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| Lupo v Pro Foods, LLC |
| 2009 NY Slip Op 30389(U) |
| February 20, 2009 |
| Supreme Court, New York County |
| Docket Number: 107565/06 |
| Judge: Edward H. Lehner |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 107565/2006

LUPO, GIULIO

VS.

PRO FOODS, LLC.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

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

_____ motion is decided in accordance

with accompanying memorandum decision

FILED

FEB 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: FEB 20 2009



J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
GULIO LUPO,

Plaintiff,

Index No.
107565/06

- against -

PRO FOODS, LLC, PROFOODS RESTAURANT SUPPLY,
LLC, SCHIMENTI CONSTRUCTION COMPANY OF NEW
YORK, INC., SCHIMENTI CONSTRUCTION COMPANY,
LLC and COPPOLA PAVING & LANDSCAPING, CORP.,

Defendants.

-----X
SCHIMENTI CONSTRUCTION COMPANY OF NEW YORK,
INC., and SCHIMENTI CONSTRUCTION COMPANY, LLC,

Third-Party Plaintiffs,

Index No.
591069/06

-against-

JAK CONSTRUCTION SERVICES,

Third-Party Defendant.

-----X
EDWARD H. LEHNER, J.;

FILED
FEB 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Before the court are motions by i) Pro Foods, LLC and Pro Foods Restaurant Supply, LLC ("Pro Foods") for summary judgment dismissing plaintiff's complaint against them; (ii) plaintiff for summary judgment on liability on his claim under Labor Law §§ 240(1) and 241(6); and iii) Coppola Paving & Landscaping, Inc. ("Coppola") for summary judgment dismissing the complaint and cross-claims against it. The cross-motion by Schimenti Construction Company of New York, Inc. and

Schimenti Construction Company LLC ("Schimenti") to dismiss plaintiff's complaint against them is granted without objection, and the cross-claims against Schimenti are converted into third-party claims (tr. p. 6-7). Pro Foods' claim for contractual indemnification is granted against Schimenti, conditioned upon a finding of negligence against said party (Id. pp. 35-36).

Pro Foods is a lessee that was in control of the premises at 53-01 11th Street, Long Island City (tr. p. 6). Schimenti is the general contractor and plaintiff's employer (Id.). Coppola is a paving subcontractor that laid concrete (Id., p. 26).

Plaintiff alleges: that he was working light duty on the day of the accident, cleaning up and making sure the area of the accident site was clean (plaintiff EBT, p. 55); that there was dirt on the ground inside and outside the building (Id., p. 66); that there was preparation work for concrete to be poured (Id. p. 82); that there was a ramp with a hole onto which he fell (tr. p. 18, plaintiff EBT, p. 99); that prior to the hole being filled with concrete, the ramp was made of dirt and was walkable (Id., p. 169), and plaintiff thought it was filled with concrete and attempted to walk over it (Id., p. 170); that Schimenti was aware there was a tripping hazard (Anthony Cioppa EBT p. 60) and failed to barricade the area (Id. pp. 61-62); and that as a result plaintiff fell and injured himself.

Pro Foods asserts: that concrete was being laid on the dirt floor in sections of an existing building (tr. p. 8); that a tarp was placed on the freshly poured concrete

(Id., p. 9); that plaintiff was on the ground and not on an elevated surface (Id., 10-11); and that therefore plaintiff's claims under Labor Law §§ 240(1) and 241(6) are not viable.

Labor Law § 240(1) requires owners of buildings undergoing alteration and contractors retained to perform such work to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed". The statute imposes absolute liability on a building owner and contractor for failure to provide or erect safety devices necessary to give proper protection from elevation-related risks to a worker who sustains injuries proximately caused by that failure [Bland v. Manocherian, 66 NY2d 452, 459 (1985)]. The legislative purpose of the provision is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" [Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513, 520 (1985)].

