

Pober v Setai S. Beach Invs., LLC
2012 NY Slip Op 31239(U)
May 3, 2012
Supreme Court, New York County
Docket Number: 109674/2009
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARCY S. FRIEDMAN, J.S.C.

DECEMENT.

Index Number : 109674/2009

POBER, STEPHEN J.

vs
SETAI SOUTH BEACH INVESTORS,

Sequence Number : 003

SUMMARY JUDGMENT

PART 57

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
determined as per decision/order dated 5/3/12

REASON(S) REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 11 2012

Dated: 5/3/12

MJ
NEW YORK COUNTY CLERK'S OFFICE
MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 57

FILED

MAY 11 2012

PRESENT: Hon. Marcy S. Friedman, JSC

NEW YORK
 COUNTY CLERK'S OFFICE

 STEPHEN J. POBER,

Plaintiff,

Index No.: 109674/2009

- against -

DECISION/ORDER

SETAI SOUTH BEACH INVESTORS, LLC et al.,

Defendants.

 x

In this Labor Law action, plaintiff sues for damages sustained when he fell off a ladder while installing HVAC equipment in a dwelling under construction in Watermill, New York. Defendant/construction manager A.P. Joinnides Construction, Inc. (Joinnides) moves for summary judgment dismissing plaintiff's complaint against it. By separate motion, defendant/owner Setai South Beach Investors, LLC (Setai) moves for the same relief. Plaintiff cross-moves for partial summary judgment as to liability on his claims under Labor Law §§240(1) and 241(6) against Setai and Joinnides.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212[b])." (Zuckerman,

49 NY2d at 562.)

As a threshold matter, Setai moves to dismiss plaintiff's §§240(1) and 241(6) claims on the ground that, as the subject premises is a single family residence, Setai is not an owner as defined by these sections. Sections 240(1) and 241(6) apply to owners or contractors "except owners of one and two-family dwellings who contract for but do not direct or control the work." It is well settled that "the existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exception. Instead, whether the exemption is available to an owner in a particular case turns on the site and purpose of the work." (Cannon v Putnam, 76 NY2d 644, 650 [1990]; see also Bartoo v Buell, 87 NY2d 362 [1996].)

Here, it is undisputed that Setai owned the premises and was building a personal residence for its principal, Andrew Heiberger, and that the residence was also to be used to entertain clients or business acquaintances of Heiberger's. (Dep. of Jacqueline Pestana [Assistant Comptroller of non-party Buttonwood Development, LLC] at 5, 8, 12, 47-48, Ex. E to Setai's motion.)

On this record, the court finds that Setai was using the premises primarily as a residential dwelling. Setai's occasional use of the site for the purposes of entertaining, standing alone, does not render the exception unavailable to it. (See Bartoo, 87 NY2d at 368 [even if one- or two-family home serves some commercial purpose, owner is shielded from liability by the §§240 and 241 exemption if work "directly relates to residential use of the home"].) Moreover, it is undisputed that plaintiff was conducting HVAC work at the time of the accident, and that this work was for the purpose of use of the premises as a residence. (See P.'s Dep. at 25-27, Ex. D to Setai's motion; Construction Management Agreement, Ex. F to Setai's motion.) Accordingly,

Setai is exempt from liability under the residential premises exception as long as it did not direct or control the work. (See Szczepanski v Dandrea Constr. Corp., 90 AD3d 642, 643 [2nd Dept 2011].)

Ms. Pestana testified that no one from Setai advised any of the subcontractors or tradespeople on how to perform any tasks. (Pestana Dep. at 60-61.) While it is undisputed that Setai hired the construction manager and contractors at the site, and that Heiberger and Pestana visited the site to check on the status and time line of the project (see Pestana Dep. at 15, 18, 26-27, 49-50), this oversight does not establish the requisite direction and control to impose liability under the Labor Law. (Compare Acosta v Hadjigavriel, 18 AD3d 406, 407 [2nd Dept 2005]; Szczepanski, 90 AD3d at 644.) Moreover, Setai's contract with its construction manager, Joinnides, stated that Joinnides would "[p]rovide supervision, manage, coordinate, direct and monitor the work of its personnel and of the subcontractors on the Project . . ." (Construction Management Agreement, ¶Q, Ex. F to Setai's motion.)

On this record, the court finds that the one-family dwelling exception applies to Setai, and thus, it cannot be held liable to plaintiff on his claims under Labor Law §§240(1) and 241(6). Similarly, Setai cannot be found liable under section 200 of the Labor Law nor for common law negligence as it did not exercise supervisory control over plaintiff's work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993].) Accordingly, plaintiff's complaint should be dismissed as against Setai.

