

Colella v Port Auth. of N.Y.

2012 NY Slip Op 32222(U)

August 16, 2012

Supreme Court, New York County

Docket Number: 102673/08

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

ALDO COLELLA,
Plaintiff,

Index No.: 102673/08

Motion Date: 02/28/12

- v -

Motion Seq. No.: 03

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,
Defendant.

Motion Cal. No.: _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	<u>1</u>
Notice of Cross Motion/Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits - Exhibits	<u>3, 4</u>

FILED

AUG 21 2012

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury/negligence action, the defendant Port Authority of New York and New Jersey (the PA) moves for summary judgment to dismiss the complaint, and plaintiff Aldo Colella (Colella) cross-moves for partial summary judgment on the complaint (motion sequence number 003). For the following reasons, the motion with respect to Labor Law §§ 200 and 241(6) only shall be granted, and with respect to Labor Law § 240(1) shall be denied, and the cross motion for partial summary judgment of liability with respect to Labor Law § 240(1) shall be granted.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SETTLE/SUBMIT ORDER/JUDG.

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

On August 29, 2007, Colella suffered injuries to his right foot while operating a jackhammer during the course of his employment as a construction worker by non-party contracting company the LaQuila Group (LaQuila). Colella was injured at the "Freedom Tower" construction site, which is owned by the PA, and located at the intersections of Church and Liberty Streets in the County, City and State of New York.

In his cross motion, Colella alleges specifically that, at the time of his injury, he was standing on a pile of rubble approximately six inches to one foot high, and using a 90 lb. jackhammer to take down a 12 to 18 inch wide concrete ledge that ran for a length of 30 to 40 feet along a wall at the Freedom Tower site. Colella claims that the ledge was located approximately 3 to 3 ½ feet above the surface that he was standing on, and that he was holding the jackhammer perpendicular to the wall in order to chip away at the ledge. He claims that operating a jackhammer in this manner is dangerous, and that normally a scaffold and a safety tie-off are furnished whenever a job requires that a jackhammer be so operated. Colella states that despite his having requested both a scaffold and a tie-off, his supervisors ignored him and he was obliged to operate his jackhammer in that way under fear of losing his job. Colella further states that he also requested that the debris be periodically removed from his work area so that he would not have

to stand on a high pile of debris, and that such request was also ignored. Regarding the circumstances of his accident, Colella says that "the jackhammer broke through the concrete I was chipping, took a bounce, and caused me to lose control of the jackhammer" which "fell three feet to the ground on which I was standing, and the one inch bit of the jackhammer penetrated my right foot." He contends that PA employees were observing him all the while that he was operating his jackhammer perpendicular to the wall, and never told him to stop.

At his deposition on October 22, 2009, Colella had stated that he received his job assignments, all of his instruction and his tools and safety equipment from his LaQuila foreman, Anthony Imbruglia (Imbruglia).

At the time of his accident, Colella was working close to his co-worker and fellow LaQuila employee Joseph Robinson (Robinson). At his deposition on December 14, 2010, Robinson confirmed Colella's description of the accident, and stated that only Imbruglia, the LaQuila foremen - and not PA employees - gave LaQuila employees all of their assignments, instructions, safety equipment and tools for their jobs.

Imbruglia himself was deposed on January 19, 2011. Imbruglia stated that Colella had made several requests to him for a laborer to clear the debris near his work location, and for either a scaffold or a tie-off for his jackhammer, and that he

had passed these requests to LaQuila's superintendent, James Lipari (Lipari), but that Lipari had "yessed him to death" and had not complied with any of the request. Imbruglia further stated that he, Lipari, Robert Croghan (Croghan), a safety manager employed by LaQuila's safety inspection contractor, non-party Total Safety Consulting (Total) and the PA's site safety inspectors all had the authority to stop work at the site if they observed workers engaged in any unsafe practices.

The PA was deposed on December 22, 2009 via its resident engineer for the Freedom Tower site, Eli Moscovitz (Moscovitz). Moscovitz stated that he had no specific recollection of Colella's accident, but that - at that time - he and four PA-employed inspectors who reported to him were responsible for inspecting the work being performed at the Freedom Tower site, and that he and the inspectors had the authority to stop contractors from working if they observed them engaged in an unsafe practice. Moscovitz also stated that he had observed jackhammering at the Freedom Tower site, although he had not observed Colella's accident. Moscovitz acknowledged that a scaffold is normally provided to jackhammer operators to prevent them from having to use the jackhammers on surfaces above their feet. Although he stated that he did not remember having observed either condition at the Freedom Tower, Moscovitz finally stated that the use of a jackhammer above floor level without a

scaffold, and the use of a jackhammer while standing on unstable debris, were both "unsafe" conditions that would cause him to stop a jackhammer operator from working until the condition could be remedied.

