No. 200

Raul Salazar,
Respondent,
v.
Novalex Contracting Corp., et al.,
Appellants.
(And a Third-Party Action.)

Arthur T. McQuillan, for appellant Novalex Contracting Corp.
Jonathan R. Walsh, for appellant 96 Rockaway LLC.
James V. Derenze, for appellant T-Construction Co., Inc.
Peter Rigelhaupt, for respondent.

PIGOTT, J.:

Plaintiff Raul Salazar was injured in May 2004, while working in the basement of a Brooklyn building undergoing renovations. The property was owned by 96 Rockaway, LLC. Salazar was employed by T-Construction Co., Inc.; the general

contractor was Novalex Contracting Corp. The accident occurred in the largest room of the basement, which had a trench system, for piping. Salazar and the other workmen were laying a concrete floor. They were directed to pour and spread concrete over the entire basement floor, including the trenches. Before he began work on the day he was injured, Salazar looked for, and visually located, the trenches.[1]

The concrete flowed from a truck into wheelbarrows placed in the basement, via a chute fed through a window. Workmen poured the wet concrete from the wheelbarrows onto the floor of the basement, where Salazar and others "pulled" the concrete with rakes, ensuring that the floor would be level. As Salazar explained the next stage of the process at his deposition, the trench system fills with concrete "by itself because the concrete runs and it fills it out . . . the concrete kind of slides down or runs down" into the trenches.

Salazar was injured after he stepped into a trench that was partially filled with concrete. He had been walking backwards across the floor, "pulling" concrete with a rake held in front of him, and looking forward, rather than in his direction of motion. As Salazar recalled the incident, "one of the trenches began to fill out with concrete, and at some point

[1] Salazar testified at deposition that there were multiple trenches in the room. The general contractor's vice-president described a single, continuous trench. This dispute is not relevant to the disposition of the case.

when I was pulling, walking backwards, . . . my foot got inside, into that hole." After Salazar's right foot hit the bottom of the trench, his right leg folded beneath him. Before being assisted out of the trench by his coworkers, Salazar tried to pull his leg out "on my own, myself, and that's how I hurt myself."

According to Salazar, the portion of the trench system into which he stepped was about 2 feet wide and "[b]etween 3 and 4 feet deep." There was no railing, barricade, or cover around or over the trench.

Salazar commenced a lawsuit against 96 Rockaway, LLC, Novalex Contracting Corp., and T-Construction Co., Inc., alleging, among other things, violations of Labor Law §§ 240 (1) and 241 (6). Discovery and a third-party action ensued. T-Construction Co. moved for summary judgment, seeking dismissal of the complaint, and all cross-claims against it. 96 Rockaway and Novalex Contracting Corp. cross-moved for identical relief. Supreme Court granted defendants' motions, and dismissed Salazar's complaint in its entirety.

The Appellate Division reversed so much of Supreme Court's order as granted defendants' motions for summary judgment dismissing Salazar's Labor Law § 240 (1) and § 241 (6) claims, denied the motions, and reinstated those claims. One Justice dissented. The Appellate Division granted defendants leave to appeal to this Court, certifying the question whether its order

had been properly made. We now reverse.

Liability under Labor Law § 240 (1) depends on whether the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (Broggy v Rockefeller Group, Inc., 8 NY3d 675, 681 [2007]). The kind of accident triggering § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis removed]). Salazar argues that the trench into which he stepped should have been covered or barricaded in such a way as to prevent his fall.

In Wilinski v 334 E. 92nd Hous. Dev. Fund Corp. (__ NY3d ___ [Oct. 25, 2011]), the plaintiff was injured when a nearby wall that was being demolished fell into two 10-foot-high unsecured metal pipes, causing them to topple onto him. This Court denied summary judgment to both parties, holding that an issue of fact existed as to whether the worker's injury resulted from the absence of a safety device statutorily prescribed under Labor Law § 240 (1). In doing so, the Court contrasted the facts of Wilinski with other cases in which summary judgment dismissing the complaint would have been warranted:

> "Here, the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell. In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan" (id. at ___ [internal citation omitted]).

