

Hooper v Advance Mgt. Servs., Ltd.

2007 NY Slip Op 30842(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 0105431/2005

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Justice

Index Number : 105431/2005

INDEX NO. _____

HOOPER, BILLY W.

MOTION DATE _____

vs

ADVANCED MANAGEMENT

MOTION SEQ. NO. _____

Sequence Number : 002

MOTION CAL. NO. _____

SUMMARY JUDGMENT

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

/ see attached

Cross-Motion: Yes No

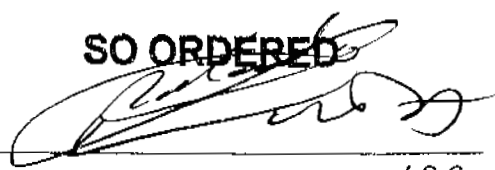
Upon the foregoing papers, it is ordered that this

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 101B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 4/10/07

SO ORDERED



ROLANDO T. ACOSTA ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION ^{JSC}

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Billy W. Hooper,

Plaintiff,

- against -

Advance Management Services, LTD and
325 West 45th Street Owners Corp.,

Defendants.

DECISION/JUDGMENT

Index No. 105431/05

Seq. No. 2

Present:

Rolando T. Acosta
Supreme Court Justice

Advance Management Services, LTD and
325 West 45th Street Owners Corp.,

Third-Party Plaintiffs,

Third-Party Index No. 590919/06

- against -

SND Contracting Corp. and American Elevator
& Machine Corp.,

Third-Party Defendants.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 5000).

The following documents were considered in reviewing defendants/third-party plaintiffs' motion to dismiss the complaint for failure to prove Labor Law §§ 240(1), 241(6), & 200 violations and common law negligence, and plaintiff's cross-motion for summary judgment on his Labor Law 240(1) claim:

Papers	Numbered
Notice of Motion & Affirmation	1 (Exhibits A-I)
Notice of Cross-Motion & Affirmation in Support of Cross-Motion & in Opposition to Motion	2 (Exhibits A-D)

**Reply Affirmation & Affirmation in Opposition
to Cross-Motion**

3-4 (Exhibits A; A-G)

Defendants' motion is GRANTED solely to the extent of dismissing the Labor Law § 200 and common law negligence claims, and plaintiff's cross-motion for an order granting summary judgment against defendants on Labor Law 240(1) liability is GRANTED.

Background.

325 West 45th Street Owners Corp. and Advance Management Services, LTD ("Advance") owned and managed the property located at 325 W. 45th Street in Manhattan. The property was undergoing renovation work on the roof at the time of the incident at issue. On December 2, 2003, plaintiff, who worked for American Elevator and Machine Corp, was taking equipment to the overhead area of the elevator shaft located on the roof of the building. A metal ladder on the roof allowed access into a doorway leading into an area containing various equipment. According to plaintiff, the ladder was supposed to be bolted to the wall. As he stepped on the first rung of the ladder with his left foot, the ladder came towards him and hit him on the knee causing injury. Plaintiff stumbled backwards and the ladder fell to the roof.

According to Mark Kublanov, the building super, he inspected the ladders on the roof prior to the date of the incident on Mondays and Thursdays and never noticed any problems. He specifically stated that the ladder in question was bolted to the wall when he inspected it and noticed no corrosion on the ladder or the bolts fastening it to the wall. Kublanov Deposition at 30-33. Although it is not very clear in Kublanov's testimony, it appears that SND Contracting Corp (third-party defendant) was hired to put up new brick housing on the elevator shafts and new ladders. See Kublanov Deposition at 37 and 39; Third Party Complaint, Defendants' Exhibit C. It is not clear to the Court, however, when SND installed the ladders.

Kublanov and Barbara Kaminsky, the building manager, both stated that Advance did not supervise or control either SND's or American Elevator's work. Defendants Exhibits H & I. There had also been no prior complaints about the ladder in question. Kublanov Deposition at 34 and Defendants' Exhibit I.

In his complaint, plaintiff alleged four causes of action. In his first cause of action, he alleged negligence and his second through fourth, he alleged violations of Labor Law §§ 200, 240(1), and 241(6), respectively. With respect to the Labor Law § 241(6), he did not specify which particular Industrial Code provisions were allegedly violated.

In its motion to dismiss, Advance argued that plaintiff's accident was not the type of accident contemplated by Labor Law 240(1) and that with respect to the Labor Law 241(6) claim, plaintiff failed to particularize the specific Industrial Code violations in his Bill of Particulars or in his Amended Bill of Particulars. As for plaintiff's Labor Law 200 and common law negligence claims, there was no indication that Advance controlled or supervised plaintiff's work nor did it have knowledge of any defect.

Plaintiff cross-moved for summary judgment on his Labor Law 240(1) claim. With respect to Advance's argument regarding the Labor Law 241(6) claim, plaintiff noted that discovery was still on going which "would address the totality of the § 241(6) violations perpetrated by defendants." Affirmation in Support of Cross-Motion and in Opposition to Motion at ¶ 9. He went on to note, however, that "[a]t this juncture, the facts raised in defendants own motion papers support the following section violations by defendants," and he went on to list the following five Industrial Code violation: 12 NYCRR 23-1.21(b)(4)(i); 12 NYCRR 23-1.21(b)(4)(ii); 12 NYCRR 23-1.21(b)(4)(iv); 12 NYCRR 23-1.21(e)(3); 12 NYCRR 23-1.21(b)(3)(iv). Affirmation in Support of Cross-Motion and in Opposition to Motion at ¶ 10.

