SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

EUGENE TRAVERS and ANGELA TRAVERS,

Plaintiffs,

-against-

RCPI LANDMARK PROPERTIES, L.L.C.

Defendants.

RCPI LANDMARK PROPERTIES, L.L.C.,

Third-Party Plaintiff,

-against-

RADIO CITY PRODUCTIONS LLC,

Third-Party Defendant.

Motion Sequence #1
Submitted February 17, 2009
XXX

INDEX NO: 15810/06

The following papers were read on these motions:

LANDMARK Notice of Motion 1
LANDMARK Memorandum of Law 2
Plaintiff's Affirmation in Opposition.....3
Reply Affirmation.....4
Reply Memorandum of Law.....5

Defendant, RCPI LANDMARK PROPERTIES, L.L.C. (hereinafter referred to as "LANDMARK") moves, pursuant to CPLR §3212, for an order dismissing the plaintiffs',

EUGENE TRAVERS and ANGELA TRAVERS (hereinafter referred to collectively as "TRAVERS"), complaint. Plaintiffs' oppose the motion, which is determined as follows:

Background

This is an action for personal injuries sustained by the plaintiff, EUGENE TRAVERS, on March 4, 2006, when he was struck from above by a speaker which fell from a forklift while in the course of his employment with Radio City Productions, at the music hall leased by the defendant, LANDMARK. It is noted at the outset that the Third-Party Action commenced without prejudice against Radio City Productions LLC was discontinued by Stipulation dated March 28, 2007.

On March 4, 2006, the plaintiff, EUGENE TRAVERS was working as a stagehand at Radio City Music Hall. On the date of his accident, the plaintiff was in the employ of Radio City Productions which had leased the music hall from LANDMARK and functioned as the operator of said premises. The plaintiff testified that on the day of his accident he was in the process of setting up for a show scheduled to take place at the music hall later that evening. He testified that his particular duties on that day involved "pushing" audio speakers into place on the stage at the music hall. These speakers were unloaded from trucks located at street level and thereafter placed onto a loading ramp which led to the area above the stage. The speakers were subsequently positioned onto a forklift operated by the plaintiff's co-worker and lowered to the stage. As to the particular circumstances surrounding his accident, the plaintiff states that after pushing a speaker into it's appropriate location on the stage, he was walking back toward the loading ramp to retrieve another piece of equipment and was struck from above by a speaker which fell from the forklift.

The underlying action was thereafter commenced in or about September 2006, with the first cause of action setting forth allegations predicated upon negligence, as well as upon Labor Law §§200, 240 and 241[6] and with the second cause of action alleging a claim for loss of services.

Parties' Contentions

In support of the within application, the defendant posits several arguments. Initially, LANDMARK argues that inasmuch as it did not direct, supervise, oversee or control the work in which the plaintiff was engaged when he sustained injury, those claims asserted by the plaintiff under common law negligence and Labor Law §200 must be dismissed.

The defendant further contends that when the plaintiff was injured he was not engaged in the construction or erection of a structure, but rather was rolling movable speakers on casters across the existing stage and as such those claims predicated upon Labor Law §240 and Labor Law §241[6] should also be dismissed.

Additionally, LANDMARK argues that it was as an out of possession landlord with a limited right of re-entry which did not manage or operate the interior of the leased premises or in any respect supervise, direct or control the actions of Radio City Productions, and as a result cannot be held liable to the plaintiff.

Finally, LANDMARK argues that the various code provisions which plaintiff alleges have been violated are inapplicable to the facts herein. Firstly, the defendant contends that the sections of the New York City Administrative Code of 1968 and/or it's predecessor of 1938, which during the course of expert exchange the plaintiff claims were violated, are not relevant given that Radio City Music Hall was issued a Certificate of Occupancy in 1932 and is thus governed by the code provisions enacted in 1915 and not those cited by the

plaintiff. Secondly, LANDMARK asserts that the two sections of the Industrial Code which the plaintiff's expert claims have been violated are not sufficiently specific and thus insufficient to sustain liability under Labor Law §241[6].

Annexed to the moving papers, LANDMARK has provided an affidavit from Bernard Lorenz, a Professional Engineer, who avers that on August 26, 2008, he conducted an inspection of the stage and loading ramps located at Radio City Music Hall. Upon completion of said inspection, Mr. Lorenz concluded "the subject stage and ramp were neither dangerous nor defective or unsafe" and that he found "no evidence to suggest that the subject incident was causally related to the construction of or maintenance of the loading ramp".

In opposing the within application the plaintiff contends that at the time of his accident he was engaged in the erection of a temporary stage, and as a result, his activities properly fall within the purview of Labor Law §240[1]. The plaintiff additionally asserts that LANDMARK is not an out of possession landlord and as such the plaintiff is not under any burden to demonstrate the existence of a statutory violation.

The plaintiff proffers the affidavit of Elise Dann, a Registered Architect, who conducted an on-site inspection of the subject premises on July 29, 2008. Upon said inspection, Ms. Dann opined "with a reasonable degree of architectural and technical certainty, that the hinged loading ramp used for the handling and delivery of theater set construction materials and equipment to the stage level at Radio City Music Hall, was unsafe for intended use and failed to comply with the applicable building codes and industry standards, which created a dangerous condition that proximately caused EUGENE TRAVERS' injury". Ms. Dann ultimately rendered the following professional

opinions: the hinged loading ramp used at the music hall was "excessively steep for it's intended use"; the defendant violated Labor Law 240 in failing to provide "a proper material hoist such as an adjustable height gantry crane with a mechanical hoist" and that said violation "resulted in the unsecured load falling from the elevated position of the ramp and striking and injuring TRAVERS"; and that the defendant violated 12 NYCRR 23-9.2[b][1] and 12 NYCRR 23-9.2[c].

Discussion

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 NE2d 387, 165 NYS2d 498 [1957]; *Bhatti v Roche*, 140 AD2d 660, 528 NYS2d 1020 [2nd Dept. 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 390 NE2d 298, 416 NYS2d 790 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 479 NE2d 229, 489 NYS2d 884 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]. It is incumbent upon the non-moving party to lay

bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631, 595 NYS2d 236 [2nd Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247, 406 NE2d 481, 428 NYS2d 665 [1980]; *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2nd Dept. 1989]).

Labor Law §200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof, a duty to provide workers with a safe environment in which to perform their assigned duties (*Lombardi v Stout,* 80 NY2d 290, 604 NE2d 117, 590 NYS2d 55 [1992]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 618 NE2d 82, 601 NYS2d 49 [1993]; *Everitt v Nozkowski*, 285 AD2d 442, 728 NYS2d 58 [2nd Dept 2001]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 [2nd Dept 2008]). "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Rizzuto v Wenger Contracting Co.,* 91 NY2d 343, 693 NE2d 1068, 670 NYS2d 816 [1998] quoting *Russin v Picciano & Son*, 54 NY2d 311, 317, 429 NE2d 805, 445 NYS2d 127 [1981]).

The Court has reviewed the record and finds that LANDMARK has satisfied it's *prima facie* burden of establishing it's entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, *supra; Winegrad v New York University Medical Center*, 64 NY2d 851, 476 NE2d 642, 487 NYS2d 316 [1985]). In opposition, the plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, *supra*). In the instant matter, LANDMARK has demonstrated that it did not exercise any control over the work in which the plaintiff was engaged when he was injured (*Rizzuto v Wenger Contracting Co., supra*). The plaintiff herein testified that it was, in fact, other stagehands who were responsible for unloading the speakers from the loading ramp onto the forklift and that is was another co-worker who operated the actual forklift from which the speaker fell and thereafter struck the plaintiff.

Moreover, and contrary to the plaintiff's assertions, the deposition testimony of a Mr. David Berk, which is annexed to the plaintiffs' opposing papers, demonstrates that LANDMARK was an out of possession landlord with a limited right of re-entry, which did not, in any respect, exercise supervision or control over the plaintiff's work or the manner in which it was conducted. Mr. Berk, who at the time of the plaintiff's accident served as assistant property manager of the subject premises, testified that LANDMARK did not have any employees who worked for or at the Music Hall and that the tenant, Radio City Productions, "ran their own operations."

