

Minarovic v Tishman Westside Constr., LLC

2008 NY Slip Op 30672(U)

March 3, 2008

Supreme Court, New York County

Docket Number: 0107090/2004

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MICHAEL MINAROVIC and YVETTE MINAROVIC,

Index No.: 124000/02 *107090/04*

Plaintiffs,

Motion Date: 05/20/05

- v -

Motion Seq. No.: 02

TISHMAN WESTSIDE CONSTRUCTION, LLC, TISHMAN REALTY & CONSTRUCTION CO., INC., TISHMAN CONSTRUCTION CORPORATION of NEW YORK, TISHMAN CONSTRUCTION CORPORATION of MANHATTAN, PRINCE CARPENTRY, INC., DREAM TEAM HOTEL ASSOCIATES, LLC, 42nd ST. DEVELOPMENT CORPORATION, TISHMAN REALTY CORPORATION, TISHMAN HOTEL CORPORATION, STARWOOD HOTELS & RESORTS WORLDWIDE, INC. and ZWICKER ELECTRIC CO., INC.,

Motion Cal. No.: _____

Defendants.

FILED

MAR 11 2008

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 12 were read on this motion and cross motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1-2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants move for summary judgment dismissing plaintiffs' Labor Law §§ 240(1), 241(6) and 200 and common law negligence causes of action. Plaintiffs have discontinued their claim pursuant to Labor Law § 240(1), rendering defendants' motion moot as to such claim. They also cross move for partial summary

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):

judgment of liability on their causes of action for common law negligence, and they oppose defendants' motion as to the remaining Labor Law claims. For the reasons that follow, the court shall deny the motion and cross-motion for summary judgment.

On February 11, 2003, plaintiff Michael Minarovic was employed as a foreman by GER Industries, an architectural millwork company, a subcontractor in the construction of the Westin Hotel at Times Square, New York. On that day, plaintiff claims that while carrying bathroom wood trim strips in a room on the 25th floor of the hotel, he suffered serious injury when a pile of approximately twenty mirrored doors vertically stacked against a wall fell on top of him.

Defendant Tishman Westside Construction LLC ("Tishman Westside") was hired as the construction manager in the hotel construction. Responsible for coordinating all trades as it pertained to the schedule and design and completion dates of the building, Tishman Westside hired GER to install the millwork in the entire building, including wood moldings, cabinetry and wood finishing work.

Defendant Tishman Westside hired defendant Prince Carpentry, Inc. to complete all drywall, framing, and trim work. Prince was also responsible for the installation of mirrored sliding closet doors. To that end, Prince was responsible for meeting and

unloading the truck that delivered the closet doors, as well as transporting the doors to a designated location within the hotel for storage.

Plaintiff alleges that he and his crew were working on the floor beneath the 25th floor installing the millwork, when plaintiff left to go to the 25th floor to obtain wood supplies so that they could continue that work. He alleges that the mirrored doors and GER supplies were stored within the room where he was injured and that his body never came in contact with the mirrored doors before they fell.

Labor Law § 241(6) provides that

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The regulations implementing that code include Industrial Code § 23-2.1(a)(1) that states-

Storage of material or equipment. (1) All building materials shall be stored in a safe and orderly manner. Materials piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thorough fare.

Defendant disputes plaintiffs' claim that Industrial Code § 23-2.1(a)(1) applies to the facts at bar. This court concurs with plaintiff that this case is distinguishable from Kocurek v. Home Depot, 286 AD2d 577 (1st Dept 2001) and finds that provision applicable, since here there is evidence that the accident took

place in a storage room. Plaintiffs' unrebutted expert affidavit raises a triable issue of fact as the negligence of defendants as to the storage of the mirrored doors. Massey v New York City Housing Authority, 230 AD2d 601 (1st Dept 1996).

Plaintiff and defense counsel both describe the doctrine of res ipsa loquitur as an element of a common law negligence cause of action. This court disagrees with that characterization. Res ipsa loquitur refers to a type of circumstantial evidence that creates a rebuttable inference of negligence. Morejon v Rais Construction Company, 7 NY3d 203 (2006).

In any event, neither plaintiffs nor defendants are entitled to summary judgment based on the doctrine of res ipsa loquitur. "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment". This court finds no case where a defendant was awarded summary judgment dismissal based on that doctrine, nor would the court expect to find such precedent since res ipsa has merely a procedural role with respect to evidence and does not in and of itself constitute substantive evidence.

The criteria for the application of res ipsa loquitur are

(1) that the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Corcoran v Banner Super Mkt, 19 NY2d 425 (1967).

On their cross motion, plaintiffs have not established common law negligence as a matter of law on the part of defendants based on *res ipsa loquitur* because, inter alia, they have not demonstrated *prima facie* that the "agency or instrumentality [was] in the exclusive control of defendants." The facts of plaintiffs' case are distinguishable from those in Thomas v New York University Medical Center, 283 AD2d 316, 317 (1st Dept 2001), where "the defendants ... were in joint and exclusive control of plaintiff" and in Kerber v Sarles, 151 AD2d 1031 (4th Dept 1989), where "the agency or instrumentality in the operating room ... was within the exclusive control of the defendants". Here, it is undeniable that neither the mirrored doors nor the room where they were stored were within the exclusive control of the defendants, since plaintiff admitted that without any intervention from any of the defendants, he himself had access to the storage room and the area where the doors were stacked. Nor does the court find Pavon v Rudin, 254 AD2d 143 (1st Dept 1998) analogous, since unlike the pivot hinge that was determined to be an instrumentality exclusively within the control of the landlords and tenants there, the mirrored doors at bar were not concealed specific mechanisms outside of the easy reach of persons other than the defendants.

It is therefore

ORDERED that defendants' motion for summary judgment is DENIED; and it is further

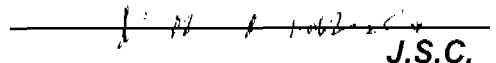
ORDERED that the cross-motion by the plaintiff for partial summary judgment as to liability is DENIED; and it is further

ORDERED that the parties and their counsel are directed to attend a mediation conference before Part Mediation-1 on March 19, 2008, at 10:30 A.M. If the case does not settle in Part Mediation-1, the parties' counsel are directed to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on April 22, 2008 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: March 3, 2008

ENTER:


J.S.C.
DEBRA A. JAMES
J.S.C.