

O'Reilly v North Berry Structures, Inc.

2002 NY Slip Op 30131(U)

November 12, 2002

Supreme Court, New York County

Docket Number: 119253/00

Judge: Shirley Werner Kornreich

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

PRESENT: KORNREICH
Justice

PART 54

John O'Reilly

INDEX NO. 19262/00
MOTION DATE 6/6/02 10/24/02
MOTION SEQ. NO. NYS SUPREME COURT RECEIVED
MOTION CAL. NO. DEC 03 2002

- v -

North Berry Structures

The following papers, numbered 1 to 2 were read on this motion to/for IAS MOTION SUPPORT OFFICE

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits	<u>2</u>
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by defendant for summary judgment is decided in accordance with the annexed decision order and judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/15/02

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
JOHN O'REILLY,

Plaintiffs,

Index No.:119253/00

-against-

**DECISION,
ORDER AND
JUDGMENT**

NORTH BERRY STRUCTURES, INC.,

Defendant

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is an action brought to recover for personal injuries arising from a work-related accident occurring during the construction of the new Hayden Planetarium adjacent to the Museum of Natural History on Central Park West in New York City. Plaintiff, employed by the project's general contractor, was traversing a wooden platform at the site when he slipped and fell, sustaining injury. Plaintiff brought **this** action against defendant North Berry Structures, Inc., a sub-contractor on the construction project, alleging violations **of** Labor Law sections 200, 240(1) **and** 241(6) as well **as** common law negligence.

Motion for Summary Judgment

Defendant now moves for summary judgment, arguing that it owed no duty of care to plaintiff and **was** not negligent. In support of its motion, defendant submits copies of plaintiffs summons and verified complaint, defendant's verified answer, plaintiff's verified bill of particulars, and plaintiff's deposition testimony.

Plaintiffs deposition testimony demonstrates the following: Plaintiff, a sixty-six year old

college graduate with an advanced degree in computer science, worked **as** Safety Director for Morse Diesel, the general contractor on the project. EBT of plaintiff, p. **9**. On March 20th, 1998, the day of the accident, plaintiff was conducting a safety audit of defendant's concrete form work. **Id.** at **23**. The form work consisted of a large deck constructed of plywood platforms upon which concrete would later be poured. **Id.** at 43. Plaintiff was walking from one end of the deck to the other, where defendant's crew was performing its work. **Id.** at 45. The entire surface of the deck was interrupted at intervals by striations approximately two feet deep and two feet across, whose function would be to form beam bottoms once the cement was poured onto the deck. **Id.** at **48**. Although the striations created gaps between platforms, the two ends of the platforms on either side of the striations were generally level with each other. **Id.** at 51. After crossing over one gap, and immediately after plaintiff's rear foot touched the further platform, plaintiff slipped and fell forward onto the platform. The surface of the platform upon which plaintiff fell **was** covered by a plastic finish, and **was** wet. **Id.** at **55**.

Defendant argues that: 1) because it had no authority to control plaintiff or his work, it owed no duty to plaintiff under common law negligence or under Labor Law section §200; 2) for the same reason it was not liable **as** a matter of law under Labor Law sections 240(1) or 241(6); 3) Labor Law §240(1) is inapplicable because plaintiff was not exposed to a gravity related **risk**; 4) Labor Law §241(6) is inapplicable due to plaintiff's failure to allege violation of the Industrial Code; and **5)** it was not liable under common law negligence because it had no notice of the unsafe condition causing the accident.

Plaintiff contests the summary judgment motion. With the exception of the inapplicability of Labor Law §240(1), the Court finds defendant's arguments unpersuasive.

Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. Zuckerman v. City of N.Y., 49 N.Y.2d 557 (1980). Here, defendant **has** failed to meet its burden of establishing that it was not negligent in maintaining the platform upon which plaintiff slipped and that Labor Law §§200 and 241(6) are inapplicable.

