SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART 36

Justice

----------X

INDEX NO. 721149/2020

CESAR MOROCHO,

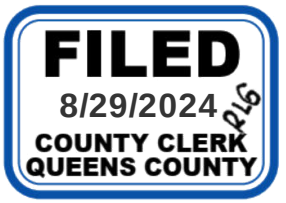
Plaintiff,

MOTION SEQ. NO. 010

- v -

MATTONE GROUP ELMHURST CO., LLC,TITAN REALTY & CONSTRUCTION, LLC,G.B.C. CORP., WELL BUILD RESTAURANTS INC.,

DECISION + ORDER ON MOTION



Defendants.

----------X

The following e-filed documents, listed by NYSCEF under the motion as: 50-62, 64, 65, 69, 72-74, 76, 78 were read on the motion by Defendant Titan Realty & Construction, LLC (hereinafter "Titan") for an order (1) dismissing plaintiff's negligence claims; (2) dismissing plaintiff's Labor Law 200 claims; (3) dismissing plaintiff's Labor Law 240(1) claims; (4) dismissing plaintiff's Labor Law 241(6) claims; and (5) dismissing all cross-claims.

Upon the foregoing papers, it is ordered that the motion by Defendant Titan is granted in part and denied in part for the following reasons:

According to the Complaint, on January 15, 2014 Plaintiff was injured while working at the premises located at 92-10 59th Avenue, Queens County, due to Defendants' violations of Labor Law 200, 240(1) and 241(6). By Stipulation of Discontinuance, dated December 3, 2020 (E7), Plaintiff discontinued all claims against Defendant Well Built Restaurants, Inc. s/h/s Well Build Restaurants Inc. In a letter, dated March 18, 2024, Defendant Mattone Group Elmhurst Co., LLC (hereinafter "Mattone") withdrew its motion for summary judgment because it had settled this matter.

Defendant Titan now moves for summary judgment dismissing all cross claims, as well as Plaintiff's claims for negligence claims, Labor Law 200, 240(1) and 241(6). Defendant Titan submitted, among other things, the transcripts for the following depositions: Plaintiff; Keith Zenobio (hereinafter Zenobio"), Principal at Titan; Christopher Todd (hereinafter "Todd"), General Counsel for Defendant Mattone Group; Elmhurst Co. (hereinafter "Mattone"); Carlos Rojas (hereinafter "Rojas"), employed by Defendant G.B.C. Corp. (hereinafter "G.B.C.) as a supervisor at the time of the subject accident; and Sean Rice (hereinafter "Rice"), owner of non-party Rice Company, LLC (hereinafter "Rice, LLC").

According to its submissions, Defendant Titan claims the following: Mattone owned and developed three restaurants, Longhorn Steakhouse, Olive Garden and Joe's Crab Shack at the premises. Mattone hired Titan as a construction manager pursuant to a construction management

agreement to perform pre-delivery work where Titan drove the piles for the slabs for each of the restaurants, did storm water drainage and curbing. Pre-delivery work with regard to completion of the pads for Longhorn and Olive Garden began in the middle of 2013 and ended in December 2013. Mattone leased a portion of the site to Rare Hospitality International, Inc. (hereinafter "Rare"). Rare hired G.B.C. to build a Longhorn and an Olive Garden at the site. G.B.C. subcontracted with Rice, LLC for the foundation and concrete work at the Longhorn and Olive Garden. Plaintiff was employed by Rice, LLC. On June 15, 2014, Mr. Rice was using a skid steer to move concrete from a concrete truck to the area where the foundation was being poured for the Longhorn restaurant. The concrete would be poured into the skid steer's front bucket, the skid steer would then be driven by Mr. Rice to the foundation form, and then the concrete would be dumped from the front bucket into the foundation form. While Mr. Rice was operating the skid steer, Plaintiff and other Rice, LLC workers were using rakes to smooth out the concrete that had been dropped into the foundation form. The skid steer became stuck in the mud after dropping a load of concrete into the foundation form. Mr. Rice directed Plaintiff and the other workers to stand and repeatedly jump on the rear of the skid steer to free it from the mud. As Plaintiff was standing on the rear of the skid steer, Mr. Rice was pumping the gas trying to move the skid steer and free it from the mud, when the skid steer suddenly moved backward and Plaintiff's right foot became caught between the skid steer and a wooden post.

The branch of Defendant Titan's motion for summary judgment dismissing Plaintiff's Labor Law 240(1) claim and dismissing all cross claims asserted against Titan is granted as unopposed. In the next branch of the motion, Titan argues that it is entitled to summary judgment dismissing Plaintiff's remaining claims because Titan was not an "owner", "contractor", or "agent" within the meaning of the Labor Law. In opposition, Plaintiff argues that issues of fact exist regarding whether Titan, as construction manager, was responsible for site safety at the entire property during the construction regardless of the specific area of the site under construction.

