

Ferretti v Gotham Contrs., Inc.
2010 NY Slip Op 31883(U)
June 25, 2010
Supreme Court, New York County
Docket Number: 116287/07
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: How Joan A. Middle
Justice

PART 11

Index Number : 116287/2007
FERETTI, THOMAS
VS.
GOTHAM CONTRACTORS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1-7-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for Summary Judgment

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 is decided in accordance with the attached Memorandum Decision + order.

FILED
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 25, 2010

[Signature]
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 11

INDEX NO. 116287/07

-----X
THOMAS FERRETTI,

Plaintiff,

-against-

GOTHAM CONTRACTORS, INC. and
125 WEST 31ST STREET ASSOCIATES,
Defendants.
-----X

FILED
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN MADDEN, J.:

In this action to recover damages for the injuries allegedly sustained by plaintiff as the result of a workplace accident, defendant 125 West 31st Street Associates ("West 31st Street Associates") moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion.

BACKGROUND

Plaintiff sues to recover for damages under Labor Law §§ 240(1), 241(6), and 200 and for common law negligence. Plaintiff was employed by non-party Cross Country Concrete ("Cross County"), a concrete subcontractor hired by non-party Gotham Construction Company, LLC,¹ in connection with the construction of the building at 125 West 31st Street ("the Building"), a property owned by West 31st Street Associates.

Plaintiff was injured on January 10, 2006, when the wooden form that he was removing or "stripping" from concrete, fell on his leg. Wooden forms like the one that plaintiff was stripping hold concrete while it is wet in order to keep it in place until the concrete is dried and cured. The forms are put into place by carpenters. Once the concrete was cured, plaintiff and his

¹Gotham Construction Company, LLC is a separate entity from Gotham Contractors, Inc. which is named as a defendant; however, Gotham Contractors, Inc. never appeared in this action and as indicated in plaintiff's note of issue, it is not a party to it.

fellow workers from Cross Country stripped the wooden forms off the concrete using a four foot long wrecking or stripping bar which had a right angle hook on its end. According to plaintiff, when he arrived to strip the forms, he noticed that there were approximately nine other laborers present stripping forms and "making a mess" and "dropping lumber criss-crossed, nails were sticking up, [it] looked like a bomb had gone off," (Plaintiff's Dep., at 44), and that there was no supervisor on the floor (Id., at 49). He further testified that while "his footing was not stable" the area was "safe enough" for his work which was "to strip the wall [and] the shaftway" (Id., at 55).

Before the accident, plaintiff stripped three forms on the wall (one at floor level and the next two were 6 feet high) (Id., at 57-58) After he removed the first three forms he stacked them up on the floor "straight down in front [of him]" since there was "nowhere to put them" (Id., at 58, 65). However, he testified that the position of the stacked forms did not make it difficult for him to reach the fourth form; instead, it was the lumber behind him stacked criss-crossed 6 feet high by other laborers that made it hard for him to reach the fourth form (Id., at 66).

The accident occurred as plaintiff was stripping the fourth form which was 8 feet high and weighed more than the first three forms since "it had concrete in it and was made with a 4 by 4 and not a 2 by 4" (Id., at 64). Plaintiff, who is six feet tall, testified that he did not need to stand on anything to reach the form and he reached up with a stripping bar to take the form off (Id., at 59). Plaintiff testified that before the accident:

I opened the form from the new existing concrete poured. I opened the wood off the concrete. I stuck my bar in there and popped it from the form which means open it up from the way it did not come down. I saw two metal straps. I tried to walk out of my way, and then the form came down hitting me in the leg, so I am assuming the metal straps broke.

(Id., at 60). Plaintiff later testified that the form fell because the metal straps broke but that he did not see them break but heard them snap and that “he was too busy to get out of the way”(Id., at 60).

Plaintiff later described the method he used to remove the fourth form, which unlike the previous three forms was attached not only to the wall but also to the ceiling, as a two-part process; the first involves “getting the form away from the wall” and then you “reach up with a right angle [hook] on top [where the ceiling is nailed to the top of the form] and pry it down.” (Id., at 69). After the bottom part of the form had been pulled away from the wall and the top part had been pried loose for about five seconds, he testified that the form fell off the wall when two metal straps, the only thing holding the form to the wall, broke, and the form fell from both sides and hit him on his left leg (Id., at 71-72). Plaintiff did not observe anything wrong with the form or the metal straps before the form fell ((Id., at 63, 65)

THE MOTION

West 31st Street Associates moves for summary judgment, arguing that with respect to the Labor Law § 240(1) claim, plaintiff has failed to establish that the form fell as a result of the absence of an adequate safety device of the kind enumerated in the statute, such as hoists and scaffolds, for securing or lowering loads. See Narducci v. Manhasset Bay Assoc., 96 NY2d 259 (2001). In addition, West 31st Street Associates argues that plaintiff’s actions, were the sole proximate cause of his injuries and thus it is not subject to liability § 240(1). In support of this argument, West 31 Street Associates cites plaintiff’s deposition testimony that he was “too busy to get out of the way” when the form fell and his testimony that there is nothing wrong with metal straps holding form or the form.

