

Varesi v Bridgedale, LLC

2009 NY Slip Op 31495(U)

July 8, 2009

Supreme Court, Richmond County

Docket Number: 101120/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 101120/06
Motion No.: 003**

**THOMAS VARESI and
CHARLOTTE VARESI,**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

BRIDGEDALE, LLC.,

Defendant

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3
Replying Affidavits	
Exhibits	Attached to Papers
Memorandum of Law	2, 4

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Bridgedale, LLC (“Bridgedale”), moves for an order granting summary judgment dismissing the plaintiffs’ complaint. Bridgedale’s motion is granted in its entirety.

Facts

Thomas Varesi is employed by the New York City Housing Authority as a carpenter. The New York City Housing Authority maintained offices and a shop at 23-02 49th Avenue, Queens, New York in a building owned by the defendant Bridgedale. On March 23, 2006, Thomas Varesi injured himself by slicing his hand while operating a table saw in the course of his duties as a carpenter. According to the bill of particulars, Thomas Varesi sustained numerous personal injuries as a result of this incident including the amputation of his left forefinger.

During his examination before trial, Thomas Varesi testified as follows:

Q. Now, at the time that your accident occurred, first of all, what were you doing?

A. We had been renovating different offices in the building up on the executive floor. They had requested to make changes in some of the offices upstairs and because of my experience, past experience in home renovations, I was the key— they called on me a lot to do any kind of alteration work or any kind of construction work. If they needed, they relied on my design ability I was working on a lot of molding work and in the offices and that was it. . . .¹

Q. On March 23, 2006, the work that you were doing at that time that your accident occurred, was that part of some project you were involved with?

A. You could say it was a project. I was working on doing alterations on the building upstairs. We were doing concealed chair rails on the walls . . .²

Q. At the time that this accident happened in March of 2006, what, generally, were you involved in? What type of work were you doing?

A. I was involved with carpentry in the building, At the time, we were doing built-in desk, we were doing radiator covers, built-in bookcases. Chair rails, there was a lot. It changed at the whim of, you know, one minute, you were doing something and one would say drop that and do this for another bigshot, who said what were you doing working in his office and not my office. Your duties changed on a daily basis. . .³

Q. How long were you working on Rick Augusta's office?

¹ Transcript Thomas Varesi, Tr. P 33-34

² Id. at 34.

³ Id. at 36.

MR. KUHARSKI: Prior to the accident.

- A. We had started the day before. I had done some preliminary demolition and I had taken measurements to start making the permanent ground to install, in fact I was cutting the permanent ground for installation in the office when I got hurt. . .⁴

- Q. Was there some time when one of your bosses came to you and said we are going to start this project, and renovate from the top down?
- A. No, the work came down, word came down to Rick. We had been working all alone upstairs I was detailing furniture. I was making a built-in radiator covers. I was doing built-in bookcases. I was making a lot of stuff for upstairs.
- Q. But at some point, Rick said to you this is the project we are going to work on now?
- A. It was a continuous project. It's an ongoing project. . .⁵

In addition to the aforementioned testimony, Thomas Varesi testified that he removed a small wall partition.⁶ In contrast, the deposition of Richard Agosta, referred to as "Rick" in the testimony of Thomas Veresi, testified as follows:

- Q. What work was he [Thomas Varesi] doing at that time [March 23, 2006]?
- A. He was doing a renovation for a carpenter office, constructing a computer table and lockable desk. . . .
- Q. The carpenter office, was that part of your office or was that your office?
- A. The carpenter office? Yeah, it was my office and it was also shared by any other foreman that would come in, any other carpenter foreman that would come in there.
- Q. The project for the carpenter office, was that part of a

⁴ Id. at 37.

⁵ Id. at 39.

⁶ Id. at 57.

- bigger renovation or was that sort of on its own?
- A. It was on its own, in that case. It was quite small. I gave it to him because it was like an, in my estimation, a half a day job. It was a table with a locking cabinet to keep secure documents in and that's all it really was. . .⁷

In addition, the testimony of John O'Hara a fellow carpenter of Thomas Varesi who testified that he helped the plaintiff install a chair rail and that he was not aware of any renovations to the office space taking place within 23-02 49th Avenue, Queens, New York.⁸ This testimony is corroborated by the testimony of Ronald Jakubowski, who stated that he was unaware of any renovation being conducted in the office space within 23-02 49th Avenue, Queens, New York.⁹

The plaintiff withdrew his negligence claims and claims pursuant to *Labor Law* § 200. The defendant now moves for summary judgment dismissing the plaintiff's complaint arguing that the plaintiff did not sustain injuries that are recoverable against it pursuant to *Labor Law* § 241(6).

