

Chiarovano v 237 Park Owner, LLC

2023 NY Slip Op 32630(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 153867/2018

Judge: Arlene P. Bluth

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. ARLENE P. BLUTH PART 14

Justice

-----X

WILLIAM CHIAROVANO,

Plaintiff,

- v -

237 PARK OWNER, LLC,PAVARINI MCGOVERN, LLC,

Defendant.

INDEX NO. 153867/2018

MOTION DATE N/A, N/A, N/A,
N/A

MOTION SEQ. NO. 002 003 004
005

**DECISION + ORDER ON
MOTION**

-----X

237 PARK OWNER, LLC, PAVARINI MCGOVERN, LLC

Plaintiff,

-against-

ALLRAN ELECTRICAL OF NEW YORK, ALLRAN
ELECTRICAL OF N.Y. LLC

Defendant.

Third-Party
Index No. 595617/2019

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 175, 199, 200, 201, 226, 229, 242, 247

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 172, 173, 174, 176, 197, 198, 227, 230, 245, 246

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 177, 202, 203, 204, 205, 206, 207, 228, 231, 243, 244

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Motion Sequence Numbers 002, 003, 004 and 005 are consolidated for disposition.

Plaintiff's motion (MS002) for summary judgment on his Labor Law § 241(6) claim is granted. Defendants' motion (MS003) for summary judgment is granted in part and denied in part. Third-party defendants' motion (MS004) for summary judgment is granted. Plaintiff's motion (MS005) to quash a subpoena is granted.

Background

In this Labor Law action, plaintiff contends that he tripped over debris while working at a construction site at around 8:30 p.m. Plaintiff, an ironworker, was working for non-party Structural Steel when he claims he tripped over wood debris. He insists that this entitles him to summary judgment on his Labor Law § 241(6) claim. That evening he was allegedly told by an employee for the general contractor (defendant Pavarini McGovern LLC) to move about 20 disassembled sections of scaffolding to another area so that other contractors could do work in that area. Plaintiff testified that he was carrying scaffolding when he stepped on what he thought "was a 2-by-4 piece of wood debris" and fell (NYSCEF Doc. No. 119 at 95-98).

Plaintiff's Motion

Plaintiff moves for summary judgment on his claim premised on Industrial Code Section 23-1.7(e)(2).

Defendants, the general contractor and owner, argue that this Industrial Code section is inapplicable because plaintiff testified that he was injured when he stepped down off a curb to a lower level. They insist that it would be impossible for plaintiff to trip over an object located about a foot below the level from which he was stepping.

Defendants insists that even if plaintiff tripped, the two-by-four was an integral part of the work being performed. They claim that the lobby area (where the accident occurred) was undergoing significant renovation and there were more than two dozen workers on site the day of plaintiff's accident.

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff points to a single Industrial Code Section, 12 NYCRR 23–1.7(e)(2), which states: “Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed” (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489, 71 NYS3d 31 [1st Dept 2018]).

The Court grants the motion. Plaintiff established through his deposition testimony that he fell when he stepped on a piece of wood debris. Defendants did not raise a material issue of fact that compels the Court to deny plaintiff’s motion.

Defendants did not point to any eyewitness testimony that claims that plaintiff did not fall or that his fall was caused by something other than dirt, debris, scattered tools, other materials or sharp projections as required under the Industrial Code section. Their focus on a possible black

box of tools (somewhat visible in the video) upon which plaintiff might have tripped does not raise an issue of fact. Tripping over a box of tools is a basis for liability under this Industrial Code section (*see Sande v Trinity Ctr. LLC*, 188 AD3d 505, 506, 135 NYS3d 389 [1st Dept 2020] [noting that tripping over an electrical box hidden by debris did not foreclose plaintiff's entitlement to summary judgment]). Of course, a box of tools could constitute "other materials" under the statute.

The Court also recognizes that defendants attempt to parse plaintiff's deposition transcript by pointing to where plaintiff explains that he only thought it was a piece of two-by-four because a co-worker had picked up a wooden plank when plaintiff walked back over to the accident site. And defendants emphasize that plaintiff testified, when asked whether it would "have just been a random piece of debris" that "I'm not sure exactly" (NYSCEF Doc. No. 119 at 98). However, plaintiff's testimony was that it was a piece of wood debris and that he was not sure whether or not it was a two by four (*see id.*). The exact dimensions of the wooden plank are irrelevant. Plaintiff repeatedly testified that he fell because of a piece of wood (*id.* at 98, 122) and defendants did not sufficient rebut that testimony. They did not, for instance, point to testimony from some other witness that plaintiff simply fell on his own and didn't trip over any debris.

