

Kalfman v Benjamin Realty Dev. Corp.

2007 NY Slip Op 31363(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0004698/2003

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-16-07
ADJ. DATE 4-05-07
Mot. Seq. # 001 - MotD

-----X		
JASON KAUFMAN and MICHELLE:	:	GREY & GREY, L.L.P.
KAUFMAN,	:	Attorneys for Plaintiffs
	:	360 Main Street
	:	Farmingdale, New York 11735-3298
	:	
Plaintiffs,	:	
	:	
- against -	:	O'CONNOR, OCCONOR, HINTZ, et al.
	:	Attorneys for Defendants
BENJAMIN REALTY DEVELOPMENT CORP.	:	One Huntington Quadrangle, Suite 3C01
COURTHOUSE CORPORATE CENTER, LLC,	:	Melville, New York 11747-4415
COURT PLAZA SENIOR APARTMENTS, L.P.,	:	
ARLEN CONTRACTING COMPANY OF	:	
CENTRAL ISLIP, INC. and ARLEN SENIOR	:	
CONTRACTING COMPANY OF CENTRAL	:	
ISLIP, INC.,	:	
	:	
Defendants.	:	
-----X		
BENJAMIN REALTY DEVELOPMENT CORP.	:	
COURTHOUSE CORPORATE CENTER, LLC,	:	
COURT PLAZA SENIOR APARTMENTS, L.P.,	:	
ARLEN CONTRACTING COMPANY OF	:	
CENTRAL ISLIP, INC. and ARLEN SENIOR	:	
CONTRACTING COMPANY OF CENTRAL	:	
ISLIP, INC	:	
	:	
Third-Party Plaintiffs,	:	
	:	
- against -	:	
	:	
SAV-MOR MECHANICAL, INC.,	:	
	:	
Third-Party Defendant.	:	
-----X		

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 16 - 21; Replying Affidavits and supporting papers 22 - 23; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants, Courthouse Corporate Center, LLC and Arlen Contracting Company of Central Islip, Inc., for an Order pursuant to CPLR 3212 granting them

summary judgment dismissing plaintiffs' complaint is granted to the extent that plaintiffs' Labor Law §§ 240(1) and 200, and common-law negligence causes of action are dismissed, and is otherwise denied.

Injured plaintiff James Kaufman commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence, for injuries he allegedly sustained in a fall at a renovation site on August 19, 2002. His wife, Michele Kaufman, sues derivatively. Plaintiff, an experienced HVAC mechanic, was employed by third-party defendant Sav-Mor Mechanical, Inc. The office building undergoing renovation was owned by defendant Courthouse Corporate Center, LLC, which employed defendant Arlen Contracting Company of Central Islip, Inc. as the general contractor. By stipulation filed February 21, 2006, the third-party action was discontinued. It also appears that the action, as against the remaining defendants, has been discontinued, although the Court's computer records do not reflect the filing of any such notice, stipulation or certificate with the County Clerk.

The injured plaintiff testified at his examination before trial that he was a lead mechanic and that he and a coworker were installing HVAC units and ducts in the ceiling of the seventh floor. To lift the units and larger ducts to the ceiling, they were utilizing a "genie lift" supplied by their employer. The genie lift resembled a large hand truck with forks, although smaller than a fork lift. It was hand operated, had four wheels, and was easily transported. The forks which cradled the HVAC units or ducts were raised and lowered via a hand-powered crank. Plaintiff testified that the units and the ducts were secured to the ceiling by metal straps, and to install the straps he and his partner each used six-foot A-frame fiberglass ladders. The lift would be in the middle of the duct or unit, and they would stand on ladders on opposite sides of the unit. There were normally four straps and plaintiff and his coworker would climb down and move the ladders to the area for installation of each strap. After all the straps were installed, the lift was lowered about 12 inches so that he could make sure the unit or duct was secure and level, and he trimmed the excess strap metal. Plaintiff would descend the ladder, adjust the crank to lower the forks about a foot, and climb back up the ladder to check the unit and trim the straps. Plaintiff testified that, prior to his fall, he had no problem with the ladder or with the genie lift. The cement floor has some unevenness due to age and repairs and he did his best to position the ladder and the lift in even areas. He did not notice any particular problem with the floor near his work before his fall.

Just prior to his fall, plaintiff had gone down the ladder to lower the forks and release the wheel brakes, and then had come back up the ladder. The forks of the lift were in his way and, while standing on the fourth or fifth rung of the ladder, he pushed the genie lift several inches back. However, on this particular trip, the lift toppled over backward and the bottom of the lift hit the bottom of the ladder, kicking the ladder out and propelling plaintiff to the floor, where he sustained the injuries complained of herein.

