

Lybaert v D & D Diagnostics , Inc.

2011 NY Slip Op 31411(U)

May 12, 2011

Sup Ct, Nassau County

Docket Number: 7882/08

Judge: Anthony L. Parga

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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8
BRIAN R. LYBAERT,

Plaintiff,

INDEX NO. 7882/08

-against-

MOTION DATE: 3/25/11
SEQUENCE NO. 003, 004,
005

D & D DIAGNOSTICS, INC., DENNIS DOUDICAN,
CLIFFORD DOUDICAN, and BCB PROPERTIES, LLC

Defendants.

-----X

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Upon the foregoing papers, defendant BCB Properties, LLC’s motion for summary judgment is granted; defendants D & D Diagnostics, Inc., Dennis Doudican, and Clifford Doudican’s cross-motion for summary judgment is granted, in part, and denied, in part; and plaintiff’s cross-motion for summary judgment is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff, Brian R. Lybaert, on January 13, 2007, at the commercial premises located at 758 Main Street, Farmingdale, New York. Within his complaint, the plaintiff alleges causes of action sounding in common-law negligence and violations of Labor Law Sections 200, 240(1), and 241(6). At the time of the alleged accident, defendant BCB Properties, LLC owned the building where the accident occurred. Defendant BCB Properties, LLC (hereinafter “BCB”) contends that it maintained no presence at the building. The building was occupied by defendant, D & D

Diagnostics, Inc. (hereinafter "D&D"), pursuant to a written lease between BCB and D&D. Defendants, brothers, Dennis Doudican and Clifford Doudican, are co-owners of D&D and operate D&D as an automotive repair garage and service station.

The plaintiff, Brian Lybaert, is a long time friend of defendant Clifford Doudican, dating back to their junior high school days. Clifford Doudican asked the plaintiff to paint a mural of a 1969 Camaro upon one of the interior walls of the garage. In exchange for same, the Doudican brothers were to furnish an inspection for plaintiff's motor vehicle. There was no written contract or written agreement memorializing same, and no money ever changed hands. Defendants contend that "no employment agreement was struck," and that the plaintiff testified they agreed on a barter arrangement where plaintiff would paint the mural in exchange for an inspection of his car. Defendant BCB also contends that, as evidenced by the deposition testimony of the president of BCB, Nick Bartolomeo, BCB had no knowledge that a mural was being painted, did not hire the plaintiff to do any work, was not present when the accident occurred, and did not direct, supervise or inspect the painting of the mural. Mr. Bartolomeo testified that BCB also did not maintain any offices on the premises and had made no structural changes to the building. He further testified that the lease provided that the tenant was responsible for repairs and maintenance of the premises.

The plaintiff alleges that he was injured while coming down an A-frame ladder while he was painting the mural. He testified at his deposition that he was carrying a pallet and paint brush at the time of the accident. Plaintiff alleges that the accident occurred when the ladder tipped, causing him to fall off of it, as plaintiff was descending the ladder. In his bill of particulars, plaintiff alleges that "the dangerous and defective condition which caused the plaintiff's accident and injuries was his working on a ladder that was not properly constructed and/or affixed to an uneven floor." The Court notes, however, that no evidence has been submitted regarding what is alleged to have caused the ladder to "tip."

At his deposition, plaintiff testified that Clifford Doudican's friend, "Roger," provided plaintiff with the ladder and that defendant Clifford Doudican helped set up the ladder prior to plaintiff's accident. Plaintiff also testified that there was equipment and tools on the floor of the autobody shop in the vicinity of the accident location, but did not testify that the ladder tipped due to the presence of these items on the floor. Plaintiff testified at his deposition that the feet of the ladder were placed on the floor and not on top of the tools and equipment.