The court reaches a different conclusion as to defendant Joinnides. Joinnides was hired by Setai as the construction manager for the site, rather than as a general contractor. The standards for imposition of liability on a construction manager are well settled. "Although a

construction manager of a work site is generally not responsible for injuries” under the Labor Law, a construction manager:

“may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. When the work giving rise to [the duty to conform to the requirements of section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor. Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law.”

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005] [internal quotation marks and citations omitted] [decided under Labor Law §240(1)].)

Section Q of the contract between Joinnides and Setai provided that Joinnides would supervise personnel on site. (Supra at 3.) Andrew Joinnides, principal of A.P Joinnides Construction, Inc., testified that, as the construction manager, his job was to “qualify subcontractors that were brought in and check them out.” (Joinnides Dep. at 12-13, Ex. H to Joinnides’ motion.) According to Setai, Mr. Joinnides could tell the trades how to correct their work (Pestana Dep. at 67), whereas Setai did not have the authority to tell a contractor it was not doing its work correctly and that it should be done differently. (Id. at 61.) Mr. Joinnides and home inspectors would have the final decision as to whether the workmanship was proper. (Id.)

The contract between Joinnides and Setai stated that Joinnides will provide, “either through subcontractors or [its] own forces, labor, construction equipment, tools” and other items necessary to complete the project. (Construction Management Agreement, ¶ 9 [R].) The contract required Joinnides to “[p]rovide supervision, manage, coordinate, direct and monitor the work of . . . the subcontractors . . . using its best efforts to maintain the highest standards of the

local construction industry” (Id., ¶ 9 [Q].) In addition, it stated that Joinnides will “review and inspect the work of the subcontractors on a regular basis for defects and deficiencies in such work . . . and stop the work of such subcontractors if necessary.” (Id., ¶ 9 [U].)

This contractual obligation renders Joinnides vicariously liable as an agent of the owner, whether or not it actually exercised this contractual obligation. (See generally Butt v Bovis Lend Lease LMB, Inc., 47 AD3d 338, 341 [1st Dept 2007]; Lodato v Greyhawk N. Am., LLC, 39 AD3d 491 [2nd Dept 2007]; In re E. 51st St. Crane Collapse Litig., 89 AD3d 426 [1st Dept 2011].) Accordingly, the court finds Joinnides to be a statutory agent for the purposes of Labor Law §240(1) and §241(6).

Labor Law §240(1)

Plaintiff moves for summary judgment on his §240(1) claim, and Joinnides moves for summary judgment dismissing this claim.

Labor Law §240(1) provides:

All contractors and owners and their agents, * * * in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“The purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.” (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused

injury.” (Gordon, 82 NY2d at 559.)

It is well-settled that “an accident alone does not establish a Labor Law §240(1) violation or causation.” (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff’s injury. (Id. at 287-289.)

It is further settled that comparative negligence is not a defense to a Labor Law §240(1) claim. (Gordon, 82 NY2d at 562.) In order for a plaintiff’s acts to constitute a defense to a §240(1) claim, such acts must have been “the sole proximate cause” of the plaintiff’s injuries. (Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875; Blake, 1 NY3d at 290.) “[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.” (Id.)

It is undisputed that plaintiff fell from a 4-foot stepladder while installing duct work above the ceiling. (P.’s Dep at 37.) It is also undisputed that there was a 6-foot ladder at the site. (P.’s Dep. at 75-77, 124.) No witnesses of the accident have been identified, and plaintiff could not identify the exact cause of his fall. (Id. at 123.)

In moving to dismiss plaintiff’s §240(1) claim, Joinnides claims that plaintiff was the sole proximate cause of his injuries, in that an adequate safety device -- i.e., a 6-foot ladder -- was available to plaintiff and he chose not to use it. (Liguori Aff., ¶ 90.) Defendant further contends that plaintiff not only chose to use the smaller of two ladders available to him, but also misused the smaller ladder by standing on the top step, causing it to fall. (Id., ¶ 91.)

Plaintiff identified the taller, six-foot ladder with duct tape on its leg as belonging to his employer. (P.’s Dep. at 75-76.) When asked if he knew how the ladder came to have duct tape

on its leg, plaintiff responded: "I don't have a clue. I almost see that and get nervous for [my coworker]. He's lucky he didn't get hurt." (Id. at 76.) This testimony and the presence of duct tape on the ladder's leg raise a triable issue of fact as to the suitability of the six-foot ladder. If an adequate safety device was not available to plaintiff, he will not have been the sole proximate cause of his injury.