As for the Labor Law § 241(6) claim, West 31st Street Associates argues that this claim

should be dismissed as plaintiff's Bill of Particulars does not cite any Industrial Code violations which are required to support such a claim. Moreover, it argues that neither of the two potential sections applicable to concrete work are relevant to the facts of this case.

Next, West 31st Street Associates argues that there is no liability under Labor Law § 200 as the evidence shows that it did not control the details of the work conducted by plaintiff and that plaintiff's work was controlled, supervised and directed solely by his employer, Cross County. Additionally, West 31st Street Associates argues that as Labor Law § 200 codifies common law negligence and as the elements of proof for common law negligence and Labor Law § 200 are virtually identical, any claim for common law negligence must also be dismissed.

Plaintiff opposes the motion, asserting that liability for falling objects under Labor Law § 240(1) is not limited to objects that are in the process of being hoisted or secured but also extends to objects that require securing. Plaintiff also asserts that while West 31st Street argues that the forms were meant to fall, both sides were not supposed to fall at the same time and required securing. Moreover, plaintiff argues that his actions were not the sole proximate cause of his injuries and that his testimony that he was "too busy to get out of the way" was taken out of context.

In support of his opposition, plaintiff submits his affidavit in which he states that he testified that his work area was "good enough for him to attempt to work [as he] did not think both sides of the form would fall off at the same time." He further states that when the form fell he "was unable to get out of the way due to the presence of all the scattered lumber materials in the work area. I had intended for the sides [of the form] to fall one at a time. Both sides falling together was completely unexpected and unusual" (Plaintiff's Affidavit, ¶ 2). Plaintiff also states that while he said in his deposition that he "was too busy to get out of the way, what I

meant was that I was too busy trying [to] get out of the way of the mess on the floor.”

Plaintiff also asserts that 31 West Street Associates is potentially liable under Labor Law § 241(6) based on the violations of Industrial Code §§ 23-1.7(e)(2), 23-2.1(a), 23-2.2(a).

With respect to the claim under Labor Law § 200, plaintiff argues that a construction management agreement between Gotham and 31 West Street Associates, gave West 31st Street Associates authority to exercise supervision and control over the work so as to provide a basis for its liability.²

In reply, West 31 Street Associates argues that plaintiff’s affidavit is an attempt to raise feigned issues of fact which contradict his deposition testimony, and notes that plaintiff testified that when the form fell, “[a]ll my attention was on the form” West 31 Street Associates also points to plaintiff’s deposition testimony that just before the form fell, he had walked to the end of the form about three feet. West 31 Street Associates also notes that the Industrial Code provisions relied on by plaintiff are not in his Bill of Particulars.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68

²Plaintiff also argues that 31 West Street Associates’ motion is untimely as it was made more than sixty days after the note of issue was filed as required by the Preliminary Conference order. However, this argument is without merit since, as 31 West Street Associates notes, its affidavit of service and post mark indicates that its motion was served within the 60 day period.

secured.” In Ross v Curtis-Palmer Hydro-Elec. Co. 81 NY2d 494, 500-501 (1993), the Court, in discussing the risks covered by the statute, stated that section 240:

“evinces a clear legislative intent to provide ‘exceptional protection’ for workers against the ‘special hazards’ that arise when the work site is itself elevated or is positioned below the level where ‘materials or load [are] hoisted or secured.’ The ‘special hazards’ to which we referred in *Rocovich*, however, do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the ‘special hazards’ referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. In other words, Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*”

(citations omitted).

Recently, in Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 (2009), the Court determined that liability under section 240 (1) may attach even if a worker does not fall and is not struck by a falling object. There, the Court stated that “we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, *the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential*” (emphasis supplied). The Court continued, stating that “the governing rule is to be found in the language from *Ross* . . . where we elaborated more generally that ‘Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or*

person.” *Id.* at 604, quoting Ross, 81 NY2d at 501 (emphasis in original).

