SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 27

Present: JULIA I. RODRIGUEZ, JSC

Index No.: 8321/2003

MAXINE GRANT,

Plaintiff,

DECISION & ORDER

Noticed on 2/1/11
Submitted on 3/29/11

JUN 29 2011

-against-

STEVE MARK, INC. 1220 PARK AVENUE CORPORATION and LESLIE CORNFELD,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendant's motion for summary judgment:

Papers Submitted	Numbered
Defendant's Motion & Exhibits	1
Plaintiff's cross-motion & exhibits	2
Defendants' Opposition	3
Plaintiff's Reply	4

Upon the foregoing papers, Defendants move for an Order granting them summary judgment and dismissing Plaintiff's complaint. Plaintiff cross-moves for an Order granting her summary judgment on her Labor Law §240(1) claim.

In her complaint, Plaintiff alleges violations of Labor Law § § § 200, 240(1) and 241.

Labor Law §200 is a codification of the common law duty of an owner or employer to provide employees with a safe place to work. *Comes v. New York State Electric and Gas Company,* 82 N.Y.2d 876 (1993) ; *Jock v. Fien*, 80 N.Y.2d 965 (1992). Where the claim stems from the alleged defects or dangers arising from a subcontractor's methods or materials, liability under the common law or statute cannot be imposed unless the party to be charged exercised some supervisory control over the operation or had notice of a dangerous condition. *Comes v. New York State Electric and Gas Company,* supra.; Also see, *Murray v. South End Improvement Corp.*, 263 A.D.2d 577, 578 (3rd Dept. 1999); *Butigian v. Port Authority of New York and New Jersey*, 266 A.D.2d 133 (1st Dept. 1999). This rule arises from the basic common law principle

that an owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or contractor had no direction or control. *Ross v. Curtis Palmer Hydro Electric Co.*, 81 NY2d 494 (1993). In addition, a construction manager whose duties are limited to observing the work and reporting safety violations does not thereby become liable when the contractor's employee is injured by a dangerous condition arising from the contractor's negligent methods. The construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees. *Buccini v. 1568 Broadway Associates,* 250 A.D.2d 466 (1st Dept. 1998).

An implicit precondition for such liability is that the party charged with that responsibility have the authority to control the activity which brought about the injury. *Russin v. Picciano & Son,* 54 N.Y.2d 311, 317 (1981). Where the subcontractor's agent/inspector's responsibilities were limited to observing and reporting, that does not amount to control. *Comes,* supra. Where an inspector had the authority to stop the work and insure compliance with safety regulations, such authority does not amount to supervision and control of the work site to that degree necessary to supplant the liability of the contractor who performs the day-to-day operations. *Reilly v. Newireen Assoc.*, 303 A.D.2d 214 (1st Dept. 2003); *D'Antuono v. Goodyear Tire & Rubber Co. Chemical Division,* 231 A.D.2d 955 (4th Dept. 1996). *Bink v. F.C. Queens Place Associates*, 27 A.D.2d 408 (2nd Dept. 2006) (where the construction manager had a general supervisory role, made daily inspections of the work site and would stop work that failed to comply with accepted safety standards, the Court found that to be insufficient to establish that he exercised direction, control or supervision.)

In the instant matter, Plaintiff testified that her supervisor provided her with a ladder to clean shelves in a closet. Her supervisor opened and positioned the ladder for the first closet. Then, Plaintiff had to move and re-position the ladder to clean another closet. Plaintiff did not have problems when the supervisor set up the ladder. The accident occurred when Plaintiff set up the ladder and attempted to clean another closet. Here, Defendants did not exercise any supervision or control over the Plaintiff's work assignment or how she performed her duties. Therefore, Plaintiff's Labor Law §200 claim is dismissed.

Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). The statute provides for extra safety protection to the laborer engaged in certain

contemplated occupational hazards. While the contemplated hazards are not spelled out in the statute, they can be inferred from the types of protective devices set forth in the statute. The hazards that are to be afforded the exceptional statutory protection are identified as two distinct sources of elevation risk and are related to the effects of gravity. They entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *Toeffer v. Long Island Rail Road,* 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite. *Rocovich v. Consolidated Edison Co,* 78 N.Y.2d 509 (1991). The cases involving these elevation type risks have been described as the "falling object" and "falling worker" cases. *Toefer* at 407. "The extraordinary protections of the statute extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity." *Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914 (1999). The statute encompasses extraordinary elevation risks, not the usual and ordinary dangers of a construction site. *Nieves* at 916. Where a Plaintiff's actions are the sole proximate cause of his injuries, liability will not attach. *Weininger v. Hagedorn & Co.,* 91 N.Y.2d 958 (1998).

With respect to the "falling worker" claim, which is applicable in this case, in order to impose absolute liability, Plaintiff must show that the worker's injuries were proximately caused by the absence or inadequacy of a type of safety device enumerated in the statute. *Felker v. Corning Inc.,* 90 N.Y.2d 219 (1997) and *Rocovich* at 513.