Labor Law § 240(1), commonly known as the "scaffold law," 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 they had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices

Kaufman v Benjamin Realty Dev. Corp, et al.
Index No. 03-04698
Page No. 3

where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are “scarcely in a position to protect themselves from accident” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). Nevertheless, the “special hazards” afforded by § 240(1) “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 Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]). 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 (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). An injured plaintiff’s contributory negligence will not exonerate a defendant who has violated § 240(1) (*Raquet v Braun*, 90 NY2d 177, 184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under § 240(1) where there is no evidence of a violation and the proof reveals that the plaintiff’s own negligence was the sole proximate cause of the accident (*Robinson v East Med. Ctr.*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Defendants argue that plaintiff’s Labor Law § 240(1) cause of action must be dismissed because his actions were the sole proximate cause of his accident. They rely upon his deposition testimony that, when moving the genie lift, the arms were always in the down position because the machine would be top heavy if moved while the arms were raised. They also point to his statements that there was no defect in the ladder, it was not unsteady, and he had not placed it on an uneven surface. Therefore, they argue it was plaintiff’s decision to push the genie lift back, while the arms were raised, which caused the accident.

As a general rule, issues of an injured plaintiff’s recalcitrance, i.e. refusing to use a safety device supplied to him which would have prevented the accident (*Cahill v Triborough Bridge & Tunnel Authority*, 4 NY3d 35, 38-40, 790 NYS2d 740 [2004]), or his deliberate misuse or misplacement of a safety device (*Robinson v East Med. Ctr.*, *supra*; *Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra*), must be resolved in defendant’s favor in order to find that there was no violation of § 240(1) and that plaintiff’s actions were the sole proximate cause of the accident. Here however, there is no argument that plaintiff declined to use a safety device or that he misplaced or misused the ladder. Here, the parties agree that ladder did not slip or fall due to a defect in the ladder, it fell because it was hit with the genie lift. Therefore, the Court finds that defendants established that the accident was caused by plaintiff’s action in moving the lift backward with the forks raised. In opposition, plaintiff argues that the genie lift fell backward because of defects in the floor. Assuming that is accurate, as the Court must on summary judgment, such a scenario is insufficient to raise issues of fact for the purposes of defendant’s § 240(1) liability and, therefore, to withstand defendants’ summary judgment motion (see generally, *Zuckerman v City New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, summary judgment dismissing the Labor Law § 240(1) cause of action is granted.

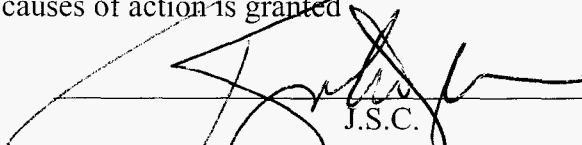
Labor Law § 241(6) requires owners and general contractors to “provide reasonable and adequate protection and safety” for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner’s regulations imposed by § 241(6) is nondelegable

(*Ross v Curtis-Palmer Hydro-Elec. Co., supra; Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a “specific positive command” and not merely “general safety standards” need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see, Ross v Curtis-Palmer Hydro-Elec. Co., supra; Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff’s opposition is confined to defendants’ alleged violations of 12 NYCRR §§ 23-6.1(j)(2), and 23-9.8(e). Plaintiff did not address the remaining Code violations, and in any event they are either too general or not applicable to plaintiff’s accident. As to § 23-9.8, entitled: “Lift and fork trucks,” it comes under subpart § 23-9, entitled “Power-Operated Equipment.” Clearly, the genie lift is not a “power operated” lift and, therefore, 23-9.8(e) is inapplicable and cannot support plaintiff’s Labor Law § 241(6) cause of action. As to § 23-6.1(j), entitled “Hoisting machine,” it provides at subsection (2) “Hoisting machine anchorage. Hoisting machines shall be so constructed, installed and secured in place as to prevent tipping or dislodgment.” Here, there are questions of fact as to the lifts placement and the condition of the floor, and the Court finds that defendants have not established that this provision is too general or that it is inapplicable, as a matter of law (*Wallace v City of New York*, 8 Misc3d 1024A, 803 NYS2d 21 [2005]). Further, while plaintiff’s bill of particulars did not state which subsection of § 23-6.1 was applicable, (j)(2) does not allege new facts and would not prejudice defendants, therefore, the Court, *sua sponte*, grants plaintiff leave to so amend the bill of particulars (*Latino v Nolan & Taylor-Howe Funeral Home*, 300 AD2d 631, 754 NYS2d 289 [2002]). Plaintiff’s amended bill of particulars shall be served no later than thirty days after the service upon counsel of a copy of the instant order with notice of entry. Accordingly, summary judgment as to this alleged violation of the Industrial Code is denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see, Russin v Picciano & Son, supra*) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner and general contractor exercised no supervision or control over the injured plaintiff’s work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]).¹ Therefore, summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence causes of action is granted.

Dated: MAY 21 2007



J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION

Plaintiffs did not oppose dismissal of these causes of action.