When, as here, a plaintiff is injured as the result of a falling object, the plaintiff is required to show that at the time the object fell, it was either being “hoisted or secured” (Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]) or “required securing for the purposes of the undertaking.” Quattrocchi v. F.J. Sciamè Const. Corp., 11 NY2d 757 (2008); see also, Luongo v. City of New York, 72 AD3d 609 (1st Dept 2010).

Here, there is no dispute that injuries to plaintiff were caused by the application of the force of gravity to the form. However, the record raises triable issues of fact as to whether the form was adequately secured under the circumstances and in particular, whether the weight and position of the form required that a safety device be used to secure the form while plaintiff was removing it. See e.g., Quattrocchi v. F.J. Sciamè Const. Corp., 11 NY2d at 759 (holding that record raised triable issues of fact as to whether planks that fell on plaintiff were adequately secured in light of the purposes of the plank assembly). In addition, contrary to West 31st Street Associates’ position, the fact that the form was being removed does not render section 240(1) inapplicable since liability has been found under the statute where an object being removed is not properly secured to avoid injury to a worker. See Mata v. Park Here Garage Corp., 71 AD3d 423 (1st Dept 2010) (holding that failure of defendant to provide worker with appropriate safety devices for removal of 300-pound assemblage above entranceway of the parking facility provided a basis for liability under Labor Law § 240(1)); Vargas v. City of New York, 59 AD3d 261 (1st Dept 2009) (holding that defendant was potentially liable under Labor Law § 240(1) when plaintiff was struck by a pipe that fell from several floors above where workers were performing demolition work including cutting and removing of pipes).

Next, it cannot be said that plaintiff was the sole proximate cause of his injuries such that there is no liability under section 240(1). To show that a plaintiff's negligence was the sole proximate cause of an injury allegedly based violations of the Labor Law, a defendant must establish that the plaintiff "had adequate safety devices available: that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 (2004); see also, Kosavick v. Tishman Construction Corp. of New York, 50 AD3d 287 (1st Dept 2008). Here, the record shows that plaintiff was not provided with any safety devices. And, plaintiff's failure to move out of the way to escape injury provides, at most, evidence of comparative negligence which does not provide a defense to a claim under Labor Law § 240(1). See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d at 289-290.

Accordingly, summary judgment is not warranted dismissing plaintiff's Labor Law § 240(1) claim.

Labor Law § 241(6) Claim

Labor Law § 241(6) requires that owners and contractors "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., *supra*, 81 NY2d at 502. Claimants must cite specific violations of the Industrial Code regulations for section 241(6) to apply. See, Amato v State of New York, 241 AD2d 400 (1st Dept 1997), *lv denied* 91 NY2d 805 (1998). "Only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a

basis for liability under that statutory section." Heller v 83rd St. Investors Ltd. Partnership, 228 AD2d 371, 372 (1st Dept), lv denied, 88 NY2d 815 (1996).

Here, plaintiff bases his Labor Law § 241(6) on an alleged violations of Industrial Code sections 23-1.7(e)(2) , 23-2.1(a), 23-2.2(a). 12 NYCRR 23-1.7 which provides that:

(e) Tripping and other hazards.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

12 NYCRR § 23-2.1(a), regarding storage of material and equipment provides that "(1) [a]ll building materials and equipment shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Section 23-2.2(a), which provides general requirements for concrete work, provides that "[f]orms, shores, and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain proper position and shape."

Although plaintiff did not identify these Industrial Code violations in his Bill of Particulars, this failure is not fatal to his § 241(6) claim. See Noetzell v. Park Avenue Hall Housing Development Fund Corp., 271 AD2d 231 (1st Dept 2000); Kelleir v. Supreme Industrial Park, LLC, 293 AD2d 513 (2d Dept 2002). Next, the Industrial Code violations relied on by plaintiff are sufficiently specific to support claims under Labor Law § 241(6). Lane v. Fratello Const. Co., 52 AD3d 575 (2d Dept 2008); Castillo v. 3440 LLC, 46 AD3d 382 (1st Dept 2007); Morris v. Pavarini Const., 9 NY3d 47 (2007). The remaining issue, then, is whether the violations are applicable to the circumstances of this case. Mendoza v. Marche Libre Associates,

256 AD2d 133 (1st Dept 1998).

Industrial Code § 23-1.7(e)(2), which requires “work areas” to be free of scattered materials, is potentially applicable here based on plaintiff’s deposition testimony that the area surrounding his work space was surrounded by improperly stacked lumber. Moreover, it cannot be said as a matter of law that the haphazardly stacked lumber was “an integral part of the work being performed” at the accident site. See McDonagh v. Victoria’s Secret Inc., 9 AD3d 395, 396-397 (1st Dept 2004)(holding that issue of fact existed as to whether telephone equipment over which plaintiff tripped constituted an integral part of the work being performed). In addition, in his affidavit, plaintiff stated that he was unable to get out of the way when the form fell due to the presence of all the scattered lumber materials in the work area.

