SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM, PART 6
HON. JAMES G. STARKEY

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BABOUCAR DIALLO,

Plaintiff,

-against-

PATRICK LaFRIEDA, as Executor of the Estate of LISA LaFRIEDA and PATRICK LaFRIEDA,

Defendant.

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DECISION

INDEX NO.: 18261/2003

Dated: June 29, 2007.

APPEARANCES OF COUNSEL

For the Plaintiff(s):
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Caption: Diallo v. LaFrieda Index No.: 18261/2003

By notice of motion for summary judgment dated December 15, 2006, Defendants PATRICK LaFRIEDA, Individually, and as Executor of the Estate of LISA LaFRIEDA, seek dismissal of plaintiff's complaint in its' entirety. Plaintiff, by notice of cross motion dated February 7, 2007, seeks partial summary judgment as against defendants pursuant to Labor Law § 240(1).

After several adjournments, the parties appeared in Part 6 of this Court for oral argument on April 4, 2007. The Court issued a short form Order dismissing plaintiff's causes of action for negligence and Labor Law § 200 and § 241(6), and reserved decision on plaintiff's claim based upon Labor Law § 240(1) claim with respect to both the original motion and cross motion.

PROCEDURAL BACKGROUND

Plaintiff commenced this action for personal injuries on May 16, 2003 by filing a summons and verified complaint. Issue was joined by defendant's verified answer dated July 29, 2003, and discovery thereafter conducted. A Note of Issue was filed on October 16, 2006, and this motion was timely made within sixty days thereafter.

Plaintiff's complaint and deposition testimony allege that on August 3, 2000, plaintiff was injured when he climbed and stood upon the forks of a forklift owned by his employer, Safi Supplies International (hereinafter "Safi"), in an attempt to turn off a valve controlling the water flow to a ruptured, overhead, exposed water line. As plaintiff was attempting to turn this valve, he lost his footing and fell between the forks suffering injury.

THE FACTS

The undisputed facts are as follows: Plaintiff commenced his employment with Safi in the summer of 1998 as a general laborer in charge of maintenance and repairs. Safi had

previously leased the premises – described as a garage – from defendants. Decedent Defendant LISA LaFRIEDA – the sister of co-defendant– was onsite almost daily prior to the accident as a gratuitous bookkeeper for Safi, and prior to her demise[1] lived in an apartment above the leased premises.

There was a "month to month" verbal rental agreement between Safi and defendants. Under the arrangement, Safi was responsible for all interior repairs and maintenance and defendants for any "structural" repairs to the premises. When the garage was originally rented, there was no bathroom or running water and Safi installed the overhead water pipes to facilitate its' business.[2] The garage was adjacent to a wholesale meat market owned and operated by defendants[3], though there was no interior passageway from the meat market to the garage. The garage was leased to Safi in an "as is" condition, and at no time did defendants provide any ladders, tools, or equipment to either plaintiff or Safi. All plumbing work in the interior portion of the garage was accomplished by Safi, either using its employees or by hiring third party contractors.

Plaintiff, as Safi's employee, was primarily responsible for maintenance and repairs of the water system. Since the premises did not have a heating system, these pipes occasionally ruptured during freezing temperatures and periodically leaked at other times including the date plaintiff was injured (August 3, 2000). Some of the leaks were caused by pushcart vendors pulling on hoses connected to the pipes in the course of cleaning their push carts. Usually Safi employees – including plaintiff– soldered or replaced sections of pipe, though occasionally professional plumbers were called in.

On such occasions, plaintiff routinely and repeatedly utilized the forklift as an elevation

platform, instead of a ladder. On such occasions, he drove the forklift to a place under the appropriate shutoff valve, climbed upon the forks to turn off the valve, then repositioned the forklift to the area where piping required soldering or replacement. A Safi agent initially directed plaintiff to utilize the forklift instead of a ladder, but over time plaintiff began to use the forklift as an elevation platform without further instruction.

Between 6:30 and 7:30AM on August 3, 2000, a section of the system started leaking. Plaintiff noticed the water flowing and – without being told or directed, since it was part of his job duties – drove the forklift to a position under the valve, approximately 30 feet from the leak. As in the past, plaintiff climbed the forks of the forklift, but this time lost his footing and fell, sustaining injury.

LAW AND APPLICATION

Summary judgment is a drastic remedy, and should be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v. Citibank,* 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772 (2003). A failure to make that showing requires the denial of the motion, regardless of the adequacy of the opposing papers. *Ayotte v. Gervasio,* 81 NY 2d 1062, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez v. Prospect Hospital*, *supra,* at 324.

Plaintiff's sole remaining cause of action is based upon Labor Law § 240(1), which reads as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Defendants argue that (1) they did not have knowledge of the work performed; (2) plaintiff was the sole proximate cause – and ultimately responsible– for his own accident by misuse of the forklift; and (3) plaintiff was conducting routine maintenance and not repair of the water supply system at the time of the accident. Defendants urge that on one or more of those bases they are entitled to summary judgment. Plaintiff disputes the first two claims and also asserts that the work performed at the time of the accident was a repair, thereby entitling him to protection under the statute.