Plaintiff testified that at the time of his accident, he had one foot on the top step of the ladder, and one foot on the step below the top. (P.'s Dep. at 40.) Plaintiff also testified that it was a possibility that there was a point when both feet were on the top step of the ladder. (See P.'s Dep. at 124.) The apparent contradiction in plaintiff's testimony is a matter for resolution by the trier of fact. If plaintiff did stand on the top step of the ladder, it may constitute misuse of the ladder. (See Robinson v E. Medical Center, LP, 6 NY3d 550 [2006] [plaintiff's choice of a ladder that was too short for the work to be accomplished when a taller ladder was available constituted negligence and was the sole proximate cause of his injuries].) Summary judgment is accordingly denied to both defendant Joinnides and plaintiff on his §240(1) claim.

Labor Law §241(6)

Plaintiff moves for summary judgment on his §241(6) claim, and Joinnides moves for summary judgment dismissing this claim.

Labor Law §241(6) provides:

All contractors and owners and their agents * * * shall comply with the following requirements:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons

employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents “to 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-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” (Id. at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (Id.) “[W]hether or not plaintiff was himself negligent may require an apportionment of liability but does not absolve defendants of their own liability under section 241(6).” (Keegan v. Swisshotel New York, Inc., 262 AD2d 111, 114 [1st Dept 1999], lv dismissed 94 NY2d 858 [1999].

Plaintiff relies on Industrial Code §23-1.21, a detailed section of the Labor Law regulating ladders and ladderways. Among other things, this section requires that a ladder be capable of sustaining four times its maximum load without breakage, and that a ladder not be used if it has any flaw or defect of material that may cause it to fail. (12 NYCRR 23-1.21[b][1] and [b][3][iv].)

Photographs of the four-foot ladder taken after the accident show a splintered leg. (Ex. K to Joinnides’ motion.) Plaintiff testified that he did not see the splintered leg until after the accident, and that he would not have used the ladder had he seen this condition. (P.’s Dep. at 113.) Plaintiff also states that he does not know if the ladder was cracked before, after, or during the incident. (Id. at 102.) A triable issue of fact therefore remains as to whether plaintiff’s fall

from the ladder caused the leg to splinter or if the leg was already splintered, and thus whether there was a violation of this section of the Industrial Code. Summary judgment is therefore denied to plaintiff and Joinnides on plaintiff's claim under §241(6).

Labor Law §200

Joinnides also moves for summary judgment dismissing plaintiff's claim under Labor Law §200. Section 200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes, 82 NY2d 876.) Cases under Labor Law §200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed. (Ortega v Puccia, 57 AD3d 54, 61 [2nd Dept 2008]; see also Urban v No. 5 Times Sq. Dev., LLC, 62 AD3d 553, 556 [1st Dept 2009].)

Where the alleged failure to provide a safe work place arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work." (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007].) "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or contractor] controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." (Id. [emphasis in original].)

In contrast, where the defect arises from a dangerous condition on the work site, instead of from the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law §200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or

constructive notice.” (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also Minorczyk v Dormitory Auth. of the State of New York, 74 AD3d 675 [1st Dept 2010].) In this circumstance, “whether [it] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law §200 and common-law negligence claims. . . .” (Seda v Epstein, 72 AD3d 455, 455 [1st Dept 2010].)

Defective ladders have been held to be dangerous conditions of a work site, rather than means and methods of work. (Higgins v 1790 Broadway Assoc., 261 AD2d 223, 225 [1st Dept 1999]; see Cevallos v Morning Dun Realty, Corp., 78 AD3d 547 [1st Dept 2010].) The issue therefore is whether Joinnides created or had notice of the defective condition.

There is no claim that Joinnides created the dangerous condition as the ladder belonged to plaintiff’s employer and was in its control throughout construction. As to actual notice, plaintiff testified that he not did make any complaints to Joinnides about the ladder, and that he did not think he made any complaints about working conditions at the site. (P.’s Dep. at 125.) There is nothing in the record that shows actual notice to defendant Joinnides of a defective condition at the premises. As to constructive notice, an issue of fact remains as to whether the ladder plaintiff was using splintered before or after plaintiff’s accident. If the splinter existed prior to the accident, Joinnides may have had constructive notice of the defect if it was open and obvious. However, if the splinter occurred during the accident, the ladder may have appeared adequate and Joinnides would have had no notice of any defect. Summary judgment is therefore denied to Joinnides on plaintiff’s §200 claim.

Accordingly, it is hereby ORDERED that Setai’s motion for summary judgment is granted to the extent that plaintiff’s complaint is dismissed as against it, and the Clerk is directed

to enter judgment accordingly; and it is further

ORDERED that Joinnides' motion is denied in its entirety; and it is further


ORDERED that plaintiff's cross-motion is denied in its entirety.

FILED

This constitutes the decision and order of the court.

MAY 11 2012

Dated: New York, New York
May 3, 2012


NEW YORK
COUNTY CLERK'S OFFICE

MARCY FRIEDMAN, J.S.C.