In the instant case, the court finds that Plaintiff did not meet her burden in establishing a Labor Law §240(1) violation. Plaintiff was provided a ladder, which was the safety device to be used to reach the high spaces. Plaintiff failed to allege that the ladder was defective and/or that she was made to use the ladder in an unsafe position, and failed to identify what other safety devices were necessary that were not provided. Given that Plaintiff was merely cleaning shelves, the court does not find that there was a need for other safety devices because a stable ladder would enable Plaintiff to perform her work duties safely.

Plaintiff is incorrect in arguing that the mere fall from a ladder is *prima facie* showing of liability. *See, Blake v Neighborhood Housing Services of NYC,* 1 NY3d 280 (2003), where the Court of Appeals stated:

> "The terms of Labor Law §240 may have given rise to a mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise. .... The mere fact that a Plaintiff fell off the scaffolding surface is insufficient, in and of itself to establish that the device did not provide proper protection."

In support of her argument that Plaintiff's fall establishes *prima facie* liability, Plaintiff cites to cases where the ladder was used in an unsecure fashion or defective, which does not support her argument. To the extent that Plaintiff cites to cases that contravene the Court of Appeals case, this court declines to follow said cases. For example, Plaintiff cites to *Siegel v RRRG Fort Greene,* 68 AD3d 675 (1st Dept. 2009). In *Siegel*, the court found that there was an issue of fact as to whether the condition of the floor and placement of the ladder on the floor was the cause of the accident. It was not the mere fall from the ladder that could give rise to liability, it was the placement of the ladder with the condition on the floor.

Plaintiff also cites to *Vega v Rotner Mgt. Corp.*, 40 AD3d 473 (1st Dept. 2007). In *Vega,* the court found that the ladder shifted and fell because it was not secured. A ladder is considered unsecure when it is used in a closed position, leaned against something and there's nothing at the bottom of the ladder to secure it and keep it from shifting. Also, a ladder is unsecure when it is placed on a floor that is slippery, not level or has some other condition that will cause it to shift. In *Vega,* liability was imposed because of the way the ladder was positioned or used which made it unsecure *and* there was no safety device to keep the ladder from shifting, *not* merely because of Plaintiff's fall. By contrast, in this case Plaintiff was provided with a ladder which when used in the open position on level ground should have provided sufficient safety support. Although Plaintiff argues that the ladder was unsecure, Plaintiff failed to establish how or why she felt the ladder was insecure. The ladder is the safety device and when used properly, no supporting safety devices are necessary. Consequently, the Court finds that Plaintiff did not establish a violation of Labor Law §240(1) because she did not establish that the failure to provide a safety device was a contributing cause of her fall . *See Blake* at 289.

Thus, Defendants' motion for summary judgment on the issue of Labor Law §240(1) is hereby **granted** and Plaintiff's cross-motion for summary judgment on the issue of Labor Law §240(1) is hereby **denied.**

Further, Labor Law §241 states in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work...."

By the clear and unambiguous language of the statute, Labor Law §241 applies to owners, other than one and two family dwellings, their agents and contractors who contract for work. Since the owner of the apartment utilized the apartment as her one-family dwelling, Labor Law §241 is not applicable to Defendant Cornfeld and the court declines to apply the statute to Cornfeld. As Defendant 1220 Park Avenue Corporation did not contract for work to take place within Defendant Cornfeld's residence, Labor Law §241 does not implicate said Corporation either.

Thus, Plaintiff's claims under Labor Law §241 as against Defendant Cornfeld and Defendant 1220 Park Avenue Corporation are hereby dismissed. Thus, Plaintiff's complaint against said Defendants are dismissed.

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety for construction workers. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494(1993) As the duty to comply with the regulation is nondelegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work-site in order to establish a Labor Law §241(6) claim. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Electric Co.*, supra at 502.

What is necessary is that plaintiff establish the existence of a violation of a specific regulatory provision of the Industrial Code which resulted in injury to the plaintiff. The Industrial Code provision must impose a specific duty or requirement and may not merely recite a general safety requirement. If plaintiff demonstrates a breach of such regulation, the general contractor and owner are vicariously liable for the resulting injury without regard to fault. *Armer v. General Electric Co.*, 241A.D.2d 581(3rd Dept. 1997); *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, supra at 343.

In the instant case Plaintiff relies on varies sections of the Industrial Code, 12 NYCRR 23-1.21 et seq., which all deal with safety, installation, maintenance, build and use of ladders. Upon reviewing these sections, the court finds that these sections are not applicable to the instant

case as Plaintiff did not allege that the ladder was defective. Further, Plaintiff did not submit any opposition, argument or proof as to how these sections are applicable. Therefore, Plaintiff's Labor Law 241(6) claims are hereby dismissed as against all Defendants.

For the foregoing reasons, Motion for summary judgment by Defendants STEVE MARK, Inc., 1220 PARK AVENUE CORP. And LESLIE CONFELD is **granted;** and cross-motion by Plaintiff is **denied**; and therefore it is

ORDERED that Plaintiff's complaint is dismissed, and concomitantly, the instant action is dismissed as against all defendants.

Dated: Bronx, New York
June 24, 2011

J. Rod

Hon. Julia I. Rodriguez, J.S.C.