Defendant Patrick LaFrieda claims to have had no "knowledge" of the leaking pipe, nor of plaintiff's efforts to address the problem until about an hour after the occurrence when he was advised of the accident by his son, who appeared at the scene just prior to arrival of emergency personnel. Defendants claim that this lack of actual knowledge releases them from coverage under the statute and cite in support of their position, *Abbatiello v. Lancaster Assoc.*, 3 N.Y.3d 46, 781 N.Y.S.2d 477, 814 N.E.2d 784 (2004) and *Lacy v. Long Island Lighting Company*, 293 A.D.2d 718, 741 N.Y.S.2d 558 (2nd Dept. 2002). Each case, however, is distinguishable.

The *Abbatiello* case, *supra*, concerned the claim of a cable repairman called to defendant' s premises by a tenant in the building. The Court of Appeals specifically recognized that an owner "cannot be charged with the duty of providing the safe working conditions contemplated by Labor Law § 240(1) for cable television repair people of whom it is wholly unaware." *Id.* at

52. The Court further held that the owner was not chargeable with constructive notice since the owner was prevented from excluding the worker by Public Services Law §228 (which prohibits a landlord/owner from preventing access to the premises for cable services) and that there was no " nexus between the owner and the worker, whether by lease agreement or grant of an easement or other property interest." *Id.* at 51.

Here, while defendants may have been *actually unaware* of plaintiff's activities on the day in question until after the accident, it is not factually established that defendants did not have at least constructive notice of the plaintiff's activities through the almost daily presence of defendant decedent inside the garage. Further, Defendant Patrick LaFrieda operated his wholesale meat market next door to the garage and his now deceased sister lived in the apartment above it.

The *Lacey* case, *supra*, involved a NYNEX employee working on a residential telephone line when he fell from a ladder placed against a utility pole owned by defendant LILCO. Unlike defendants here, defendant LILCO did not hold title to the residential telephone lines which was the subject of the NYNEX work or have the right to control the way the work was done and thus was ruled not to be an "owner" as contemplated by Labor Law §240(1).

Defendants also argue that plaintiff's misuse of the forklift was the sole proximate cause of his accident, and not the failure of defendants to provide at least one of the devices designated in Labor Law § 240(1). See *Blake v. Neighborhood Housing Service, N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 (2003). For plaintiff to be charged as the sole and superseding proximate cause of his injuries, his act must be unforeseeable, and plaintiff's action of utilizing the forklift as an elevation platform could not be viewed as "an unforeseeable act" in light of the evidence that defendants had constructive notice – and possibly actual notice[4] – prior

to the accident. See *Misirlakis v. East Coast Entertainment Prop.*, 297 A.D.2d 312, 313, 746 N.Y.S.2d 307 (2nd Dept. 2002).

Defendant makes a stronger argument that the work performed by plaintiff was routine maintenance, and not a repair or alteration of the premises, thereby placing him outside the ambit of Labor Law § 240(1). The critical inquiry in determining coverage under the statute is "what type of work the plaintiff was performing at the time of injury." *Joblon v. Solow*, 91 N.Y.2d 457, 465, 672 N.Y.S.2d 286, 695 N.E.2d 237 (1998). An "alteration" within the meaning of Labor Law § 240(1) requires a significant physical change to the configuration or composition of the building or structure. *Ibid.* Therefore, plaintiff clearly was not "altering" the premises within the meaning of the statute.

The question then presented is whether plaintiff's work was routine maintenance or a repair under the statute. Plaintiff argues that turning the valve off – thereby stopping the water flow – was a necessary and integral first step in repairing or replacing the leaking section of pipe.

Defendants urge that in the context described, plaintiff's conduct fell into the category of maintenance and not a repair. Defendants' argument is persuasive. In circumstances where a water supply system regularly developed cracks and leaks, which problems were routinely dealt with by employees such as plaintiff who were employed, in part, for that purpose, turning off a water valve preparatory to corrective action as to a leak would appear, in light of the applicable authorities to fall into the area of maintenance. See *Wein v. Amato Properties, LLC*, 30 A.D.3d 506, 816 N.Y.S.2d 370 (2nd Dept. 2006) (Oil burner repairman fell while replacing a defective boiler safety valve); *Sanacore v. Solla*, 284 A.D.2d 321, 725 N.Y.S.2d 383 (2nd Dept. 2001) (Plaintiff fell from ladder while replacing broken fluorescent light ballast); *Barbarito. V. County*

of Tompkins, 22 A.D.2d 937, 803 N.Y.S.2d 208 (3rd Dept. 2005) (Plaintiff fell while removing links from loose chain on garage door); *Petermann v. Ampal Realty Corp.*, 288 A.D.2d 54, 733 N.Y.S.2d 9 (1st Dept. 2001) (Engineer, performing regular duties, fell off ladder closing valve to allow plumbing work by others to begin).

CONCLUSION

In light of the above, defendants' motion for summary judgment dismissing plaintiff's Labor Law 240(1) claim is granted, plaintiff's cross motion for partial summary judgment is denied, and the complaint is dismissed. This constitutes the decision and order of the Court. Defendant is directed to settle Order on Notice in accordance with this decision.

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[1] Decedent defendant passed away in the summer of 2004.

[2] Safi sublet portions of the premises to various pushcart vendors for storage. The water system was installed for the primary purpose of cleaning the pushcarts, some of which plaintiff cleaned in the course of his duties as Safi's employee. This water delivery system which had a main water pump, serviced approximately 75 pushcarts on the premises.

[3] On occasion, defendants would utilize the forklift upon which plaintiff was injured for their meat market business.

[4] Since defendant decedent died before her deposition was taken, it is unknown if she had actual knowledge of plaintiff's repeated use of the forklift as an elevation platform.