Croghan a safety manager employed by LaQuila's safety inspection contractor, was deposed on October 13, 2010. Croghan stated that he was present at the time of Colella's accident, and that he had confirmed Colella's version of the events from conversations with eyewitnesses. Croghan also acknowledged that the practice of operating a jackhammer above floor level was "unsafe," and that, whenever it was necessary to do so, a worker was usually furnished with a scaffold or a tie-off as a safety measure. Croghan further stated that, had he observed such operation without such equipment, he would have asked the worker's foreman to stop work until a safety device could be procured. Croghan denied having the authority to stop work himself, however.

Colella's amended complaint sets forth one cause of action for negligence grounded in the PA's alleged violation of the common law and Labor Law §§ 200, 240 (1) and 241 (6) (as well as 12 NYCRR § 23-1.5). Now before the court are the PA's motion for summary judgment to dismiss the amended complaint, and Colella's cross motion for partial summary judgment on so much of the complaint as is based on the PA's purported violation of Labor

Law §240 (1) (motion sequence number 003). For reasons of economy, this decision will address that portion of the PA's motion for summary judgment seeking to dismiss the claim under Labor Law §240 (1) and Colella's cross motion for partial summary judgment on so much of the complaint as alleges that the PA violated such statute, before returning to the balance of the PA's motion with respect to the other sections of the Labor Law.

Labor Law § 240 (1) provides, in pertinent part, that:

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 Court of Appeals holds that the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991). The Court also notes that this statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." Sanatass v Consolidated Inv.

Co., Inc., 10 NY3d 333, 342 (2008). The Court requires a "plaintiff to show that the statute was violated and that the violation proximately caused his injury." Cahill v Triborough Bridge and Tunnel Auth., 4 NY3d 35, 39 (2004).

Here, the PA argues that Colella may not assert a claim under Labor Law §240 (1) because the facts of this case do not demonstrate that his injury was the result of an "elevation related hazard." The PA argues that Colella's claim is outside the statute's ambit because he neither fell from an elevated surface, nor was struck by a falling object. Colella responds that his accident was "elevation related" because it resulted from the force of gravity causing his jackhammer to fall on his foot from the wall he was chipping, and because "that fall would not have taken place had the jackhammer been 'tethered' or 'tied off' as is commonly done." Colella cites several cases to support this argument, however the PA points out in its reply papers that these cases are all factually distinguishable, since they all involved plaintiffs who were injured when objects fell on them from height. After reviewing the extant case law, the court finds against the PA on this issue.

In Rocovich v Consolidated Edison Co. (78 NY2d at 514 [1991]), the Court of Appeals observed that Labor Law §240 (1) was enacted to protect workers against "hazards ... related to the effects of gravity where protective devices are called for

either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Later, in Ross v Curtis-Palmer Hydro-Elec. Co. (81 NY2d 494, 500-501 [1993]), the Court of Appeals refined this interpretation by explaining that the statute contemplates only "special hazards" that arise where the work site is either itself elevated or is positioned below the level where "materials or load [are] hoisted or secured". "In other words, Labor Law § 240(1) was designed to prevent the types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." Here, it is clear that the injury to Collela flowed directly from the application of the force of gravity to his jackhammer, from which Collela would have been shielded had he been supplied with one of the safety devices enumerated in the statute, i.e., a scaffold or stay (tie-off). Since there is no dispute that the accident occurred when the jackhammer, which was "improperly hoisted or inadequately secured", descended three feet, the injury falls within the ambit of Labor Law §240 (1). See Zory v Consolidated Edison Co. of N.Y., Inc., 248 AD2d 708 (2d Dept 1998). Moreover, the evidence here shows that the work site on

which Collela was positioned was below the level where the "material[] or load [here jackhammer] was improperly hoisted or inadequately secured", and thus constituted a "special hazard" contemplated by the statute.

The facts before the court on this motion are distinguishable from the facts of Makarius v Port Authority, 76 AD3d 805 (1st Dept 2010) and analogous to those of Runner v New York Stock Exchange, 13 NY3d 599 (2010).

