition contractor" had ever been moved (Baron EBT at 32, 36). He further testified that he had no personal knowledge of the subject gate, whether it was a swinging gate, or the locations of the gates (*id.* at 35, 58, 108). Mr. Baron testified that he did not visit the site "early

² Mr. Samperi initially argued that Northeast's motion was premature because Mr. Baron and Mr. Wharton had not been deposed. Thereafter, Mr. Samperi filed a supplemental opposition when Mr. Baron had been deposed. The court accepts the supplemental opposition and declines to deny Northeast's motion as premature.

in the project” (*id.* at 29), but only when it was 65% to 70% completed (*id.* at 29). In the absence of any dispositive proof as to whether Northeast constructed a swinging gate or a sliding gate, there are triable issues of fact concerning the creation of the condition. Accordingly, the remaining portion of Northeast's motion for summary judgment is denied.

Site 5's and Mr. Samperi's Motions for Summary Judgment (Seqs. 010 and 012)

Site 5 moves for summary judgment to dismiss Mr. Samperi's claims for negligence and violation of Labor law §§ 200 and 241(6). Mr. Samperi moves for summary judgment on his claims for negligence and violation of Labor law § 200 against Site 5 only, and does not oppose the portion of Site 5's motion seeking dismissal of his Labor Law § 241(6) claim. Accordingly, plaintiff's Labor Law § 241(6) is dismissed as against Site 5 without objection.

As to Mr. Samperi's remaining claims, “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” (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Site 5 appears to argue that it had nothing to do with the ongoing performance of the project and that it did not supervise plaintiff. However, Site 5 does not establish that it is an owner that is out-of-possession and that it had entirely transferred its responsibility to keep the premises safe to another party. Accordingly, Site 5 remains responsible as the property owner for ensuring a safe place to work.

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a

dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991-92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]).

While there is an argument that this case involves defective equipment, there is no dispute that Site 5 did not supervise Mr. Samperi. In the absence of direct supervision, Mr. Samperi's claims for negligence and violation of Labor Law § 200 which are based on defective equipment are dismissed as against Site 5 (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018]).

With regard to defective condition, Site 5 identifies the alleged condition as a loose chain. However, Mr. Samperi identifies the condition in his bill of particulars as “a hazardous gate, likely to strike and cause injury to worker(s) and/or pedestrian(s)” and as the absence of “components and/or mechanisms that would have prevented said gate to swing freely and strike Plaintiff” (bill of particulars at ¶ 4). There is no contention that Site 5 created this condition. Additionally, Mr. Samperi is not aware of anyone complaining, prior to the accident, about how the gate opened outwardly on to the sidewalk (Samperi's EBT at 130).

As for constructive notice, a landowner is deemed notified of a dangerous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the owner a reasonable opportunity to discover and remedy it (*Mowla v Wu*, 195 AD3d 706 [2d Dept 2021]). As explained above, there is a question of fact concerning when the swinging gate was installed. Because that fact is in dispute, the court cannot determine if the

swinging gate existed for a sufficient amount of time prior to the accident. While the ECB issued a violation of section 3307.7.2, this is only evidence of negligence and not dispositive (*DiLallo v Katsan Ltd. Partnership*, 134 AD3d 885, 886 [2d Dept 2015]). Accordingly, Mr. Samperi's motion is denied and the remaining portion of Site 5's motion is denied.

BFC's Summary Judgment Motion (Seq. 011)

BFC seeks summary judgment dismissing Mr. Samperi's claims for negligence and violation of Labor law §§ 200 and 241(6). Again, Mr. Samperi does not object to the dismissal of his claim for violation of Labor Law § 241(6), and so those claims are dismissed as against BFC.

BFC also argues that, as a preliminary matter, only BFC Partner Development was involved in the project (Wharton EBT at 10-14). BFC contends that the remaining BFC entities were not involved in the project and should be dismissed. Mr. Samperi does not object to their dismissal. Accordingly, BFC Partners, L.P., Delancey Street Associates, BFC Delancey Street Associates LLC and BFC Phase I DSA LLC are dismissed.

BFC argues that BFC Partner Development was involved only in pre-construction development, and was not an owner or a general contractor. It is not disputed that Site 5 was the owner. Mr. Samperi and Mr. Baron testified that Essex was the general contractor. The contract between Site 5 and Essex also identifies Essex as the general contractor. However, Mr. Caruso identifies BFC as the general contractor and he testified that BFC hired City Safety (Caruso EBT at 17-18). He further testified that BFC hired flagmen that staffed the subject gate during deliveries (*id.* at 53-55), and that BFC would know who installed the subject gate (*id.* at 56). Mr. Caliendo testified that BFC hired Northeast (Caliendo EBT at 10-11). Based on this evidence,

there is a question of fact as to whether BFC Partner Development was a general contractor or other agent of the owner (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011], *affd*, 20 NY3d 194 [2012]; *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011]).

Assuming, however, that BFC Partner Development is an agent of Site 5, there is no evidence that suggests BFC Partner Development supervised Mr. Samperi. Accordingly, plaintiff's claims for negligence and violation of Labor Law § 200 based on defective equipment are dismissed as against BFC Partner Development.

Conclusion

For the reasons stated above, the motions are resolved as follows:


- (a) Northeast's motion for summary judgment (Seq. 008) is granted solely to the extent that Mr. Samperi's claim for violation of Labor Law § 241(6) against Northeast is dismissed.
- (b) Site 5's motion for summary judgment (Seq. 010) is granted to the extent that plaintiff's claims for negligence and violation of Labor Law § 200 which are based on defective equipment, and claims for violation of Labor Law § 241(6), are dismissed as against Site 5.
- (c) BFC's motion for summary judgment motion (Seq. 011) is granted to the extent that Mr. Samperi's claims against BFC Partners, L.P., Delancey Street Associates, BFC Delancey Street Associates LLC and BFC Phase I DSA LLC are dismissed. In addition, Mr. Samperi's claims against BFC Partner Development for negligence and violation of Labor Law § 200 which are based on defective equipment, and claims for violation of Labor Law § 241(6), are dismissed.
- (d) Mr. Samperi's cross-motion for summary judgment (Seq. 012) is denied.

(e) Site 5's motion to strike the second supplemental bill of particulars (Seq. 013) is denied.

(f) Mr. Samperi's cross-motion for permission to serve the second supplemental bill of particulars *nunc pro tunc* (Seq. 014) is granted.

This constitutes the decision and order of the court.

August 11, 2021
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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