

**Rookwood v Hyde Park Owners Corp.**

2006 NY Slip Op 30476(U)

September 28, 2006

Supreme Court, Queens County

Docket Number: 17879/03

Judge: Carolyn Geller

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CAROLYN GELLER IA Part 14  
Justice

AUBREY ROOKWOOD, x

Plaintiff,

- against -

HYDE PARK OWNERS CORP., NEW YORK  
PLUMBING & HEATING CORP.,

Defendants.

x

Index  
Number 17879 2003

Motion  
Date July 11, 2006

Motion  
Cal. Numbers 20 & 21

The following papers numbered 1 to 20 read on this motion by defendant Hyde Park Owners Corp. for an order granting summary judgment dismissing, with prejudice, the complaint and all cross claims. Defendant New York Heating & Plumbing Corp. separately moves for an order granting summary judgment dismissing the complaint and all cross claims.

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Numbered

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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are decided as follows:

Plaintiff Aubrey Rookwood allegedly sustained personal injuries on January 24, 2002, while constructing an oil burner tank in the basement of the premises known as 67-50 136<sup>th</sup> Street,

Flushing, New York. The premises are owned by Hyde Park Owners Corp. (Hyde Park). Hyde Park had contracted with New York Plumbing & Heating Corp. (NYPH) to install a boiler and an oil tank in the basement of the subject building. NYPH sub-contracted with Empire Industrial Systems Corporation (Empire), plaintiff's employer, to install the oil burner. At the time of the accident, plaintiff was the foreman at the job site, and was assisting in the transportation of metal plates used in the construction of the burner. One of the workers was standing in the basement where he would operate a chain fall which would lower a metal plate to the ground. The metal plate was standing on the landing just inside the basement door, and was secured by two workers who were standing in the doorway. Plaintiff was standing on the landing inside the doorway to the right of the plate. Prior to the accident, plaintiff had removed the railing from the landing at the top of the stairs in order to move the plate to the basement floor. Plaintiff was attaching the hooks of the chain fall to the pad eyes on the plate when the plate slipped off the landing and causing him to fall off the landing to the basement floor below.

It is well settled that a party seeking summary judgment " must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470; [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]; Duncan v Perry, 307 AD2d 249 [2003]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). " General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]).

Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). “Where the alleged dangerous condition arises from the contractor’s methods and the owner exercises no supervisory control over the operation, no liability attaches’ (Yong Ju Kim v Herbert Constr. Co., 275 AD2d 709)” (Rosenberg v Eternal Mems., 291 AD2d 391, 391-392 [2002]; see also Perri v Gilbert Johnson Enterprises, 14 AD3d 681 [2005]; Toefer v Long Is. R.R., 308 AD2d 579, 581 [2003], affd 4 NY3d 399 [2005]; Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]). Here, plaintiff testified that he determined that in order to move the metal plates into the basement it was necessary to remove the portion of the handrail located at the top landing of the staircase, and that once all the metal plates were lowered to the basement floor, the handrail would be replaced. Plaintiff stated that he made this decision on his own and that he did not consult with either Hyde Park or NYHP. The court finds that defendants’ Hyde Park and NYHP have established that they did not supervise or control the work of the subcontractor Empire, or its employees, including the plaintiff (see Vasiliades v Lehrer McGovern & Bovis, 3 AD3d 400, 401-402 [2004]), and that they had no notice of any dangerous condition posed by the removal of the handrail at the top of the staircase landing. (Mitchell v New York Univ., 12 AD3d 200, 201, [2004]). Plaintiff, in opposition, failed to raise an issue of fact as to these elements (see Paulino v Hearts Serv. Co., Inc., 28 AD3d 362 [2006]; Locicero v Princeton Restoration, Inc., 25 AD3d 664 [2006]). Therefore, defendants’ request to dismiss the claims for common-law negligence and a violation of Labor Law § 200 is granted.

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (see Ross v Curtis- Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The “exceptional protection” provided for workers by § 240(1) is aimed at “special hazards” and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see Ross v Curtis- Palmer Hydro-Electric Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are “scarcely in a position to protect themselves from accident” (see Rocovich v Consolidated Edison, supra at 501). Although the “special

hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (Ross v Curtis-Palmer Hydro-Electric Co., supra, at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452 [1985]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]).

Here, the staircase landing upon which the plaintiff was injured was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk (see Gallagher v Andron Constr. Corp., 21 AD3d 988 [2005]; Griffin v N.Y. City Transit Auth., 16 AD3d 202, 203 [2005]; Parsuram v I.T.C. Bargain Stores, Inc., 16 AD3d 471, 472 [2005]; Norton v Park Plaza Owners Corp., 263 AD2d 531 [1999]; Williams v City of Albany, 245 AD2d 916 [1997], appeal dismissed 91 NY2d 957, [1998]; Dombrowski v Schwartz, 217 AD2d 914, [1995]). The fact that the staircase's railing had been temporarily removed, thereby altering its initial condition, does not warrant treating it as a "temporary" structure used only to afford workers access to a work site (see Williams v City of Albany, supra).

