Rosario v 1610-1618 St. Nicholas Ave, LLC
2022 NY Slip Op 32351(U)
January 24, 2022
Supreme Court, Bronx County
Docket Number: Index No. 36308/2017E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 4

JOSE ERNESTO ROSARIO,

Index No.: 36308/2017E

Plaintiff,

- against -

1610-1618 ST. NICHOLAS AVE, LLC, KTC DESIGN GROUP INC., S & S PLUMBING CORP. and OMEGA LAUNDROMATS, INC.,

Defendants.

DECISION and ORDER

1610-1618 ST. NICHOLAS AVE, LLC,

Third-Party Plaintiff,

- against -

OMEGA LAUNDROMATS, INC.,

Third-Party Defendant.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant/Third-Party Defendant Omega Laundromats, Inc.'s ("Omega") summary judgment motion is whether it made *prima facie* showing for a dismissal of Plaintiff's Labor Law §§240(1) and 200 claims, S & S Plumbing Corp.'s ("S & S") cross-claims, and Defendant/Third-Party Plaintiff 1610-1618 St. Nicholas Ave, LLC's ("1610-1618") third-party claims.[1] This court holds there are triable issues of fact surrounding Omega's role at the subject premises, which precludes its application for dismissal.

[1] Plaintiff voluntarily discontinued his Labor Law §241(6) claim, therefore, same will not be addressed herein.

According to Plaintiff, on the day of his accident he was employed by non-party City Lights Construction ("City Lights") as a handyman. He testified that City Lights was engaging in demolition work in the basement of the subject premises in order to lay down gas lines to build a laundromat thereat. He further testified on the day of his accident, he was assigned by his supervisor and Omega employee, Jorge Campoverde, to remove debris from the basement of the subject premises to a yard area where garbage would be left for pickup.

Plaintiff claims that he would place debris in bags then load it onto a handcart. Once the bags of debris were loaded onto the handcart, he would exit out of the basement area and then traverse a concrete ramp to gain access to the subject premises' yard where he disposed the bags of debris. He alleges that his accident occurred as he attempted to descend the concrete ramp with the handcart loaded with four bags of debris weighing approximately 100 pounds each. He claims that due to the steep inclination of the concrete ramp it caused the handcart to quickly accelerate downward. This resulted in Plaintiff slipping and falling, thereby, causing the handcart to fall on top of him rendering him injured.

I. Labor Law §200

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC,* 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision

and/or control. *Makarius v. Port Auth. of NY & New Jersey,* 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

Omega contends that liability under Labor Law §200 cannot be imposed upon it because it was not the owner of the subject premises, the general contractor or their agent. Furthermore, it posits that it did not construct or maintain the concrete ramp where Plaintiff fell. It further contends that Omega was not given authority to control the manner and method of the work performed by Plaintiff or City Lights. Omega argues that it only provided Plaintiff general direction of what task to complete, but that Plaintiff voluntarily chose the method and means of how to dispose of the debris. Therefore, Omega maintains that because it only exercised general supervision over Plaintiff's injury-producing work it is insufficient to impose liability upon it under Labor Law §200.

In opposition, S & S, 1610-1618, and Plaintiff proffer similar arguments against Omega's claim that liability cannot be imposed upon it under Labor Law §200. S & S, 1610-1618, and Plaintiff all argue that at a minimum there are triable questions of fact as to Omega's role at the subject premises and whether it exercised sufficient supervision and control over Plaintiff's injury-producing work to be held liable under Labor Law §200.

S & S, 1610-1618, and Plaintiff contend triable issues of fact exist concerning Omega's role at the subject premises since no contracts/agreements have been interchanged between City Lights and Omega which detailed their respective roles. In addition, they highlight several contradictions concerning Plaintiff's employment status.

They rely upon Plaintiff's testimony that he only received instruction for his injury-producing work from his supervisor, Jorge Campoverde, who was an Omega employee. Furthermore, Plaintiff testified that if he had any questions about his work, he would

only call Mr. Campoverde. Further, they rely upon Jorge Campoverde's testimony that confirmed Plaintiff was a "helper" at the time of the accident. He also testified that he assigned work to Plaintiff since it was his responsibility to coordinate the demolition work being completed. Mr. Campoverde further confirmed that the handcart Plaintiff was using at the time of his accident belonged to Omega. However, Mr. Campoverde testified that he did not know of an entity called City Lights nor was he aware of who Plaintiff's employer was.

