

Martinez v Tishman Constr. Corp.

2010 NY Slip Op 32022(U)

July 23, 2010

Supreme Court, Queens County

Docket Number: 20041/08

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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NELSON MARTINEZ,

Plaintiff(s),

Index No.:20041/08

Motion Date:6/1/10

- against -

Motion Cal. #: 29,30

Motion Seq. #: 2, 3

TISHMAN CONSTRUCTION CORPORATION and
99 CHURCH INVESTORS, LLC,

Defendant(s).

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TISHMAN CONSTRUCTION CORPORATION and
99 CHURCH INVESTORS, LLC,

Third-Party Plaintiff(s),

Third-party

Index No.:350609/08

- against -

WALDORF EXTERIORS, LLC,

Third-Party Defendant(s).

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The following papers numbered 1 - 18 read on this motion by the plaintiff Nelson Martinez for a motion granting summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6); and a separate motion by the defendants Tishman Construction Corporation and 99 Church Investors for an order granting summary judgment and dismissing plaintiff's complaint.

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Upon the foregoing papers it is **ORDERED** that the motions are considered together and decided as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on May 19, 2008 while he was working as a laborer for third-party defendant Waldorf Exteriors, LLC ("Waldorf"). Waldorf was hired by defendant/third-party plaintiff Tishman Construction Corporation ("Tishman") as a demolition subcontractor to demolish the subject building, which was owned by defendant/third-party plaintiff 99 Church Investors LLC ("99 Church"). At the time of the accident, plaintiff's co-worker Christopher Panarella ("Panarella") was in the process of demolishing an exterior rear wall on the first floor of what was left of the building with an excavating machine. Within the wall was a partially-exposed steel beam that was also to be removed. Immediately prior to his accident, plaintiff was instructed to cover an electrical box located in the area to protect it against falling debris from the demolition work. Plaintiff covered the box and was leaving the area when Panarella began to strike cinder blocks adjacent to the beam. The beam dislodged and fell 6 to 12 feet, striking plaintiff's right leg.

As a preliminary matter, this court notes that, in the absence of a court-ordered rule to the contrary, CPLR 3212 (a) requires motions for summary judgment to be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown. *Brill v City of New York* (2 NY3d 648 [2004]) and its progeny require a moving party to demonstrate "good cause" for the delay in making a motion for summary judgment, "rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*id.* at 652). Furthermore, "[n]o excuse at all, or a perfunctory excuse, cannot be 'good cause' " (*id.*).

In the instant case, the note of issue was filed on November 12, 2009. Pursuant to a stipulation between the parties, dated January 6, 2010, the time to submit dispositive motions was extended to the extent that all motions for summary judgment were to be made returnable no later than April 13, 2010. This stipulation was "so-ordered" by the Honorable Martin E. Ritholtz, J.S.C. Plaintiff's motion for summary judgment was made returnable on that date and is, therefore, timely. However, defendants' motion for summary judgment, was made returnable on May 13, 2010, beyond the time prescribed by the court's January 6 order. Defendants neither obtained leave of court nor demonstrated good cause for their delay (CPLR 3212 [a]; see *Brill*, 2 NY3d at 653; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]).

This court may still consider defendants' motion without a showing of good cause for the delay if the issues raised therein are nearly identical to those made in plaintiff's timely motion for summary judgment (see CPLR 3212 [b] [setting forth the court's

power to search the record before it]; see also *Ellman v Village of Rhinebeck*, 41 AD3d 635 [2007]; *Grande v Peteroy*, 39 AD3d 590 [2007]). Therefore, those portions of defendants' motion which address Labor Law §§240 (1) and 241 (6) will be considered as they are the same causes of action discussed in plaintiff's timely motion. However, this court will not consider those portions of defendants' motion which deal with plaintiff's Labor Law § 200 and common-law negligence claims, as they are not nearly identical to plaintiff's timely motion (see *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [2006]).

Labor Law §240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action made pursuant to Labor Law §240 (1), a plaintiff must establish that the statute was violated and that the violation was the proximate cause of his or her injuries (see *Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

In support of his motion, plaintiff argues that he was struck by an unsecured object that should have been secured or otherwise protected against gravity-related risks. In opposition to plaintiff's motion, and in support of their own motion, defendants argue, *inter alia*, that Labor Law §240(1) does not apply to this action because plaintiff was not struck by an object that was in the process of being hoisted or secured. Moreover, defendants assert that the beam was part of the structure of the building that Waldorf employees intended to demolish and, therefore, did not require securing.

The court initially notes that, notwithstanding the phrase used by the Court of Appeals in *Narducci v Manhasset Bay Assoc.* (96 NY2d 259 [2001]), which states that "[a] plaintiff must show that the object fell, while being hoisted or secured" (*id.* at 268), the fact that the beam was not actually in the process of being hoisted or secured does not automatically render the statute

inapplicable (see *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; *Outar v City of New York*, 5 NY3d 731 [2005], *affg* 11 AD3d 593 [2004]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004 [2009]). Rather, the issue is whether the beam was an object that required securing (see *Outar*, 5 NY3d at 732).

None of the movants are entitled to summary judgment with respect to Labor Law §240 (1). The record demonstrates that material issues of fact remain as to whether the beam was required to be secured by a device of the type enumerated in the statute (see *Ravinov v Popeye's*, 68 AD3d 1085 [2009]). Namely, there is an issue as to whether it was foreseeable (see *e.g. Gordon*, 82 NY2d at 562 [explaining that defendants are liable if the risk of injury is foreseeable], given the nature of the work that was being performed, that the beam would fall on plaintiff).