To the extent that plaintiff claims that the accident was caused by a falling object, Labor Law § 240(1) applies "where protective devices are called for . . . because of 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., supra at 514; see e.g. Narducci v Manhasset Bay Assoc., 96 NY2d 259, 269-270 [2001]; Sutfin v Ithaca Coll., 240 AD2d 989, 989-990 [1997]). However "[a]n object falling from a minuscule height is not the type of elevation-related injury that this statute was intended to protect against" (Schreiner v Cremosa Cheese Corp., 202 AD2d 657, 657-658 [1994]; see Perron v Hendrickson/Scalamandre/Posillico (TV), 22 AD3d 731 [2005], leave to appeal denied \_\_\_ NY3d \_\_\_, 2006 N.Y. LEXIS 2055 [July 5, 2006]). Here, the metal plate was resting on the same staircase landing that plaintiff was standing on, and therefore no elevation differential existed. Therefore, as no liability pursuant to Labor Law § 240(1) can attach, that branch of the defendants' motions which seek to dismiss plaintiff's claims under Labor Law § 240(1) is granted.

In order for a contractor or an owner to be liable under Labor Law § 241(6), a plaintiff is required to establish a breach

of a rule or regulation of the Industrial Code which gives a specific, positive command (see Rizzuto v Wenger Contr. Co., *supra*; Ross v Curtis-Palmer Hydro-Elec. Co., *supra*; Vernieri v Empire Realty Co., 219 AD2d 593 [1995]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v Ludovico, 246 AD2d 642 [1998]; Vernieri v Empire Realty Co., *supra*). Plaintiff, in his bill of particulars, asserts violations of 12 NYCRR 23-1.7(b), 23-1.7(d), 23-1.15, 23-16, 23-6.1, and 23- 6.2.

12 NYCRR 23-6.1 which deals with material hoisting equipment, and 12 NYCRR 23-6.2 which deals with rigging, rope and chains for material hoists are inapplicable here, as plaintiff has not set forth any evidence which establishes that the accident was caused by any problem with the materials hoisting equipment or chains used to move the metal plates.

12 NYCRR 23-1.7(d) deals with slipping hazards, and provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Plaintiff, at his deposition, stated that it was raining on the day of his accident and that the surface of the platform was slippery. However, plaintiff also testified that the metal plate slipped, due to unknown reasons, and that he fell off the stairway landing. Therefore, as plaintiff has not submitted any evidence that his accident was caused by a slippery surface on the landing, this section is inapplicable.

12 NYCRR 23-1.15, entitled "Safety railing," does not specify when safety railings are required but, rather, sets forth only how they must be constructed when they are required. Section 23-1.16, entitled "Safety belts, harnesses, tail lines and lifelines," also does not specify when such safety devices are required. These sections are inapplicable here, as there was no safety railing in place, and plaintiff was not provided with any of those devices set forth in section 23-1.16 (see Dzieran v 1800 Boston Rd., LLC, 25 AD3d 336 [2006]; Partridge v Waterloo Cent. Sch. Dist., 12 AD3d 1054, 1056 [2004]; D'Acunti v N.Y. City Sch. Constr. Auth., 300 AD2d 107, 107-108 [2002]; Avendano v Sazerac, Inc., 248 AD2d 340, 341 [1998]).

12 NYCRR 23-1.7(b) applies to "[e]very hazardous opening into which a person may step or fall," provided that the "hazardous opening' ... [is] one of significant depth and size, i.e., more than 5 by 12 inches wide and 15 to 24 inches deep" (D'Egidio v Frontier Ins. Co., 270 AD2d 763, 765 [2000]). The regulation requires hazardous openings to be "guarded by a

substantial cover fastened in place or by a safety railing" (12 NYCRR 23-1.7 [b][1] [i]). Certain other forms of protection are needed when employees are required to work close to the edge of such an opening (see 12 NYCRR 23-1.7 [b][1][iii]). According to plaintiff's evidence, it was necessary for him to remove the railing in order to move the metal plate into the basement, which left the staircase landing open. The opening was large enough for a person to fall through to a lower area. Whether or not plaintiff was himself negligent in removing the railing may require an apportionment of liability, but does not absolve defendants of their own liability under Labor Law § 241(6) (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513 [1985]). Therefore, as the evidence is sufficient to allege a violation of 12 NYCRR 23-1.7(b)(1) (see Messina v City of New York, 300 ADd 121, 123 [2002]; Alvia v Teman Elec. Contr., 287 AD2d 421, 423 [2001], lv denied 97 NY2d 749 [2002]), that branch of defendants' motion which seeks to dismiss plaintiff's claim under Labor Law § 241(6) is denied.

In view of the foregoing, defendants' motions are granted to the extent that plaintiff's causes of action for common-law negligence and for violations of Labor Law §§ 200 and 240(1) are dismissed, and all cross claims based on these causes of action are dismissed. That branch of defendants' motions which seek to dismiss plaintiff's claims under Labor Law § 241(6) are denied.

Dated: September 28, 2006

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J.S.C.