

McGarry v CVP I LLC
2008 NY Slip Op 31104(U)
April 11, 2008
Supreme Court, New York County
Docket Number: 0107635/2005
Judge: Joan Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joaw A. Madden.

PART 11

Justice

Index Number : 107635/2005

MCGARRY, PATRICK SR.

vs.

CVP I, LLC.

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO. 107635-05

MOTION DATE #002

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

re 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 is decided in accordance with the annexed Memorandum Decision & Order.

FILED

APR 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 11, 2008

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

INDEX NO. 107635/2005

-----X
PATRICK MCGARRY SR. and ROLAETT MCGARRY,

Plaintiffs,

-against-

CVP I LLC and AVALON BAY NYC DEVELOPMENT
INC., SORBARA CONSTRUCTION and LAQUILA
CONSTRUCTION,

Defendants.

-----X

JOAN MADDEN, J.:

In this action to recover damages for the injuries allegedly sustained by plaintiff Patrick McGarry (“McGarry”) as the result of a workplace accident, plaintiffs move for partial summary judgment on their claims under Labor Law § 240(1) and § 241(6) (motion seq. 002) . Defendants oppose the motion, and separately move to dismiss plaintiffs’ claims brought under Labor Law § 240(1), § 241(6) and Labor Law § 200 (motion seq. no. 003).¹

Factual Background

McGarry, an employee of non-party, Bovis Lendlease (“Bovis”), was injured on October 7, 2004, at approximately 6:30 am, at a construction site located at 225-235 Chrystie Street, New York, New York, where a residential building project was at the beginning stages of construction (“the Project”). Bovis was the program manager on the Project, and was in charge of safety on the site and hired the site safety manager.

Defendant CVP I, LLC, as owner of the site, hired defendant Avalon Bay, NYC

¹Motion seq. nos. 002 and 003 have been consolidated for disposition.

Development (“Avalon”) as the general contractor for the Project. Defendants Sorbara Construction (“Sorbara”) and Laquilia Construction (“Laquilia”) were hired as subcontractors on the Project. Sorbara was the concrete superstructure contractor at the site and poured the concrete for all the floors except the basement. Laquilia was responsible for excavation, underpinning, and backfilling the base of the new structure. The record shows that Laquilia had stopped working at the site in 2003, which is before the accident at issue.

McGarry’s job at the construction site was to run the outside hoist to bring the workers to the upper portions of the Project. On the date of the accident, McGarry arrived at the work site at around 6:00 a.m. After McGarry got some coffee, he entered the work site from the street and stepped onto a plywood platform and walked towards a shanty to get a helmet and gloves before beginning his work on the hoist. At his deposition, McGarry testified that to get to the shanty, he had to work across the plywood platform, which was approximately three feet above a concrete slab floor, and which had a ‘hod’ or materials hoist at its center.

According to McGarry, the shanty was located approximately twenty feet beyond the platform, and to get to the shanty McGarry had to walk to the left to avoid the materials hoist in the middle of the platform and climb down to the concrete slab three feet below using a temporary stairway made of four or five concrete cinder blocks. McGarry testified that the accident occurred when he stepped onto the first cinder block and “the block went out from under me [and] skidded forward.” (McGarry dep. at 55). McGarry’s description of the accident site and the accident are uncontroverted.

Plaintiffs argue that they are entitled to summary judgment as to liability on their Labor Law § 240 (1) claim as the record demonstrates that McGarry’s injuries were proximately caused

by a violation of the statute. Plaintiffs also assert that they are entitled to summary judgment on their Labor Law § 241(6) claim based on the deposition testimony of Ronald Dulim, a licensed safety manager employed by Bovis at the Project, that OSHA requires that any change in elevation greater than 19 inches requires steps to be constructed.