The court notes that the fact that the wall was being demolished at ground level when the accident occurred is immaterial, as it is clear that there was a height differential between the level where plaintiff was positioned and the beam itself. Accordingly, those portions of both plaintiff's and defendants' motions which seeks summary judgment for plaintiff's Labor Law §240(1) allegations are denied.

Plaintiff's complaint also alleges that the defendants are in violation of Labor Law §241 (6). This statute requires owners, contractors, and their agents to provide reasonable and adequate protection and safety for workers and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the New York Industrial Code (see *Ross*, 81 NY2d at 501-502; *Galarraga v City of New York*, 54 AD3d 308 [2008]; *Lodato v Greyhawk N. Am.*, 39 AD3d 491 [2007]). In order for plaintiff to maintain a cause of action under Labor Law §241 (6), he must plead and prove a specific, positive violation of one or more of the aforementioned regulations (see *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2006]), and that said violation was the proximate cause of plaintiff's injuries (see *Rakowicz*, 56 AD3d at 747; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 [2008]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396 [2005]).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR §§ 23-1.7 and 23-3.4, plaintiff has failed to address these violations in his moving papers (as well as in his opposition to defendants' motion). Consequently, those portions of plaintiff's Labor Law §241 (6) claim predicated upon violations not discussed by plaintiff are hereby dismissed as abandoned (see *Genovese v Gambino*, 309 AD2d 832 [2003]; *Mulvihill v Brooklyn Law School*, 22 Misc 3d 1114[A] [Sup Ct, Kings County 2009]).

This court will now consider those sections of the Industrial Code that have been addressed by the plaintiff, specifically Industrial Code 12 NYCRR §§23-1.7 (a) (1) and 23-3.4. (b), (c) (3)-(5).

12 NYCRR §23-1.7 (a) (1) states in pertinent part:

"Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

In this action, the relevant testimony reveals that the steel beam fell on plaintiff in an area where he would not have otherwise been (see e.g. *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732 [2007]; *Portillo v Roby Anne Dev., LLC.*, 32 AD3d 421 [2006]). Both plaintiff and his foreperson testified that plaintiff was attempting to leave the subject area before demolition of the wall was to commence, indicating that this was not a place where plaintiff was *required* to work. Even assuming that plaintiff was required to work or pass through the area, the overhead protection described in this particular section of the Industrial Code "would have rendered the task at hand impossible to carry out" (*Banaczyk v 1425 Broadway, LLC*, 24 Misc 3d 1213[A] [Sup Ct, Queens County 2009]). As such, plaintiff may not rely on Industrial Code §23-1.7 (a) (1) as a predicate for liability, and defendants are entitled to dismissal of this claim.

Plaintiff's complaint also alleges that the defendants violated Industrial Code §23-3.4 (b). This statute pertains to mechanical methods of demolition and provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unsupported or unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." Contrary to defendants' contention, the beam did not fall due to the deliberate application of force upon it, which would have otherwise rendered this section inapplicable (cf. *Smith v New York City Hous. Auth.*, 71 AD3d 985 [2010]). During Panarella's testimony, he explained that it was his intention to knock down the cinder block surrounding the beam, not to knock down the beam itself. He further stated that, after removing the concrete, the beam was to be pulled out or burned with oxygen. Most compelling is the testimony of plaintiff's foreperson that Panarella was working on the cement surrounding the beam, and not the beam itself, and that the beam "wasn't meant to fall," but that

"it fell accidentally," and "[i]t fell only [due] to the vibration." Defendants have not proffered any relevant evidence to the contrary. As no issues of fact exist as to what caused the beam to fall, plaintiff has conclusively demonstrated his entitlement to summary judgment with respect to this claim.

12 NYCRR §§ 23-3.4 (c) (3)-(5), provide, in relevant part, that:

"(3) Where other mechanical devices or equipment are being used in demolition operations, a zone of demolition shall be maintained in the area into which the building or other structure or any portion thereof may fall. Such zone of demolition shall equal at least one and one-half times the height of the building or other structure or any portion thereof above the ground, grade or equivalent level.

(4) Only persons essential to the operation of the demolition devices or equipment shall be suffered or permitted to enter any zone of demolition.

(5) Substantial barricades constructed and installed in compliance with this Part (rule) shall be erected wherever there is likelihood of any person entering a zone of demolition other than the persons essential for operation of the demolition devices or equipment."

The relevant testimony offered with the motions is that plaintiff was instructed to enter a "zone of demolition," and was still in the area when active demolition operations were taking place. The court is not persuaded by defendants' arguments that plaintiff was essential to the operation of the demolition devices or equipment such that he was permitted to enter that zone. While plaintiff was certainly a member of the demolition crew, he was not essential to the "operation of any demolition devices or equipment" being used. It is uncontroverted that, immediately prior to the accident, plaintiff's only task was to place protective covering on an electrical box. As defendants have failed to demonstrate that plaintiff's presence in the "zone of demolition" was essential to the operation of the demolition devices or equipment, plaintiff is entitled to summary judgment with respect to these claims.

Accordingly, that branch of plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240 (1) is denied, while that branch of the motion on the issue of liability pursuant to Labor Law §241(6) is granted only to the extent that the claim is predicated on a violation of 12 NYCRR §§23-3.4 (b) and (c) (3)-(5). The branches of defendants' motion for summary judgment which seek dismissal of plaintiff's Labor Law §§240 (1), 200, and common-law negligence claims are

denied. That branch of defendants' motion for summary judgment which seeks dismissal of plaintiff's Labor Law §241 (6) cause of action is granted to the extent that the allegations of defendants' violations of 12 NYCRR 23-1.19, 1.30, 1.33, 2.3, 3.3, and 4.1 are dismissed as abandoned and 23-1.7 is dismissed on the merits.

Dated: July 23, 2010

JANICE A. TAYLOR, J.S.C.

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