Here, the installation of a protective device of the kind that Salazar posits – assuming that such a device, although not listed in Labor Law 240 (1), was an "other device[]" within the meaning of the statute – would have been contrary to the objectives of the work plan in the basement. Salazar testified that he was directed to pour and spread concrete over the entire basement floor, a task that included filling the trenches.[2] Put simply, it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete. Moreover, the record is clear that the purpose of the work here was to lay concrete over the entire basement. Since the liquid concrete would necessarily fill the trench and pour out over the

[2] Contrary to the dissent's reading (see dissenting op. at 3), Salazar's testimony does not suggest that the process of seepage whereby the trench he stepped in had filled with concrete "by itself" was unintentional.

surrounding floor areas, it would be impractical and contrary to the very work at hand to cover the area where the concrete was being spread, particularly since the settling of concrete requires that the work of leveling be done with celerity. Given that Labor Law § 240 (1) should be construed with a common sense approach to the realities of the workplace at issue, defendants are entitled to summary judgment dismissing that claim.

Salazar's Labor Law § 241 (6) cause of action, predicated on a violation of 12 NYCRR 23-1.7 (b) (1) (i), fails for similar reasons.[3] That regulation states that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part." Even assuming that the trench here constituted a "hazardous opening," 12 NYCRR 23-1.7 (b) (1) (i) cannot be reasonably interpreted to apply to a case like this one, where covering the opening in question would have been inconsistent with filling it, an integral part of the job. Hence, defendants are also entitled to summary judgment dismissing the Labor Law § 241 (6) claim.

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims dismissed, and the certified question answered in the

[3] Although the Appellate Division dissent analyzes 12 NYCRR 23-1.7 (b) (1) (iii), Salazar's brief makes clear that he relies upon 12 NYCRR 23-1.7 (b) (1) (i).

negative.

Raul Salazar v Novalex Contracting Corp., 96 Rockaway LLC, and T-Construction Co., Inc.

No. 200

LIPPMAN, Chief Judge(dissenting):

The majority misapplies this Court's recent holding in Wilinski v 334 E. 92nd Hous. Dev. Fund Corp. (__NY3d ___ [Oct. 25, 2011]), and errs by viewing the evidence in the light most favorable to defendants, rather than in the light most favorable to plaintiff, on defendants' motions for summary judgment. Therefore, I respectfully dissent.

The majority endeavors to create exceptions to Labor Law § 240 (1) that should not exist and to narrow arbitrarily the scope of the statute in concluding that it does not apply to this case in which an elevation-related risk was clearly present and the accident, which was caused by the force of gravity acting on the body of plaintiff, could have been prevented by the simple placement of a cover over the trench or a barrier around its perimeter.[1] Contrary to the position taken by the majority, this is precisely the type of case to which Section 240 (1) was intended to apply. I also see no reason why the trench in this

[1] Covers and barriers qualify as "other [safety] devices" within the meaning of the statute, which is not limited to devices expressly enumerated therein.

case is not a "hazardous opening" within the meaning of 12 NYCRR § 23-1.7 (b) (1) that should have been covered. Because there exist triable issues of fact with regard to plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, I respectfully dissent.

In Runner v New York Stock Exch., Inc. (13 NY3d 599, 603 [2009]), we held that the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and that test is certainly met in this case. In Rocovich v Consolidated Edison Co. (78 NY2d 509 [1991]), we clarified that "extent of the elevation differential" (here, measured by the depth of the trench) is not necessarily dispositive (id. at 514) and on this basis I conclude that based on plaintiff's deposition testimony as to the depth of the trench (which we must take as true for purposes of deciding defendants' motions for summary judgment), there was a significant elevation differential in this case. It is undisputed that no safety device was provided to plaintiff.