Liability against a subcontractor based upon a claimed violation of Labor Law §200 and common-law negligence requires a showing that authority was conferred on the subcontractor to supervise and control the activity which produced the injury. See Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 (1993); Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981). Similarly, liability of a subcontractor under Labor Law sections 240 and 241 is predicated on a showing that the subcontractor had the authority to supervise and control the work being done. See Russin. supra.

Relying on Fourth Department and Third Department cases, defendant argues it lacked any authority or control over the activity which produced the injury because it had no authority or control over plaintiff or his work. The Court finds defendant's formulation misleading. The proper question is whether defendant had any authority over or control of the work being done at the accident site and the authority to insist that proper safety practices be followed. See Serpe v. Eyris Productions. Inc. 243 A.D.2d 375 (1st Dept. 1997); Velez v. Tishman Foley, 245 A.D.2d 155, (1st Dept. 1997); Terranova v. City of New York, 197 A.D.2d 402 (1st Dept. 1993).

Here, plaintiff, while inspecting defendant's ongoing construction of a concrete deck,

slipped and fell upon a plywood platform that was part of the partially completed deck. The work being done was the construction of the deck and plaintiff's inspection was part of that work. See Campisi v. Epos Contracting Corp., ___ A.D.2d __; 747 N.Y.S.2d 218 (1st Dept. 2002)(inspection of ongoing construction work is "part of" project for purposes of Labor Law applicability).

Defendant was in control of precisely the area where the accident occurred and presumably had the authority to maintain that work area in a safe condition. Defendant presents no evidence to the contrary. Rather, defendant makes the incredible assertion that because plaintiff's job was to inspect defendant's work on behalf of the general contractor, plaintiff was "directing and controlling the work of [defendant] North Berry." But See Campisi, supra.

Defendant further argues that summary judgment should be granted as to plaintiff's claim under Labor Law §240 because plaintiff's injury was not caused by a gravity-related risk of the type encompassed by the statute. The Court agrees, Labor Law §240 was intended to afford protection against a falling risk caused either by a difference between the elevation level of the required work and a lower level, or by a difference between the elevation level where the worker is positioned and a higher level of the materials or load **being** hoisted or secured. See Brennan v. RCP Associates, 257 A.D.2d 389 (1st Dept. 1999), leave to appeal dismissed 93 N.Y.2d 889 (1999). Neither of those causes were present here. Plaintiff slipped and **fell** on a platform. **The** mere fact that plaintiff had just stepped over a gap to get to the platform is not sufficient to prove that plaintiff **was** injured **as** a result of a gravity-related **risk**.

Defendant's motion to dismiss the cause of action based on Labor Law §241(6) is denied. The Court grants plaintiff leave to amend **his** complaint to allege a violation of Industrial Code (12 NYCRR) §23-1.7(d). See Colucci v. Equitable Life Assur. Soc'v of the United States, 218

A.D.2d 513 (1st Dept. 1995)(allegation of violation of 12 NYCRR §23-1.7(d) contains sufficient "concrete specifications" to meet the standard for imposing nondelegable duty under Labor Law §241(6)); see also. Adams v. Santa Fe Const. Corp. (1st Dept. 2001)(failure to identify specific rule violation in complaint or bill of particulars not fatal because leave to amend should be granted freely).

Finally, defendant's argument as to notice is insufficient as a matter of law to warrant the Court in deciding the issue in its favor. In order to be liable in negligence, a defendant must have had actual or constructive notice of the dangerous condition. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. See Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986). Defendant argues it had neither actual nor constructive notice of any water on the platforms when plaintiff fell. **As** defendant does not dispute that it had rained the night before, that its workers were on the deck, and that the accident occurred at approximately 10:00 a.m., there is at least a triable issue of fact **as** to whether or not defendant had constructive notice of the water on the platforms. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted **as** to plaintiff's cause of action under Labor Law §240(1), and denied **as** to the remainder of the complaint.

The foregoing constitutes the decision and order of the Court.

Date: November 12, 2002

New York, New York


SHIRLEY WERNER KORNREICH