

Dawson v PJ Venture II LLC
2008 NY Slip Op 33131(U)
November 17, 2008
Supreme Court, New York County
Docket Number: 105951/2006
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Jack A. Miller

PART 11

Justice

Index Number : 105951/2006

DAWSON, THOMAS

VS.

PJ VENTURE II

SEQUENCE NUMBER : 004

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

6-19-08

MOTION SEQ. NO.

MOTION CAL. NO.

in 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
attached Memorandum Decision + Order.

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

FILED

NOV 21 2008

NEW YORK COUNTY CLERK

Dated: Nov. 17, 2008

[Signature]

J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate

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

-----X
THOMAS DAWSON and LAURA DAWSON,
Plaintiffs,

INDEX NO. 105951/2006

-against-

PJ VENTURE II LLC, MARCH ASSOCIATES, INC., KOHL'S
DEPARTMENT STORES, INC. & VISION GENERAL
CONSTRUCTION, INC.,

Defendants.

-----X
KOHL'S DEPARTMENT STORES, INC. & VISION
GENERAL CONSTRUCTION, INC.,
Third-party plaintiffs,

-against-

BAY CRANE SERVICE, INC. and BAY CRANE
SERVICE OF LONG ISLAND, INC.,

Third-party Defendants.

-----X
BAY CRANE SERVICE OF LONG ISLAND, INC.,
Second Third-party plaintiffs,

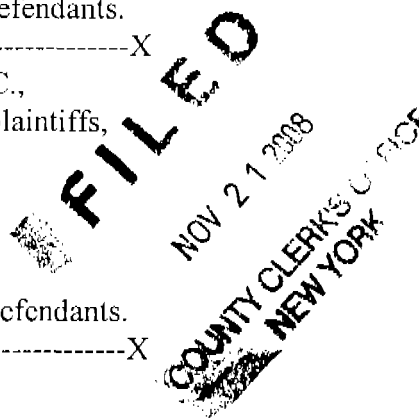
-against-

SWINGLINE CONSTRUCTION, INC.

Second Third-party Defendants.

-----X
JOAN MADDEN, J.:

In this action to recover damages for the injuries allegedly sustained by plaintiff Thomas Dawson ("Dawson") as the result of a workplace accident, plaintiffs move for partial summary judgment on their claim under Labor Law § 240(1). Defendant PJ Ventures III LLC ("PJ Ventures") cross moves to dismiss the claims against it, and plaintiffs oppose the cross motion. Defendants Kohl's Department Stores, Inc. ("Kohl's") and Vision General Construction, Inc.



("Vision") (together the "Kohl defendants") oppose the motion and cross motion.¹ For the reasons below, the motion is granted and the cross motion is denied, except to the extent of dismissing the Labor Law § 200 claim against PJ Venture.

Background

Dawson, an employee of second third-party defendant Swingline Construction, Inc. ("Swingline"), was injured on March 23, 2006, while working on the construction of a Kohl's department store located at Cricket Hill Road in Commack, New York.. PJ Venture owns the land on which the department store was being constructed, and leased it to Kohl's. Vision was the general contractor for the Project and hired Swingline as a subcontractor.

At the time of the accident, Dawson was standing on a piece of steel that was 25 feet off the ground. Before the accident, Dawson, and his partner Paul McGlone ("McGlone") had just finished setting a joint girder that was sent up by a crane by two men on the ground. Dawson and McGlone then waited for the crane to lift up the next piece. Dawson saw the next piece, a tie joist, being hoisted by the crane, and he reached for it with his left hand. As Dawson reached for it, the tie joist jerked away from him causing him to lose balance and fall 25 feet. Dawson was not provided with any safety equipment, such as a harness, lanyard, safety cables or safety lines. Dawson subsequently commenced this action to recover damages under Labor Law §§ 240(1), 241(6) and 200, and discovery is complete.

Plaintiffs now move for summary judgment as to liability on their Labor Law § 240 (1) claim, arguing that the record demonstrates that Dawson's injuries were proximately caused by a violation of the statute.

PJ Venture opposes the motion and cross moves for summary judgment dismissing the

¹Plaintiffs voluntarily discontinued the action against defendant March Associates, Inc.

complaint against it. It argues that it cannot be held liable as an owner, under Labor Law § 240 (1) or § 241 (6) since it owned the land but not the structure built on the land, and that its lessee, Kohl, was responsible for the construction of the building and hired Vision as its general contractor. PJ Ventures also argues that the Labor Law § 200 claim should be dismissed against it as there is no evidence that it supervised, controlled or directed the work at the project.

The Kohl defendants oppose the motion on the ground that the evidence in the record establishes that Dawson's employer, Swingline, did not violate any provisions of the Occupational Safety and Health Act ("OSHA"), including those pertaining to type of work at issue here, i.e. the connecting of steel joints at a height between 15 and 30 feet, and point to Dawson's testimony that it is not the standard in his trade for steel connectors to use personal fall protection systems when working at heights of less than 30 feet. The Kohl defendants argue that they cannot be held liable to plaintiffs since OSHA preempts the provisions of Labor Law § 240(1) requiring that a worker at an elevated work site use safety devices. The Kohl defendants also argue that triable issues of fact exist as to whether safety devices were provided at the site and Dawson refused to use such devices.

The Kohl defendants also oppose the cross-motion, asserting that as the fee owner of the property, PJ Venture is liable under the Labor Law.

Discussion

Labor Law Section 240(1)

Section 240(1) of the Labor Law imposes absolute liability on owners², contractors, and

²The term "owner," for purposes of the applicable sections of the Labor Law, "has not been limited to the titleholder ... [but] has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit"(citation omitted) Bach v Emery Air Freight Corp., 128 AD2d 490, 491 (2d Dept 1987); see also Pacheco v South Bronx Mental Health Council, 179 AD2d 550, 551 (1st Dept 1992), lv.

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. 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 NY2d 513, 521 (1985).

To establish liability under section 240, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained. Bland v. Manocherian, 66 NY2d 452 (1985). Proximate cause is demonstrated based on a showing that a “defendant’s act or failure to act as the statute requires ‘was a substantial cause of the events which produced the injury.’” Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 (1st Dept. 1996), citing Public Administrator of Bronx County v. Trump Village Construction Corp., 177 AD2d 258 (1st Dept 1991). Comparative negligence is not a defense. See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289-290 (2003).

denied, 80 NY2d 754 (1992)(citing *Bach*). Thus, although it is a lessee as opposed to the owner of the property where the accident occurred, Kohl’s does not dispute that it is considered an owner for the purposes of the Labor Law.

Under this standard, summary judgment is warranted as to liability on plaintiffs' Labor Law § 240(1) claim since the uncontroverted record shows that Dawson fell while working at an elevated work site, and that the lack of safety devices required under the statute was a substantial factor in causing his injuries.

Moreover, contrary to the Kohl defendants' position, which is unsupported by any case law, there is "a consensus" that OSHA does not preempt the provisions of the Labor Law since "[OSHA'S] savings clause plainly states that workers' statutory remedies for personal injuries are preserved." Sakellaridis v. Polar Air Cargo, Inc., 104 FSupp2d 160, 163-164 (ED NY 2000). See also, Irwin v. St. Joseph's Inter-Community Hospital, 236 AD2d 123, 129 (4th Dept 1997)(holding that OSIIA's "savings clause expressly preserves from preemption plaintiff's right under section 241(6) to seek damages for injuries arising during the course of plaintiff's employment); Businesses For a Better New York v. Angello, 2007 WL 2892615, *5 (WD NY 2007)(rejecting argument that Labor Law §§ 240(1) and 241(6) are preempted by OSIIA noting that there is a "consensus" that OSIIA's "savings clause" preserves workers' statutory remedies).

Thus, even assuming arguendo that there were no OSHA violations at the work site, the failure to provide safety devices as required under section 240(1) is a basis for liability here. In addition, evidence that the standard in the trade was not to use safety devices to prevent falls from steel beams less than thirty feet off the ground is insufficient to raise a triable issue of fact as to liability under Labor Law § 240(1). Zimmer v. Chemung Council for Performing Arts, Inc., 65 NY2d at 523 ("[W] here an injury is allegedly caused through a violation of section 240(1) which establishes its own unvarying standard, evidence of industry ... practice is immaterial.").

Moreover, unsubstantiated assertions that safety devices were provided at the site but Dawson refused to use such devices are insufficient to raise an issue of fact, particularly as

comparative negligence is not a defense to a claim under Labor Law § 240(1).

Next, PJ Venture cannot avoid absolute liability under Labor Law § 240(1) based on its argument that it is not an owner as defined by the statute. In Sanatass v. Consolidated Investing Co., Inc., 10 NY3d 333 (2008), the Court of Appeals recently held that an owner can be held liable under Labor Law § 240(1) even though it had no notice of, or control over, the injury producing work. In reaching this conclusion, the court relied on its earlier precedents which, “articulated a ‘bright line rule’ that section 240(1) applied to all owners regardless of whether the property was leased out and controlled by another entity or whether the owner had the means to protect the worker.” 10 NY3d at 340, quoting, Coleman v. City of New York, 91 NY2d 821, 822 (1997).

Under this rule as reaffirmed in Sanatass, PJ Venture is absolutely liable as an owner for the purposes of the Labor Law based on its ownership of the property where the accident occurred, and its lack of involvement or control over the building of the structure on its property and its status as an out-of-possession owner are “legally irrelevant.” Id.

Moreover, the case law relied on by PJ Venture is not to the contrary, including Abbatiello v. Lancaster Studio Assocs, 3 NY3d 46 (2004), in which the Court of Appeals found that a building owner could not be held liable under Labor Law § 240(1) for injuries suffered by a cable repair technician who went to the building based on a tenant complaint. In Sanatass, the Court of Appeals explained that although it noted in Abbatiello that the owner was unaware of and did not consent to plaintiff’s presence at the building, its holding was based on its analysis of the Public Service Law which establishes “mandatory access for cable repair workers” and its finding that “but for this statute the plaintiff ‘would be a trespasser upon [the owner’s] property.’” 10 NY3d at 341, quoting Abbatiello, 3 NY3d at 52. Thus unlike earlier cases where

“a nexus existed between the out-of-possession owner and the plaintiff, be it by lease, easement or some other property interest ...[i]n Abbatiello ...the injured cable technician was on the property solely ‘by reason of the provisions of the Public Service Law.’”Id., quoting Abbatiello, 3 NY3d at 51. In Sanatass the court held that unlike Abbatiello where there was an insufficient nexus between the owner and worker, in the case before it, the lease agreement between the owner and tenant provided a basis for imposing liability on the owner under Labor Law § 240. 10 NY3d at 341-342.

Here, in contrast to Abbatiello, and as in Sanatass, a sufficient nexus exists between the owner and the plaintiff by virtue of a lease agreement, so as to hold the owner liable under Labor Law § 240. Additionally, the remainder of cases cited by PJ Venture are either factually distinguishable from the instant case (see e.g. Berrios v. TEG Management Corp., 7 AD3d 555 [2d Dept 2004][holding that owner of property adjacent to the property where the injuries occurred is not an owner for the purposes of the Labor Law]), or not controlling in light of subsequent precedent by the Court of Appeals (see e.g. Ogden v. City of Hudson Development Agency, 277 AD2d 794 [3d Dept 2000][holding that key criteria for owner under Labor Law is right to insist that proper safety practice are followed]).

Accordingly, plaintiffs are entitled to summary judgment as to liability on their Labor Law § 240(1) claim.

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-Electric Co., 81 NY2d 494, 502 (1991).

It has been held that the statute imposes a non-delegable duty upon owners to provide reasonable and adequate protection to workers, making them liable for damages even in the absence of a showing that they controlled, directed or supervised the work site as long as there is some nexus between the owner and the plaintiff. See e.g., Celestine v. City of New York, 59 NY2d 938 (1983)(denying defendant Long Island Railroad's motion to dismiss Labor Law § 241(6) claim arising out of injuries suffered by worker building a subway line on the ground that it was not an owner under the statute since it granted an easement in favor of the City of New York and the New York City Transit Authority); Long v. Forest-Fehlhaber, 55 NY2d 154, 159 (1982).

Thus, although it leased its land to the Kohl defendants and did not control or supervise the injury producing work, PJ Venture is potentially liable as an owner under Labor Law § 241(6) based on its lease agreement with the Kohl defendants. Accordingly, its cross-motion to dismiss this claim must be denied.

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 PJ Venture controlled or supervised the activity causing Dawson's injuries, or that it had notice of any defect causing injury or caused or created the condition. Accordingly, the Labor Law § 200 claim must be dismissed as against PJ Venture.

Conclusion

In view of the above, it is

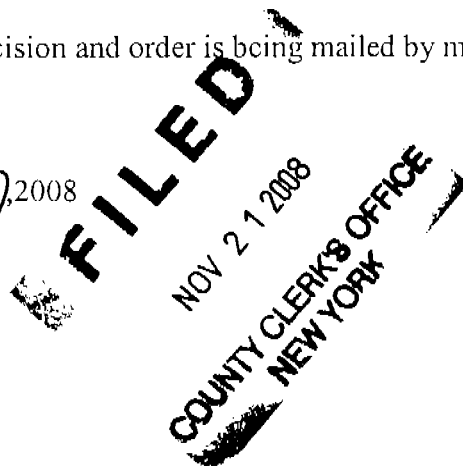
ORDERED that plaintiffs' motion for summary judgment as to liability of their claim under Labor Law §240 is granted with respect to defendants PJ Ventures III LLC, Kohl's Department Stores, Inc., and Vision General Construction, Inc.; and it is further

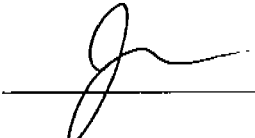
ORDERED that the cross-motion for summary judgment by PJ Ventures III LLC is granted to the extent of dismissing plaintiffs' Labor Law § 200 claim against it; and it is further.

The parties shall appear for jury selection in Part 11, room 351, 60 Centre Street on December 8, 2008, at 9:30 am.

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

DATED: November 17, 2008




J.S.C.