

Pappas v Sachem Cent. School Dist.

2008 NY Slip Op 30273(U)

January 24, 2008

Supreme Court, Suffolk County

Docket Number: 0008304/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 9-7-07
ADJ. DATE 10-17-07
Mot. Seq. # 001 - MotD
002 - XMD

-----X	
RICHARD PAPPAS,	:
	:
Plaintiff,	:
	:
- against -	:
	:
SACHEM CENTRAL SCHOOL DISTRICT and	:
E.W. HOWELL, CO., INC.,	:
	:
Defendants.	:
-----X	
SACHEM CENTRAL SCHOOL DISTRICT and	:
E.W. HOWELL, CO., INC.,	:
	:
Third-Party Plaintiffs,	:
	:
- against -	:
	:
METROPOLITAN ROOFING SYSTEMS, INC.,	:
	:
Third-Party Defendant.	:
-----X	

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Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 23; Answering Affidavits and supporting papers 24 - 26; Replying Affidavits and supporting papers 26 - 27; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendants/third-party plaintiffs for an Order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint or, alternatively, summary judgment on

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the third-party complaint, is granted to the extent that plaintiff's complaint is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff for an Order pursuant to CPLR 3212 granting him summary judgment as to defendants' liability and leave to serve an amended bill of particulars, is denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he allegedly suffered in a work accident at a school building owned by defendant Sachem Central School District (hereafter Sachem). Plaintiff's employer, Metropolitan Roofing Systems, Inc. (hereafter Metropolitan), was the roofing subcontractor hired by general contractor, E.W. Howell Co., Inc. (hereafter Howell), to perform roofing work at Sachem's building.

Plaintiff testified at his deposition that he was a union mechanic employed by Metropolitan. On the day of his accident he and a coworker were working on the roof, moving a roll of weatherproofing membrane. The rolls were originally placed on the roof by a crane utilized by the vendor supplying the roofing material. Plaintiff estimated that a full roll of weatherproofing membrane weighed about 800 pounds. The particular roll involved in his accident was less than one-half full; therefore plaintiff estimated that it weighed 350 to 400 pounds. He and his coworker had rolled it over the flat roof to a parapet or lip, which was about three feet high. They intended to move it to the flat roof area on the other side of the parapet. Each of them were at a different end of the roll, they had placed their hands inside the roll and had lifted it to about plaintiff's waist. As it reached the top of the three foot wall, plaintiff's coworker, instead of rolling it to the other side of the parapet, threw his end. Plaintiff's hand was still inside the roll, and he suffered the injury to his hand alleged herein.

Labor Law § 240(1), commonly known as the "scaffold law," is designed to protect workers at construction projects against injury from the expected risks of work which is inherently hazardous, such as that posed where there are elevation differentials at the work site (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491, 634 NYS2d 35 [1995]). It mandates the use of enumerated protective devices to prevent injuries from either "a difference between the elevation level of the required work and a lower level or 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 NY2d 509, 514, 577 NYS2d 219 [1991]; *Melo v Consolidated Edison Co.*, 92 NY2d 909, 680 NYS2d 47 [1998]). It imposes absolute liability upon owners and contractors on proof that a violation of the statute was a proximate cause of the injury sustained (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). However, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 727 NYS2d 37 [2001]).

Here, the facts do not support the absolute liability imposed by Labor Law § 240(1). Plaintiff alleges that he was injured when his coworker threw his end of the weatherproofing roll instead of rolling it off the parapet, while his hand was still inside the roll. Plaintiff was standing on the roof, had lifted the

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membrane to his waist, and intended to roll it over the parapet to another part of the roof. Therefore, plaintiff was not struck by a falling object which was improperly hoisted or inadequately secured above him (*compare, Outar v City of New York*, 5 NY3d 731, 799 NYS2d 770 [2005]). “The protections of Labor Law § 240 (1) are not implicated simply because the injury is caused by the effects of gravity upon an object” (*Melo v Consolidated Edison Co., surpa* at 911; *Ross v Curtis-Palmer Hydro-Elec. Co., supra* at 501). While the plaintiff’s hand injury was tangentially related to the effects of gravity upon the roll of weatherproofing he was intending to drop to the other side of the parapet, it was not caused by the limited type of elevation-related hazards contemplated by Labor Law § 240 (1) but rather plaintiff was exposed to the usual and ordinary dangers of a construction site (*Aloi v Structure-Tone*, 2 AD3d 375, 767 NYS2d 832 [2003]; *Hasty v Solvay Mill Ltd.*, 306 AD2d 892, 760 NYS2d 795 [2003]). Accordingly, summary judgment dismissing plaintiff’s Labor Law § 240(1) cause of action is granted to defendants.

Labor Law § 241(6) imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers (*Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 350, 670 NYS2d 816 [1998]). However, it is not self-executing, and to establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502, 601 NYS2d 49 [1993]). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence (*id.* at 503-504). Further, the regulation must be applicable to the facts and the its violation must be the proximate cause of the plaintiff’s injury.

Although plaintiff’s proposed supplemental bill of particulars asserts that defendants violated 55 separate sections of the Industrial Code, plaintiff has confined his arguments to defendants’ alleged violations of the Code found at 12 NYCRR §§ 23-1.7 (f) and 23-1.22 (b) (1),(2) and (3).¹ Section 23-1.7 provides at paragraph (f):

Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Plaintiff reliance on this subsection is based upon the holding in *Smith v M.V. Woods Constr. Co.*, (309 AD2d 1115, 746 NYS2d 749 [2003]), wherein the injured plaintiff was lifting 40-pound cinder blocks from the ground and placing them on an eight-foot high scaffold. In *Smith*, the plaintiff could not reach the top of the scaffold from a makeshift 24-inch high platform that had been constructed with cinder blocks, and therefore had to throw them up over his head onto the scaffold, injuring his back. The Court in *Smith* decided that there was evidence from which the jury could find that defendant violated the regulation by failing to provide plaintiff with a safe means of access to his working level on the scaffold and could find that this failure resulted in the injury to plaintiff’s back. Here however, plaintiff had no difficulty obtaining

¹ The Court has examined the other 53 sections of the Industrial Code set forth in plaintiff’s proposed supplemental bill of particulars and finds them to be either too general or not applicable to the factual scenario presented by plaintiff.

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access to his working level, nor is there any reading of the facts which suggest the need for a vertical passage. Accordingly, the Court finds that section 23-1.7 (f) is inapplicable to plaintiff's accident. Likewise, since 12 NYCRR §§ 23-1.22 (1), (2) and (3) provides the standards for runways and ramps, and the Court has found that plaintiff cannot establish that the lack of a vertical passage, via runway or ramp or otherwise, was a cause of his accident, these sections are also inapplicable. Accordingly, leave to serve the supplemental bill of particulars is denied to plaintiff, and summary judgment dismissing plaintiff's Labor Law § 241(5) cause of action is granted to defendants.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see, Russin v Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 128 [1981]) who exercised control or supervision over the work and either created a dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner and general contractor exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Defendants established their entitlement to summary judgment as to these claims and plaintiff did not rebut defendants' showing with credible evidence to the contrary. Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to defendants.

As plaintiff's complaint has been dismissed in its entirety, plaintiff's cross motion which seeks summary judgment as to defendants' liability, is correspondingly denied. In any event, the Court notes that it was untimely, having been made more than 120 days after the filing of the note of issue (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

The third-party action is severed and shall continue.

Dated: 1/24/08

Emily Pines
 J.S.C.

HON. EMILY PINES
 ___ FINAL DISPOSITION X NON-FINAL DISPOSITION