

O'Brien v S.J. Elec., Inc.

2024 NY Slip Op 33360(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 157845/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 157845/2021

TIMOTHY O'BRIEN,

MOTION DATE 04/26/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

S.J. ELECTRIC, INC., CROSS FIRE & SECURITY CO., INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of July 24, 2024, Defendant S.J. Electric Inc.'s ("S.J. Electric") motion dismissing Plaintiff Timothy O'Brien's ("Plaintiff") Complaint and all crossclaims asserted against S.J. Electric is granted in part and denied in part.

I. Background

Plaintiff alleges personal injuries arising from violations of Labor Law § 200 and § 241(6), and due to common law negligence. Plaintiff was injured on March 14, 2020 at 230 Park Avenue South, New York, New York (the "Premises"). Plaintiff was employed as a Building Engineer for non-party T.F. Cornerstone, the management company for the Premises (NYSCEF Doc. 44 at 35-36). He admitted he was not involved in construction, excavation, or demolition at the Premises (id. at 110-112). His responsibility was "solely bringing contractors around" the Premises (id. at 127). On the date of his accident, Plaintiff entered the mechanical room. Plaintiff then saw the footprints of an animal (id. at 141). As Plaintiff attempted to track the paw prints, he walked though

loose and discarded wires, which allegedly caused him to trip and fall. The mechanical room was being used as a “staging area” for electrical contractors (*id.* at 156 and 159).

SJ Electric employee Andre McKenzie testified SJ Electric was contracted to renovate the fire alarm system (NYSCEF Doc. 45 at 18). Mr. McKenzie testified that SJ Electric’s work on the Premises created a lot of scrap material (*id.* at 31-32). He admitted that SJ Electric used the mechanic room where Plaintiff fell to store material (*id.* at 33-34). Mr. McKenzie admitted a spool of wire was kept in the corner of the room where Plaintiff was injured (*id.* at 45).

S.J. Electric now moves for summary judgment. S.J. Electric argues that Plaintiff’s Labor Law § 241(6) claim should be dismissed because Plaintiff admitted he does not meet the statutory requirement of being engaged in protected work¹ under the Labor Law. S.J. Electric argues Plaintiff’s Labor Law § 200 claim also should be dismissed because S.J. Electric was neither a contractor nor agent of the owner of the Premises within the meaning of the Labor Law and S.J. Electric did not direct, supervise, or control the means and methods of Plaintiff’s work. Finally, S.J. Electric argues that it cannot be held liable under common law negligence as it did not cause, create, or have notice of the tangled wires.

Plaintiff opposes. Plaintiff argues there is an issue of fact as to whether S.J. Electric caused the wires to become tangled in a way that caused Plaintiff’s fall. Plaintiff has not opposed S.J. Electric’s motion seeking dismissal of the Labor Law § 241(6) claims and therefore those claims are dismissed as abandoned. In reply, S.J. Electric argues that Plaintiff only offers conclusory and speculative arguments in opposition to dismissal of the common law negligence claim.² There is

¹ Labor Law 241(6) requires a plaintiff to be involved in construction, excavation or demolition and to be injured in the course of that work.

² S.J. Electric offers, for the first time on reply, the deposition testimony of Thomas Kesling, Robert Currenti, and an incident report. However, a defendant cannot remedy a deficiency in its moving papers with evidence submitted on reply (*Ruland v 130 FG, LLC*, 181 AD3d 441 [1st Dept 2020]).

no opposition from Defendant Cross Fire & Security Co., Inc. (“Cross Fire”) and therefore the crossclaims asserted by Cross Fire against S.J. Electric are dismissed.

II. Discussion

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]).

It is undisputed that S.J. Electric did not supervise, instruct, or control Plaintiff in any way, which is a requirement to impose Labor Law § 200 liability (*see Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012]; *Hughes v Tishman Const. Corp.*, 40 AD3d 305 [1st Dept 2007]). However, there are issues of fact as to whether S.J. Electric may be liable under common law negligence. Viewing the facts in the light most favorable to the Plaintiff, there is an issue of fact as to whether S.J. Electric created a dangerous condition through improper storage of the wiring.

Moreover, contrary to S.J. Electric’s contention, S.J. Electric has not met its prima facie burden of showing a lack of notice. It was conceded that wires were being kept in the mechanic room, but there is no evidence showing when the wires were last inspected or organized (*see generally Joachim v AMC Multi-Cinema, Inc.*, 129 AD3d 433 [1st Dept 2015], *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Although S.J. Electric relies on Mr.

McKenzie’s testimony that Plaintiff fell over a pipe, this contradicts Plaintiff’s testimony. Issues of credibility cannot be resolved on summary judgment and must be left for the jury (*Lichtenstein v Bauer*, 203 AD2d 89 [1st Dept 1994]).

Accordingly, it is hereby,

ORDERED that Defendant S.J. Electric Inc.’s motion for summary judgment dismissing all claims and crossclaims against it is granted in part and denied in part; and it is further

ORDERED that Defendant S.J. Electric Inc.’s motion for summary judgment is granted to the extent that the crossclaims asserted against S.J. Electric Inc. by Defendant Cross Fire & Security Co. are dismissed, and Plaintiff’s Labor Law § 241(6) and 200 claims asserted against S.J. Electric Inc. are dismissed; and it is further

ORDERED that Defendant S.J. Electric Inc.’s motion for summary judgment is denied solely to the extent that Plaintiff’s common law negligence claim against S.J. Electric Inc. survives; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/23/2024

DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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