In Makarius, the Appellate Division modified the lower court's decision to the extent that it granted the Port Authority's motion for summary dismissal of the Labor Law § 240(1) cause of action in that case. A careful reading of Makarius shows that the appellate court found no violation of Labor Law § 240(1) because plaintiff there was unable to show that any protective device would have prevented the transformer from falling from the place where it was affixed to the wall, approximately two feet above plaintiff, when it struck his head.

By contrast, and similar to the facts at bar, the Court of Appeals in Runner found that "plaintiff's injuries were a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (13 NY3d at 603). The Runner court, describing the 800 pounds rope reel that was being moved down the stairs by the plaintiff, also observed that "[t]he elevation differential here

involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating" (*id.*, at 605). Here, the raising of a powered jackhammer three to three and one half feet above the work site is no less significant.

The court holds, therefore, that the portion of the PA's motion as seeks summary judgment dismissing so much of Colella's claim as is based on Labor Law §240 (1) should be denied, and that Colella's cross motion for partial summary judgment of liability with respect such section of the Labor Law should be granted.

The balance of the PA's motion seeks summary judgment dismissing so much of Colella's claim as is based on Labor Law §§ 200 and 241 (6). With respect to the former, the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 in its holding in Ortega v Puccia (57 AD3d 54, 61 [2d Dept 2008]), as follows:

Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work

Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.

Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous

condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.

By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, the PA argues that Colella's claim must be dismissed because it neither exercised supervisory control over Colella's work, nor had either actual or constructive notice of the allegedly dangerous working condition that led to his injury. Colella first responds that the issue of supervisory control is irrelevant, because his Labor Law § 200 claim is based on a "premises condition" argument, and not on a "means and manner theory." Colella then notes that Moscovitz's and Croghan's deposition testimony establishes that employees of the PA and Total did in fact observe the jackhammering being conducted at the Freedom Tower site, and argues that this evidence is sufficient to impute constructive notice of the allegedly dangerous working conditions to the PA. The PA replies that "plaintiff's injury here was caused by the manner in which the jackhammering was conducted," and "not by a defect in the premises." The PA cites the Court of Appeals decision in Lombardi v Stout (80 NY2d 290, 295 [1992]), in which the

plaintiff was injured in a fall from a ladder while engaged in cutting a tree limb, and in which the Court rejected the plaintiff's assertion of a Labor Law §200 "premises condition" analysis on the ground that the "[p]laintiff's account of the accident establishes that there was no dangerous condition on the premises which caused the accident, but rather that it was caused by the manner in which removal of the branch was undertaken." The PA urges that here, the court should similarly decline to consider Colella's "premises condition" analysis because the only "danger" connected with his injury arose from the manner in which he was operating his jackhammer. The PA then concludes that Colella's claim must be dismissed under a "means and manner" analysis, because the LaQuila employees' deposition testimony all indicates that the PA did not supervise or control the jackhammering conducted at the Freedom Tower site. Colella does not address this argument in his sur-reply papers, but merely restates his position that his claim is based on a "premises condition" theory. The court rules in favor of the PA on this issue.

In the original order issued in Lombardi v Stout, the Appellate Division, First Department, cited the Court of Appeals decision in Persichilli v Triborough Bridge and Tunnel Auth. (16 NY2d 136, 145 [1965]) for the proposition that Labor Law § 200 "is not breached when the injury arises 'out of a defect in the

subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work.'" Lombardi v Stout, 178 AD2d 208, 210 (1st Dept 1991), affd as mod 80 NY2d 290 (1992). In the later Lombardi v Stout decision, the Court of Appeals did not disturb this portion of the First Department's holding. This court finds that the Persichilli decision is relevant because it is clear that the "dangerous condition" that Colella complains of in this action is actually the absence of certain safety equipment, rather than an independent condition such as a wet floor or an unsecured ladder. However, the deposition testimony herein makes it clear that LaQuila was responsible for furnishing its employees with everything they needed to perform their jobs - including instructions, tools and, presumably, safety equipment. Indeed, Colella himself testified that he had requested safety equipment from his supervisors, but that his requests had been ignored. The court finds that this constitutes a "defect in the subcontractor's own plant, tools and methods" that precludes Colella from maintaining a Labor Law § 200 claim against the instant landowner - i.e., the PA. Thus, the court holds that the portion of the PA's motion that seeks summary judgment dismissing so much of Colella's claim as is predicated on a purported violation of Labor Law § 200 should be granted.

