

Castro v Porth Auth. of N.Y. & N.J.

2011 NY Slip Op 32940(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 112026/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

GUIDO CASTRO and INGRID CASTRO,
Plaintiffs,

Index No.: 112026/09

Motion Date: 07/26/11

- v -

Motion Seq. No.: 02

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and BOVIS LEND LEASE
LMB, INC.,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

FILED

NOV 09 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Guido Castro (Castro or plaintiff) moves, pursuant to CPLR 3212, for summary judgment against defendants, The Port Authority of New York and New Jersey (Port Authority), the owner of the property, and Bovis Lend Lease LMB, Inc. (Bovis), the construction manager, on that portion of his first cause of action alleging a violation of section 240 (1) of the Labor Law.

Plaintiff testified that he was injured on May 12, 2009 at the World Trade Center Memorial and Museum while he was

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

performing his job as an ironworker for Cornell & Company, one of Bovis's subcontractors. When the accident occurred, Castro was on the third floor of the South building walking on the q-decking to retrieve an order from another worker. Q-decking is composed of corrugated metal pieces that are laid over the floor beams to provide a "stay in place" metal form for the concrete slabs that are attached later. As Castro was walking, one piece of the q-decking slid from its position causing both the q-decking and Castro to fall approximately 20 feet to the floor below. Castro states that pieces of q-decking are supposed to be temporarily secured by tack welds, which are temporary welds, until the final welding occurs.

Duane Fitzpatrick, Bovis's safety manager, testified that although he was not an eyewitness to the accident, he performed an investigation into the occurrence and learned that a piece of the q-decking had moved when Castro walked on it, causing Castro and the decking to fall through a hole that was approximately 6 to 8 feet by 3 feet. The distance Castro fell was about 20 feet to the floor below. Fitzpatrick also stated that, ordinarily, the q-decking would be tack welded in place until the final welding could be done.

John Daly, Castro's co-worker and a witness to the accident, stated in pertinent part:

There were multiple holes in the 3rd floor q-decking. I recall some were for electrical work, some were for

mechanical work and some for duct work. On this floor the holes were covered with sheets of q-decking that were supposed to be tack-welded [sic] to serve as a temporary secure so that they don't move or slide. On the floors below they had erected screens with wood skids underneath so it was clear you were walking on an opening, but not on this floor.

In support of summary judgment, Castro argues that pursuant to § 240 (1) of the Labor Law, the defendants are absolutely liable for his injuries because: 1) he is within the class of persons protected by the statute, 2) the defendants violated the statute because the work platform collapsed causing him to fall through an unprotected opening onto the floor below and 3) that the violation of the statute was the proximate cause of his injuries.

In opposition to the motion, the defendants contend that Castro has failed to make a prima facie showing that the failure to provide a safety device was the proximate cause of his injuries; that there is no evidence that the q-decking was supposed to be tack-welded; that the openings were part of the deck spreading process and that plaintiff's alleged incident was the type of ordinary and usual peril a worker is commonly exposed to at a construction site.

Section 240 (1) of the Labor Law provides:

All contractors and owners and their agents . . . who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists,

stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed, and operated as to give proper protection to a person so employed.

The statute imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 [2003], citing Melber v 6333 Main St., 91 NY2d 759, 762 [1998]). The duty imposed is nondelegable and an owner is liable for violation of § 240 (1) even though he/she exercised no control over the work being done (John v Baharestani, 281 AD2d 114, 117 [1st Dept 2001], citing Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]).

The hazards contemplated by section 240 (1) are "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]).

Plaintiff argues that based on the facts of this case the collapse of the g-decking covering the floor constituted a prima facie violation of Labor Law § 240 (1) because Castro was injured while engaged in work at a construction site when he fell through a six-by-eight foot inadequately protected hole in the g-

decking to the floor below. It is undisputed that there were no safety devices on the deck to provide protection (see John v Baharestani, 281 AD2d at 117; see also, Zong Mau Zou v Hai Ming Constr. Corp., 74 AD3d 800 [2d Dept 2010] [summary judgment granted on liability on Labor Law 240 (1) claim where plaintiff was injured when sheet metal decking collapsed underneath him causing him to fall approximately 10 to 13 feet to the floor below]).