While plaintiff’s statement in his affidavit amplifies his deposition testimony, it does not directly contradict it, and the portions of plaintiff’s deposition testimony relied on by West 31st Street Associates to argue the contrary are ambiguous at best.³ See Bosshart v. Pryce, 276 AD2d 314 (1st Dep’t 2000) (denying summary judgment when plaintiff’s affidavit submitted in opposition to defendant’s summary judgment motion, though more detailed, did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2d Dep’t 1995) (court did not err in considering affidavit which did not contradict plaintiff’s deposition testimony). In particular, while plaintiff testified that he was too busy to move out of the way, he also testified as to the limited area he had to work in due to the haphazard stacking of materials on the floor and that before the form hit him “he tried to walk out of [the] way.”

Accordingly, there are triable issues of fact as to whether Industrial Code § 23-1.7(e)(2)

³For example, plaintiff answered “no”, when asked “whether he had no time to move in any direction” (Plaintiff’s Dep., at 82).

applies which precludes summary judgment with respect to this provision.

Likewise, the record raises factual issues as to whether there was a violation of Industrial Code 23-2.2(a) which requires forms to be structurally safe and properly braced and tied together so as to maintain position and shape. Morris v. Pavarini Const., 9 NY3d at 51. In this regard, while plaintiff testified that he did not observe any defect in the form or the metal straps, he also testified that the form fell because the metal straps broke.

In contrast, Industrial Code § 23-2.1(a), which requires that materials be stored so as not to obstruct any passageway, walkway, stairway or other thoroughfare does not apply as a matter of law since plaintiff was injured while working in an open area. Isoja v. JWP Forest Elec Corp., 262 AD2d 95 (1st Dept), lv. dismissed, 94 NY2d 797 (1999).

Accordingly, summary judgment is only granted to the extent of dismissing that part of plaintiff's Labor Law § 241(6) claim that is based on a violation of Industrial Code § 23-2.1.

Labor Law § 200 Claim

"Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to owner under the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993). Moreover, liability will not be found under 200 "solely because the owner had notice of the unsafe manner in which work is performed." Id., at 878. To be charged with liability under Labor Law § 200, an owner or general contractor must perform more than their "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied, 100 NY2d 508 (2003).

“[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons.” Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003). Instead, it must be shown that the owner “‘*had authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition*’.” Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007)(emphasis in the original), quoting, Ruzzuto v. Wenger Construct. Co., 91 NY2d at 352.

Here, there is no evidence that West 31st Street Associates had the authority to control the stripping of the forms. Notably, plaintiff testified that his work was supervised solely by his employer. In addition, contrary to plaintiff’s position, the construction management agreement between West 31st Street Associates and Gotham does not raise a triable issue of fact as to whether West 31st Street Associates exercised the type of control needed to provide a basis for liability under Labor Law § 200.⁴ Finally, plaintiff has not shown that West 31st Street Associates can be held liable for common law negligence.

In view of the above, it is

ORDERED that defendants’ motion for summary judgment is granted to the extent of dismissing that part of plaintiff’s Labor Law § 241(6) claim which is based on a violation of


⁴When an injury is caused not by a contractor’s methods but by a defect in the premises, it is not necessary to show that an owner or general contractor exercised control or supervision over the work causing injury if the owner or general contractor had actual or constructive notice of the defect causing the injury or was responsible for creating the condition. Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dept 2003). However, since this case does not involve a defect in the work site, as opposed to a danger caused by the methods employed for performance of the work, West 31st Street Associates cannot be held liable under § 200 even if it had constructive notice of the improperly stacked lumber or a defect with the forms. See Dalanna v City of New York, 308 AD2d 400 (protruding bolt was not a defect in the premises itself, but rather was created by the manner in which the worker’s employer performed his work).

Industrial Code § 23-2.1 and dismissing plaintiff's Labor Law § 200 and common law negligence claims and is otherwise denied; and it is further

ORDERED that a pretrial conference shall be in Part 11, room 351, 60 Centre Street on at August 5, 2010 at 3:00 pm.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: June 25, 2010



J.S.C.

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