Defendant BCB moves for summary judgment on the grounds that plaintiff is not an employee or in the class of protected persons to be protected within the ambit of Section 240(1) or 241(6) of the Labor Law; that the plaintiff was not painting in conjunction with any other construction or excavation activity thus rendering Section 241(6) of the Labor Law statute in applicable even if plaintiff was a covered person under the Labor Law; and that defendant BCB

is an out of possession landowner which had no knowledge about the painting of the mural and did not provide any supervision or control of the plaintiff in performing his artwork on the garage wall. Defendant BCB argues that since it did not direct, supervise, or control the work being done by the plaintiff, and, in fact, was an out of possession landlord which had no knowledge of same, it cannot be held liable for a violation of Section 200 of the Labor Law.

Defendants D&D, Dennis Doudican and Clifford Doudican cross-move for summary judgment upon the same grounds, as well as upon the additional grounds that the plaintiff's complaint should be dismissed as against the individual defendants, Dennis Doudican and Clifford Doudican, as the plaintiff failed to identify any specific act of negligence on their part that occurred outside of the operation of their business, D&D. Defendants D&D, Dennis Doudican and Clifford Doudican argue that plaintiff has failed to "pierce the corporate veil" as the plaintiff failed to set forth any facts that demonstrate that the painting of the mural was for the benefit of anyone other than the business, D&D.

Plaintiff opposes defendants' motion and cross-motion, and plaintiff cross-moves for summary judgment upon the grounds that the defendants violated Labor Law Section 240(1) as a matter of law. Plaintiff contends that, contrary to defendants' arguments, plaintiff was a protected person under the Labor Law and that his fall from the ladder was an elevation-related accident covered by New York Labor Law Section 240(1). Plaintiff contends that he was not provided with the safety devices required under section 240(1) and that section 240(1) imposes absolute liability upon owners and contractors even if they retain no control or supervision over the work being done. Plaintiff argues that he is covered as an "employee" under the Labor Law, as he was not performing the painting of the mural gratuitously, but was painting the mural in exchange for defendants' service in inspecting his vehicle. Plaintiff also contends that the activity he was performing in painting the mural was a "covered activity" under sections 240(1) and 241(6). Plaintiff further contends that Section 241(6) applies even where there is no ongoing construction or demolition.

With respect to BCB's liability herein, plaintiff argues that because the lease between BCB and D&D allowed the landlord (BCB) to enter the leased property in order to examine it "or to make such decorations, repairs, alterations, improvements or additions as LANDLORD may deem necessary or desirable" and reserves the right to "enter the premises for the purposes of examining and inspecting...and to make any necessary repairs," summary judgment should not be granted to BCB on plaintiff's causes of action for common law negligence.

Lastly, plaintiff contends in his opposition that there are questions of fact regarding the individual liability of Dennis Doudican and Clifford Doudican, as plaintiff claims that the deposition testimony of said defendants indicated that they individually entered into the barter agreement with the plaintiff to do the mural work.

The defendants have made a prima facie demonstration of entitlement to summary judgment on plaintiff's causes of action which allege violations of Labor Law Sections 200, 240(1) and 241(6), upon the grounds that plaintiff is not an employee, or in the class of protected persons to be protected, within the ambit of the New York State Labor Law. In order to invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent. (*Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 563 N.E.2d 263 (1990)). The intent of Labor Law Sections 200, 240 and 241 was to provide for the health and safety of employees. (*Id.*). Section 200 codifies the common law duty of an employer to provide a safe work place, and the intent of Sections 240 and 241 were to place responsibility for safety practices at building construction jobs on the owner and general contractor. (*Id.*). If a plaintiff does not fall into the class of persons protected by the New York Labor Law, the protections afforded by Sections 200, 240(1) and 241(6) do not apply. (*Id.*).

The Court of Appeals has held that an individual does not become an employee covered by the Labor Law "by providing casual, uncompensated assistance to another person with a repair or construction project in an informal arrangement that does not give rise to mutual duties or obligations between them and bears none of the traditional hallmarks of an employment relationship." (*Stringer v. Musacchia*, 11 N.Y.3d 212, 898 N.E.2d 545 (2008)). In *Stringer*, the court did not find that the plaintiff was protected by the strict liability provisions of Labor Law 240(1) where the plaintiff had agreed to construct a shed on the defendant's property in exchange for being allowed to participate in a turkey hunt.

