

Fernandes v Skanska USA Bldg. Inc.

2007 NY Slip Op 34598(U)

February 21, 2007

Supreme Court, New York County

Docket Number: 109840/04

Judge: Rolando T. Acosta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 61**

Gabriel Fernandes,

Plaintiff,

- against -

Skanska USA Building Inc. and Barney Skanska USA,

Defendants.

DECISION/ORDER

Index No. 109840/04

Seq. No. 1

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendants' motion pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation & Affidavits	1 (Exhibits A-D)
Affirmation in Opposition	2 (Exhibits A-C)
Defendant's Reply Affirmation	3 (Exhibit A)
<u>Background</u>	

FILED
FEB 27 2007
COUNTY CLERK'S
NEW YORK

Defendant Skanska USA Building Inc ("Skanska") was the "Design/Builder" of a runway at JFK Airport. According to Joseph Carzzarella, the lead superintendent for Skanska, Skanska's role was solely to provide construction management services, which were "limited to scheduling and coordinating the various contractors, monitoring the overall conduct and progress of the work, and taking steps . . . to assure that the contractors adhere to the terms of their contracts. . ." Carzzarella Affidavit at ¶ 4. "Skanska did not control, supervise, direct, devise, or have any involvement at all with the means and methods by which any contractor . . . or its employees performed their work. The means and methods by which the work of any contractor . . . was done, and by which employees of any contractor. . . performed their work, were determined solely by that contractor and its own employees." Carzzarella Affidavit at ¶ 6.

Plaintiff was an employee of Ruttura & Sons Construction Co (“Ruttura”), who was the concrete contractor. On April 16, 2003, plaintiff was instructed to assist in the removal of certain concrete forms that were used to hold wet concrete in place until the concrete dried. The forms were held in place by metal rods approximately three to three and one half feet in height and about two inches in diameter. The rods would be jack-hammered in the ground about six to ten inches. Plaintiff removed between fifty and sixty rods that day, most manually using what he referred to as a wrench.

For rods that could not be manually removed, Ruttura with Skanska’s consent, according to plaintiff, devised a method by which a cable was attached to the bucket of a backhoe. The wrench was attached to the end of the cable. Plaintiff’s job was to place the wrench on the top of the rod, which was held in place solely by friction, and the backhoe operator would lift the basket and remove the rod from the ground. For one particular rod, the wrench kept slipping off, so plaintiff was instructed to hold the wrench in place while the backhoe applied pressure. While doing so, the wrench slipped, and upon the release of the pressure on the back-hoe, the bucket came down and struck plaintiff on the head and cause injuries.

In his complaint, plaintiff asserted Labor Law 240(1); 241(6); and 200 causes of action. Defendant moved to dismiss the complaint on the grounds that the injury plaintiff suffered was not caused by the type of risk which Labor Law 240(1) was intended to cover; that the claimed Industrial Code violations were not applicable to the facts of this case, and that it cannot be held liable under a negligence theory because it did not control or supervise plaintiff’s work.

Analysis

Labor Law 240(1) provides that:

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, 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.

In Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500-501 (1993), the Court of Appeals addressed the nature of the occupational hazards to which Labor Law § 240 (1) was designed to protect against:

Noting that the statute “is to be construed as liberally as may be for the’ accomplishment of the purpose for which it was . . . framed’ ” (Koenig v Patrick Constr. Corp., 298 NY 313, 319, quoting Quigley v Thatcher, 207 NY 66, 68), we held in Rocovich v Consolidated Edison Co. [78 N.Y.2d 509] that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device.

* * *

The "special hazards" to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, DeHaen v Rockwood Sprinkler Co., 258 NY 350). In other words, Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist.(emphasis added).

Thus, in Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001), the Court held that Labor Law 240(1) did not apply when a worker on a scaffold was struck by a falling window totally unrelated to the work that he was performing. It applied, however, in Malloy v. Madison Forty-Five Co., 13 A.D.3d 55 (1st Dept. 2004), where the operator of a backhoe was struck by a metal beam it had transferred into an adjacent dumpster. The Appellate Division, First Department, held that Labor Law 240(1) applied because “defendants failure to provide adequate hoisting devices forced plaintiff to drop the beams into dumpster rather than placing them there.” Likewise, in Sharp v. Scandic Wall Ltd. Partnership, 306 A.D.2d 39 (1st Dept. 2003), the Court held that the injury resulting from the failure to properly place and operate a hoisting device to lower an elevator to ground level was covered under labor law 240(1). The Plaintiff in Sharp was standing on top of the elevator. The Court noted that “while the case is unusual in that the load being hoisted was at the same level as the injured worker, it remains that plaintiff’s injuries were the immediate result of the ‘effects of gravity’ . . . and the ultimate result of the lack of a hoist that was properly placed and operated so as to afford the protection required by the statute.” Id at 40.

Here, viewing the evidence in the light most favorable to plaintiff, the injury was the immediate result of the effect of gravity; that is, the bucket coming down on his head when the tension was unexpectedly released, and the lack of a hoist that was properly placed to afford plaintiff protection. Indeed, plaintiff's expert opined that the wrench should have had a locking mechanism to prevent slippage.