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".¹⁰ Summary judgment should not be granted where there is any

⁷ Transcript Richard Agosta, Transcript 10-11.

⁸ Transcript John O'Hara, p. 6-7.

⁹ Transcript Ronald Jakubowski, p 7.

¹⁰ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

doubt as to the existence of a triable issue or where the existence of an issue is arguable.¹¹ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.¹² On a motion for summary judgment, the function of the court is issue finding, and not issue determination.¹³ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.¹⁴

The plaintiff is asserting a cause of action under *Labor Law* § 241(6) that states:

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, 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 persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.¹⁵

¹¹ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

¹² *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

¹³ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

¹⁴ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

¹⁵ *Labor Law* § 241(6).

The issue in this case turns on whether the plaintiff was engaged in construction as that term is defined by the aforementioned statute.

In 1998 the Court of Appeals took up the task of determining the definition of “construction” pursuant to *Labor Law* § 241(6) in *Joblon v. Solow*.¹⁶ In that decision the court held:

Liability under *Labor Law* § 241(6) is not limited to accident on a building construction site . . . As in *Jock v. Fien* . . . we look to the regulations contained in the Industrial Code . . . To define what constitutes construction work within the meaning of the statute . . . Because the Industrial Code includes ‘work of the types performed in the construction, erection, *alteration*, repair, maintenance, painting or moving of buildings or other structures’ in the definition of construction work . . . we conclude that plaintiff could state a claim under *Labor Law* § 241(6).¹⁷

In so holding the Court of Appeals allowed a plaintiff to maintain an action under *Labor Law* § 241(6) if he or she was engaged in an “alteration” to the premises because “alteration” was used to define “construction under the Industrial Code. Four years later in *Nagel v. D & R Realty Corp* the Court refined the *Joblon* definition of what constituted “construction” pursuant to *Labor Law* § 241(6).¹⁸

In *Nagel* the Court of Appeals affirmed the dismissal of a cause of action brought by a plaintiff alleging injuries under *Labor Law* § 241(6) when the plaintiff injured himself during a two year elevator test. The Court of Appeals held that “. . . section 241(6) covers industrial

¹⁶ 91 NY2d 457, [1998].

¹⁷ *Id.* at 466(citations omitted, emphasis original).

¹⁸ 99 NY2d 98, [2002].

accidents that occur in the context of construction, demolition and excavation.”¹⁹

In so holding the Court of Appeals reasoned that:

the Legislature sought to protect workers from industrial accidents specifically in connection with construction, demolition or excavation work is therefore, patent. In the present case, Nagel’s work of performing a two-year elevator test constituted maintenance work that was not connected to construction, demolition or excavation of a building or structure and therefore not within the statute’s coverage.²⁰

In this case the plaintiff seeks to impose liability on the defendant landlord for the construction of a “computer table and lockable desk.” While the plaintiff asserts that this project was a piece of an ongoing construction project the record does not support such a finding. The deposition testimony of O’Hara, Jakubowski, and Agosta does not support such a position.

In *Esposito v. New York City Industrial Development Agency*, the Appellate Division, First Department affirmed the trial court’s decision to dismiss the plaintiff’s claim under *Labor Law* § 241(6).²¹ In so affirming the Appellate Division, First Department held:

[t]he Court of Appeals recently explained in *Nagel v. D & R Realty Corp*, that to be covered by section 241(6) , maintenance or repair work must occur “in the context of construction, demolition [or] excavation.” The reasoning of previous cases that the word “construction” in *Labor Law* § 241 (6) includes the broad definition of “construction work” contained in the Industrial Code, namely, “[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of

¹⁹ *Id.* at 103.

²⁰ *Id.* at 102.