However, "(n)ot every worker who falls at a construction site ... gives rise to the extraordinary protections of Labor Law § 240(1).' In some cases involving falls of workers and objects, (the court has) held that where a plaintiff 'was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1),' the plaintiff cannot recover under the

statute" [Toefer v. Long Island Rail Road, 4 NY3d 399, 407 (2005)]. "[U]nder the case law, a plaintiff in a § 240(1) action who was injured because he or she fell must establish that (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of gravity, and (3) the protective devices envisioned by the statute, e.g., ladders, scaffolds and similar devices were designed to prevent the hazard that caused the fall" [Jones v. 414 Equities LLC, 57 AD3d 65, 72 (1st Dept. 2008)]. In Wynne v. B. Anthony Construction Corporation, 53 AD3d 654 (2nd Dept. 2008), the court concluded that the "safety devices to protect workers from elevation-related risks (were not required because) [t]he plaintiff was not exposed to any risk that the safety devices referenced in Labor Law § 240(1) would have protected against since he was working at ground level" (p. 655). In Miller v. Weeden, 7 AD3d 684, 686 (2nd Dept. 2004), it was held that "[b]ecause the worksite was at a ground level, the scaffolding, hoists, ladders, and other protective devices required under Labor Law § 240(1) were inapplicable." See also, Monterozza v. State University Construction Fund, 56 AD3d 629 (2nd Dept. 2008); Wells v. British American Development Corporation, 2 AD3d 1141, 1143 (3rd Dept. 2003); Paolangeli v. Cornell University, 296 AD2d 691 (3rd Dept. 2000). Here, since plaintiff was not working at an elevated height, his Labor Law § 240(1) claim is dismissed.

Labor Law § 241 provides:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: 6) 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 person employed therein or lawfully frequenting such place. The commissioner may make rules to carry into effect the provisions of this subdivision".

"Labor Law § 241(6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors" [Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 348 (1998)]. Under this law, owners, contractors and their agents must "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, 501-502 (1993)].

Plaintiff is relying solely upon a claimed violation of 22 NYCRR 23-1.7(b) (tr. p. 20), which states:

- "(b) Falling hazards. (1) Hazardous openings.
 - (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
 - (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening

shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

- (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
- (b) An approved life net installed not more than five feet beneath the opening; or
- (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.”

This section, which involves hazardous openings, applies to “one of significant depth and size” [D’Egidio v. Frontier Insurance Co., 270 AD2d 763, 765 (3rd Dept. 2000), lv. to ap. den. 95 NY2d 765 (2000)]. In Messina v. City of New York, 300 AD2d 121 (1st Dept. 2002), it was stated (p. 123):

“Reading the regulation as a whole, it is clear that it was not intended to apply to the type of opening involved in this case. As its heading reflects, 12 NYCRR 23-1.7(b) establishes rules for protections against ‘falling hazards.’ The safety measures required – planking installed below the opening, safety nets, harnesses and guard rails – all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit.”

The case at bar does not involve a fall from an elevated area to a lower area where the devices referred to in the regulations would provide safety to the worker, and thus this regulation is not applicable herein. Hence, plaintiff’s claim under Labor Law § 241(6) is dismissed.

Plaintiff has withdrawn his claim under Labor Law § 200 and common-law negligence against Pro Foods (tr. p. 25) .

Plaintiff has alleged that Coppola created the alleged defective condition by pouring the concrete and failing to place barricades (tr. p. 27), and that Schimenti was aware of a tripping hazard and failed to place barricades. This raises a factual issue as to whether Coppola created a dangerous condition that caused injury to plaintiff. Hence, a claim for common-law negligence has been adequately stated by plaintiff against Coppola, and its motion to dismiss is thus denied.

In sum, the complaint is dismissed in its entirety against Pro Foods and the Clerk is directed to enter judgment accordingly. The complaint is dismissed against Schimenti and the cross-claims against it are converted to third-party claims; Pro Foods is granted summary judgment on its claim for contractual indemnification against Schimenti conditioned upon a finding of negligence against said party; and plaintiff's claims under Labor Law § 240(1) and Labor Law § 241(6) are dismissed. The motion of Coppola to dismiss plaintiff's claim based on common-law negligence is denied.

This decision constitutes the order of the court.

Dated: February 20, 2009