" 'To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented' " (Matter of New York City Asbestos Litig., 33 NY3d 20, 25 [2019], quoting Glick & Dolleck, Inc. v Tri–Pac Export Corp., 22 NY2d 439, 441 [1968]). " 'Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable' " (Matter of New York City Asbestos Litig., 33 NY3d at 25, quoting Forrest v Jewish Guild for the Blind, 3 NY3d 295, 315 [2004]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (Matter of New York City Asbestos Litig., 33 NY3d at 25 [internal quotes omitted]), and "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (id., at 25-26, quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

Here, the Court finds that Defendant Titan's submissions failed to establish its prima facie burden of proof that Titan was not a "contractor" or "agent" within the meaning of the Labor Law. Zenobio, Titan's Principal, testified that Titan had authority to close the entire worksite and that Titan had a safety manual for worksites. Zenobio further testified that Titan's representative on site had the authority to enforce safety rules and stop unsafe activities. Todd, Mattone's General Counsel, testified that Titan, as construction manager, was responsible for site safety at the entire property during the construction regardless of the specific area of the site under construction. Based

upon this testimony, the Court finds that issues of fact exist regarding whether Titan was a "contractor" or "agent" within the meaning of the Labor Law. Accordingly, the branch of Titan's motion seeking summary judgment dismissing Plaintiff's Labor Law 200 and 241(6) claims because Titan was not a "contractor" or "agent" within the meaning of the Labor Law is denied.

In the next branch of the motion, Titan moves for summary judgment dismissing Plaintiff's Labor Law 200 claim arguing that it did not direct or control the plaintiff's work on the date of accident nor did it have actual or constructive notice of the muddy conditions. Plaintiff opposes. Labor Law 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed." (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]). Where the manner and method of work are at issue in a Labor Law 200 analysis, the issue is whether the owner or contractor had the authority to supervise or control the work. (See Mitchell v Caton on the Park, LLC, 167 AD3d 865 [2d Dept 2018]; see also Poalacin v Mall Props., Inc., 155 AD3d 900 [2d Dept 2017]; Ortega v Puccia, supra). Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a property owner or contractor may be liable in common-law negligence and under Labor Law 200 only if the owner or contractor had control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous condition while having actual or constructive notice of it (See Abelleira v City of New York, 120 AD3d 1163 [2d Dept 2014]; see also Martinez v City of New York, 73 AD3d 993 [2d Dept 2010]; Van Salisbury v Elliott-Lewis, 55 AD3d 725 [2d Dept 2008]).

Here, the Court finds that Defendant Titan's submissions failed to establish its prima facie entitlement to summary judgment dismissing Plaintiff's Labor Law 200 claim. As stated above, the testimony by Zenobio and Todd indicated that Titan was the construction manager for the site and had the authority to close the site if Titan felt that the site was unsafe. Consequently, issues of fact exist regarding whether Titan had actual notice of the muddy conditions at the location of the subject accident. Accordingly, the branch of Titan's motion seeking summary judgment dismissing Plaintiff's Labor Law 200 claim is denied.

In the remaining branch of the motion, Defendant Titan moves to dismiss Plaintiff's Labor Law 241(6) claim. In opposition, Plaintiff only opposes dismissal of his claim alleging Titan violated Industrial Code Sections 23-4.2(k), 23-9.4(c), and 23-9.5(c). Consequently, the Court will only address those Code Sections Plaintiff opposes, and the remaining Code Sections Plaintiff claims in his Supplemental Bill of Particulars is dismissed.

"Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (Aragona v State of New York, 147 AD3d 808, 809 [2d Dept. 2017]). "In order to recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards" (id.). "To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case"

(id.). " Contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim" (id.).

Section 23-4.2(k), provides that " Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment". "Excavation equipment" is not defined in the regulations, however, an "excavation machine" is defined as "[a] power-driven vehicle equipped to excavate, push, grade or elevate earth, rock, or other material" (12 NYCRR 23-1.4[18]). Here, Defendant Titan's submissions failed to resolve all issues of fact exist regarding whether the skid steer, with its front bucket used to lift, transport, and dump concrete into the foundation area, is an "excavation machine" as defined by Section 23-4.2(k). Accordingly, the branch of Defendant Titan's motion seeking summary judgment dismissing Plaintiff's Labor Law 241(6) claim based upon a violation of Section 23-4.2(k) is denied.

Section 23-9.4(c), states in relevant part as follows:

> Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions:
>
> (c) Footing. Firm, level and stable footing shall be provided for each such machine. Where such footing is not otherwise supplied, it shall be provided by substantial timbers, cribbing or other structural members in sufficient numbers and of sufficient size to distribute the load so as not to exceed the safe bearing capacity of the underlying material

Here, then Court finds that Defendant Titan's submissions failed to resolve all issues of fact exist regarding whether Section 23-9.4(c) was violated by failing to provide adequate firm footing for the skid steer that was being used to transport material. Significantly, Zenobio, Titan's Principal, testified that "machines in mud are unpredictable". Accordingly, the branch of Defendant Titan's motion seeking summary judgment dismissing Plaintiff's Labor Law 241(6) claim based upon a violation of Section 23-9.4(c) is denied.

Section 23-9.5(c), states in relevant part as follows: (c) Operation. ... "No person except the operating crew shall be permitted on an excavating machine while it is in motion or operation". Here, the Court finds that the skid steer, with its front bucket that was used at the time of the accident to lift, transport, and dump concrete into the foundation area, was an "excavation machine" within the meaning of Section 23-9.5(c). Further, Defendant Titan's submissions failed to establish that Plaintiff was a member of the operating crew, and Rice testified that he was the only person who operated the skid steer. Consequently, it was a violation of Rule 23-9.5(c) to permit Plaintiff, who was not an operator of the skid steer, to ride on the machine while the skid gear was being operating. Accordingly, the branch of Defendant Titan's motion seeking summary judgment dismissing Plaintiff's Labor Law 241(6) claim based upon a violation of Section 23-9.5(c) is denied.

DATED: August 27, 2024

ROBERT I. CALORAS, J.S.C.

FILED
8/29/2024 RG
COUNTY CLERK
QUEENS COUNTY