

**Fuchs v Austin Mall Assoc., LLC**

2007 NY Slip Op 31903(U)

June 6, 2007

Supreme Court, Queens County

Docket Number: 0023452/2004

Judge: Patricia P. Satterfield

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action individually, and as administrator of the estate of Peter Fuchs (Fuchs), to recover damages for fatal injuries Fuchs sustained while renovating an elevator in the property located at 70-09 Austin Street, Forest Hills (Property). Austin Mall, the Property owner, previously moved for summary judgment, however, by court order dated January 12, 2007, this court denied the motion with leave to renew. Austin Mall now renews its previous motion for summary judgment.

The record indicates that Austin Mall retained the services of defendant, Elite Elevator Cab Remodeling, Inc. (Elite), for the purpose of renovating the building elevator. On August 30, 2004, the day of the accident, Fuchs was a head mechanic employed by Elite, and was assigned to the Austin Mall project to replace the elevator ceiling and re-tile the elevator floor. According to the deposition testimony of Adam Gilman (Gilman), Fuchs' assistant on the job that day, replacing the elevator ceiling involved removing the old ceiling and installing a prefabricated ceiling with a new lighting system. While finalizing the installation of the new ceiling, Fuchs was electrocuted which, according to Douglas E. Smith (Smith), an investigator for the New York City Department of Buildings, occurred because the main power to the elevator had not been shut off, and because a junction box in the elevator ceiling had not been properly grounded. Smith gave deposition testimony that shutting off the power and grounding the junction box was the responsibility of the installer, Fuchs.

As the movant, it is Austin Mall's burden to establish its prima facie entitlement to summary judgment as a matter of law. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) Upon making a showing of its entitlement to summary judgment, the burden then shifts to plaintiff to produce evidence, in admissible form, to demonstrate the existence of material issues of fact which require a trial of the action. (Alvarez v Prospect Hosp., supra .)

Initially, the court notes that plaintiff concedes that Labor Law §§ 240(1) and 241(a) are inapplicable to the facts and has, therefore, withdrawn these causes of action. Accordingly, those portions of Austin Mall's motion dismissing plaintiff's causes of action predicated on Labor Law §§ 240(1) and 241(a) are granted.

With respect to that portion of the motion dismissing plaintiff's Labor Law § 241(6) claim, Austin Mall has demonstrated its entitlement to summary judgment as a matter of law. Both Austin Mall and plaintiff present compelling arguments regarding whether the work Fuchs was performing at the time of his death should be afforded protection under Labor Law § 241(6),

which covers industrial accidents that occur in the context of construction, demolition and excavation. The Court of Appeals in Nagel v D & R Realty Corp., (99 NY2d 98 [2002]) addressed this issue by deferring to Part 23 of the Industrial Code, in which the Industrial Board of Appeals has defined construction work as follows:

Construction work. All work of the type performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose. (12 NYCRR 23-1.4[b][13].)

The Industrial Board of Appeals has further defined demolition as follows:

Demolition work. The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment. (12 NYCRR 23-1.4[b][16].)

Based upon the deposition transcripts of Gilman and Smith, who described the process of removing the existing ceiling and electrical equipment, installing the new ceiling and electrical equipment, ripping out the old tiles in the floor of the elevator cab and replacing it with new flooring, it is this court's initial impression that the work in which Fuchs was engaged is properly classified as demolition and construction. (Compare Jablon v Solow, 91 NY2d 457 [1998].)

However, this court also recognizes that there are those cases, albeit from other departments, in which the Labor Law § 241(6) claims were dismissed because the worker was not engaged in construction, excavation or demolition which had an impact on the structural integrity of the building or structure, or was an integral part of the construction of a building or structure. (Peluso v 69 Tiemann Owners Corp., 301 AD2d 360 [2003]; Sajta v Latham Four Partnership, 282 AD2d 969 [2001].) From the deposition transcripts, it appears that the subject elevator cab

was encased by a glass elevator shaft, which stood apart from the building, and which was only connected to the building by an exterior walkway on the first and second floors of the building. Therefore, it is plausible to argue that the work performed on the elevator did not constitute a significant impact on the structural integrity of the building itself. However, these same cases do not limit the protected activity to the building only, but extend coverage to "structures," which is consistent with the Industrial Code's definition of "construction" and "demolition," as those definitions also include the term "structure." To the extent that the elevator is a "structure" attached to the building, the coverage of Labor Law § 241(6) should encompass Fuchs' activities.

Nevertheless, to prevail on a Labor Law § 241(6) claim, Fuchs' injuries must have been proximately caused by a violation of an applicable Industrial Code provision that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals. (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993].) Here, as plaintiff failed to set forth any specific Industrial Code provisions allegedly violated by defendants in either the complaint or the bills of particulars, plaintiff's Labor Law § 241(6) must be dismissed. (Brunette v Time Warner Entertainment Co., L.P., 32 AD3d 1170 [2006]; Phelan v State, 238 AD2d 882 [1997].)

In opposition, plaintiff failed to raise a triable issue of fact. It is only now, in plaintiff's affirmation in opposition to Austin Mall's motion, that plaintiff identifies specific provisions of the Industrial Code that were allegedly violated. However, the specific provisions of the Industrial Code should have been identified in either the complaint or in the bill of particulars. (See Joachimssen v Perini Corp., 253 AD2d 737 [1998]; see Charles v City of New York, 227 AD2d 429 [1996].) Further, plaintiff's contention that New York City Administrative Code § 27-3017 forms the basis for Austin Mall's liability under Labor Law § 241(6) is without merit. "Only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under [Labor Law §241 (6)]." (Heller v 83rd Street Investors Ltd. Partnership, 228 AD2d 371 [1996]; Dowd v City of New York, \_\_\_ AD3d \_\_\_, 2007 NY Slip Op 04439 [2<sup>nd</sup> Dept, May 22, 2007].)

Austin Mall has also established its entitlement to summary judgment dismissing plaintiff's Labor Law § 200 cause of action. Labor Law § 200 codifies the common-law duty of owners and general contractors to provide workers with a safe place to work. (Haider v Davis, 35 AD3d 363 [2006].) Implicit to this duty is the precondition that "the party charged with that responsibility ha[s] the authority to control the activity bringing about the

injury.” (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981].) Therefore, “[w]here the alleged defect or dangerous condition arises from the contractor’s methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200.” (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993].) Based on the submitted deposition testimony, it is apparent that Austin Mall did not supervise Fuchs’ work. Further, the dangerous condition, having not shut down the power to the elevator and having not grounded the junction box, resulted from Fuchs’ own failure and method in conducting his work.

Plaintiff failed to raise a triable issue of fact with respect to the Labor Law § 200 claim. According to the deposition testimony of Seeram Ramnarine (Mike), the Austin Mall employee who directed Fuchs to the elevator on the day of the accident, Fuchs initially requested Mike to shut off the power to the elevator, but then stopped Mike and directed him to leave the power on. Plaintiff suggests that this court should not trust the credibility of Mike’s testimony, given Gilman’s testimony that on similar jobs, Fuchs made certain that the power to the elevator was shut off. However, even if Mike had failed to shut off the power, as initially requested, Smith’s testimony establishes that it was Fuchs’ ultimate responsibility to make sure that the main power was shut down and that the junction box was properly grounded.

Accordingly, Austin Mall’s motion for summary judgment is granted, and plaintiff’s complaint is dismissed solely as against Austin Mall.

Dated: June 6, 2007

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J.S.C.