According to defendants, Labor Law 240(1) does not apply to the facts of this case because the rods were being "pried" off the ground rather than being hoisted off the ground over plaintiff's head. This argument lacks merit. Hoisting is defined as "to raise or haul up with a mechanical apparatus." The American Heritage College Dictionary, Third Edition. That is exactly what happened in this case. Metal rods approximately three feet long and two inches in diameter that had been imbedded into the ground about six inches were being hauled up by a mechanical apparatus. And, according to Sharp, the load did not have to be lifted over plaintiff's head. Rather, what is required is that the injury was caused by the effect of gravity and the lack of a proper hoist. Accordingly, defendants have failed to establish their prima facie entitlement to summary judgment dismissing the labor Law 240(1) claim and, thus, that portion of the motion is denied.

To establish liability under Labor Law 241(6), plaintiff must plead and establish a violation of a specific Industrial Code provision. Amato v. State of New York, 241 A.D.2d 400 (1st Dept. 1997). Here plaintiff alleged that defendants violated 23 different Code provisions. Defendants have established their entitlement to summary judgment dismissing the bulk of these Code provisions, except for the following ones: 23-9.4(e)(1)(2); 23-9.4(h)(5); 23-9.5(c).

Specifically, 23.9.4(1) provides that any load handled by a backhoe "shall be suspended from the bucket or bucket arm by means of a wire rope having a safety factor of four," and (2) provides that "such wire rope shall be connected by means of either a closed shackle or safety hook capable of holding four times its intended load." As plaintiff notes, the legislative intent was to prevent slippage or dropping of said load. Defendants argue that 23-9.4(e)(1)(2) do not apply because this provision is entitled "Power shovels and backhoes used for material handling," and the backhoe in this case was "not being used to move materials from one place to another." See Howard I. Edleson Affidavit at ¶ 23. This argument does not make any sense since the rod was clearly material that was being moved from its embedded position to another place. Defendants also argue that plaintiff did not come into contact with the load, but rather, the bucket. Viewing the evidence in the light most favorable to plaintiff, however, he came into contact with the bucket because the cord slipped since it was not properly secured. Cf Gabriel v. The Bold Group, 8 A.D.3d 1058 (4th Dept. 2004)(Labor Law 240(1) applied where plaintiff struck by the hoist itself).

Defendants sought to dismiss Industrial Code 23-9.4(h)(1) & (5) for the same reasons stated above, which this Court has already rejected. Although 23-9.4(h)(1), which provides that "any load lifted by such equipment shall be raised in a vertical plane to minimized swinging during hoisting," should be dismissed because there is no indication that the rod was lifted other than in a vertical plane, 23-9.4(h)(5) is relevant to the facts of this case. 23-9.4(h)(5) provides that "carrying or swinging suspended loads over areas where persons are working or passing is prohibited." Here, defendants have failed to establish their entitlement to summary judgment because the rods were allegedly being suspended in the area where plaintiff was working. Moreover, in Vicari v. Triangle Plaza II, 16 A.D.3d 672 (2nd Dept. 2005), the Appellate Division, Second Department, held that 23-9.4(h)(5) did not apply because the backhoe was not lifting or hoisting anything at the time of the accident. By implication, however, if the backhoe was in operation at the time of the accident, 23-9.4(h)(5) would apply.

Last, 23-9.5 (c) provides, in relevant part, that "[n]o person other than the pitman and the excavating crew shall be permitted to stand within the range of the back of a power shovel or within range of the dipper bucket while the shovel is in operation." According to plaintiff's expert, plaintiff was neither a pitman nor part of an excavating crew. An even though the backhoe was not being used to excavate, the Court in Malloy v. Madison Fourty-Five Co, supra, 13 A.D.3d 55, held that even if a backhoe is used in another capacity, it is still an excavating machine and 23-9.5 applies. Accordingly, defendants also failed to establish their entitlement to summary judgment dismissing this alleged code violation.

Last, with respect to Labor Law 200, plaintiff testified that in addition to Ruttura, Skanska employees gave him instruction "as to hooking up the items on a backhoe to the pins." Plaintiff's Deposition at p. 33, Defendants' Exhibit D. Thus, there are triable issues of fact as to whether Skanska controlled or supervised plaintiff's work.

Accordingly, based on the foregoing, it is hereby

ORDERED that defendant's motion for an order pursuant to C.P.R. 3212 dismissing the complaint, is granted solely to the extent of dismissing that portion of the complaint which alleges Industrial Code violations other than 23-9.4(e)(1)(2), 23-9.4(h)(5), and 23-9.5 (c).

This constitutes the Decision and Order of the Court.

Dated: February 21, 2007

ENTER

FILED
 FEB 27 2007
 COUNTY CLERK'S OFFICE
 JUDICIAL DEPARTMENT
 NEW YORK

SO ORDERED

Rolando T. Acosta

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
 J.S.C.