SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3

Index No.: 13002/2002
Motion No.: 4

SAMUEL EISENSTEIN and LINDA EISENSTEIN,

Plaintiffs

against

THE BOARD OF MANAGERS OF THE OAKS AT LA TOURETTE CONDOMINIUM SECTIONS I-IV,

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves this court for an order: 1) granting leave for the plaintiff to file a late summary judgment motion; and 2) seeking summary judgment on liability on the plaintiffs' first cause of action alleging a violation of Labor Law § 240(1).

In this action, there has been numerous motions regarding summary judgment of the plaintiffs' labor law cause of action. Specifically, the defendant had originally moved this Court for an order dismissing the plaintiffs' cause of action alleging Labor Law violations. On January 31, 2006, this Court granted the defendant's motion holding that the plaintiff was engaged in routine maintenance and not repair work at the time of his fall and therefore, was not entitled to the protection of the Labor Law. That very same day, the Appellate Division, Second Department, issued a controlling decision in *Fitzpatrick v. State of New York* 25 AD3d 755. In *Fitzpatrick,* the Appellate Division held, on facts very similar to the ones in the case at bar, that "the replacement of the light fixture on the lighting pole transcended mere routine maintenance and was activity protected under the statute." (citing to *Joblon v. Solow,* 91 N.Y.2d 457 [1998]; *Cook v. Presbyterian Homes of W. N.Y.,* 234 A.D.2d 906

[4th Dept 1996]). The plaintiff moved to reargue and then renew which was granted and on September 12, 2006 this Court issued a decision which reinstated the plaintiffs' first cause of action alleging a violation of Labor Law § 240(1).

The plaintiff now seeks leave to file a late summary judgment motion based upon the good cause that the plaintiff could not have moved earlier due to the dismissal of that specific cause of action by this Court on January 31, 2006. The Court agrees and will adjudicate the motion for summary judgment on the merits. (*Brill v. City of New York* 2 NY 3d 648 [2004].)

At the plaintiff's deposition, he testified that he went to the defendant's property on September 12, 2000 to specifically repair a light on a pole due to an outage. He stated that he was told that the light was not working. Upon arriving at the light pole, he placed his fiberglass and aluminum ladder up against the light pole, extended it approximately 25-26 feet and proceeded up the ladder with pliers and a screwdriver. The plaintiff stated that there was no way for him to see if the light was working and to repair the light without going up the ladder. At the top of the ladder, the plaintiff took the cover off and covered the photo cell to see if the light was working and then determined that power was going into the fixture from the transformer. He then had to check the voltage, capacitor, and igniter. The plaintiff then descended the ladder to retrieve a new bulb, climbed the ladder, replaced the bulb, re-installed the cover and proceeded back down the ladder. After coming approximately 8 feet down the ladder, the pole began to shake, causing the ladder to slip and the ladder fell to the ground. The plaintiff was holding onto the ladder as he and the ladder both fell to the ground.

The defendant was deposed through David Wheeler, who was employed by Saparn Realty which managed section II of the condominium development. Mr. Wheeler testified that he called the plaintiff's contracting firm to repair a light fixture that would heat up and shut off continuously. He testified that when the plaintiff showed up, he told him where to go and what to fix and that the plaintiff's function was repair work and not routine maintenance.

Based upon the Appellate Division, Second Department's holding in *Fitzpatrick* (supra), the plaintiff is entitled to summary judgment on the issue of liability only. In *Fitzpatrick*, the plaintiff was working on restoring lighting to a parking lot owned by the defendant. The job required the repair of a fixture, as well as the photo cell that turns the light on and off. The plaintiff used a ladder to gain access to the light fixture as well as the photo cell. The plaintiff in *Fitzpatrick* fell while attempting to descend from the roof of the shed for the final time, after he finished installing the new photo cell. Specifically, his ladder twisted as he was stepping onto it from the shed. The Court noted that Fitzpatrick's "replacement of the photo cell should not be viewed in isolation from the totality of his activities" which included replacement of the neglected fixture, to restore light to the parking lot.

In this action, the plaintiff acted very much like the plaintiff in *Fitzpatrick* in that he had to investigate the cause of the problem and repair same. Therefore, the actions of the plaintiff in this action would constitute a repair and not routine maintenance, entitling the plaintiff to the protection of Labor Law § 240.

Labor Law Section 240(1) affords protection to workers who are exposed to the risks of working at elevated heights. (*Blake v. Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280 [2003].) The statute was designed to prevent gravity-related accidents by imposing strict liability upon owners, contractors and their agents upon proof that inadequate safety precautions proximately caused the injury (*Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509 [1991]). It is well settled that New York's Labor Law § 240(1) imposes a non-delegable duty upon owners and general contractors to furnish, erect, or cause to be furnished or erected, devices to give proper protection and safety to people working upon a building or structure. Furthermore, absolute liability is imposed upon an owner or general contractor for failure to comply with this statute when such a failure is a contributing factor to the accident (*Zimmer v. Chemung County Performing Arts. Inc.* 65 NY2d 513 [1985]). Actual or constructive notice on the part of the owner or general contractor is not required to impose liability (*Miller v. Perillo* 1 AD2d 389 [1st Dept 1979]). Liability is imposed regardless of the degree of control over the work performed (*Haimes v. New York Telephone,* 46 NY2d 132 [1978]), and regardless of the injured party's own comparative negligence or assumption

of risk (*Zimmer v. Chemung County Performing Arts,* supra). Furthermore, a ladder moving, breaking, or collapsing by itself establishes a *prima facie* case under New York's Labor Law (*Fitzpatrick v. State* 25 AD3d 755 [2d Dept 2006]; *Peralta v. AT&T Co.* 29 AD3d 493 [1st Dept 2006]).

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion for summary judgment on liability only is granted; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **October 15, 2007** for a pre-trial conference.

ENTER,

DATED: August 22, 2007

Joseph J. Maltese
Justice of the Supreme Court