Defendants' insistence that the debris was an integral part of the work is also without merit. They do not contend that the debris was part of the task plaintiff was performing; that it might have been generated by some trade during the day (the accident happened at night) does not mean that those contractors were entitled to just leave debris around for other workers to trip over. No one claims that the wood was anything other than debris – that is, no one argues that it was placed there deliberately as part of some task performed by a contractor.

Similarly, the issue of the curb does not raise an issue of fact. Plaintiff's testimony is that he lost his balance when his foot landed on the piece of wood. That makes the piece of wood the proximate cause of the accident. While the step down from the curb may have had some role in plaintiff losing his balance, it was not the proximate or sole cause of plaintiff's fall.

Defendants' Motion

Defendants make their own motion in which they seek dismissal of all of plaintiff's claims. This includes plaintiff's claims under Labor Law §§ 241(6) and 200.

With respect to Labor Law § 241(6), the Court observes that plaintiff did not oppose the branches of defendants' motion that sought dismissal on Industrial Code Sections 23-1.5(a)- (b), 23-1.7(d), 23-1.7(e)(1), 23-2.1(a)(1), and 23-2.1(b). These claims are therefore severed and dismissed.

The Court addressed 23-1.7(e)(2) above and the Court grants summary judgment in favor of plaintiff on this Industrial Code section.

The only other Industrial Code Section plaintiff addresses in his opposition is 23-1.30. This section provides that "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

The Court denies the branch of the motion that seeks to dismiss plaintiff's claim based on this section as plaintiff testified that he made numerous complaints about the lack of lighting in the area and his bill of particulars cites lack of lighting (NYSCEF Doc. No. 137). A jury must

consider the role of the lack of lighting in the accident and assess plaintiff's alleged knowledge of this situation (including his decision to keep working in spite of the purported lack of light).

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

“Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). “Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*id.* at 144).

“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

The Court declines to dismiss this cause of action as well. Plaintiff testified that he asked the superintendent for the general contractor that very evening (before the accident) to clean up the work area (NYSCEF Doc. No. 119 at 84). He added that he told the Pavarini employee that the area was a mess “every night” and the response he received was that Pavarini had nobody to

do the job (*id.* at 85). This raises issues of fact about the general contractor’s knowledge of the dangerous condition (the debris left in the work area) in the days leading up to the accident and on the night of the accident. Plaintiff also testified that it was the general contractor’s job to clean up the work area and that these laborers were always assigned to do other jobs instead of cleaning up (*id.* at 70).

Indemnification (MS 003 and 004)

Defendants and the third-party defendants make motions about the issue of indemnification—namely whether the third-party defendants (which provided lighting) have to provide indemnification to defendants pursuant to their trade contract.

The Court begins its analysis with a critical term of the contract—the scheduled work hours. The third-party defendants (“Allran”) admit that they were supposed to provide lighting but claim that the contract did not require them to provide lighting at the time of the accident (around 8:30 p.m.).

The contract states that “Unless directed otherwise by the Construction Manager, the scheduled work hours for this project are Monday thru Friday: 7:00 a.m. - 3:30 p.m. Saturday & Sunday: "Closed." Trade Contractor shall be responsible for all costs, including stand-by labor, to receive off-hour deliveries” (NYSCEF Doc. No. 159, ¶ 4.3).

There is no evidence on this record that defendant ever demanded that Allran provide lighting past 3:30 p.m. on the day of the accident. Defendants’ focus on a contractual provision that states that “This Trade Contractor to furnish and install temporary light and power throughout all work areas and phasing for all trades to perform their work” (*id.* at 34) is understandable but does not compel the Court to find an issue of fact (or grant defendants’ summary judgment on this claim).

“A guiding legal principle of contract interpretation, *generalia specialibus non derogant*, holds that specific provisions control over general provisions when an issue may be governed by either” (*Rosen's Cafe, LLC v 51st Madison Gourmet Corp.*, 2013 WL 11230470 [Sup Ct, NY County 2013]). In other words, a broad (and vague) assertion that Allran had to provide lighting for all trades to do their work is not a basis to find that Allran is somehow liable for not providing lighting after the stated work hours. This is especially true where there is no testimony or documents showing that Allran was asked to provide lighting off-hours.

“A contract assuming an obligation of indemnification must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Vigliarolo v Sea Crest Const. Corp.*, 16 AD3d 409, 410, 791 NYS2d 163[2d Dept 2005]). The Court declines to read into this trade contract a duty that Allran had to provide lighting anytime a trade was on site, even more than five hours after the stated workday had ended. A provision requiring Allran to provide lighting on request \ or anytime someone was working could have been included in this lengthy contract, but it was not. The Court cannot simply include such a provision now. The Court cannot change a contract after it is signed.

To the extent that defendants seek common law indemnification or contribution claims against Allran, those claims are also severed and dismissed. There is no basis to find that Allran contributed or caused the accident by not providing lighting when it was under no obligation to do so at the time of the accident.

The Court also dismisses the breach of contract (for failure to procure insurance claim) as Allran submitted evidence demonstrating that it procured the required insurance (NYSCEF Doc. No. 167) that covered defendants.

Quash Subpoena

In this motion, plaintiff moves to quash a subpoena by defendants on non-party Christopher Davidson. Mr. Davidson was plaintiff's co-worker and was on site on the day of the accident. He submitted an affidavit in support of plaintiff's motion for summary judgment but was never deposed.

Plaintiff observes that it disclosed Mr. Davidson as a witness in discovery response dated August 2018 (NYSCEF Doc. No. 187 at 16 of 47) as one of two witnesses to the accident. He claims that defendants' efforts to take this witness' deposition well after the note of issue was filed and well after motions for summary judgment were filed (including a motion by defendants themselves) is improper. Plaintiff insists that defendants should not have waited so long to seek this deposition and points out that plaintiff even identified Mr. Davidson at his deposition transcript as a person who appeared in the video of the accident (*see* NYSCEF Doc. No. 119 at 119).

Defendants cross-move for leave to do post-note of issue discovery to take the deposition of Mr. Davidson.¹ They complain that plaintiff did not disclose the affidavit of Mr. Davidson until the instant summary judgment motion practice and so they now want the deposition of this witness. They claim that the inability to take the deposition of this witness would cause it severe prejudice and they should have the chance to cross-examine this witness.

The Court grants the motion to quash. "Defendants failed to establish that unusual or unanticipated circumstances developed after the note of issue was filed that require additional

¹ The Court denies Allran's cross-motion to preclude defendants from using certain documents as moot. In any event, the Court would deny this motion as procedurally improper. A cross-motion seeks relief against the moving party (here, the plaintiff), not against any other party to the lawsuit.

discovery to prevent substantial prejudice to them” (*Palmiero v 417 E. 9th St. Assoc., LLC*, 167 AD3d 472, 88 NYS3d 27(Mem) [1st Dept 2018]).

This is not a situation in which plaintiff hid the existence of a witness, only to submit a surprise affidavit in connection with a dispositive motion. Rather, plaintiff disclosed this witness nearly five years ago and he repeatedly mentioned this witness at his deposition. There is no dispute that plaintiff identified Mr. Davidson in the video of the accident. Defendants had ample opportunity and reason to take Mr. Davidson’s deposition. That they want to take it now, only after plaintiff submitted an affidavit from this witness, is not a basis to permit this post-note of issue discovery. Defendants also do not point to any discovery demand or some other basis that would have required plaintiff to disclose this affidavit prior to the summary judgment motion.

In other words, the Court finds that plaintiff was absolutely entitled, on this motion, to submit an affidavit from a witness where defendants admit they knew about for many years. That defendants decided not to take the witness’s deposition prior to the instant motion practice does not constitute prejudice or unusual circumstances sufficient to permit post-note of issue discovery. To be clear, the fact that the note of issue was already filed means that no party is allowed to take this deposition before the trial.

Accordingly, it is hereby

ORDERED that plaintiff’s motion (MS002) for partial summary judgment is granted as to liability only on his Labor Law § 241(6) claim premised on Industrial Code § 23-1.7(e)(2); and it is further

ORDERED that defendants’ motion (MS003) for summary judgment is granted only to the extent that plaintiff’s claims under Labor Law § 241(6) based on Industrial Code §§ 23-

1.5(a)- (b), 23-1.7(d), 23-1.7(e)(1), 23-2.1(a)(1), and 23-2.1(b) are severed and dismissed and denied with respect to the remaining branches of the motion; and it is further

ORDERED that the third-party defendants Allran Electrical of New York and Allran Electric of N.Y., LLC’s motion (MS004) for summary judgment dismissing the third-party complaint against them is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff’s motion (MS005) to quash a non-party subpoena is granted and defendants’ cross-motion is denied.

7/31/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE