Rodriguez v Faber
2009 NY Slip Op 31175(U)
May 11, 2009
Supreme Court, Nassau County
Docket Number: 5502/2007
Judge: William R. LaMarca
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SHORT FORM ORDER

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

Present: HON. WILLIAM R. LaMARCA
Justice

JOSE ARMANDO GRANDE RODRIGUEZ,

Plaintiff,

-against-

ERIN F. FABER, JOANNE S. FABER and GENE MAGISTRO HOME IMPROVEMENTS, INC.,

Defendants.

Motion Sequence #1
Submitted February 26, 2009

INDEX NO: 5502/2007

The following papers were read on these motions:

Notice of Motion 1
Affirmation in Opposition...2
Reply Affirmation..3

Plaintiff, JOSE ARMANDO GRANDE RODRIGUEZ (referred to herein as "RODRIGUEZ"), moves for an Order, pursuant to CPLR §3212, awarding him summary judgment on the issue of liability as against defendant, GENE MAGISTRO HOME IMPROVEMENTS, INC. (referred to herein as "GENE MAGISTRO") pursuant to violations of New York Labor Law §240(1). Defendant, GENE MAGISTRO, opposes the motion which is determined as follows:

This is an action for personal injuries sustained by the plaintiff, RODRIGUEZ, on March 19, 2007, at approximately 9:00 a.m., when he fell from the roof while in the

[* 2]

course of his employment as a "framer" with non-party David Della Vecchia, Inc. (referred to herein as "Vecchia"), at the premises located at 8 Daniel Drive, South Farmingdale, New York (the "subject premises"). The subject premises are owned by defendants, EDWIN F. FABER and JOANNE S. FABER.[1] In March 2008, the FABERS began a construction project to undergo a first and second floor extension to their home. The homeowners retained defendant, GENE MAGISTRO, to act as the general contractor for this project through a written contract signed on Augsut 8, 2006. GENE MAGISTRO, in turn, entered into a sub-contract agreement with non-party Vecchia to perform framing and sheeting work at the subject premises. Such work included working with the walls, roof and windows of the house. Plaintiff, RODRIGUEZ, was working on the roof at the FABER house at the time of his fall. Specifically, plaintiff's accident occurred as he was clearing snow and ice from the roof of the FABER house. Plaintiff fell from the roof down to the concrete driveway, sustaining, *inter alia*, a severe fracture to his back. It is undisputed that plaintiff was not provided with any safety equipment or device to protect him from falling off the roof.

At his oral examination before trial (EBT), plaintiff testified that he was told by his employer to cut off the roof after removing the ice thereon. To do this, the plaintiff was instructed to utilize two ladders, one leaning on the front of the house to climb onto the roof, and the second to lay on the roof itself to remove the ice. The second ladder was attached by a hook located on the peak of the A-frame roof. The idea was to slide the second ladder, which was laying on the ice, along the roof as the plaintiff chipped away

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[1]On September 11, 2008, plaintiff, RODRIGUEZ, stipulated to discontinue his action as against the homeowner defendants, EDWIN F. FABER and JOANNE S. FABER.

the ice to allow him to then cut the roof off. Both ladders belonged to the plaintiff's employer. At the time of the accident, plaintiff had a hammer and shovel in his hand, which were used to remove the ice from the roof.

Eugene Magistro, the President of the defendant, GENE MAGISTRO, testified at his EBT that, on March 19, 2007, upon his arrival at the subject premises, he observed the plaintiff lying on the driveway, screaming of pain to his back. He testified that he also noticed at that time that there was snow on the roof. Magistro recalled that it began to snow a day or two prior to the accident. He stated that the project required that a first and second story extension by added to the existing premises, requiring the roof over the existing garage to be removed. He stated that the plaintiff's employer, Vecchia, was scheduled to remove the roof at the premises on the date of the occurrence. He further stated that as the general contractor, defendant, GENE MAGISTRO, had the authority to stop work at the project site, and that the conditions at the work site where the plaintiff fell from the roof were unsafe without the use of a harness. He stated that the defendant GENE MAGISTRO would have stopped the work had he appeared thereat before the occurrence. Magistro testified that not only did he never provide a harness or any other equipment for the work being performed, but he also testified that he never observed any safety equipment, otherwise available, at the work site.

Upon the instant motion, plaintiff, RODRIGUEZ, seeks summary judgment as against the general contractor, GENE MAGISTRO, pursuant to violations of New York Labor Law §240(1). Counsel for plaintiff submits that the overwhelming and undisputed

evidence clearly demonstrates that, GENE MAGISTRO, violated Labor Law §240(1), in that it breached its duty, as the general contractor, to provide adequate safety devices and equipment to ensure the safety of those individuals lawfully working at the site, including the plaintiff, RODRIGUEZ. Counsel argues that defendant, GENE MAGISTRO, breached its non-delegable duty imposed upon it by Labor Law §240(1), and that the evidence presented in this matter establishes that GENE MAGISTRO's violation of Labor Law §240(1) was the proximate cause of RODRIGUEZ's injures.

Defendant, GENE MAGISTRO, opposes the motion. It is noted at the outset that the opposition, consisting only of defendant's attorney's affirmation, is without any evidentiary value as it is not accompanied by any documentary or otherwise admissible evidence (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Silverite Const. Co., Inc. v Town of North Hempstead*, 229 AD2d 387, 644 NYS2d 565 [2nd Dept. 1996]). Nevertheless, counsel for defendant, in his affirmation in opposition, argues that plaintiff was not engaged in an activity covered under the Labor Law and further, that the plaintiff was the sole proximate cause of the accident. Counsel for GENE MAGISTRO, relying upon, *inter alia*, two Second Department cases, *Garcia v Piazza*, 16 AD3d 547, 792 NYS2d 157 [2nd Dept. 2005] and *Paciente v MBG Development, Inc.*, 276 AD2d 761, 715 NYS2d 436 [2nd Dept. 2000], submits that clearing snow from a roof, as plaintiff claims to have been doing at the time of his fall, is not one of the activities covered by the Labor Law. Counsel, for the defendant, argues that the plaintiff's testimony, that at the time of his accident, the process he was engaged in involved the use of two ladders, demonstrates that the plaintiff alone was

the sole proximate cause of the accident. Counsel for defendant argues that as plaintiff's actions were the sole proximate cause of his accident, and as the activity plaintiff was engaged in was not covered by the Labor Law, plaintiff's motion for summary judgment should be denied.

The standards for summary judgment are well settled. "On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (C.A.2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A. 1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 851 (C.A. 1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demshick v Community Housing Management Corp.*, 34 AD3d 518, 824 NYS2d 166 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591, 551 NYS2d 563 (2d Dept. 1990).

Labor Law §240(1) states, in pertinent part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals has explained that Labor Law § 240(1) "imposes absolute liability on owners and contractors for any breach of the statutory duty that proximately causes injury" (*Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 [C.A.2004]). The Court of Appeals has coordinately recognized that "[t]he critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 [C.A.2003], *quoting Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 [C.A. 1998]). "Only work that involves the erection, demolition, repairing, altering or painting of a building or structure enjoys the protection of Labor Law § 240(1)" (*Wein v Amato Properties, LLC*, 30 AD3d 506, 816 NYS2d 370 [2nd Dept. 2006]). That is, insofar as it is applicable herein, "routine maintenance" does not indicate Labor Law §240(1) liability. In determining whether plaintiff in the case at bar was engaged in a "protected activity" under the Labor Law, this Court is guided by factors previously considered by other Courts in deciding whether a task constitutes "routine maintenance." These factors include: (1) whether the work was a huge job that required many workers or many hours of labor or a single person job completed in a matter of minutes (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 848 NYS2d 688 [2nd Dept. 2007]; *DiBenedetto v Port Authority of New York and New Jersey*, 293 AD2d 399, 742

NYS2d 207 [1st Dept. 2002]; *see also Yong Ju Kim v Herbert Construction Company, Inc.*, 275 AD2d 709, 713 NYS2d 190 [2nd Dept. 2000]; *Juchniewicz v Merex Food Corporation*, 46 AD3d 523, 848 NYS2d 255 [2nd Dept. 2007]); (2) whether the work was "routine" task that was perhaps performed pursuant to some service contract or whether it was a non-routine job requiring special payment (*Arevalo v NASDAQ Stock Market, Inc.*, 28 AD3d 242, 813 NYS2d 383 [1st Dept. 2006]; *Bax v Allstate Health Club, Inc.*, 26 AD3d 861, 809 NYS2d 378 [4th Dept. 2006]; and (3) whether the job was merely one part of an ongoing construction project or a discrete activity (*Anderson v Olympia & York Tower B Company*, 14 AD3d 520, 789 NYS2d 190 [2nd Dept. 2005]; *Einstein v Board of Managers of the Oaks at La Tourette Condominium Sections I-IV*, 43 AD3d 987, 842 NYS2d 72 [2nd Dept. 2007]). Thus, plaintiff's status as a member of a team carrying out an enumerated activity and the fact that plaintiff was personally involved in the construction or alteration activities are factors weighing heavily in favor of a protected activity (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 800 N.E.2d 351, 768 NYS2d 178 [2003]).

It is the judgment of this Court that, based upon the evidence presented, the plaintiff was engaged in an activity protected by the Labor Law. The evidence confirms that the plaintiff was involved in the alteration and demolition of the existing roof at the subject premises. Plaintiff's employer Vecchia, involved in the framing and sheeting work at the subject premises, was retained by the general contractor to add an extension to the second floor at the subject premises. The evidence additionally confirms that the existing roof was scheduled to be demolished by plaintiff's employer

on the date of the accident, immediately after the ice on the roof was removed. The Court of Appeals has made it clear that in determining whether plaintiff's work constituted "alteration" or "erection" of a structure, this Court is precluded from "isolat[ing] the moment of injury and ignor[ing] the general context for the work" (*Prats v Port Authority of New York and New Jersey, supra*). In this case, the general context of the plaintiff's work at the subject premises was to remove a roof and frame a new second story thereat immediately after the removal of ice and snow on said roof, all to be done on the very same day as the occurrence. The Court finds that plaintiff's work at the time of the occurrence was contemporaneous with the construction, alteration, and demolition being performed at the subject premises. Furthermore, the removal of ice was not considered a separate phase of the overall project. The actual roof was to be removed upon the clearing of ice and snow. Therefore, based upon the evidence presented, this Court finds that removal of ice on the roof was hardly an "isolated " activity; rather, that was part of the overall project to remove the roof and add an extension to the second story.

Defendants' reliance upon *Garcia v Piazza, supra*, and *Paciente v MBG Development, Inc., supra*, is entirely misplaced. There is no blanket rule of law which precludes all snow and ice removal activities from being covered by the Labor Law as "routine maintenance." As defendant suggests, the Second Department, does not preclude a plaintiff from maintaining a cause of action under the Labor Law merely because he was removing snow and ice at the time of the occurrence. In both, *Garcia v Piazza, supra*, and *Paciente v MBG Development, Inc., supra*, the Appellate Division

held that as the plaintiffs in each of those cases was engaged in routine maintenance in a "nonconstruction, nonrenovation context," they would not be afforded the protections of Labor Law §240(1). In this case however, it is this Court's determination that the plaintiff was engaged in construction and renovation and thus, the removal of snow and ice still deserves the protection of the Labor Law. The removal of snow and ice from a roof about to be demolished was an integral part of the ongoing construction project. Accordingly, this Court finds that the plaintiff's work of removing snow and ice from the subject roof was necessary and incidental to the construction, alteration, and demolition work being performed.

Defendant's argument that the plaintiff was the sole proximate cause of the accident because he failed to mention a defect with the equipment given to him, namely two extension ladders and a hook, and that he improperly used the same, also fails. The precise manner of plaintiff's fall is immaterial if there is no question that the plaintiffs' injuries are at least partially attributable to defendant's failure to provide proper protection (*Pichardo v Aura Contractors, Inc.*, 29 AD3d 879, 815 NYS2d 263 [2nd Dept. 2006]). In this case, the plaintiff was given both ladders and a hook that attaches to the roof at one end of the ladder laying on the roof to perform the task of ice removal. Defendant's principal, Magistro testified that he had the authority to stop the work being performed at the site and acknowledges that the conditions at the worksite from which the plaintiff was caused to fall were unsafe without the use of a safety harness. There is no evidence that the plaintiff declined the use of appropriate safety devices and unilaterally elected to use the two ladders, in the manner provided. Moreover, the

construction, demolition and alteration work of the subject premises could not be performed without the removal of snow and ice atop the roof. Finally, there is nothing extraordinary or unanticipated in the plaintiff's conduct. Rather, the manner in which he performed his work on the date of his accident was consistent with his employer's instructions. Therefore, this case is factually distinguishable from those decisions in which the conduct of the workers was the sole proximate cause of their injuries (*see e.g. Montgomery v Federal Express Corp.*, 4 NY3d 805, 828 NE2d 592, 795 NYS2d 490 [2005]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 803 NE2d 757, 771 NYS2d 484 [2003]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 695 NE2d 709, 672 NYS2d 840 [1998]), or where their actions may have been so extraordinary as to constitute superseding causes of their accidents (*see e.g. Vouzianas v Bonasera*, 262 AD2d 553, 693 NYS2d 59 [2nd Dept. 1999]; *Styer v Vita Constr.*, 174 AD2d 662, 571 NYS2d 524 [2nd Dept. 1991]).

The Court of Appeals has repeatedly recognized that Labor Law §240(1) is "'for the protection of work[ers] from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*see e.g.*, *Melber v 6333 Main Street, Inc.*, 91 NY2d 759, 698 NE2d 933, 676 NYS2d 104 [C.A. 1998]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 679 NYS2d 104, 698 NE2d 933 [C.A. 1985], *rearg. denied* 65 NY2d 1054 [C.A. 1985]). Consistent with this purpose, Appellate Courts have held that the statute establishes absolute liability for a breach which proximately causes an injury (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 [C.A. 1985]), has treated the statutory duty as nondelegable

(*Del Vecchio v State of New York*, 246 AD2d 498, 667 NYS2d 401 [2nd Dept.1998]) and has broadly construed the statute's terms in a variety of circumstances (*see e.g.*, *Joblon v Solow*, *supra*). Thus, after a careful reading of the submissions herein, it is hereby

ORDERED, that in light of defendant, GENE MAGISTRO's failure to raise a triable issue of fact in opposing plaintiff's *prima facie* showing of entitlement to judgment as a matter of law on his Labor Law §240(1) claims, plaintiff's motion for summary judgment, as against GENE MAGISTRO, on the issue of liability, is granted (*Winegrad v New York Univ. Med. Center*, *supra*).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 11, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

MAY 1 4 2009

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