

Bongiorni v City of New York

2007 NY Slip Op 32357(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0106214/2004

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
Index Number : 106214/2004
J.S.C.

PART S

BONGIORNI, JEFFERY

vs
CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUL 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 7/25/07



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
JEFFREY BONGIORNI,

Plaintiff,

Index No.
106214/04
Seq. 002 and 003

- against -

Decision and
Order

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE
DEPARTMENT and KREISLER BORG FLORMAN
GENERAL CONSTRUCTION, INC.,

Defendants.

-----X
HON. EILEEN A. RAKOWER

Jeffrey Bongiorno ("plaintiff") brings this action for personal injuries he allegedly sustained while he was performing construction/demolition work as part of a major renovation project of Firehouse Ladder Co. 25, located at 205 West 77th Street in the County and State of New York on June 3, 2003. The City of New York ("City") owns the subject premises along with the New York City Fire Department ("FDNY"), and hired Kreisler Borg Florman General Construction ("Kreisler") as the construction manager for this renovation project, among others projects.

City brings this motion for summary judgment as against Kreisler for indemnity. Kreisler, by separate motion, moves for summary judgment as against plaintiff, seeking to dismiss all claims and cross claims as against it. City cross moves as against plaintiff for summary judgment dismissing all claims and cross claims as against it. Plaintiff cross moves for partial summary judgment for a finding of liability pursuant to Labor Law §§ 240(1) and 241(6) as against all defendants.

Plaintiff, an employee of subcontractor Brickens Construction Company ("Brickens"), had been working at the accident site for some six weeks doing interior

demolition. The renovation project included the demolition of the street level floor of the firehouse, jack hammering the cement floor that existed, and replacing it. Brickens, days before plaintiff's accident, had installed a conveyor belt going up through an opening in the basement ceiling to carry the broken pieces of jack hammered cement up to a garbage container at street level. Plaintiff was stationed in the basement on the date of the accident, while Brickens' men upstairs on the first floor were jackhammering the cement floor. Plaintiff, provided with a hard hat and safety glasses, was to load the fallen pieces of cement onto the conveyor belt. The conveyor belt was being used to hoist the debris up from the cellar floor to the street level 12-13 feet above. Plaintiff was injured when a large piece of cement tumbled down the conveyer belt. Kreisler had a safety officer there at the job site. However, Kreisler denies that it had responsibility to conduct safety inspections at the work site. Indeed, Kreisler alleges that City had a safety unit on the job site, that had the authority to stop work if they came across an unsafe condition. (See, Chakraborty deposition at page 13.)

The first question before the court is whether the conveyor belt used here is a safety device contemplated by Labor Law §240(1) which states, in relevant part:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect . . . 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.

Kreisler argues that Labor Law §240(1) is inapplicable since plaintiff was working on the cellar floor and not performing elevation-related work. Kreisler asserts that the expert affidavit of Kathleen V. Hopkins, a certified Site Safety Manager, demonstrates that the accident was the result of a one-time major overloading of the conveyor belt and that there was nothing unsafe with the set up of the conveyor belt. Since plaintiff himself improperly loaded the conveyor belt, Kreisler claims it cannot be found to be strictly liable.

Plaintiff argues that the City and FDNY, the owners of the premises, and Kreisler, the general contractor present at the work site, are strictly liable pursuant to New York Labor Laws §240(1) and §241(6). Plaintiff supplements Kreisler's exhibits

with his own expert affidavit of Nicholas Bellizzi, P.E., a civil engineer. Plaintiff asserts that the rock debris tumbled down a conveyor belt that was void of any safety devices to prevent the falling of an object. Thus, this falling object comes within the purview of Labor Law §§240(1) and 241(6).

Labor Law §240(1) was enacted to protect workers from the exceptionally dangerous conditions posed by elevation differentials at work sites, where workers labor under unique gravity related hazards which can result in falling from a height differential, or being struck by an object which falls from a height differential. Where the claim regards a falling object, plaintiff must show that the object fell while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259[2001]). Labor Law §240(1) is applicable when the hazards concern the threat of gravity related injury 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.*, 78 N.Y.2d 509, 514[1991]).

It is undisputed that plaintiff was hit by a piece of cement that was placed on the conveyer belt at the cellar level where plaintiff was positioned and was being carried 12-13 feet up to the floor above. Both experts agree that the conveyor was at an incline up from the cellar to the first floor above. Those items loaded onto the conveyor belt were subject to the forces of gravity. The Court finds that the conveyor was being used as a hoist to transport debris from one elevation to another. Thus, it constitutes a device contemplated by Labor Law §240(1), which should have been “constructed, placed and operated as to give proper protection to a person so employed.”

