

Estevez v DeBoe Constr. Corp.

2023 NY Slip Op 34989(U)

October 16, 2023

Supreme Court, Bronx County

Docket Number: Index No. 22323/2020E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

DOMINGO ESTEVEZ,

Index No.: 22323/2020E

Plaintiff,

- against -

DECISION and ORDER

DEBOE CONSTRUCTION CORP., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION.,

Defendants.

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Statement of Material Facts, Affirmation in Support, Exhibits	NYSCEF Doc. No. 39-52
Defendants/ Third-Party Plaintiffs The City of New York, New York City Department of Transportation, and New York City Department of Design and Construction's Affirmation in Opposition, Exhibits, Expert Affidavit of Terrene J. Jearon, Memorandum of Law	NYSCEF Doc. No. 77-82
Plaintiff's Reply Affirmation	NYSCEF Doc. 83

Upon the enumerated papers, this Court finds Plaintiff is entitled to severance of the third-party action and partial summary judgment on his Labor Law 240(1) and 241(6) claims.

Plaintiff was involved in an accident on October 7, 2019 while performing water main installation work as part of an ongoing construction project taking place adjacent to the Throgs Neck Expressway at or near its intersection with Meagher Avenue in the Bronx.

The Project involved, inter alia, the replacement and installation of water main pipes at various locations in Queens and the Bronx, including along the Throgs Neck Expressway near Meager Avenue (the "Project").

The owner of the Project was the City of New York. The Department of Design and Construction ("DDC") managed and supervised the project for the Department of Environmental Protection ("DEP"), both of which are agents of the City of New York. The City hired P.J. Scariano ("PJS"), plaintiff's employer, to perform the work, which entailed digging a trench and installing pipes. PJS was the general contractor for the Project and performed all of the water main removal and installation work.

Defendant DeBoe is a utility contractor that provided some equipment to the job site, including an excavator, payloador and dump truck, which were rented by PJS. Paul Scariano, the owner of PJS, is a partial owner of DeBoe.

On the date of the accident, plaintiff's supervisor, Fernando, instructed plaintiff to continue installing twenty (20) inches in diameter pipe that had begun to be installed the previous day and that ran along the bottom of a trench. In order to install and connect the pipe, plaintiff had to descend to the bottom of the trench, which was approximately eight (8) feet deep, and lay on top of the pipe since that was the only way to reach the screws underneath it.

While Plaintiff was laying on the pipe at the bottom of the trench and tightening the screws, one of the trench walls suddenly caved in and collapsed. A large boulder that was

located at the top of the trench fell into the trench and landed on plaintiff's left hand. Sand, dirt and other debris also fell into the trench and landed on plaintiff's back.

In the area of the trench where plaintiff was working, there was no "sheeting," which is a metal and wood box-shaped safety device used to prevent trenches from collapsing.

Fernando would make the decision regarding whether sheeting would be used at any given time, but plaintiff was not involved with the installation of the sheeting.

Sheeting existed at the job site and consisted of a metal box that would be installed by a machine operator and lifted by a crane and inserted into the trench to "keep the walls of the trench up." "Shoring" refers to the support system created by pieces of "sheeting," but the words are used interchangeably in the industry. The sheeting box used at this job site was approximately 20 feet long and the trench had approximately 50 feet opened at any given time, which meant that there would be a portion of the trench that was not protected.

According to Kanhai Shivsankar, Engineer in Charge for the City, sheeting should have been used in the trench where plaintiff's accident happened.

PJS prepared an Incident Report, which states that the trench in which plaintiff was working was approximately eight (8) feet deep and "did not have any sheeting." It also states the "trench caved in and a rock approx. 16" fell landing on his hand crushing 4 of his fingers including his thumb."

Plaintiff moves for partial summary judgment on his Labor Law 240(1) and 241(6) claims.

Labor Law 240(1) imposes a nondelegable duty upon owners, contractors, and their agents to provide safety devices to protect workers from risks inherent in earth work sites, including the shoring of trenches to prevent cave in. *Rivas v Seward Park Housing Corp.*, __ A.D.3d __ 1st dept. 2023) 2023 NY Slip Op 04415; *Velasquez v. 94 E. 208th Street Partners LLC.* __ A.D.3d __ (1st Dept. 2023)

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y.2d 833, 675 N.E.2d 458, 652 N.Y.S.2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 NY 2d 525, 571 N.E.2d 645, 569 NYS 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 (1st Dept. 1998)).

