

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - December 8, 2008

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2007-10627

DECISION & ORDER

Stanislaw Kretowski, respondent-appellant,
v Braender Condominium, et al., respondents,
Brend Renovation Corporation, appellant-
respondent (and a third-party action).

(Index No. 35097/05)

Bivona & Cohen, P.C., New York, N.Y. (Michael Seltzer and Baxter Smith Tassan & Shapiro, P.C. [Margot L. Ludlam], of counsel), for appellant-respondent.

Samuel J. Lurie, New York, N.Y. (Dennis A. Breen of counsel), for respondent-appellant.

Thomas D. Hughes, Richard C. Rubinstein, and David D. Hess, New York, N.Y., for respondents.

In an action to recover damages for personal injuries, the defendant Brend Renovation Corporation appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Saitta, J.), dated October 4, 2007, as denied its cross motion for summary judgment dismissing the causes of action pursuant to Labor Law §§ 200, 240(1), and 241(6), and alleging common-law negligence insofar as asserted against it, and granted the motion of the defendants Braender Condominium and Rudd Realty Management Corp. for summary judgment on their cross claim for contractual indemnification, and the plaintiff cross-appeals from so much of the same order as denied his cross motion for summary judgment on the issue of liability on his cause of action pursuant to Labor Law § 240(1).

December 30, 2008

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ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying the plaintiff's cross motion for summary judgment on the issue of liability on his cause of action pursuant to Labor Law § 240(1) and substituting therefor a provision granting the cross motion, and (2) by deleting the provision thereof denying that branch of the cross motion of the defendant Brend Renovation Corporation which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as asserted against it to the extent it is based on a violation of 12 NYCRR 23-6.3(a) and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff, Stanislaw Kretowski, was working as a construction helper at a building owned by Braender Condominium (hereinafter Braender) and managed by Rudd Realty Management Corp. (hereinafter Rudd). He allegedly was injured when a brick fell from a pallet being hoisted to the roof of the building. He commenced this action against, among others, Braender and Brend Renovation Corporation (hereinafter Brend), a contractor performing construction on the premises, alleging violations of Labor Law §§ 240, 241, and 200, as well as common-law negligence.

To prevail on a claim under Labor Law § 240(1), a plaintiff must prove that the statute was violated and that such violation was a proximate cause of the resulting injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287). Here, the plaintiff established, prima facie, that the defendants were subject to liability under Labor Law § 240(1) based on his deposition testimony that a brick fell on him while it was being hoisted to the roof (*see Zervos v City of New York*, 8 AD3d 477). In opposition, the defendants failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Hamilton v Kushnir Realty Co.*, 51 AD3d 864).

In order to establish a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards and is applicable to the circumstances of the accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505; *Meng Sing Chang v Homewell Owners Corp.*, 38 AD3d 625, 627). Here, the plaintiff's cause of action pursuant to Labor Law § 241(6) is premised on violations of 12 NYCRR 23-6.1(d), which provides that all loads suspended on hoisting equipment "shall be securely slung and properly balanced before they are set in motion" and 12 NYCRR 23-6.3(a), which provides that material platform or bucket hoists "shall be designed by a professional engineer licensed to practice in the State of New York."

Brend established its prima facie entitlement to judgment as a matter of law with respect to the Labor Law § 241(6) cause of action. In opposition, the affidavit of the plaintiff's expert was speculative and conclusory and thus was insufficient to defeat a motion for summary judgment (*see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525; *Sabessar v Presto Sales & Serv. Inc.*, 45 AD3d 829, 831; *Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930; *Rochford v City of Yonkers*, 12 AD3d 433). Nonetheless, despite the insufficiency of the expert's affidavit, the plaintiff also testified at his deposition that he was injured when a brick fell off the pallet which was being hoisted to the roof of the building. This raises "an issue of fact whether a violation of [12 NYCRR 23-6.1(d)] was a proximate cause of plaintiff's injury" (*Cruci v General Electric Co.*, 23 AD3d 838, 839; *see Rissel v Nornew Energy Supply*, 281 AD2d 880). However, the plaintiff failed to raise a triable issue

of fact with respect to the alleged violation of 12 NYCRR 23-6.3(a) since he failed to set forth any evidence that the hoisting equipment was not designed by a professional engineer.

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 (*see Ortega v Puccia*, _____AD3d_____, 2008 NY Slip Op 08305 [2d Dept 2008]; *Reinoso v Ornstein Layton Mgt.*, 19 AD3d 678, 679). For liability to attach, the defendant must have authority to exercise supervision and control over the work at the site (*see Lombardi v Stout*, 80 NY2d 290; *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734). Here, Braender and Rudd established their prima facie entitlement to judgment as a matter of law in connection with the Labor Law § 200 cause of action by showing that they did not have authority to exercise supervision and control over the work (*id.*; *see Capolino v Judlau Contr., Inc.*, 46 AD3d 733). In opposition, the plaintiff failed to raise a triable issue of fact.

The Supreme Court properly granted the motion of Braender and Rudd for summary judgment on their cross claim for contractual indemnification against Brend (*cf. Bahrman v Holtsville Fire Dist.*, 270 AD2d 438, 439).

RIVERA, J.P., ANGIOLILLO, DICKERSON and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court