

Richards v New York City Tr. Auth.

2009 NY Slip Op 33369(U)

October 2, 2009

Supreme Court, New York County

Docket Number: 109823/06

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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TREVOR RICHARDS,

Plaintiff,

Index No. 109823/06
Mtn. Seq. 004, 005

-against-

NEW YORK CITY TRANSIT AUTHORITY and
JOHN P. PICONE, INC.,

Defendants.
-----x

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NEW YORK

WALTER B. TOLUB, J.:

Motion sequence 004 and sequence 005 are consolidated for disposition and decided in accordance with this memorandum decision.

By motion sequence 004, Plaintiff seeks and order (1) granting summary judgment (CPLR 3212) on the labor law Section 240 and 241(6) causes of action; (2) the suppression of Defendants investigator's affidavit and the preclusion of his testimony (CPLR §§ 3126 and 3101); (3) an order striking Defendants Answer for spoliation of photographic evidence.

By motion sequence 005, Defendants seeks summary judgment (CPLR 3212) dismissing Plaintiff's Complaint consisting of labor law §§ 200, 240 and 241(6) and common law negligence causes of action.

Facts

Plaintiff commenced this action for injuries sustained on January 13, 2006.

New York City Transit Authority (NYCTA) hired John P. Picone,

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Inc., as the general contractor for the renovation of the underground fan chamber located at 13th Street and 6th Avenue, New York, NY. Plaintiff, a Class A Journey Electrician, was working at the NYCTA fan plant. Plaintiff claims that on the day of the incident he was on his way out of the work area to walk up to street level when he slipped and fell from a fixed steel "ladder"¹, attached to an emergency hatch. The ladder provided the only means of egress to the work site. Plaintiff claims, without more, that he slipped due to the step being worn and wet with greasy water.

It should be noted that prior to Plaintiff retaining counsel and prior to Plaintiff testifying at his 50-h hearing, on January 25, 2006, Plaintiff met and provided an oral statement to an investigator [George Chaban], who was employed by AIG World Investigative Resources, Inc. (Defendant Ex. H). According to Mr. Chaban, Plaintiff stated that:

as he was walking up the ladder his foot slipped. He confirmed he fell to the base/floor and that his feet had been approximately five feet off the ground. He stated that he did not know what exactly happened. All he could recall was that his foot slipped off the metal stair and he fell down. Mr. Richards told me [Mr. Chaban] that he did not know the reason he slipped. He confirmed that at the time of the incident, **the ladder area was dry and that there was no water anywhere.** Mr. Richards also said that

¹Disputed in this case is whether the device Plaintiff slipped and fell on was a ladder or a staircase.

at the time of his accident, **the concrete floor at the base of the ladder was dry and that there was no debris anywhere.**

(*Emphasis added*; Defendants' Ex. H; Chaban Aff. ¶6)

Additionally, Defendants submit the affidavits of Ronald Mark, a safety engineer for John P. Picone, Inc. Mr. Mark stated that he inspected the metal stairs and the surrounding area on the day of the incident. Mr Mark stated that he did not see water or a wet or slippery unsafe condition. He stated that it was dry in the area leading up to the base of the stairs (Defendant Ex. I; Mark Aff.). On the day of the incident, Mr. Mark also took a photograph of the ladder/stairs on which Plaintiff slipped (Defendant Ex. J).

Allan Fall, Plaintiff's foreman, stated that he too did not recall seeing any water or wetness at the base of the stairs, the corridor leading up to the stairs or the stairs themselves (Defendant Ex. K).

Defendant also submits the affidavit of Dr. William Marletta, a Board Certified Safety Professional since 1984. Mr. Marletta reviewed the records in this matter and performed a site inspection on May 28, 2009, more than five years after the incident. In Mr. Marletta's opinion, the "ladder" at issue is actually a fixed "staircase". (Defendant Ex. O). Mr. Marletta also stated that the stairs were not slippery because of the slip resistant raised pattern diamond plate steel. The steel pattern, which had a flash coating of rust on the tread surface, would

produce a very slip resistant surface for wet or dry conditions (Defendant Ex. O).

By these motions, Plaintiff seeks and order granting summary judgment the labor law Section 240 and 241(6) causes of action, the suppression of Defendants investigator's affidavit and the preclusion of his testimony (CPLR §§ 3126 and 3101), and an order striking Defendants Answer for spoliation of photographic evidence. By motion sequence 005, Defendants seeks summary judgment dismissing Plaintiff's labor law §§ 200, 240, 241(6) and common law negligence causes of action.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atلمان, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

Labor Law §240(1) Claims

Under Labor Law § 240(1), owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure (Rocovich v. Consolidated Edison Co., 78 NY2d 509 [1991]). The extraordinary protections of Labor Law §240(1) apply only to a the narrow class of dangers where the hazards are those related to the effects of gravity where protective devices are called for because of a difference in the elevation level(Id.). The statute is intended to impose absolute liability on owners and contractors except where a worker's conduct is the sole proximate cause of the

accident (Weininger v. Hagedorn & Co., 91 NY2d 958 [1998]).