In opposition to plaintiffs' motion and in support of their own motion for summary judgment, defendants argue that Labor Law § 240 (1) does not apply here as the three foot high platform did not pose the type of elevation risk protected under the statute. In addition, defendants argue that plaintiffs' claim under Labor Law § 241 (6) must be dismissed as plaintiffs has not demonstrated any violation of a specific safety provision of the State Industrial Code. Defendants also argue that plaintiffs do not have a cognizable claim against defendants based on Labor Law § 200.

In opposition to defendants' summary judgment motion, plaintiffs argue, *inter alia*, that 12 NYCRR 23-1.7 (d) and (e), which respectively concern slipping and tripping hazards, were violated as a matter of law. Plaintiffs also assert that summary judgment dismissing their Labor Law § 200 claim is unwarranted as there are triable issues of fact as to whether Avalon supervised the work in the area of the cinder blocks, or created the condition which caused McGarry to fall.

Labor Law Section 240(1)

Section 240(1) of the Labor Law imposes absolute liability on building owners, contractors, and their agents for injuries to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," which result from the failure to provide "proper protection" against dangers associated with elevation differentials

to workers constructing buildings.. Melo v. Consolidated Edison of New York, Inc. , 92 N.Y.2d 909 (1998). To provide such protection, section 240 requires owners and contractors to furnish “scaffolding, hoists, stays ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices.” The statute imposes a non-delegable duty on owners and contractors to provide adequate safety measures at the work site, and is to be construed liberally to accomplish its purpose of placing the ultimate responsibility on the owner and general contractor, rather than individual workers, for safety practices. Zimmer v. Chemung Council for Performing Arts, Inc., 65 N.Y.2d 513, 521 (1985).

When a temporary staircase, like the one made of cinder blocks in this case, is used to access different levels of a work site, such staircase is considered “to be the functional equivalent of a ladder...and comfortably falls within the designation of ‘other devices’ as used in section 240(1).” Wescott v. Shear, 161 AD2d 925, 925 (3d Dept), appeal dismissed, 76 NY2d 846 (1990). See also, Megna v. Tishman Construc. Corp. of Manhattan, 306 AD2d 163, 164 (1st Dept 2003)(holding that “[a]s the temporary stairway was being used to facilitate plaintiff’s access to a different elevation level, [it] therefore [is] indisputably an elevation device within the meaning of Labor Law § 240”).

Moreover, contrary to defendants’ argument, the three foot height differential between the platform and the concrete floor below poses a risk requiring protection under the Labor Law. In fact, in Megna v. Tishman Construc. Corp. of Manhattan, 306 AD2d at 164, the Appellate Division, First Department found liability under Labor Law § 240 where plaintiff fell from a temporary two-step wooden staircase, writing that “the shortness of the distance of plaintiff’s fall—at least two feet according to plaintiff, no more than 16 inches according to defendant—is

irrelevant.”

In addition, defendants’ position that McGarry was not engaged in construction work at the time of the accident is without merit since the record shows that at the time of his fall, McGarry was using the temporary stairs to obtain equipment needed for his duties on the site. See Santamira v. 125 Park Ave. Corp., 249 AD2d 16, 17 (1st Dept 1998)(plaintiff was engaged in work for the purposes of the Labor Law when he fell off a ladder while trying to gain access to the roof to obtain tools for brick replacement work).

Here, as undisputed record indicates that McGarry was injured during the performance of construction work when the temporary stairs constituting an elevation device failed and proximately caused his injuries, plaintiffs are entitled to summary judgment as to liability on their Labor Law § 240 claim against CVP 1 LLC and Avalon.²

Labor Law Section 241(6)

Labor Law § 241(6) requires that owners and contractors “provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” Ross v Curtis-Palmer Hydro-Elcctric Co., supra, 81 NY2d at 502. Claimants must cite specific violations of the Industrial Code regulations for section 241(6) to apply. See, Amato v State of New York, 241 AD2d 400 (1st Dept 1997), lv. denied 91 NY2d 805 (1998). “Only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a

²As subcontractors without any supervisory role at the project, defendants Sorbara and Laquila are not subject to liability under Labor Law § 240. Russin v. Louis N. Picciano & Son, 54 NY2d 311, 318 (1981). Moreover, while it is unclear from the pleadings, it appears that the only claims plaintiffs intended to assert against these defendants are under Labor Law § 200.

basis for liability under that statutory section." Heller v 83rd St. Investors Ltd. Partnership, 228 AD2d 371, 372 (1st Dept), lv denied, 88 NY2d 815 (1996). Thus, even assuming the use of cinder blocks instead of stairs violated OSHA regulations, such violation does not provide a predicate for liability under § 241(6). Schiulaz v. Arnell Construction Corp., 261 AD2d 247, 248 (1st Dept 1999)(alleged OSHA violations insufficient to provide basis for liability under Labor law §241(6)).

Plaintiffs argue, in reply, that § 12 NYCRR 23-1.7 subparts (d) and (e), apply to the circumstances of this case and warrant a grant of summary judgment as to liability on their claims under Labor Law § 241(6). This argument is without merit as subparts (d) and (e) of 12 NYCRR 23-1.7 are not applicable here. Section 12 NYCRR 23-1.7 (d) and (e) provide that:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use floor, passageway, scaffold, platforms or other working surface which is in slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from other obstructions or conditions which cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, there is no evidence that the platform was in a slippery condition in violation of 23-1.7 (d), or that there was dirt, debris or another condition which resulted in a tripping hazard on the platform in violation of 23-1.7(e). Accordingly, as there is no violation of the State

Industrial Code which would provide a basis for liability here, plaintiffs' claims under Labor Law § 241(6) must be dismissed.

Labor Law Section 200

To establish a prima facie case of common-law negligence, a plaintiff is required to show that a defendant either created or had actual notice of the alleged dangerous or defective condition, and that the alleged dangerous condition was the proximate cause of the injury. See, Pouso v City of New York, 177 AD2d 560 (2d Dept 1991).

An owner's or general contractor's common-law duty to maintain a safe workplace is codified in Labor Law section 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963). To be charged with liability under that statute, an owner, general contractor, or construction manager must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981). On the other hand, a showing that a defendant exercised control or supervision over the work causing injury is not necessary when a defendant had actual or constructive notice of the defect causing the injury or was responsible for creating the condition. Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dept 2003)

Here, there is no evidence, and plaintiffs do not claim, that the defendants CVP 1, LLC, Avalon, Sorbara and/or Laquila controlled or supervised the activity causing McGarry's injuries. In fact, McGarry testified that he received instructions and work assignments only from the superintendent employed by Bovis. Furthermore, as indicated above, Laquila was no longer working at the site at the time of McGarry's accident. With respect to Avalon, the general contractor on the site, Avalon's project manager Andrew Forsberg ("Forsberg"), testified that his

company was responsible for contracts, scheduling and budget consideration at the site, whereas Bovis was responsible for site safety. Forsberg also testified that he had no knowledge of the accident, or of the cinder block stairs on which McGarry fell.

Thus, while plaintiffs assert that there are triable issues of fact as to whether Avalon supervised the work in the area of the cinder blocks, or created the condition which caused McGarry to fall, there is no evidence in the record to support this assertion.

Accordingly, the Labor Law § 200 claim must be dismissed.

Conclusion

In view of the above, it is

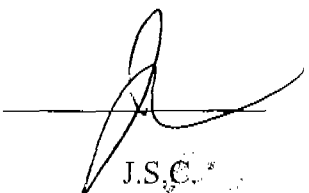
ORDERED that plaintiffs' motion for summary judgment as to liability of their claim under Labor Law §240 is granted with respect to defendants CVP I, LLC and Avalon Bay, NYC Development; and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 241(6) and § 200 claims.

A pretrial conference shall be held in Part 11, room 351, 60 Centre Street on May 22, 2008 at 2:30 pm.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: ~~March~~
April 11, 2008


J.S.C.
