

Russell v The Pierpont Morgan Lib.

2007 NY Slip Op 32493(U)

August 10, 2007

Supreme Court, New York County

Docket Number: 0108822/2005

Judge: Jane S. Solomon

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.

FILED ON 8/13/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 108822/2005
RUSSELL, DAVID
vs
PIERPONT MORGAN LIBRARY
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/30/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
<u>1-3</u>
<u>4-5</u>
<u>6-7</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

NB 9/17/07 @ 2PM PreTrial conf set at end of decision.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/10/07

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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 : IAS PART 55

-----X

DAVID RUSSELL and MAUREEN RUSSELL,

Plaintiffs,

-against-

INDEX NO. 108822/05

THE PIERPONT MORGAN LIBRARY and
F.J. SCIAME CONSTRUCTION CO., INC.,

DECISION AND ORDER

Defendants.

-----X

F.J. SCIAME CONSTRUCTION CO., INC.,

Third Party Plaintiff,

-against-

INDEX NO. 590078/06

JOSEF GARTNER USA, INC.,

Third Party Defendant.

-----X

JANE S. SOLOMON, J.

Plaintiff David Russell ("Russell") alleges that he was injured in a construction site accident at the Pierpont Morgan Library ("Library") in Manhattan. He sued the Library and its general contractor, defendant F.J. Sciame Construction Co., Inc. ("Sciame") for negligence and under sections 200, 240(1) and 241(6) of the Labor Law. Defendants sued Sciame's subcontractor, Josef Gartner USA, Inc. ("Josef Gartner"), for contribution and common law and contractual indemnification.

On this motion, defendants move for summary judgment dismissing the complaint. Russell has withdrawn his claim under

Labor Law section 240(1), but otherwise opposes the motion.

Russell contends that on January 8, 2005, he was an iron worker employed to work on a major renovation at the Library. He was directed by his employer to install gutters on the Library roof. At the end of his shift, he put away his tools in a room approximately fifteen feet square that he described as an open space. As he turned around and began to walk away, he tripped and fell over a two-inch height differential in the floor, sustaining injuries.

The project design provided for gaps in the floor into which vertical glass panels were to be installed. Once the glass was installed, pedestrians would not pass over the gaps. In addition, the floor on either side of the particular gap where Russell fell was not level, presenting a height differential of approximately two to three inches. Russell tripped on one of these gaps (which had once been covered by plywood before the date of the accident). Russell presents affidavits of two co-workers who claim that they had complained of this condition before the accident.¹

Sciame employed superintendents and a safety director,

¹ Defendants complain that plaintiffs did not disclose the identity of one of these affiants (James Behrens, who states that he complained directly to a Sciame employee) before the note of issue was filed. However, the other witness was disclosed; issues relating to preclusion may be addressed at the pre-trial conference directed below.

whose duties included performing spot checks. The superintendents also performed daily walkthroughs on the construction site to look for unsafe conditions. Where an unsafe condition was found, the contractor responsible for the work would be directed to remedy it; if the condition was not amenable to a simple fix, a barricade might be installed.

The Claim Under Labor Law section 200

Section 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work. Comes v NYS Elec. & Gas Corp., 82 NY2d 876 (1993). Where the alleged defect or dangerous condition arises from a subcontractor's methods or materials, and the owner and general contractor exercised no supervisory control over the operation, no liability attaches to the owner and general contractor. Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993).

The alleged dangerous condition in this case was an unguarded gap, with a height differential, that was in accordance with the design approved by the Library. It was not a defect, and did not arise from a subcontractor's methods or materials. The condition was not transient. The height differential in the floor was left in an unguarded condition. Indeed, the witness for Sciame testified at his deposition that he was aware that

glass was to be installed at that location on a later date.

Defendants further contend that the condition was open and obvious, so they had no duty to protect workers from the hazard. However, Russell testified that he was turning toward the gap when he fell, so he did not see it. With a height differential of this magnitude, it cannot be said as a matter of law that it was so open and obvious that defendants had no duty to protect workers from the hazard, and this issue is better left to the trier of fact. Accordingly, defendants' motion is denied with respect to Labor Law section 200.

The Claim Under Labor Law section 241(6)

Defendants contend that plaintiffs have failed to allege a claim under Labor Law section 241(6) because none of the sections of the Industrial Code cited by plaintiffs are applicable to this action. In opposition, plaintiffs rely only on Industrial Code sections 23-1.7(e)(1) and 23-1.7(e)(2), which provide as follows:

23-1.7 Protection from general hazards.

* * *

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

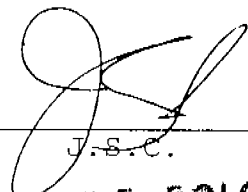
These sections are not applicable to this action because Russell did not trip over debris or scattered tools or materials; he tripped over a permanent structure. Accordingly, section 23-1.7(e)(2) does not apply to these facts. Neither does section 23-1.7(e)(1), because Russell's accident did not occur in a passageway within the meaning of the Code. Since plaintiffs have not alleged an actionable violation of the Industrial Code, the claim under Labor Law section 241(6) must be dismissed. Accordingly, it hereby is

ORDERED that defendants' motion for summary judgment is granted to the extent that the plaintiffs' claims under Labor Law sections 240(1) and 241(6) are dismissed, and otherwise is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on September 17, 2006 at 2 PM.

Dated: August 10, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE