

Mattei v New York City Mission Society

2008 NY Slip Op 31938(U)

July 2, 2008

Supreme Court, New York County

Docket Number: 0119217/2003

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 119217/2003

MATTEI, MARGARITA

vs

MISSION SOCIETY, 143RD STREET

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were 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 & affirmed*

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

FILED
JUL 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/2/08

EMILY JANE GOODMAN ¹⁸⁶

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

MARGARITA MATTEI,

Plaintiff,

-against-

Index No. 119217/03

NEW YORK CITY MISSION SOCIETY et al

Defendants.

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff, an asbestos worker employed by co-defendant TUC Environmental (TUC), fell off an A frame ladder, supplied by TUC, while removing asbestos on November 11, 2000. Defendant New York Mission Society, the owner of the premises, moves for summary judgment dismissing claims under Labor Law §§ 240 (1), 200 and 241 (6).¹

FILED

DISCUSSION

JUL 07 2008

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the

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¹Defendant moves to dismiss a claim under Labor Law § 240 (1) although the complaint does not actually allege that claim, given "the power that the Court has to search the record, and plaintiff's ability to move to amend her complaint."

motion, regardless of the sufficiency of the opposing papers'" *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Labor Law § 240 (1)

"Labor Law § 240 (1) provides special protection to those engaged in the 'erection ... of a building or structure'" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 880 [2003]). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately

secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993])

Defendant moves to dismiss the Labor Law § 240 (1) claim, maintaining that Plaintiff herself was the sole proximate cause of her accident, in that she used a ladder which she testified was "bent" or "a little twisted" on "the sides." Defendant further argues that because Plaintiff testified that other co-workers in the room were also using ladders, she could have borrowed a ladder and averted her accident. Plaintiff originally defaulted in opposing the motion, but the Court permitted plaintiff to put in opposition papers given the lack of prejudice to Defendant. Plaintiff did so, but the opposition is general, vague and non-responsive.

Where a "plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240 (1) [does] not attach" [citations omitted]. Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them

(*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; see also *Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate

cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"). In considering whether a plaintiff's actions were the sole proximate cause of his or her injuries, a court must consider whether the plaintiff's "'normal and logical response'" should have been to ensure that he had the proper equipment to perform the work (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]).

The flaw in Defendant's argument is that Defendant has not established that (1) the fact that the ladder was bent or twisted was the proximate cause of the accident², (2) that even assuming it was, that the "'normal and logical response'" of Plaintiff should have been to not use that ladder (i.e, that it would have been normal and logical to conclude that the fact that the ladder was bent or twisted, made it unsafe), (3) although other ladders were at the site, that they were available to her, and (4) the Plaintiff knew that the ladder was bent or twisted

²Although Plaintiff has not moved for summary judgement in her favor, she is "under no obligation to show that the ladder was defective in some manner or to prove [some defect in the floor] to make out a Labor Law § 240 (1) violation. It was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling" (*Bonanno v Port Authority of New York and New Jersey*, 298 AD2d 269, 270 [1st Dept 2002]).

before she used it, as opposed to after she fell.³

The case cited by Defendant, *Miro v Plaza Construction Corp.* (38 AD3d 454, 455 [1st Dept 2007]) is inapposite because there the Court stated that the "uncontroverted evidence establishes that plaintiff recognized the undesirability of the fireproofing material on his ladder, knew full well that could have requested that his employer provide him with a new, clean ladder, and yet-for no apparent reason-chose not to make such a request." Here, however, there is no evidence that Plaintiff recognized that the ladder was unfit, or that a replacement ladder was available which would have prevented the accident. Thus, Defendant's defense of sole proximate cause is unpersuasive.

Labor Law § 200

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; see also *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

"1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and

³Plaintiff's deposition testimony is unclear on this point. In response to counsel's question, seeking identification of any problems with the ladder, she identified that the ladder was bent or twisted on the sides. However, Plaintiff never stated that her observation was made prior to her use of the ladder as she was never asked that question.

conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 [2d Dept 2007]). When the methods and means of work is involved, an implicit precondition to imposing liability is that

the party charged with [the responsibility to provide workers with a safe place to work] have the authority to control the activity bringing about the injury. Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal quotation marks and citations omitted]

(Smith v 499 Fashion Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]). Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (Hughes v Tishman Construction Corp., 40 AD3d 305, 311 [1st Dept 2007]). When the accident arises from a dangerous

condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and, plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (see Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]; but see Buckley v Columbia Grammar and Preparatory, 841 NYS2d 249 [1st Dept 2007] [finding that the accident, caused by a five-inch spike protruding from an elevator shaft, resulted from the methods and means of the subcontractor's work, and not from a defective condition on the property, court stated in dicta that "in any event, while notice of the injury-causing condition is not enough, supervisory control still being necessary to make an owner or general contractor liable . . . there is no evidence that either defendant had actual or constructive notice of any inherent defect in the elevator shaft"]).

Here, there is no evidence that the accident resulted from either an allegedly dangerous condition on the property or the methods and means of the work. Even if the accident did

result from the methods and means of the work, there is no evidence that Defendant exercised supervision or control over the work. Thus, Defendant is entitled to summary judgment dismissing Plaintiff's Labor Law § 200 claim.

Labor Law § 241(6)

"Labor Law § 241 (6) 'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers' [citations omitted]" (*Giza v New York City School Construction Authority*, 22 AD3d 800, 801 [2d Dept 2005]). "In order to support a cause of action pursuant to Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*Biafora v City of New York*, 27 AD3d 506, 811 NYS2d 764, 766; see also *Locicero v Princeton Restoration*, 25 AD3d 664 [2d Dept 2006]), and which "sets forth specific safety standards" (*Giza*, 22 AD3d at 801).

Defendant moves to dismiss this cause of action because Plaintiff failed to specify (either in the complaint, bill of particulars or in opposition to this motion) any Industrial Code provisions which were violated. Accordingly, that cause of action is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is granted to the extent that the Labor Law § 200 and § 241 (6) claims are dismissed and is denied as to dismissal of the Labor Law § 240 (1) claim, which, although not stated in the complaint, is fairly implied; and it is further

ORDERED that the action shall proceed to trial on the Labor Law § 240 (1) claim on October 20, 2008.

This Constitutes the Decision and Order of the Court.

Dated: July 2, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

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