

Peraza v City of New York

2008 NY Slip Op 30425(U)

February 13, 2008

Supreme Court, New York County

Docket Number: 0100739/2006

Judge: Edward H. Lehner

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.

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

PRESENT: EDWARD H. LEHNER

PART 19

Justice

Index Number : 100739/2006

PERAZA, JOEL A.

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO.

100739-06

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits - Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

FILED FEB 15 2008 NEW YORK COUNTY CLERK'S OFFICE

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

Dated: FEB 13 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
JOEL A. PERAZA,

Plaintiff,

INDEX NO.
100739/06

- against -

THE CITY OF NEW YORK,

Defendant.
-----X

EDWARD H. LEHNER, J.;

Before the court is a motion by defendant for summary judgment dismissing
the complaint.

Plaintiff's claims under Labor Law §200 and common law negligence were dismissed without objection (tr. p. 2). Plaintiff has withdrawn his claims under Labor Law §241(6) for all regulations except 12 NYCRR 23-9.4(h)(1) and 9-4(h)(5)(the "Excavator Regulations") and 12 NYCRR 23-8.1(f)1(iv), (f)(2) and 8.2(d)(the "Crane Regulations")(Id., p. 12). Defendant is not seeking dismissal of plaintiff's Labor Law §241(6) claims based upon purported violation of the Excavator Regulations (Id. p. 11).

Plaintiff contends: that he was employed as a laborer, driving a dump truck with a trailer (plaintiff EBT pp. 18, 21); that he was working on a construction site at 97th Street and Park Avenue (Bill of Particulars, Item 5); that defendant was the general contractor for the construction work and he was employed by a subcontractor

FILED
FEB 15 2008
NEW YORK
COUNTY CLERK'S OFFICE

(complaint, ¶¶ 9, 14); that the truck was transporting handrails from the work site (plaintiff EBT p. 22); that the flatbed of the trailer was two to two and a half feet above ground (Id.); that the handrails were rectangular metal, 20 feet by four inches by six inches weighing between 500 and 600 lbs. (Id. p. 29); that the handrails were moved from the work site by a backhoe with chains (Id. p. 26); that prior to the accident, 6 to 8 handrails had been loaded on the flatbed (Id. p. 27); that the backhoe lifted the handrails over an 8-foot fence at the work site to the trailer (Id. p. 23-24); that a co-worker connected the chains securing the handrails and guided the back end of the handrails (Id. pp. 34, 43) while plaintiff guided the front end of the handrails onto the flatbed of the trailer (Id. p. 40); his left foot was on the trailer flatbed and he felt the handrail fall on his lower left leg (Id. pp. 56-58) and he fell on the ground (Id. p. 60) causing him to sustain a fractured left tibia and left fibula, lacerations and scarring of the left leg (Bill of Particulars, Item 9); and that defendant is liable for improperly securing the handrails under Labor Law §240(1) and Labor Law §241(6) in violating the Excavator Regulations and the Crane Regulations.

Defendant asserts that: the accident occurred while plaintiff and a co-worker, Rene Rodriguez-Arqueta (“Rene”) were loading handrails from the work site onto a flat-bed trailer hitched to a truck (Rene affidavit ¶12, plaintiff EBT p. 22); that they were using a backhoe to load the handrails onto the trailer (Rene affidavit ¶12,

plaintiff EBT p. 26); that the handrail was no more than one foot above the flatbed when its front end moved, striking plaintiff's left leg (Rene affidavit ¶24); that the flatbed trailer was no more than three feet above the job site (Id. ¶15, plaintiff EBT p. 22); and that therefore plaintiff's Labor Law §240(1) claim should be dismissed since there was no elevation risk and his claim under Labor Law §241(6) for violating the Crane Regulations should be dismissed since they are inapplicable to this accident.

“Labor Law §240(1) ... provides that '(a)ll contractors and owners ... shall furnish or erect or cause to be furnished or erected ... 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 (construction workers employed on the premises)' ... (However) 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 required safety device.... The special hazards ... do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity” [Ross v. Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 499-501 (1993)] (italics in original). Put another way, Labor Law §240(1) “has historically been construed in the context of workers injured as a result of inadequate or missing safety equipment at elevated

work sites” [Misseretti v. Mark IV Construction Co. Inc., 86 NY2d 487, 490-491 (1995)]. See also, Melo v. Consolidated Edison Company of New York, Inc., 92 NY2d 909 (1998). The flatbed trailer was not itself an elevated work site, nor was it at an elevated work site, and the handrails were being moved from the work site and not from a higher level of elevation. Therefore, plaintiff has not shown “a significant, inherent risk attributable to an elevation differential” [Buckley v. Columbia Grammar and Preparatory, 44 AD3d 263, 267 (1st Dept. 2007)]. See also, Daley v. City of New York, 277 AD2d 88 (1st Dept. 2000). Plaintiff’s claim under Labor Law §240(1) is therefore dismissed.

The Crane Regulations are as follows:

23-8.1(f) Hoisting the load

“(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

(2) During the hoisting operation the following conditions shall be met:

(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.

(ii) The load shall not contact any obstruction”

23-8.2(d) Mobile crane travel

“(1) A mobile crane traveling to or from one job site to another or traveling on a street or highway shall not carry any jibs, attachments, buckets or other devices or material attached in any way to the boom whether the boom is in the folded position or not.

Exception: A hydraulic crane where the jib is permanently hinged to the boom or any crane where the manufacturer authorizes that the design of such crane guarantees the safe transport of the jib or other attachments.

(2) Mobile cranes shall not travel with suspended loads unless such crane is under the control of a competent, designated person who shall be responsible for the position of the load, boom location, ground support, travel route and speed of movement.

(3) A mobile crane, with or without load, shall not travel with the boom so high that it may bounce back over the cab.”

The Excavation Regulations are as follows:

23-9.4 Power shovels and backhoes used for material handling

“ Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions:

(a) Strength. Such equipment shall be so constructed, placed and operated as to be stable. Such equipment shall be so constructed, placed and operated as to be stable. Such equipment shall not be stressed beyond their capacities as determined by the manufacturers.

(h) General operation.

(1) Any load lifted by such equipment shall be raised in a vertical plane to minimize swing during hoisting.

(5) Carrying or swinging suspended loads over areas where persons are working or passing is prohibited.”

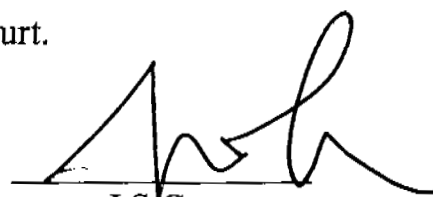
Plaintiff stated that the handrails were being moved by a backhoe with chains (plaintiff EBT p. 26), and defendant also states that the material was being removed from the work site by a backhoe (Rene affidavit, ¶12). The Crane Regulations “apply

to cranes hoisting loads” [McCoy v. Metropolitan Transportation Authority, 38 AD3d 308, 309 (1st Dept. 2007)]. The Excavator Regulations “concern equipment (including backhoes) carrying loads over the area where individuals are working” [Vicari v. Triangle Plaza II, LLC, 16 AD3d 672, 673 (2nd Dept. 2005)]. The Crane Regulations “do not apply because no mechanical hoisting devices or cranes were utilized by the plaintiff in this case” [Toefer v. Long Island Rail Road, 308 AD2d 579, 581 (2nd Dept. 2003)]. Plaintiff's claim under Labor Law §241(6) for violating the Crane Regulations is therefore dismissed.

In sum, plaintiff's claims for breach of Labor Law §200, common law negligence, and Labor Law §240(1) are dismissed. The claims under Labor Law §241(6) are dismissed except for violation of the Excavator Regulations, with respect to which defendant does not request dismissal.

This decision constitutes the order of the court.

Dated: February 13, 2008



J.S.C.

FILED
FEB 15 2008
NEW YORK
COUNTY CLERK'S OFFICE