With respect to Labor Law § 241(6), the Court of Appeals has long held that the statute imposes a nondelegable duty on "owners and contractors 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-Electric Co., 81 NY2d at 501-502. In order to prevail on a claim under Labor Law § 241(6), it is incumbent on a plaintiff to demonstrate that the defendant violated an Industrial Code regulation containing "concrete specifications" applicable to the facts of the plaintiff's case. Id. at 505. Here, the PA initially argues that so much of Colella's claim as is based on Labor Law § 241(6) should be dismissed because 12 NYCRR § 23-1.5, the Industrial Code provision that Colella cited in his complaint, is insufficient to support such a claim, as a matter of law. The court is not persuaded by such argument, as the First Department has specifically ruled otherwise. See McCormack v Helmsley-Spear, Inc., 233 AD2d 203 (1st Dept 1996). However, rule 23-1.5 is of no moment, because, in his cross motion, Colella abandoned his reliance on that rule, and chose to base his Labor Law § 241(6) claim instead on 12 NYCRR § 23-1.7 (e) (2), an Industrial Code provision that has also been held to be capable of supporting such a claim. See e.g. Lopez v City of

N.Y. Tr. Auth., 21 AD3d 259 (1st Dept 2005). That provision states as follows:

(e) Tripping and other hazards.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The Appellate Division, First Department, has held, however, that in situations where the accumulated debris that causes a plaintiff's injury was generated as "an integral part of the work being performed," 12 NYCRR § 23-1.7 (e) (2) is factually inapplicable, and will not support a Labor Law § 241(6) claim. See e.g. Zieris v City of New York, 93 AD3d 479, 480 (1st Dept 2012); Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389 (1st Dep 2007); Cabrera v Sea Cliff Water Co., 6 AD3d 315 (1st Dept 2004); Bond v York Hunter Constr., Inc., 270 AD2d 112 (1st Dept 2000), affd 95 NY2d 883 (2000). Here, the PA argues that, to the extent that the shifting of the debris that Colella was standing on contributed to his injury, 12 NYCRR § 23-1.7 (e) (2) is factually inapposite because that debris was generated as "an integral part of" his jackhammering work. The PA also claims that the provision is inapposite because Colella does not allege to have "tripped" at all. Colella responds that the First Department precedent cited above "apparently proceeded on the assumption that keeping a work area free from 'dirt and debris' is part of a

construction worker's job," and that "that assumption clearly does not apply in this case." The PA responds that the question of who was responsible for removing the debris is irrelevant, and that the First Department's legal analysis centers solely on whether such debris was generated as an "integral part" of the plaintiff's work. The court agrees with the PA. It is clear that the First Department does not factor the issue of who is responsible for debris removal into its analysis of 12 NYCRR § 23-1.7 (e) (2). Instead, the question is whether the plaintiff generated the debris, and whether its generation was an integral part of the plaintiff's work. If so, then to the extent that the debris contributed to the plaintiff's injury, 12 NYCRR § 23-1.7 (e) (2) may not be used to support a Labor Law § 241(6) claim.¹ The court determines that the portion of the PA's motion that seeks summary judgment dismissing so much of Colella's claim as is based on Labor Law § 241(6) should be granted.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Port Authority of New York and New Jersey is granted with respect to Labor Law §§ 200 and 241(6) of the complaint and such causes of action are dismissed; and it is further

¹ The court discounts the PA's observation that Colella does not claim to have "tripped," because the plain language of 12 NYCRR § 23-1.7 (e) (2) states that it also applies to "other hazards" involving debris.

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Port Authority of New York and New Jersey is denied with respect to Labor Law § 240(1) and the cross motion, pursuant to CPLR 3212, of the plaintiff Aldo Collela for partial summary judgment of liability with respect to Labor Law § 240(1) is granted and defendant is found to be liable to plaintiff pursuant to Labor Law § 240(1) and the issue of the amount of a judgment to be entered thereon shall be determined at a trial thereof; and it is further

ORDERED that the parties and their counsel are directed to attend a mediation conference before Part Mediation-2, and provide the mediator with a copy of this Order. If the case does not settle in Part Mediation-2, the parties' counsel are directed to attend a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013, on November 13, 2012 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: August 16, 2012

ENTER:

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

[Handwritten Signature]
DEBRA A. JAMES J.S.C.