Instead of viewing the facts in the light most favorable to plaintiff and allowing this case to proceed to a trial, the majority sidesteps a glaring set of triable factual issues--principally, whether the trench was being actively filled at the time of the accident, and if it was not, whether it could have been temporarily covered or blocked off prior to being filled. During a deposition, plaintiff testified that at the

time of the accident, "I was walking backwards, and at the same time I was pulling the concrete, and at the same time we were smoothing the concrete, then one of the trenches began to fill out with concrete, and at some point when I was pulling, walking backwards...my foot got inside, into that hole," and he also testified with regard to the trench that "it fill[ed] out by itself because the concrete r[an] and it fill[ed] it out." When asked directly "is it not true that someone had actually poured concrete from the wheelbarrow into that trench prior to the accident?" plaintiff responded "[n]ot directly, because the concrete kind of slides down or runs down." It is therefore not clear from the record that the trench was purposely being filled at the time of the accident, yet the majority nevertheless concludes that this was the case. Plaintiff's testimony suggests otherwise--that the concrete in the trench into which his right leg fell had unintentionally seeped in. Defendants maintain that the trench was being purposely filled by plaintiff's coworkers at the time. In sum, based on this record we know only that the plan was to fill the trench at some point before the job was complete, but we do not know precisely when. There is a factual dispute about the sequencing of this aspect of the project that should not be resolved by this Court on an appeal from the denial of a summary judgment motion.

I agree that "Labor Law § 240 (1) should be construed with a common sense approach to the realities of the workplace at

issue" (majority op at 6). This is the principle we described in Wilinski, which simply means that courts should not lay down rules that are, as a practical matter, impossible to follow. We implicitly recognized in that case that it would be irrational to require the shoring up of a structure being demolished. However, in this case, because we do not know enough about the realities of this workplace, a trial is required in order for key factual determinations to be made regarding the specifics of the work plan as well as the feasibility of a cover or barrier in light of those parameters. A covering over or a barrier surrounding the trench would undoubtedly have greatly decreased the likelihood of an accident like the one that befell plaintiff and there is no reason why such a device could not have been used if the trench was not being filled at the time that plaintiff approached it while walking backwards.

Even if we were to assume a disputed fact, I believe that the majority's pronouncement that "it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete" (majority op at 5) is premature. This Court is not in a position to determine conclusively that it was impossible to fill the trench and protect plaintiff from the accident at the same time. That is a finding of fact that should be made after experts on construction techniques present their views regarding

this subject at trial for the consideration of the fact-finder. The factual assumption underlying the majority's entire analysis -- that the planned order of the work was for the concrete to be poured onto the floor and then seep into the trench, such that the seepage was intentional -- is not entirely consistent with the evidence or, on the present state of the record, with any coherent work strategy.

The majority's approach runs counter to the fundamental purpose of Labor Law §240 (1). The statute, which is aimed at protecting workers from elevation-related risks and fostering safer working environments, should be construed liberally (see Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 520-521 [1985], quoting Quigley v Thatcher, 207 NY 66, 68 [1912] and holding that "with respect to section 240, 'this statute is ...for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was...framed'"]). Plaintiffs in cases such as this should be afforded the protections of the statute designed to ensure the safety and physical well-being of workers.

I also believe that there are material factual issues as to plaintiff's Labor Law § 241 (6) claim. The trench here was a "hazardous opening" under 12 NYCRR § 23-1.7 [b] (1) (i) and the regulation states that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place." The majority's rationale for rejecting

plaintiff's Labor Law § 241 (6) claim is identical to that which it uses to reject the Labor Law § 240 (1) claim and thus fails for the same reasons.

As there are genuine issues of material fact rendering the drastic remedy of summary judgment unavailable to defendants in this case, I dissent and would affirm the order of the Appellate Division and answer the certified question in the affirmative.

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Order reversed, with costs, plaintiff's Labor Law §§ 240(1) and 241(6) claims dismissed, and certified question answered in the negative. Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents and votes to affirm in an opinion in which Judges Ciparick and Jones concur.

Decided November 21, 2011