Foiles v Eastman, Cooke & Assoc., LLC
2022 NY Slip Op 30342(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 151598/2018
Judge: William Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

----------X

INDEX NO. 151598/2018

MOTION DATE 5/19/21

MOTION SEQ. NO. 004

DONALD FOILES, BARBARA FOILES,

Plaintiff,

- v -

EASTMAN, COOKE & ASSOCIATES, LLC, MICHAEL ANTHONY CONTRACTING CORP., SPECIALTY MANAGEMENT CO., GREEN ISLE CONTRACTING, INC., L.E.B. ELECTRIC, LTD.,

DECISION + ORDER ON MOTION

Defendant.

----------X

MICHAEL ANTHONY CONTRACTING CORP.

Plaintiff,

-against-

GREEN ISLE CONTRACTING, INC.

Defendant.

Third-Party
Index No. 595801/2018

----------X

MICHAEL ANTHONY CONTRACTING CORP.

Plaintiff,

-against-

L.E.B. ELECTRIC, LTD.

Defendant.

Second Third-Party
Index No. 595913/2019

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 113, 116

were read on this motion to/for DISMISS.

In this action, plaintiff Donald Foiles alleges that he was caused to trip and fall due to a dangerous condition at the worksite located at the premises where he was employed. Defendant Eastman, Cooke & Associates, LLC (EAS), seeks dismissal of plaintiff's second amended

complaint pursuant to CPLR §3211(a)(3) claiming that plaintiff lacks standing and pursuant to CPLR §3211(a)(7) for failure to state a claim because he is not entitled to the protection of the Labor Law because his job, as the director of security at the Hospital for Special Surgery, was not integral to construction work at the site. Defendant Green Isle Contracting Inc., (Green Isle) cross moves for the same relief, claiming that the second amended complaint must be dismissed and judgment entered in its favor.[1] Plaintiffs oppose defendants' motions to dismiss and contend that they have adequately pled a cause of action for common law negligence and a cause of action pursuant to Labor Law §§ 200 and 241(6).

Plaintiff maintains that as an employee of the owner he was lawfully at the construction site and is thus entitled to the protections afforded under the Labor Law. Plaintiffs assert that the appropriate inquiry is to determine whether Mr. Foiles' duties and obligations were material and integral to the project, and he maintains that at this stage of the proceeding, those issues cannot be determined without engaging in discovery; thus, plaintiffs urge this court to deny the motions and allow the parties to proceed with discovery. (NYSCEF Doc. No. 107, ¶ 20). Moving defendants aver that no discovery is needed to determine the issue presented and the complaint should be dismissed because plaintiffs fail to allege that Mr. Foiles was employed or authorized to work on the construction site and he has failed to allege that he was an employee of one of the contractors working at the construction site. Defendants contend that Mr. Foiles was performing routine duties as the director of security for Hospital for Special Surgery (HHS) and was

[1] Defendant Green Isle's cross motion is procedurally defective as CPLR 2215 requires a cross motion to be made against the original moving party. Here, EAS moved against plaintiffs, seeking dismissal of the complaint as against it, and Green Isle's "cross motion" for dismissal of the complaint seeks identical relief against plaintiffs, not from EAS. However, "[d]espite these procedural irregularities, given the absence of prejudice in light of the fact that all parties responded to the cross motions, the court, in this case, will consider the cross motion[s]." (*Aviles v Halsted Communications, Ltd.*, 24 Misc 3d 1227[A] [Sup Ct, Queens County 2009]).

performing a routine inspection at the time of the alleged fall. (NYSCEF Doc. No. 98). As such, defendants assert that because Mr. Foiles was not engaged in "construction work" within the meaning of the statutes, the second amended complaint must be dismissed.

DISCUSSION

When deciding a motion to dismiss for failure to state a cause of action, the court must accept all allegations in the complaint as true (*Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dep't 2004]). "It is well settled that a court, when deciding whether to grant a motion to dismiss pursuant to CPLR §3211, must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory" (*Samiento v World Yacht, Inc.*, 10 NY3d 70, 79 [2008]). The complaint must be liberally construed, viewed in the light most favorable to the plaintiff, and the plaintiff must be given the benefit of all reasonable inferences (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174). The court determines "only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* at 88 [internal quotation marks and citation omitted]).

Assessing the viability of any Labor Law claim, whether under section 200, section 241 (6), or another section, requires a threshold determination whether plaintiff was engaged in work entitled to protection under the Labor Law.

Labor Law §200 codifies a landowner and general contractor's common law duty to maintain a safe workplace for employees. (See *Lombardi v. Stout*, 80 N.Y.2d 290, 294 [1992]).

Additionally, the Labor Law affords protection to individuals engaged in "constructing or demolishing buildings...in areas in which construction, excavation, or demolition work is being performed." Labor Law §241(6). Recovery under the Labor Law is predicated upon a showing that the plaintiff was "actually employed to work on a construction site, i.e., 'a plaintiff must demonstrate that he was both permitted or suffered to work on a building...and that he was hired by someone.'" (*Blandon v. Advance Contracting Co., Inc.*, 264 A.D.2d 550, 552 [1st Dept 1999] ["The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation. . . or duties as a night watchman or security guard . . . ."]; *Long v Battery Park City Auth.*, 295 AD2d 204, 743 N.Y.S.2d 496 [1st Dept 2002] [plaintiff was hired solely to provide "routine security services"]).