Further, in *Fuller v. Spiesz*, 53 A.D.3d 1093, 861 N.Y.S.2d 896 (4th Dept. 2008), it was held that the New York Labor Law did not apply where the parties entered into a barter agreement, pursuant to which the defendant agreed to perform construction work on plaintiff's residence in exchange for plaintiff's construction work on defendant's roof. (*Id.*). Even where the parties have a quid pro quo barter arrangement, whereby each party agrees to assist the other, where the plaintiff is not fulfilling an obligation to the defendant and is not being paid for his work, the plaintiff is not afforded the protection of the Labor Law. (*Luthringer v. Luthringer*, 59 A.D.3d 1028, 872 N.Y.S.2d 779 (4th Dept. 2009)). The Labor Law is inapplicable to persons such as friends and neighbors who voluntarily render casual assistance to a homeowner in performing a home repair or construction job. (*Howarter v. Dugan*, 232 A.D.2d 524, 649 N.Y.S.2d 32 (2d Dept. 1996)(where plaintiff offered to cut down several trees at the defendants' home if he could then have the firewood, the arrangement did not constitute compensable hiring under Labor Law §200, even though the defendants would have had to pay someone to remove the trees if the plaintiff had not done so); *See also, Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d

573, 563 N.E.2d 263 (1990)).

Section 2(5) and (7) of the New York Labor Law defines an employee as, “a mechanic, workman or laborer working for another for hire” who is “permitted or suffered to work.” The defendants have established that the plaintiff herein does not qualify as an employee under the definitions of the Labor Law, and as such, summary judgment is granted to defendants with respect to plaintiff’s causes of action alleging violations of Labor Law Sections 200, 240(1), and 241(6).

Further, with respect to Section 241(6), said section provides that “all areas in which construction, excavation or demolition work is being performed shall be so constructed, assured, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.” In the instant action, there was no ongoing construction or excavation work being done. The deposition testimonies of the parties clearly demonstrate that there was no ongoing construction or demolition work taking place at the time that plaintiff was painting the mural. As such, Labor Law 241(6) would not apply even if the plaintiff was a covered person under the New York Labor Law. (*See, Lioce v. Theatre Row Studios*, 7 A.D.3d 493, 776 N.Y.S.2d 89 (2d Dept. 2004); *Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 782 N.E.2d 558 (2002)). The type of decorative painting work in which plaintiff was engaged does not constitute construction, excavation, or demolition work, as required under Labor Law Section 241(6). (*See, Casey v. Niagra Mohawk Power Point*, 269 A.D.2d 775, 703 N.Y.S.2d 618 (4th Dept. 2000)(touch up billboard painting “does not constitute... ‘construction, excavation or demolition work’ within the purview of Labor Law 241(6).”). Furthermore, in opposition to defendants’ motion and cross-motion, the plaintiff fails to demonstrate that the defendants violated an Industrial Code regulation setting forth a specific standard of conduct applicable to working conditions which existed at the time of the accident. (*Roberts v. Worth Construction*, 21 A.D.3d 1074, 802 N.Y.S.2d 177 (2d Dept. 2005)). In his bill of particulars, plaintiff alleges that the defendants violated New York Industrial Code Sections 23-1.16 and 23-1.17, but plaintiff fails to demonstrate that there was a violation of same at the time of plaintiff’s accident.

As the Labor Law does not apply to the within action, plaintiff’s untimely cross-motion for summary judgment upon the grounds that the defendants violated Labor Law §240(1) is accordingly denied. Even if the plaintiff was a covered person under the Labor Law, plaintiff did not make a prima facie demonstration of entitlement to summary judgment upon the grounds that the defendants violated Labor Law 240(1). All work related falls from elevated surfaces or safety devices do not fall within the ambit of Labor Law 240(1). (*Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237 (1998)). In order to prevail on a claim arising out of Section 240(1), a plaintiff must establish both that the statute was violated and that the violation was the proximate cause of the