The court next turns to plaintiff’s Labor Law §241(6) claim. Labor Law §241(6) states, in relevant part:

All areas in which construction, excavation, or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work. . .shall comply therewith.

In order to prevail under a §241(6) claim, plaintiff must first establish that there has been a violation of a specific Industrial Code section which calls for a particular standard of conduct. Here, plaintiff alleges that City, FDNY and Kresiler violated 12 NYCRR §§23-1.7(a)(1), 23-9.3(d) and 23-03.3(e).

12 NYCRR §23-1.7(a)(1) states, in relevant part:

(a) Overhead hazards.

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

12 NYCRR §23-9.3(d) states:

(d) Conveyors and cableways, Overhead protection.

Where persons work or pass directly beneath a conveyor, overhead protection in compliance with this Part (rule) shall be provided.

12 NYCRR §23-3.3(e) states:

(e) Methods of operation

Where the demolition of any building or other structure is being performed by hand, debris, bricks and any other materials shall be removed as follows:

(1) By means of chutes constructed and installed in compliance with this Part (rule);

(2) By means of buckets or hoists; or

(3) Through openings in the floors of the building or other structure in compliance with this section.

Nicholas Bellizzi, plaintiff's expert civil engineer, states that "it is well known and recognized in the industry that side guards, side boards, netting or screens, are necessary to prevent items placed on the conveyor from slipping, sliding, falling, or vibrating off the elevated moving conveyor belt." He concludes "with a reasonable degree of engineering certainty that the unguarded and unprotected conveyor was a clear violation of . . . §241(6) of the Labor Law," encompassing the above sited sections of the industrial code.

Kathleen V. Hopkins, R.N., CSSM, an expert in Site Safety, states:

I have seen this same type of conveyor belt used in demolition many times in my twenty-seven (27) years of performing construction site safety inspections and audits and there does not appear to be anything unsafe with the set up of the conveyor belt. Plaintiff was provided with a hard hat and safety glasses and was wearing them at the time of the incident. Plaintiff testified at his sworn deposition that he was trained for the use of the conveyor belt by his foreman . . . Based on the evidence and testimony available, the Plaintiff did not personally follow that training. It is apparent that the cause of this accident was a one-time major overloading (25-30lb. Piece of debris) of the conveyor belt by the Plaintiff that no one could have foreseen.

It is not clear, as a matter of law, that there was a violation of the above sited sections of the Industrial Code. This accident did not occur directly beneath a conveyor, it is not apparent that overhead protection described in the statute would have been practicable in the process of demolishing the concrete floor above, and finally, the debris was being removed using buckets and the conveyor belt as a hoist. Thus, there is an issue of fact which precludes summary judgment on the Labor Law § 241(6) claim.

City moves for summary judgment directing that Kreisler indemnify City pursuant to the contract between the two parties. City supplies the contract and points

to Article 10, requiring Kreisler to maintain comprehensive general liability insurance naming City as an additional insured, and Article 11, which states

If persons or property of the City, or of others sustain loss, damage or injury resulting, either directly or indirectly from the acts, conduct, omission, negligence, carelessness or lack of good faith of the CM [Kreisler] or its officers, agents, employees, or any person, firm, company, agent or others engaged by the CM hereunder, in their performance of this Contract, or from his or their failure to comply with any of the provisions of this Contract or of law, the CM shall indemnify and hold the City harmless from any and all claims and judgments for damages and from costs and expenses to which the City may be subjected or which it may suffer or incur by reason thereof.

The contract also directs that Kreisler

shall indemnify and hold harmless the Commissioner and the City, each officer, agent and employee of the Commissioner and the City, against all claims against any of them . . . arising out of the negligent performance of services or caused by any negligent act of the CM or anyone employed by the CM, in the performance of this Contract.

City, as the owner of the premises, is strictly liable for plaintiff's injuries under Labor Law §§240(1). Pursuant to the contract between the parties, Kreisler must indemnify City.

Wherefore it is hereby

ORDERED that defendant Kreisler Borg Florman General Construction, Inc.'s motion for summary judgment as against plaintiff is denied, and it is further

ORDERED that defendant the City of New York's cross motion for summary judgment as against plaintiff is denied; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment is granted on the issue of liability with respect to the Labor Law § 240 claim; and it is further

ORDERED that defendant the City of New York's motion for summary judgment as against defendant Kreislser Borg Florman General Construction, Inc. for indemnification is granted.

This constitutes the decision and order of the Court.

All other relief requested is denied.

DATED: JULY 25, 2007



EILEEN A. RAKOWER, J.S.C

FILED
JUL 31 2007
NEW YORK
COUNTY CLERKS OFFICE