Defendants argue that Labor Law §240(1) is inapplicable because Plaintiff was merely faced with the usual and ordinary dangers of a construction site and not the extraordinary risk envisioned by Labor Law 240(1). Defendants further argue that since Plaintiff's accident occurred on a permanent structure, Labor Law §240(1) does not apply.

The permanent affixed "ladder" from which Plaintiff fell, which appears to have been the only means of gaining access to the work site is a "device" within the meaning of Labor Law §240(1) (Crimi v. Neves Associates, 306 AD2d 152 [1st Dept 2003] citing Brennan v. RCP Assoc, 257 AD2d 389 [1999]; Santamria v. 1125 Park Ave. Corp., 249 AD2d 16 [1998]; Opera v. New York City Hous. Auth., 226 AD2d 310 [1996]).

What is less clear is whether Plaintiff was the sole proximate cause of his injuries. Plaintiff's self-serving statements made after he retained an attorney, which contradict his statements to Mr. Chaban just days after the incident, are present a triable issue of fact as to the condition of the "ladder" and the surrounding floor area at the time of the incident. Other than Plaintiff's contradictory statements, there is nothing indicating that the steps or floor were wet or covered in wet grease at the time of the incident (See generally Caraballo v. Kingsbridge Apt Corp., 59 AD3d 270 [1st Dept 2009]).

Moreover, Plaintiff has not submitted expert testimony regarding the ladder/stairs, its condition at the time of the incident and safety measures that may or may not be required for permanent ladders providing ingress egress to a work site.

As such, both motions for summary judgment are denied as there is a question of fact as to whether the Plaintiff was the sole proximate cause of his injuries.

Labor Law §241(6)

Under Labor Law §241(6), owners and contractors must provide reasonable and adequate safety for workers and 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 [1993]). It is well settled that in order to prevail under this section of the Labor Law, a plaintiff must establish that certain "concrete specifications" of the Industrial Code were violated as opposed to a general reiteration of common-law principles (Id.). Moreover, a plaintiff must demonstrate that the violation was a proximate cause of the injury (see Brown v. NYC Economic Development Corp., 234 A.D.2d 33, 650 N.Y.S.2d 213).

Here, Plaintiff claims Defendants violated Rule 23 of the Industrial Code §§ 23-1.7(d), 23-1.16, 23-1.17 and 23-1.21.

The Industrial Code §23-1.7(d) states that:

Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing. (12 NYCRR 23-1.7[d]).

As stated in the discussion *supra*, there is nothing in the record, other than Plaintiff's self-serving statements, that the "device" or surrounding area were in a slippery condition.

Industrial Code 23-1.16 [Safety Belts, Harnesses, Tail Lines and Lifelines]; 23-1.17 [Life Nets] have been considered and are deemed inapplicable under the circumstances currently before this court.

Again, questions of fact are presented regarding the condition of the ladder, whether Industrial Code Section 23-1.21 [Ladders and Ladderways] is applicable and if it was, whether it was violated. As such, both motions for summary judgment on Labor Law § 241(6) are denied.

Labor Law §200 and Common Law Negligence

Common law negligence, which is codified in Labor Law §200, arises out of the duty to maintain a safe workplace (Gasper v. Ford motor Co., 13 NY2d 104 [1963]). Under the duty, an owner or general contractor may be held liable for injuries caused as a result of a defective condition on the premises, if it can be shown that the owner or general contractor created the condition,

or that it had actual or constructive notice of the condition for a sufficient period of time that, in the exercise of reasonable care, the owner or contractor should have corrected the problem (Bender v. TBT Operating Corp., 186 Misc2d 294 [Sup Ct NY County 2000] citing Rizzuto v. LA Wenger Contracting Co., Inc., 91 NY2d 343 [1998]).

Since it is unclear what caused Plaintiff to slip and fall, there is a question of fact as to whether Defendants violated a duty owed to the Plaintiff.

Plaintiff's motion for spoliation sanctions and preclusion of reports and testimony of Mr. Chaban and Dr. Marletta, is denied as this material has in fact been turned over.

Accordingly, it is

ORDERED that Plaintiff and Defendants motion for summary judgment are denied in accordance with this memorandum decision; and it is further

ORDERED that the portion of Plaintiff's motion seeking sanction and the preclusion of reports and testimony of Mr. Chaban and Dr. Marletta is denied.

Counsel for the parties are directed to report to room 335 at 60 Centre Street, as scheduled on October 19, 2009 at 9:30 am to select a jury.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/01/09



HON. WALTER B. TOLUB, J.S.C.

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