In Richardson v Matarese (206 AD2d 353 [2d Dept 1994]), plaintiffs were injured while attempting to move a radiator across a plywood floor in a building under renovation when a set of beams underneath them disengaged and the floor collapsed sending the plaintiffs and the radiator to the floor below. There, the court held that the "collapse of the floor constituted a prima facie violation of Labor Law § 240 (1)" (see also, Sickler v City of New York, 15 Misc 3d 48, 52 [App Term, 2d Dept 2007] [collapse of the floor is a prima facie violation of Labor Law §240 (1)]; O'Connor v Lincoln Metrocenter Partners, 266 AD2d 60 [1st Dept 1999] [defendant liable under Labor Law § 240 (1) where plaintiff fell through a three foot by four foot opening in the floor when the plywood that had been placed over the opening shifted and gave way]).

In Robertti v Powers Chang (227 AD2d 542, 543 [2d Dept 1996] plaintiff was carrying a beam across a temporary floor made up of

corrugated metal decking sheets when the floor partially collapse. In that case the court stated

[A] collapsed floor has been held to constitute prima facie evidence of a violation of Labor Law § 240 (1). . . Regardless of the height from which the plaintiff fell, the fall itself was allegedly caused by the inadequacy of the flooring which allegedly failed to provide the plaintiff the proper support and protection to which he was entitled [citations omitted].

Here, Bovis' safety manager testified that, ordinarily, the q-decking would be temporarily tack welded in place until the final welding could be done and that in this case it appeared that the piece of q-decking had moved. Indeed, when the safety manager inspected the site after the accident, he observed the piece of q-decking on the floor below where Castro had fallen.

In addition, Castro's co-worker, John Daly stated that he observed that the q-decking gave way and Castro, himself, testified that a piece of the q-decking slid off and fell through the opening when he fell through.

Defendants have failed to present even a scintilla of evidence to overcome plaintiff's prima facie showing that his accident occurred as a result of a violation of Labor Law 240 (1) when he fell approximately 20 feet through a three-by-eight foot hole when he stepped on q-decking that had not been secured. Defendants' reliance on Misseritti v Mark IV Const. Co. (86 NY2d 487, 489 [1995]), for the proposition that an accident of this nature is an "ordinary and usual" peril a worker is commonly

exposed to at a construction site where workers are spreading deck is unavailing. In that case, the court found that there was no showing that plaintiff, a mason, was working at an elevated level when the accident occurred. In addition, Alvia v Teman Elec. Contr. (287 AD2d 421, 422[2d Dept 2001]), another case cited by the defendants, is distinguishable. In that case, the court specifically found that Labor Law 240 (1) was not violated because there was no risk that plaintiff would have fallen to the floor below "due to the dimensions of the hole [12 inches by 16 inches] and the permanence of the floor." In the case before the court, Castro fell through a six-by-eight foot hole in temporary flooring.

Accordingly, the court shall grant summary judgment on liability to plaintiff on that portion of his first cause of action alleging a violation of Labor Law 240 (1). Accordingly, it is

ORDERED that plaintiff Guido Castro's motion for summary judgment on the issue of liability on that portion of his first cause of action alleging a violation of Labor Law 240 (1) is GRANTED; and it is further

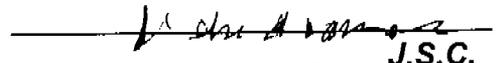
ORDERED that parties shall appear in Part Mediation-1 at any previously schedule mediation conference, and if the action is not settled thereat the parties are directed to attend a pre-

trial conference on November 29, 2011, in IAS Part 59, Room 103,
71 Thomas Street, New York, NY at 2:30 P.M.

This is the decision and order of the court.

Dated: November 3, 2011

ENTER:


DEBRA A. JAMES J.S.C.

FILED

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