Here, defendants have demonstrated that the protections afforded by the Labor Law do not apply to plaintiff. As noted, "in order to invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577, 563 NE2d 263, 561 NYS2d 892 [1990] [citations and internal quotation marks omitted]). This "holding[ ] reflect[s] the clear legislative history of sections 200, 240 and 241 of the Labor Law, which demonstrates that the Legislature's principal objective and purpose underlying these enactments was to provide for the health and safety of employees" (*id.* at 577). Here, the plaintiffs failed to demonstrate that the injured plaintiff was subject to the protection of the Labor Law.

Plaintiff, who was employed as the director of security for HHS, was not a person entitled to the protections of the Labor Law (see *Sowa v S.J.N.H. Realty Corp.*, 21 AD3d 893, 895, 800 NYS2d 749 [2d Dept 2005]; *Spaulding v S.H.S. Bay Ridge*, 305 AD2d 400, 759 NYS2d 179 [2d Dept 2003]; *Tobias v DiFazio Elec.*, 288 AD2d 209, 732 NYS2d 441 [2d Dept 2001]; see also *Blandon v Advance Contr. Co.*, 264 AD2d at 552; *Shields v St. Marks Hous. Assoc.*, 230 AD2d 903, 646 NYS2d 854 [2d Dept 1996]), and in opposition, plaintiff has failed to demonstrate that he was entitled to the protection of those statutes. He was neither 'permitted or suffered to work on a building or structure' (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576, 563 NE2d 263, 561 NYS2d 892 [1990]), nor was he performing work necessary and incidental to the erection or repair of a building or structure (see *Lombardi v Stout*, 80 NY2d 290, 604 NE2d 117, 590 NYS2d 55 [1992]).

The caselaw cited by plaintiffs in opposition to defendants' motions, does not support an expansion of the statutes' protections.

In *DeSimone v City of New York*, (121 AD3d 420, 421-422, 993 N.Y.S.2d 551 [1st Dept 2014]), the Court reinstated plaintiff's Labor Law § 241 (6) claim, noting that he was an onsite project manager, employed by one of multiple general contractors on the subject construction project. The Court did not expand the application of the statute to include any person merely working in a building that happened to be under construction; rather, the Court found that plaintiff's job pertained to financial issues such as billing of subcontractors and his job duties, including the inspection he was conducting at the time of the accident, were contemporaneous with and related to ongoing work on the construction project. (*id.* at 421-422).

Although an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law, plaintiff has not alleged or demonstrated that he performed work

integral or necessary to the completion of the construction project. Here, plaintiff's sworn statement dated April 25, 2019 to the Workman's Compensation Board averring that that he was employed as the Director of Security for the property owner, HSS, and was injured when he fell on a ramp leading to the new building while performing an inspection, does not indicate that his inspection was contemporaneous with and integral to ongoing work on the construction project. (NYSCEF Doc. No. 98).

In *Jock v Fien* (80 NY2d 965, 605 NE2d 365, 590 NYS2d 878 [1992]), the plaintiff was employed in a factory which manufactured septic tanks, and suffered injuries when he fell from an upright steel mold. In ordering the plaintiff's claims under Labor Law § 200 reinstated upon a finding that "section 200 is not limited to construction work and does not exclude employees engaged in normal manufacturing processes," the Court of Appeals held that the "safe place to work" language of section 200 applied to factories and is not limited to construction work (*id.* at 967). The Court did not expand the application of the statute beyond persons "permitted or suffered to work on a building or structure" (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576, 563 NE2d 263, 561 NYS2d 892 [1990]; see also, *Comes v New York State Elec. & Gas Corp.* 82 NY2d 876, 631 NE2d 110, 609 NYS2d 168 [1993]).

Plaintiff, who was employed as the director of security for HHS, was not a person entitled to the protections of the Labor Law and the motions seeking to dismiss the causes of action pursuant to Labor Law §§ 200 and 241(6) are granted.

However, moving defendants failed to demonstrate that the common-law negligence cause of action, alleging that defendants failed to maintain the premises in a safe condition, should be dismissed. Where, as here, a plaintiff's injuries allegedly stem from a dangerous condition on the premises, a general contractor may be liable in common-law negligence if it has

control over the work site and either created or had actual or constructive notice of the dangerous condition (see *Van Salisbury v Elliott-Lewis*, 55 AD3d 725, 867 NYS2d 454 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 835 NYS2d 705 [2d Dept 2007]; see also, *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093-1094 [2d Dept 2012], quoting *Kennedy v. McKay,* 86 AD2d 597, 598 [2d Dept 1982]).

On a motion to dismiss, the court must determine whether the facts as alleged fit within any cognizable legal theory. Here, the court finds that plaintiffs have alleged a cause of action for negligence. Accordingly, it is hereby

ORDERED that the motions to dismiss are granted in part, and the causes of action of the complaint pursuant to Labor Law §§ 200 and 241(6), are dismissed; and it is further

ORDERED that counsel are directed to meet and confer and submit a proposed Preliminary Conference Order to the court within 30 days after service of a copy of this order with notice of entry.

2/8/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE