Hartz v Sassouni

2009 NY Slip Op 30227(U)

January 22, 2009

Supreme Court, Queens County

Docket Number: 20719/06

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

--X

STANLEY HARTZ and HELEN HARTZ,

Plaintiffs,

-against-

SASSAN SASSOUNI and REBECCA YOUSEFZADEH SASSOUNI,

Defendants.

--X

Index No: 20719/06
Motion Date: 11/19/08
Motion Cal. No: 8
Motion Seq. No: 1

The following papers numbered 1 to 4 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment in favor of the Sassouni defendants, dismissing plaintiffs' complaint and all cross-claims.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits..	1 - 4

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff Stanley Hartz ("plaintiff"), as the result of a slip and fall on ice on the front exterior staircase of the private premises of defendants while upgrading the home alarm system. Defendants move for summary judgment dismissing the complaint, pursuant to CPLR § 3212, on the ground that they neither created the condition nor had notice of the defect, and they are not liable under the Labor Law.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the

motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Moreover, it is well established that to impose liability in a slip and fall context for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that defendant either created the condition that caused the accident, or had actual or constructive notice of it. "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice." Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it. Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996). Further, where the defendant moves, inter alia, for summary judgment dismissing the complaint based upon lack of notice, "the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law." Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999).

Additionally, "it is well settled that a property owner may not be held liable for snowy or icy conditions unless it has actual [or constructive] notice thereof [and] it has had a reasonably sufficient time from the cessation of the precipitation to remedy the conditions caused thereby [see, Simmons v. Metropolitan Life Ins. Co., 84 N.Y.2d 972 (1994); Grillo v. New York City Tr. Auth., 214 A.D.2d 648 (2nd Dept.1995)]." Baum v. Knoll Farm, 259 A.D.2d 456 (2nd Dept. 1999); see, Smith v. 1327 Jefferson Realty, Inc., 300 A.D.2d 466, 467 (2nd Dept. 2002); Soon Rae Kim v. Caesar Chemists, Inc., 297 A.D.2d 797 (2d Dept. 2002).

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2001). In opposing the summary judgment motion, plaintiff is required to show that defendant indeed had actual or constructive notice of the condition. Kucera v. Waldbaums Supermarkets, 304 A.D.2d 531 (2003); Associated Mut. Ins. Co. v. Kipp's Arcadian II, Inc., 298 A.D.2d 478 (2002); Bradish v. Tank Tech Corp., 216 A.D.2d 505, 506 (1995); Gaeta v. City of New York, 213 A.D.2d 509 (1995).

Here, defendants have established a prima facie right to judgment as a matter of law by proffering their deposition transcripts, as well as the deposition transcript of plaintiff. Plaintiff testified that his accident occurred just outside the front door of the residence while he was upgrading the home alarm system. He stated that he did not see the ice in the periphery prior to his fall, and did not know how long the ice was present on the walkway prior to his accident. Defendant

Rebecca Sassouni testified that neither she nor her husband was home at the time of plaintiff's accident, and they had a "loose arrangement" with plaintiff to work on the alarm system when he was available. She further testified that she had not received any previous complaints about the allegedly defective condition. She also stated that plaintiff advised her of the accident when she returned home that morning, however she did not see the ice upon which plaintiff alleges to have slipped. Defendant Sassan Sassouni testified that on the morning of plaintiff's accident before he left for work at 7:00a.m., he shoveled the area in question, and used ice melt and salt. He stated that before he left the house and upon his return home that evening after being advised of plaintiff's accident, he observed that the area in question was dry and free from snow and ice. Lastly, he asserts that on the morning of the accident, the gutters were not leaking and he never received any complaints about leakage.

It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to defeat a motion for summary judgment, a party must lay bare its proof of evidentiary facts showing there is a bona fide issue requiring a trial. Zuckerman v. City of New York, supra. Where the moving party has established that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion or speculation. See, Cain v. Amaro, 287 A.D.2d 676 (2nd Dept. 2001); Babino v. City of New York, 234 A.D.2d 241 (2nd Dept. 1996); Zuckerman v. City of New York, supra. Here, a review of the evidence presented by defendants, and plaintiff's failure to interpose opposition to the motion, has established that there are no issues of fact regarding creation and notice of a defective condition. Accordingly, that branch of the motion by the Sassouni defendants for summary judgment on the basis that they neither created the condition nor had notice of the defect is granted.

Defendants also seek summary judgment and dismissal of plaintiff's claims under sections 200, 240 and 241 of the Labor Law. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace [see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)]. To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury... (citations omitted)." Mas v. Kohen, 283 A.D.2d 616 (2001); see, Kwang Ho Kim v. D & W Shin Realty Corp., 47 A.D.3d 616 (2nd Dept. 2008); Ragone v. Spring Scaffolding, Inc., 46 A.D.3d 652 (2nd Dept. 2007); Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 850 (2nd Dept. 2006); Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 (2nd Dept. 2005); Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2003). A cause of action under section 240(1) of the Labor Law, imposes a nondelegable duty which applies when an injury is the result of one of the elevation-related risks contemplated by that section [see, Rose v. A. Servidone, Inc., 268 A.D.2d 516 (2000)], which prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object where the work site is positioned below the level where materials or loads are being hoisted or secured. See, Narducci v Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v Curtis-Palmer Hydro-Elec. Co.,

81 N.Y.2d 494 (1993); Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2nd Dept. 2008); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed." See, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a "specific" standard of conduct, and that such violation was the proximate cause of his injuries. See, Vernieri v. Empire Realty Co., 219 A.D.2d 593, 597 (2nd Dept.1995); Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 501-502 (1993). As with Labor Law § 240(1), only owners and general contractors can be held absolutely liable for statutory violations of Labor Law § 241(6). See, Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Bland v Manocherian, 66 N.Y.2d 452 (1985); Zimmer v Chemung County Perf. Arts, Inc., 65 N.Y.2d 513 (1985), and all other parties are liable "only if they are acting as the 'agents' of the owner or general contractor. See, Serpe v Eyris Prods., Inc., 243 A.D.2d 375, 379-380 (2nd Dept. 1997).

In the case at bar, defendants have made a prima facie showing of their entitlement to summary judgment under Labor Law §§ 240 and 241.[1] "Labor Law § 240 and § 241 imposes a nondelegable duty upon contractors and owners to provide scaffolding and other adequate and reasonable protection to persons employed in construction, excavation, or demolition. However, the owners of one- and two-family dwellings, who do not direct or control the work, are statutorily exempt from liability (citations omitted)." Putnam v. Karaco Industries Corp., 253 A.D.2d 457 (2nd Dept. 1998); see, Pascarell v. Klubenspies, 56 A.D.3d 742 (2nd Dept. 2008); DeSabato v. 674 Carroll Street Corp., 55 A.D.3d 656 (2nd Dept. 2008); Chang v. Chunbukyo Church, 17 A.D.3d 390 (2nd Dept. 2005). "The exception was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability (citation omitted)." Umanzor v. Charles Hofer Painting & Wallpapering, Inc., 48 A.D.3d 552 (2nd Dept. 2008). As was stated by the Court of Appeals, in Bartoo v. Buell, 87 N.Y.2d 362, 367 (1996), regarding the legislative intent of the Homeowners exception:

> In 1980, the Legislature amended Labor Law §§ 240 and 241 to exempt "owners of one and two-family dwellings who contract for

[1] From the outset, it is noted by this Court that the Labor Law provisions relied upon by plaintiff are inapplicable to the facts set forth in this case as the work being performed does not appear to have been done in a context under which liability may be imposed, such as construction, repair or demolition. Moreover, plaintiff's alleged injury did not arise from an instrumentality or condition of his work from which defendants failed to protect plaintiff, which thereby resulted in the alleged harm. Plaintiff alleges that he slipped on ice as he was exiting the premises while he was there to upgrade the alarm system. Nevertheless, for the preservation of the record, this Court will consider each claim.

> but do not direct or control the work" from the absolute liability imposed by these statutory provisions. The amendments, intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law, reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection [].

Consequently, as defendants are the owners of a one family dwelling who never possessed the right to direct, control or supervise plaintiff's work, which incidentally was not the instrumentality bringing about the injury, they are not subject to the strict liability imposed by these statutory provisions, and therefore are entitled to summary judgment and dismissal of the Labor Law §§ 240 and 241 claims. Likewise, defendants are entitled to dismissal of the claim asserted under Section 200 of the Labor Law. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace [see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)]. To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury... (citations omitted)." Mas v. Kohen, 283 A.D.2d 616 (2nd Dept. 2001); see, Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2nd Dept. 2003). Further, liability attaches where the owner or contractor created the hazard, or had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition. See, Leon v J & M Peppe Realty Corp.,190 A.D.2d 400 (1st Dept. 1993).

Accordingly, the Sassouni defendants' motion for summary judgment and dismissal of the complaint on the ground that they neither created the condition nor had notice of the defect, nor are they liable under sections 200, 240 and 241 of the Labor Law, and common-law negligence, is granted, and the complaint hereby is dismissed in it entirety.

Dated: January 22, 2009

....
J.S.C.