Analysis

Viewing the evidence in the light most favorable to plaintiff, the party opposing summary judgment, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), Advance has established its prima facie entitlement to dismiss the Labor Law 200 and common law negligence claims only. It is undisputed that Advance did not exercise supervision or control over the work performed by SND and American Elevator, nor did it have actual or constructive knowledge of the defective ladder. Meslin v. The New York Post, 30 A.D.2d 309, 310 (2006).

Turning to the Labor Law 240(1) claim, Advance is incorrect that plaintiff's accident is not the type of accident contemplated by the legislature. Indeed, section 240(1) specifically states that all contractors and owners "in the . . . repairing . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed." The contemplated hazards of section 240(1) include "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level . . ." Rocovich v. Consolidated Company, 78 N.Y.2d 509, 514 (1991).

Here, there is no dispute that the ladder, which should have been bolted to the wall, was not so constructed or placed as to protect plaintiff. Moreover, plaintiff's job involved

a height differential. He was on the roof of the building and his job required that he use the ladder to reach a doorway in the elevator shaft that could not have been accessed other than by use of the ladder in question. Given the elevation differential of the room in the elevator shaft and the roof, which was at a lower level, plaintiff's injury fell within the contemplated hazards against which Labor Law 240(1) was designed to protect. Rocovich v. Consolidated Company, 78 N.Y.2d at 214.

Contrary to Advance's assertions, Vasiliades v. Lehrer, McGovern & Bovis, 32 A.D.3d 1170 (1st Dept. 2004), is not controlling inasmuch as that case was essentially a slip and fall case. There, the plaintiff set up an eight-foot A-frame ladder to install temporary lighting. As he "grabbed the ladder with his right hand and placed his right foot on the first rung, and while his left foot was still on the floor, the ladder slid out from under him, and he fell into a pile of rubble," and was injured. Id. at 401. The Appellate Division, First Department held that Labor Law 240 did not apply because "plaintiff did not fall from the ladder, but rather was still on the ground and slipped due to a wet floor. Thus, Labor Law § 240 (1) is inapplicable, since the statute was designed to protect workers 'from harm directly flowing from the application of the force of gravity to an object or person' and the 'right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed [safety device]' (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501)." Id. Here, unlike Vasiliades, the ladder was not properly constructed to afford plaintiff the protection that he needed. He did not slip, rather, the ladder, which should have been bolted to the wall, came loose causing plaintiff to injure his knee.¹ Accordingly, Advance failed to establish its entitlement to summary judgment dismissing the Labor Law 240(1) claim, and therefore, that portion of its motion is denied.

Advance seeks to dismiss plaintiff's Labor Law 241(6) claim because plaintiff failed to specify the Industrial Code provisions that Advance had allegedly violated in the complaint or the bill of particulars, and only listed them for the first time in response to Advance's motion to dismiss. Although some Courts have taken this approach, see, e.g., Brunette v. Time Warner Entertainment Co., 32 A.D.2d 1170 (2nd Dept. 2006), this Court has the discretion to allow plaintiff to supplement his bill of particulars provided that it does not change the theory of liability already advanced. CPLR § 3043(c); Alvarado v. New York

1. Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001) is inapposite inasmuch as that case addresses Labor Law 240(1) as it applies to falling objects. The present case is not a falling objects case, but rather a faulty constructed ladder case, and according to Rocovich v. Consolidated Company, 78 N.Y.2d 509, 514 (1991), plaintiff's accident is covered under Labor Law 240(1).

City Housing Authority, 302 A.D.2d 264, 265 (1st Dept. 2003). Here, plaintiff has not change the theory of liability by specifying the following five Industrial Code violation: 12 NYCRR 23-1.21(b)(4)(i); 12 NYCRR 23-1.21(b)(4)(ii); 12 NYCRR 23-1.21(b)(4)(iv); 12 NYCRR 23-1.21(e)(3); 12 NYCRR 23-1.21(b)(3)(iv). Indeed, each of these Code provision deal with ladders, and there are triable issues of fact as to whether these provision were violated. Accordingly, this portion of Advance's motion is also denied.

Plaintiff's cross-motion for liability against Advance pursuant to Labor Law 240(1) is granted for the reasons stated above. Accordingly, it is


ORDERED that Advance Management Services, LTD's and 325 West 45th Street Owners Corp.'s motion for an order granting summary judgment dismissing the complaint is GRANTED solely to the extent of dismissing the Labor Law § 200 and common law negligence claims; and it is further

ADJUDGED that plaintiff's cross-motion for an order granting summary judgment on Labor Law 240(1) liability against Advance Management Services, LTD and 325 West 45th Street Owners Corp. is GRANTED.

This constitutes the Decision, Judgment and Order of the Court.

Dated: April 10, 2007

ENTER

SO ORDERED

Rolando T. Agosta
ROLANDO T. AGOSTA
J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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