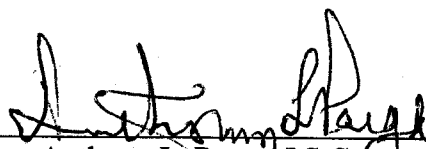
plaintiff's injuries. (See, *Bland v. Manocherian*, 66 N.Y.2d 452, 488 N.E.2d 810 (1985); See also, *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 695 N.E.2d 709 (1998)). Labor Law 240(1) benefits only those persons injured by a fall from an elevated height due to a lack of, or defective, safety devices designed to prevent such a fall and does not establish a rule of law to the effect that anyone who falls off a ladder may recover damages from the owner. (*Id.* at 462-463). In his moving papers, the plaintiff failed to demonstrate that there was a defect in the ladder or that the defendant's violation of Labor Law §240(1) in failing to provide adequate protective devices or devices to secure the ladder to the ground was the proximate cause of the plaintiff's injuries. Plaintiff further failed to present evidence demonstrating what caused the ladder to "tip" as the plaintiff descended the ladder. Accordingly, even if the plaintiff was an employee under the Labor Law, plaintiff failed to make a prima facie showing of entitlement to summary judgment on the grounds that the defendants violated Labor Law §240(1).

This Court's finding that the defendants cannot be found liable pursuant to the New York Labor Law does not absolve the defendants of liability for common-law negligence. (See, *Fuller v. Spiesz*, 53 A.D.3d 1093, 861 N.Y.S.2d 896 (4th Dept. 2008)). With regard to plaintiff's causes of action sounding in common law negligence, defendant BCB has demonstrated a prima facie showing of entitlement to summary judgment. Defendant was an out of possession landlord who did not supervise or control the work being done and who also had no actual or constructive notice of the alleged defect which caused the ladder to "tip." A landlord's reservation of a right to enter a leased premises to make repairs is insufficient to give rise to liability for a subsequently-arising dangerous condition. (*Ortiz v. RVC Realty Co.*, 253 A.D.2d 802, 677 N.Y.S.2d 598 (2d Dept. 1998); *Lafleur v. Power Test Realty Co. Ltd. Partnership*, 159 A.D.2d 691, 553 N.Y.S.2d 50 (2d Dept. 1990)). Additionally, even to establish liability against an owner or general contractor pursuant to Labor Law §200, it must be established that the owner or general contractor exercised supervision or control over the work performed at the site, or had actual or constructive notice of the allegedly unsafe condition. (*Parisi v. Loewen Development of Wappinger Falls, LP*, 5 A.D.3d 648, 774 N.Y.S.2d 747 (2d Dept. 2004)). For liability to be imposed, the owner or general contractor must have directed and controlled the manner in which the work was performed, not merely possessed general supervisory authority. (*Id.*; see also, *Dennis v. City of New York*, 304 A.D.2d 611, 758 N.Y.S.2d 661 (2d Dept. 2003)). Since defendant BCB demonstrated that it had no authority to control the activity during which the plaintiff's injury was sustained and no prior notice of the unsafe condition, BCB cannot be held liable to the plaintiff herein. (See, *Russin v. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805 (1981); *Karaktin v. Gordon Hillside Corp.*, 143 A.D.2d 637, 532 N.Y.S.2d 891 (2d Dept. 1998)). Accordingly, plaintiff's action against defendant BCB, together with all cross-claims, is dismissed.

With respect to defendants D&D, Dennis Doudican, and Clifford Doudican, said defendants have not made a prima facie showing that they are not liable to the plaintiff in common-law negligence. Questions of fact exist with respect to whether D&D, Dennis Doudican, and Clifford Doudican had actual or constructive notice of the condition which caused the ladder to "tip," and whether Clifford Doudican created the condition which caused the plaintiff's accident by failing to properly set up the ladder which plaintiff was using. Accordingly, defendants D&D, Dennis Doudican, and Clifford Doudican's motion summary judgment is denied with respect to plaintiff's causes of action for common-law negligence against defendants D&D, Dennis Doudican, and Clifford Doudican.

This constitutes the decision and order of this Court.

Dated: May 12, 2011



 Anthony L. Parga, J.S.C.

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