

Vezzuto v Forte Constr. Corp.

2024 NY Slip Op 32771(U)

August 1, 2024

Supreme Court, Kings County

Docket Number: Index No. 527012/2021

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Part LL1

Index Number 527012/2021
Seqs. 001

DECISION/ORDER

ANDREW VEZZUTO,

Plaintiff,

against

FORTE CONSTRUCTION CORP. AND LEON BRENT, JR.,

Defendants.

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	<u>1</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

Upon the foregoing papers, defendant Forte Construction Corp. (Forte)’s motion for summary judgment (Seq. 001) is decided as follows:

Procedural History and Factual Background

Plaintiff commenced this Labor Law action for injuries he claims to have sustained on June 20, 2019, after a car driven by defendant Leon Brent, Jr. struck him at the intersection of Hoyt Avenue South and 31st Street below the elevated Astoria Boulevard Station of the New York City Subway in Queens, New York. Plaintiff was working as a foreman for non-party Integrated Structures at the time of the accident, overseeing the renovation of the subway station (Vezzuto EBT at 6). Stan E. Pitera, an engineering consultant testifying for defendant Forte, admits that Forte was a general contractor on the project (Pitera aff at 3).

Plaintiff testified as follows: at the time of the accident, plaintiff was crossing the street in a cross-walk below the subway station in order to speak to an MTA employee who was directing work on the project. As he crossed he was struck by a car driven by Mr. Brent (Vezzuto EBT at 15–21). On prior occasions, Forte workers flagged and directed traffic at the intersection where plaintiff was hit. Plaintiff testified that “Carlo,” a flagman at the Astoria Station project, was

previously struck while working at the same project as plaintiff by a car making an illegal turn at Hoyt Avenue S and 29th Street, two blocks away from where plaintiff claims to have been hit (Vezzuto EBT at 49–52). John Burke, Forte’s safety engineer, said that there were no flagmen at the time of plaintiff’s accident because there were no deliveries being made and no lanes were closed at the time of the accident (Burke aff at 3).

Analysis

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 (*see 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 (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party (*see Stukas v Streiter*, 918 N.Y.S.2d 176 [2d Dept. 2011]).

Forte seeks summary judgment on plaintiff’s complaint, which alleged violations of Labor Law §§ 240 (1), 241 (6), and 200.

Labor Law § 240 (1)

Plaintiff does not oppose defendant’s motion for summary judgment as to plaintiff’s claims under § 240 (1). Therefore, that portion of the motion is granted.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff predicates

his Labor Law § 241 (6) claim on alleged violations of multiple Industrial Code provisions, including:

- § 23-1.18 (c) (1): “Along every sidewalk or pedestrian thoroughfare where a building or other structure is to be constructed or demolished...there shall be erected a substantial barricade to prevent unauthorized persons from entering the site of such operations.”
- § 23-1.18 (c) (2–3) describe the specifications of the barricade.
- § 23-1.29 (a): “Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.”
- § 23-1.29 (b) describes the flag or paddle to be used by designated persons controlling traffic.

Defendant argues that it is entitled to summary judgment: first, because plaintiff was not on a job site and, second, because the Industrial Code violations which plaintiff cites are inapplicable to the facts of the case.

As to the first prong of the defendant’s argument, it is not the case, as a matter of law, that the plaintiff was not on a job site. Plaintiff contends that, as a foreman, he needed to cross the street multiple times daily to supervise work at non-contiguous areas within the construction site (Vezzuto aff at 5). Neither of the EBTs produced by Forte deny that work for the project was being performed on both sides of the street which plaintiff was crossing at the time of his accident. The record also indicates that Forte exercised control over the area by sometimes deploying flagmen to the intersection, which may be sufficient to bring the intersection within

the worksite under the Labor Law (*see e.g. Allen v Cloutier Const. Corp.*, 405 N.Y.S.2d 630 [1978]). Given past patterns and practice, and viewed in the light most favorable to the plaintiff, the location of the plaintiff's accident may have been part of the construction site and within the sphere of Forte's control and responsibility.

On the second prong of the defendant's argument, Rule 1.18 (c) (1-3) is inapplicable to the facts of this case. However, as the plaintiff contends that the project spanned both sides of the street and he regularly needed to cross the street in order to perform his work, there is a question of fact as to whether §§ 23-1.29 (a-b) (regarding "public vehicular traffic") are applicable.

Accordingly, the portion of the defendant's motion for summary judgment dismissing plaintiff's claims under § 241 (6) is granted as to §§ 23-1.18 (c) (1-3), and denied as to §§ 23-1.29 (a-b).

Labor Law § 200

Labor Law § 200 requires plaintiffs to show that defendants exercised supervision and control over a construction site and failed to provide adequate protection, resulting in injury to the plaintiff (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 670 N.Y.S.2d 816 [1998]). A claim under § 200 may arise either where the means or methods of the work are unsafe or where dangerous conditions exist on-site (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 839 N.Y.S.2d 164 [2d Dept. 2007]).

Where the injury resulted from the means or methods of the work, a general contractor must have had the authority to control the activity bringing about the injury so as to enable the contractor to avoid or correct an unsafe condition (*id.* at 166). Where the injury resulted from a dangerous condition, a general contractor may be liable if it had control over the work site and

actual or constructive notice of the dangerous condition (*see Keating v Nanuet Bd. of Educ.*, 835 N.Y.S.2d 705 [2d Dept. 2007]).

Forte argues that it should not be held liable under § 200 because no construction was taking place in the intersection where plaintiff was injured and it did not exercise control over the area and because it did not have notice of the risk. In response, plaintiff has produced affidavits stating that plaintiff and his co-workers raised concerns about the potential for traffic collisions on the worksite at safety meetings. Forte has admitted to deploying flagmen to the intersection for certain purposes in its own affidavits. The issues of control and notice remain as questions of fact. Forte has not made out its prima facie entitlement to summary judgment.


Accordingly, that portion of the defendant’s motion to dismiss the claim under § 200 is denied.

Conclusion

Defendant’s motion for summary judgment (Seq. 001) is granted with respect to plaintiff’s claims under Labor Law § 240 (1), and § 241 (6), where predicated upon violations of Rule 23-1.18 (c) (1–3). The motion is denied as to plaintiff’s claims under Labor Law § 200, and under § 241 (6) where predicated on alleged violations of Rule 23-1.29 (a–b), due to outstanding questions of material fact.

This constitutes the decision and order of the court.

August 1, 2024
DATE


DEVIN P. COHEN
Justice of the Supreme Court