²¹ 305 AD2d 108, [1st Dep’t 2003].

buildings” . . . was rejected by the *Nagel* court.²²

In opposition, the plaintiff cites a multitude of cases that focus on defining “work” pursuant to *Labor Law* § 240(1).²³ The claims under *Labor Law* § 240(1) apply a different standard of evaluation of “work” from claims brought under *Labor Law* § 241(6). This court agrees, that pursuant to the Court of Appeals decision in *Nagel* claims pursuant to *Labor Law* § 241(6) require that the site is under construction, demolition, or excavation.

The plaintiff cites the Appellate Division, Second Department’s decision in *Rico-Castro v. Do & Co N.Y.Y Catering, Inc.* to support their argument that the plaintiff was engaged in “construction” as that term is defined in *Labor Law* § 241(6).²⁴ In that case, the Appellate Division, Second Department found that the moving of a barbed wire twelve foot fence that required the unbolting and subsequent re-bolting of the fence into a concrete floor constituted an “alteration” within the meaning of the statute. In *Rico-Castro* the court noted that the reinstallation of the fence required that holes needed to be drilled into the concrete floor of the warehouse.

The case before this court is distinguishable from *Rico-Castro* in that the plaintiff was in the process assembling a “table with locking cabinet” for his foreman. The plaintiff fabricated the materials for this custom “table with locking cabinet.” Unlike the plaintiff in *Rico-Castro*, who bore holes into concrete in preparing to move the fence within the warehouse, the installation of this “table with locking cabinet,” where the cabinet was screwed into the floor,

²² *Id.*

²³ See, *Purdie v. Crestwood Lake Hgts. Section 4 Corp.*, 229 AD2d 523, [2d Dep’t 1996]; *Piccione v. 1165 Park Ave. Inc.*, 258 AD2d 357, [1st Dep’t 1999]; *Bedassee v. 3500 Snyder Ave. Owners Corp.*, 266 AD2d 250 [2d Dep’t 1999]; *Andino v. BFC Partners*, 303 AD2d 338, [2d Dep’t 2003]; *Turisse v. Dominick Milone, Inc.*, 262 AD2d 305, [2d Dep’t 1999]; *Rivera v. K&B Furniture Co.*, 301 AD2d 403 [1st Dep’t 2003]; *Samuel v. Simone Dev. Co.*, 13 AD3d 112, [1st Dep’t 2004].

²⁴ *Rico-Castro v. Do & Cco N.Y. Catering, Inc.*, 60 AD2d 749, [2d Dep’t 2009].

does not constitute the industrial construction work protected by *Labor Law* § 241(6) pursuant to the Court of Appeals' decision in *Nagel*.

In addition the plaintiff cites the Appellate Division, Second Department's decision in *Markey v. C.F.M.M. Owners Corp.* to support his position that the circumstances of his accident qualify as "construction work" pursuant to the statute.²⁵ In that case the plaintiff was blinded when a piece of molding struck him in the eye while he operated an electric miter saw. In *Markey*, there was no question that the plaintiff was involved in a renovation that constituted "construction work" pursuant to *Labor Law* § 241(6). Instead, the issue for resolution before the court was whether the lessee of the property was considered an owner for the purposes of the statute. The Appellate Division, Second Department concluded that the lessor was an "owner" pursuant to the statute. The court concluded further that there was an issue of fact as to whether the 12 NYCRR 23-1.8(a), which required eye protection when a person is ". . . engaged in any other operation which may endanger the eyes." This court is called to resolve a completely different issue.

Conclusion

The issue before the court is to determine whether the plaintiff's accident occurred during the course of ongoing construction on the premises. This court finds that it did not. Unlike the plaintiff in *Covey v. Iroquois Gas Transmission System, L.P.* there is no evidence that the fabrication of the "table with locking cabinet" was part of an elaborate renovation project at 23-02 49th Avenue, Queens, New York.²⁶ As such, the plaintiff's injuries did not occur in the required context of construction, demolition and excavation.

²⁵ 51 AD3d 734 [2d Dep't. 2008].

²⁶ *Covey v. Iroquois Gas Transmission Sys.*, 89 NY2d 952 [1997](Labor Law § 240(1) claim permitted to go forward because the plaintiff's injuries occurred in the context of an elaborate construction site building a pipeline.).

Accordingly, it is hereby:

ORDERED, that Bridgedale, LLC's motion for summary judgment is granted and the complaint is dismissed, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

ENTER,

DATED: July 8, 2009

Joseph J. Maltese
Justice of the Supreme Court