Moreover, Plaintiff used Mr. Campoverde's testimony to establish that either Omega knew or should have known of the danger the concrete ramp posed due to its steep inclination. Plaintiff cites to portions of Mr. Campoverde's deposition testimony wherein he explained that he was physically present on the subject premises before the demolition work began in order to draw plans. Mr. Campoverde also testified that at that time he observed the concrete ramp in his initial inspection, he had a conversation with the porter regarding its use and their ability to use the ramp to dispose of demolition garbage.

This court finds that there are triable issues of fact as to whether and to what extent Omega supervised and controlled Plaintiff's injury-producing work and whether Omega knew or should have known about the unsafe conditions (i.e., the steep inclination of the concrete ramp) that gave rise to Plaintiff's injury.

Although it was uncontradicted that Omega employee, Mr. Campoverde, tasked Plaintiff with removing debris from the basement area to the yard, it is unclear from the record the degree of supervision and control that Omega exerted over the means and methods of Plaintiff's injury-producing work, and whether it was sufficient to trigger liability under Labor Law §200. Furthermore, due to the length of time from when Mr. Campoverde first observed the concrete ramp to the time that Plaintiff's accident occurred raises triable issues of fact as to whether

Omega had at least constructive notice of the dangerous condition. *See Urban v. No. 5 Times Sq. Dev., LLC,* 62 A.D.3d 553, 879 N.Y.S.2d 122 (1st Dep't 2009).

II. Labor Law §240(1)

Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC,* 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that his injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

Although a construction manager of a work site is generally not responsible for injuries under Labor Law §240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. *Walls v. Turner Constr. Co.,* 4 N.Y.3d 861, 831 N.E.2d 408, 798 N.Y.S.2d 351 (2005). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor." *Id.* Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law. *Id.*

Omega seeks the dismissal of Plaintiff's Labor Law §240(1) claim as it asserts that it was not the owner, general contractor or their agent. It argues that it had no right to control Plaintiff's work nor was it responsible for Plaintiff's safety. Moreover, it contends that Plaintiff's accident falls outside of the protective purview of Labor Law §240(1), as the concrete ramp that caused the accident was not a safety device for purposes of the statute.[2]

In oppostion, Plaintiff argues there are triable issues of fact concerning Omega's role and authority as to Plaintiff's injury-producing work and whether it was acting as the general contractor, agent or lessee with the requisite authority to impose liability upon it under Labor Law §240(1). Plaintiff further contends that Omega failed to furnish any documents detailing its role at the subject premises nor an affidavit from someone with personal knowledge concerning same. Moreover, Plaintiff posits that Omega is liable under Labor Law §240(1) as it failed to provide an adequate safety device to protect him from a gravity-related injury.

This court finds there are triable issues of fact concerning Omega's liability under Labor Law §240(1). Labor Law §240(1) imposes liability only on contractors, owners or their agents. It was undisputed that Omega was not the owner of the subject premises. However, there are triable questions of fact as to whether Omega obtained the authority to supervise and control Plaintiff's injury-producing work, thereby, potentially exposing it to liability under Labor Law §240(1).

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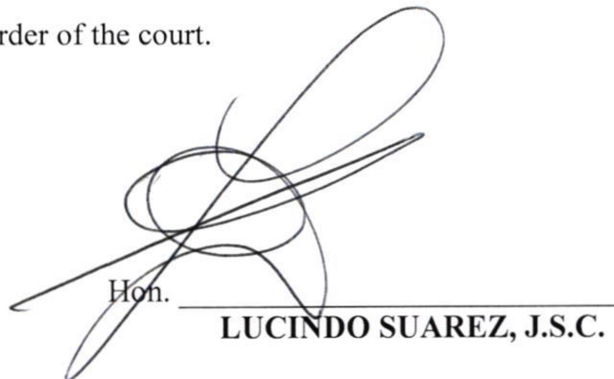
[2] Both S & S and 1610-1618 join in Omega's application to dismiss Plaintiff's Labor Law §240(1) claim as inapplicable.

Accordingly, it is

ORDERED, that Omega's summary judgment motion is granted in part, only to the extent that its application for dismissal of Plaintiff's Labor Law §241(6) claim is granted.

This constitutes the decision and order of the court.

Dated: **1/24/2022**



Hon. ______________________________
LUCINDO SUAREZ, J.S.C.