

Petrie v 1515 Broadway Fee Owner, LLC

2011 NY Slip Op 31692(U)

June 17, 2011

Supreme Court, New York County

Docket Number: 110165/06

Judge: Debra A. James

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARK PETRIE,

Plaintiff,

Index No.: 110165/06

- v -

Motion Date: 09/03/10

1515 BROADWAY FEE OWNER, LLC., and
VIACOM, INC.,

Defendants,

Motion Seq. No.: 05

Motion Cal. No.: 72

1515 BROADWAY FEE OWNER, LLC.,
Third-Party Plaintiff,

- v -

PRIME MECHANICAL SYSTEMS, INC.

Third-Party Defendant.

FILED

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/Order to Show Cause -Affdavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1
2, 3
4, 5

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant defendants' cross-motion for summary judgment dismissing plaintiff's complaint and shall deny as moot third-party defendant's motion for summary judgment.

Plaintiff, an air-conditioning technician employed by the third-party defendant, was injured at defendants' premises on

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

June 18, 2005 while repairing several air conditioning units on various floors of the building. Plaintiff's EBT testimony is that plaintiff was doing a repair on an air conditioning unit in the ceiling repairing the filter, pulley, flow valve and pump assemblies. Plaintiff procured a wooden A-frame ladder belonging to tenant Viacom. Plaintiff testified that the ladder wasn't stable and that while working on the ladder to replace a filter the ladder gave way and he fell on the floor.

Plaintiff sues on theories of common law negligence, Labor Law 200, 240 (1) and 241 (6). Defendants cross-move to dismiss the Labor Law 240 and 241(6) claims on the grounds that plaintiff at the time of the accident was performing routine maintenance work that is not within the ambit of the statutes. Precedent compels a ruling in defendants' favor. The Court of Appeals in a similar case has stated

Plaintiff was injured after falling from a ladder while attempting to remove a cover from an air conditioning unit on the 22nd floor of a commercial building in Manhattan. . . On the date of the accident, plaintiff was performing a monthly maintenance check of the air conditioning units on the 22nd through 29th floors. This included taking amperage readings and checking belts, sheaves and bearings. When checking the 22nd floor unit, plaintiff discovered a low amperage reading and heavy vibrations. The motor appeared worn and loose, and the belts were "chewed up." He left and returned with tools and parts needed to fix the machine. As he climbed a ladder and began to remove the unit's cover a second time, the bottom of the ladder "kicked out" and he fell.

Supreme Court held that plaintiff could not sustain a claim under section 240 (1), because he was not engaged in any of the covered activities. The Appellate Division

affirmed, as do we. Section 240 (1) applies where an employee is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Although repairing is among the enumerated activities, we have distinguished this from "routine maintenance" (Smith v Shell Oil Co., 85 NY2d 1000, 1002 [1995]). The work here involved replacing components that require replacement in the course of normal wear and tear. It therefore constituted routine maintenance and not "repairing" or any of the other enumerated activities.

As for Labor Law § 241 (6), we have held it inapplicable outside the construction, demolition or excavation contexts (see Nagel v D & R Realty Corp., 99 NY2d 98 [2002]). Therefore, the maintenance work involved in this case fell outside that section's reach.

Esposito v New York City Indus. Development Agency, 1 NY3d 526, 528 (2003); see Santiago v Fred-Doug 117, L.L.C., 68 AD3d 555 (1st Dept 2009) ("While 'repair' of a broken or malfunctioning item is among the statute's enumerated activities, 'routine maintenance' to prevent malfunction is not covered activity"). Esposito is dispositive of plaintiff's claim as the accident is of the same type and circumstance as alleged here.

Plaintiff's reliance upon the Court's decision in Santiago v Fred-Doug 117, L.L.C. (68 AD3d 555 [1st Dept 2009]) is misplaced. In that case the Appellate Division reversed a trial court order that granted plaintiff summary judgment on a Labor Law 240 (1) claim because of there were issues of fact as to the whether the plaintiff was performing maintenance or repair work. Id. at 556; see also, Hamill v Mutual of America Inv. Corp., 79 AD3d 478, 479 (1st Dept 2010). In this case however, plaintiff's testimony was

"I was repairing the belt. I was repairing the pulley. And I was repairing the pump." As set forth in Esposito, such work "involved replacing components that require replacement in the course of normal wear and tear" and therefore as a matter of law cannot constitute "repairing" as defined in the statute.

Esposito, supra at 528. Unlike Santiago, there is no issue of fact as to the work plaintiff performed because plaintiff's statements set forth that he did not perform work covered by the statute.

The court notes that plaintiff makes no argument opposing the cross-motion to the extent it seeks to dismiss the causes of action for negligence and liability under Labor Law 200. In any event those claims are properly dismissed. "For an owner to be liable for common-law negligence or pursuant to Labor Law § 200, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Upon the defendants' prima facie showing that they did not supervise or control the injured plaintiff's work and that they had no actual or constructive notice of the alleged defect that caused his accident, the plaintiffs failed to raise a triable question of fact." Saverino v Reiter, 1 AD3d 427, 428 (2d Dept 2003).

Accordingly, it is

ORDERED that the motion of third-party defendant Prime Mechanical Systems, Inc., is denied as moot; and it is further

ORDERED that the cross-motion of defendants 1515 Broadway Fee Owner, LLC, and Viacom, Inc., for summary judgment dismissing the complaint is GRANTED; and it is further

ORDERED that the complaint is DISMISSED and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

FILED

Dated: JUN 17 2011

ENTER: **JUN 24 2011**

NEW YORK
COUNTY CLERK'S OFFICE

~~Debra A. James~~
DEBRA A. JAMES J.S.C.