Therefore, based upon the foregoing, that branch of LANDMARK's application which seeks an order granting summary judgment dismissing the plaintiff's claims predicated upon common law negligence and Labor Law §200 is hereby GRANTED.

Labor §240[1], provides in relevant part that "all contractors and owners * * * shall furnish or erect, or cause to be furnished or erected * * * scaffolding, hoists, stays, ladders, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection. . ." to construction workers who are employed on the subject premises. The duty imposed by the statutory provisions is nondelegable in nature and an owner or contractor who breaches the duty may be held liable in damages caused thereby, irrespective of whether it has actually exercised supervision or control over the work (*Rocovich v Consolidated Edison Company*, 78 NY2d 509, 583 NE2d 932, 577 NYS2d 219 [1991]; *Ross v Curtis-Palmer Hydro-Electric Company*, *supra*).

It has been held that while the scope of Labor Law §240(1) should not be circumscribed to work which is conducted on actual construction sites, the particular job in which an injured plaintiff was engaged must nonetheless have been undertaken during the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Martinez v City of New York*, 93 NY2d 322, 712 NE2d 689, 690 NYS2d 524 [1999]). While the statute is to be liberally construed so as to give effect to the purposes for which it was promulgated, in consideration of the strict liability imposed thereby, the statutory language therein contained should not be so contorted as to bring within its sphere, that which the legislature did not intend to include (*Koenig v Patrick Construction Corp.*, 298 NY 313, 83 NE2d 133 [1948]; *Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657, 609 NYS2d 322 [2nd Dept 1994]).

Having carefully reviewed the record, the Court finds that LANDMARK has demonstrated it's *prima facie* entitlement to judgment as a matter of law by demonstrating

that the work in which the plaintiff was engaged was not of the type which falls within the purview of the statute (*Winegrad v New York University Medical Center*, *supra; Martinez v City of New York*, *supra*). In opposition to the defendant's *prima facie* showing, the plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, *supra*).

Here, the plaintiff in his supporting affidavit, specifically avers that "he was part of a crew that was moving into place and erecting the temporary stage and set for Michael Buble's performance scheduled for that evening. "However, during his examination before trial, the plaintiff testified that when his accident occurred, it "was early and at that time we were just pushing speakers". The plaintiff additionally testified that had his accident not happened he would have continued to move the next piece of sound equipment into it's proper position upon the stage.

Further, the Court notes that while the plaintiff's expert opined that the defendant violated Labor Law §240[1] and that said violation "resulted in the unsecured load falling from the elevated position of the ramp and striking and injuring TRAVERS", this opinion in not supported by the facts as adduced from the plaintiff's own sworn testimony. In this case, the plaintiff himself testified that his accident occurred not as a result of a load falling from the loading ramp, but rather from being struck by a speaker which fell from the forklift operated by his co-worker.

Thus, as the record herein demonstrates that at the time of the plaintiff's unfortunate accident, none of the activities enumerated in the statute were underway, that branch of the application by LANDMARK which seeks an order granting summary judgment dismissing the plaintiff's claims predicated upon Labor Law§240[1] is hereby GRANTED.

Labor Law §241[6] provides that "[a]ll 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 persons employed therein or lawfully frequenting such places." The definition of construction work as provided in 12 NYCRR 23-1.4[b][13] provides the following, in relevant part:

> "All work of the type performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure."

The Court of Appeals has stated that this definition as provided in the Industrial Code, "must be construed consistently with this Court's understanding that section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v Realty Corp.*, 99 NY2d 98, 782 NE2d 558, 752 NYS2d 581 [2002]). As the above cited deposition testimony clearly indicates, the plaintiff's accident happened at a time when he was engaged in "pushing speakers" into place on the existing stage at the music hall. There is no evidence in the record that the subject accident occurred during any construction, demolition or excavation. Therefore, that branch of the defendant's application which seeks summary judgment dismissing the plaintiff's claims predicated upon Labor Law §241[6] is hereby GRANTED.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court. Settle judgment on notice.

Dated: April 21, 2009

WILLIAM R. LaMARCA, J.S.C.

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