It is without dispute Plaintiff's injuries resulted from the effects of gravity following the failure of a safety device, or absence thereof. *Rivas v Seward Park Housing Corp.*, __ A.D.3d __ 1st dept. 2023) 2023 NY Slip Op 04415

Defendant New York City is the premises owner and properly held liable for Plaintiff's injuries under Labor Law §240(1). *Morales v. 2400 Ryer Ave. Realty LLC.*, 190 A.D.3d 647 (1st Dep't 2021).

Accordingly, plaintiff's motion for partial summary judgment on liability pursuant Labor Law § 240(1) is granted, as Defendant failed to raise a triable issue of fact. *De Oleo v Charis Christian Ministries, Inc.*, 106 A.D.3d 521 (1st Dept. 2013).

NY Labor Law § 241(6) provides, in pertinent part, as follows:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

* * *

NY Labor Law § 241(6) imposes a nondelegable duty on "owners and contractors to provide reasonable and adequate protection and safety' for workers" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]).

To establish a Labor Law § 241(6) violation, plaintiff must demonstrate that a specific command within New York's Industrial Code was violated. (*Id.* at 349).

In this case, Industrial Code sections 23-4.2(g),(1) and 23- 4.4(h), which can serve as predicates for a Labor Law claim. *Ferreira v. Vill. of Kings Point*, 68 A.D.3d 1048, 1051 (2d Dep't 2009).

Industrial Code 23-4.2(g) and (1) provides, in relevant part: (g) All sides or banks, slopes and areas in and adjacent to any excavation shall be stripped and cleared of loose rock or any other material which may slide, fall, roll or be pushed upon any person located in such excavation. (1) The sides of any excavation in stable rock may be vertical and are not required to be provided with sheeting and shoring. Such sides shall be scaled and kept free of all loose rock or material that may be dislodged or may fall into such excavation.

With respect to 23-4.2(g), the "sides" or "banks" of the excavated trench in this case was not adequately "stripped" or "cleared" of "loose rock" or "other material" which fell on Plaintiff "in such excavation."

Similarly, with respect to 23-4.2(1), the "sides" of the excavated trench in which Plaintiff was working was not "kept free of all loose rock or material that may be dislodged or may fall into such excavation." Since the trench was more than five feet deep, these provisions are applicable. See *Natale v. City of New York*, 33 A.D.3d 772, 774 (2d Dep't 2006).

Industrial Code 23-4.4(h) states: "Excavations which are generally parallel to existing underground pipelines, utilities or structures of any kind shall be tightly sheeted and shored alongside such pipelines, utilities or structures where they are exposed by such excavations."

There is no dispute that the area where Plaintiff was working at the bottom of the trench, on the date of the accident, lacked appropriate sheeting despite the undisputed testimony that sheeting should have been used, to prevent the trench walls from caving it.

In the context of Labor Law 241(6) liability, Plaintiff has established he is entitled to judgment and Defendants have failed to raise a material question of fact.

The motion to sever the Third-Party impleader action against P.J. Scariano is granted.

CPLR § 603 permits a court to sever claims. CPLR § 1010, instructs a court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim and in exercising such discretion, the court shall consider whether the controversy between the third-

party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

This court finds severance of the third-party action is warranted. Discovery in the main action is complete. There was an inordinate delay in commencing the third-party action and prejudice to the plaintiff, who is ready for trial, will result.

Accordingly, it is

ORDERED, that the clerk of the court is directed to sever the third-party action from the main action and Plaintiff is directed to file the note of issue forthwith; and it is further

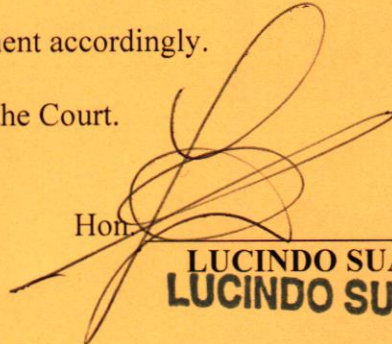
ORDERED, that Plaintiff is awarded judgment as to liability with respect to the Labor Law 240(1) and 241(6) claims against Defendants City of New York and New York City Department of Design and Construction.

Clerk of the court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: October 16, 2023

Hon.



**LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.**