Supreme Court of the State of New York
County of Kings

Part 91

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.

Index Number 513163/2017
Seqs. 015 and 018

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3-6
Replying Affidavits	7-9
Exhibits	
Other	

Upon the foregoing papers, defendant City Safety Compliance Corp.'s ("City Safety") motion for summary judgment (Seq. 015) and defendant Northeast Interior Specialists LLC's ("Northeast") motion to reargue (Seq. 018) are decided as follows:

Introduction

Mr. Samperi commenced this action against defendants for injuries he claims to have sustained as a result of an accident on November 22, 2016, at a construction site owned by defendant Site 5 DSA Owner LLC ("Site 5"). Mr. Samperi, one of the workers on the site, claims that a gate swung open and struck him in the back. He asserts claims against defendants for 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.

Procedural History

Plaintiff and many of the defendants previously moved for summary judgment in this

action. By decision and order, dated August 11, 2021, this court found that there were triable issues of fact concerning the creation and notice of the dangerous condition, namely the loose chain and outward swinging gate that caused the accident. With regard to Northeast's motion specifically, this court held that there were triable issues of fact concerning whether Northeast installed a sliding gate or a swinging gate. Thus, the court denied the portions of defendants' motions that sought dismissal of plaintiff's claims for negligence and violation of Labor Law § 200, which are based on a dangerous condition, but largely granted the remainder of their motions. For the same reasons, this court also denied plaintiff's summary judgment motion.

Analysis

City Safety's Summary Judgment Motion

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]).

As an initial matter, this court will consider City Safety's motion, despite its untimeliness. There is no dispute that City Safety filed its motion well after the sixty-day deadline from the date of filing of the note of issue (*see* Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6). A party may move for summary judgment after the deadline for good cause, such as additional post-note of issue discovery (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Kung v Zheng*, 73 AD3d 862, 863 [2d Dept 2010]). By all accounts, discovery in this case ended in June 2020. City Safety did not move until April 2021. This is a significant amount of time, and City Safety does not explain why it waited nine or ten months to move.

That said, City Safety is correct that an untimely motion made on nearly identical grounds as motions considered to be timely may be considered (*Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]). City Safety's motion addresses many of the same issues that this court considered in its prior decision, such as agency of the owner and the merits of plaintiff's claims themselves, and so it is acceptable on those grounds.

Plaintiff further argues that City Safety's motion is untimely on the basis that it does not adhere to the schedule set forth in the stipulation and order, dated January 13, 2021. The order concerns motions for summary judgment filed by the other defendants and not City Safety. The order also does not bar motions for summary judgment by other defendants. On that basis, this court will accept City Safety's motion.

City Safety seeks dismissal of plaintiff's claims against it for negligence and violation of Labor Law §§ 200 and 241(6). As he did with the previously motions, plaintiff does not object to dismissal of his claim for violation of section 241(6). As to the remaining claim, "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]).

City Safety argues that it cannot be liable because it is not the agent of the owner. "Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor" (*Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571 [2d Dept 2020], quoting *Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661-662 [2014]).

City Safety's agreement with Essex states that City Safety "will act only in an advisory capacity on all matters relating to safety at this project", and that "[a]ll violations issued on this project and work needed to correct hazards is the sole responsibility of the [owner]" (contract at 2) The contract further states that City Safety "cannot control work, stop work, or supervise any subcontractors [sic] employees" (id.) Because City Safety did not have the authority to stop the work to ensure safety or to ensure compliance with safety regulations, it is not an agent of the owner for purposes of Labor Law § 200 or common-law negligence (*Gasques v State*, 59 AD3d 666 [2d Dept 2009], *certified question answered, order affd*, 15 NY3d 869 [2010]). Accordingly, plaintiff's claims against City Safety are dismissed.

Although City Safety requests summary judgment dismissing cross-claims by other defendants against it, there is little if any discussion about those cross-claims. While City Safety may be correct that their lack of negligence may have some bearing on those cross-claims, the court is not required to find the legal standard for these claims and identify the relevant facts to evaluate the claims. Rather, City Safety, as movant, is required to do so. Because City Safety does not, this court will not evaluate defendants' cross-claims.

Northeast's Motion to Reargue

In its prior motion for summary judgment, Northeast argued that it installed a sliding gate at the accident location, and not a swinging gate. In support of its argument, Northeast submitted its plan drawings, which showed a sliding gate, and the testimony of its representative, Mr. Caliendo, who stated that Northeast installed sliding gates, and not swinging gates. Northeast further explained that it ceased work and left the premises a year-and-a-half before the accident. As this court held, however, Mr. Caliendo did not claim to have seen the sliding gate personally, and there was no proof that Northeast actually constructed a sliding gate. Furthermore, no one

disputes that Mr. Samperi was hit by a swinging gate. Thus, whether Northeast or a different company installed a different gate remained an open question of fact, and this court denied Northeast's motion for summary judgment dismissing plaintiff's claims against it.

Northeast now seeks to reargue its motion. For a motion to reargue, Northeast must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998 1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]). Northeast must also furnish a complete copy of the underlying motion papers (*Reardon v Macy's, Inc.*, 191 AD3d 712 [2d Dept 2021] [holding that under the current version of CPLR 2214(c), the movant must refer to the docket numbers of underlying motions]; *Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 178-80 [2d Dept 2012]). Northeast does not do so, and this error alone warrants denial of the motion.

In addition to Northeast's technical error, it also does not establish a sufficient basis for this court to reconsider its prior denial of summary judgment. Northeast contends that Mr. Caliendo's testimony and the plan drawings show that Northeast constructed a sliding gate. However, Mr. Caliendo does not claim to have seen the construction of the sliding gate, and the plans themselves show only that Northeast intended to construct such a gate. Northeast also notes that there is a year-and-a-half span between the time that Northeast left the jobsite and the accident. The extent of time does not bear on the question of who constructed the swinging gate, which no one disputes struck plaintiff.

Northeast also argues that this court overlooked a document from the Department of Buildings (the "DOB") that, it claims, shows that the DOB signed off on Northeast's work around the time Northeast left the jobsite. Northeast argues that this action by the DOB proves

that Northeast constructed sliding gates in accordance with its plans. While Northeast did include a copy of the DOB document in its original moving papers, it did not argue that the document proves it constructed a sliding gate. This is a new argument and is not proper on a motion to reargue (*Litton Loan Servicing, L.P. v Wasserman*, 202 AD3d 1074 [2d Dept 2022]). Additionally, the document, which is not certified or otherwise authenticated, does not show on its face that Northeast constructed the sliding gate or otherwise performed in accordance with the plan drawings. Likewise, there is no testimony from a DOB representative that explains how the document proves that Northeast performed in accordance with the plans. Essentially, Northeast has provided no sufficient basis upon which to grant reargument.

Conclusion

For the foregoing reasons, City Safety's motion for summary judgment (Seq. 015) is granted to the extent that plaintiff's claims against it are dismissed. Northeast's motion to reargue (Seq. 018) is denied.

This constitutes the decision and order of the court.

April 4, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court