

Gaffney v Norampac Ind., Inc.

2012 NY Slip Op 33696(U)

May 7, 2012

Sup Ct, Erie County

Docket Number: 2010-2140

Judge: Shirley Troutman

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 26th day of March, 2012.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PATRICK GAFFNEY,

Plaintiff,

vs.

NORAMPAC INDUSTRIES, INC.,
Defendant.

CLERK OF COURT
2012 MAR 26 9:33 AM
Decision and Order
Index No. 2010-2140

APPEARANCES: CHRISTOPHER G. FLOREALE, Esq., for Defendant
THOMAS C. PARES, Esq., for Plaintiff

Defendant, by its attorneys, GOLDBERG SEGALLA LLP, Christopher G. Floreale, Esq., of counsel, moves for an Order pursuant to CPLR §3212 granting Summary Judgment dismissing Plaintiff's Complaint for a violation of OSHA regulations and federal statutes, etc., Labor Law §§240(1), 241(6), and 200, and for common law negligence. Plaintiff opposes the motion with respect to Labor Law §§ 240(1) and 200 and cross-moves for an Order granting Summary Judgment for violation of Labor Law §§240(1) and 200 and for common law negligence.

Defendant argues that Plaintiff's cause of action pursuant to Labor Law §240 (1) [Nineteenth cause of action] should be dismissed because the work performed by Plaintiff is not covered by this section. In particular, Defendant argues that Labor Law §240(1) applies to activities in which there is a pronounced risk that arises from construction worksite elevation differentials and for which a hoist, stay or other protective device proved inadequate to shield the worker from harm directly flowing from the effect of

gravity. He cites Salazar v. Novalex Contracting Corp., 18 NY3d 134 (2011) and Runner v. New York Stock Exch., Inc., 13 NY3d 599 (2009).

Defendant also argues that the work Plaintiff was performing at the time he was injured constituted routine maintenance, and not a repair as asserted by Plaintiff. Defendant cites Barbarito v. County of Tompkins, 22 AD 3d 937 (3d Dept., 2005) and Robertson v. Little Rapids Corp., 227AD2d 560 (3d Dept., 2000) in support of its assertion that where work involves replacement of a component part, it constitutes maintenance, rather than a repair. Defendant also cites this case in arguing that a job which arises from a service call rather than regularly scheduled maintenance is not necessarily repair work. Defendant states that undisputed evidence in the case at bar shows that Plaintiff was engaged in fixing a common problem which was regularly corrected and was the result of wear and tear. Defendant notes that Plaintiff testified that he would customarily replace the part involved in this case when he was on site anyway for a routine maintenance call or while doing monthly maintenance inspections at Defendant's place of business. It, therefore, constituted routine maintenance.

Defendant further argues that even if the work did constitute a repair, Plaintiff had completed the task so that Labor Law §240(1) did not apply at the time of the incident that lead to Plaintiff's injury. It cites Beehner v. Eckerd Corporation, 307 AD2d 699 (4th Dept., 2003).

Finally, Defendant argues that Plaintiff's claims sounding in negligence, Labor Law §200 and common law negligence [First and Eighteenth causes of action], should be dismissed because it exercised no control over Plaintiff's work; it did not create the dangerous or defective condition; and it had no notice of the alleged defect nor a reasonable amount

of time within which to correct the condition. Defendant asserts that the category of section 200 cases that involve defective equipment or supervision of the worker do not apply to the facts in this case. The category that does apply is the one in which the injury was the result of an alleged dangerous or defective condition at the premises. In such cases a property owner may be liable under common law negligence, as well, because section 200 is a codification of common law negligence. In this category Defendant states that it must be shown that the owner created the dangerous condition or had actual or constructive notice of it and did not remedy it in a reasonable period of time. [See Lagiudice v. Sleepys, 67 AD3d 969 (2d Dept., 2009) et al.]. Defendant argues that it did not manufacture or install the item which fell and struck Plaintiff, a piece of insulation seal, and that it is unrefuted that it did not have notice that the seal was loose or posed a hazard. Defendant sets forth reasons why it is not in violation of Labor Law§200: that the seal was not put in place in order to protect workers; that the seal's only purpose was to prevent weather from getting inside the building; that the seal only weighed 15 to 20 pounds; that the area where Plaintiff was standing was not normally a place where people stood; the lack of evidence as to how frequently loose seals were reported by Defendant's employees; and the lack of any similar incidents which caused injury.

Plaintiff opposes Defendant's motion, arguing that the activity was a repair. He distinguishes Barbarito, supra, stating that the facts surrounding one of the jobs Mr. Barbarito had been called to work on are similar to the facts in this case and which the court found may have been a repair. The court did not decide that issue, however, because it determined that the job had been completed before the accident. Plaintiff distinguishes other cases

Defendant cited to establish that various activities are routine maintenance. He then sets forth cases in which courts have found particular activities to be repair work as opposed to routine maintenance. [See Jones v. Village of Dannemora, 27 AD3d 844 (3d Dept., 2006), et al]. Some of the factors courts consider in the cases he cites include: whether the device was inoperable; the size of the job and the length of time it took to complete; whether the work was pursuant to a service contract versus one which required special payment; whether the work was part of an ongoing construction job versus a discreet activity; and whether the equipment was malfunctioning, inoperable, or operating improperly. Further, Plaintiff asserts that the testing of the item in this case afterward was an integral part of the job and not activity that took place after the job was complete. Plaintiff avers that he has submitted evidence in admissible form that he was repairing a broken, inoperable piece of equipment and that testing thereafter was part of the job and not an act that took place after the job was finished.

Plaintiff further avers that Defendant has the burden of coming forward with evidentiary proof that it had no notice, either actual or constructive, of the dangerous condition and that it conducted reasonable inspections to detect any unsafe condition. Plaintiff avers that Defendant has not made a prima facie showing of such proof. He states that the evidence of both parties showed that Defendant failed to conduct any inspection or use reasonable care to keep the property reasonably safe.

The court, after considering the proof submitted by each party and after hearing the arguments of counsel on March 26, 2012, finds that there are questions of fact with respect to Defendant's alleged negligence. Consequently, Defendant's motion for Summary Judgment and Plaintiff's

cross-motion for Summary Judgment on the First and Eighteenth causes of action sounding in negligence, are denied.

The court further finds that the undisputed evidence shows that the work performed by Plaintiff at the time of the injury constituted a repair, as opposed to routine maintenance, and that the testing of the repaired lock was part of the work, and not an act that was performed after the job had been completed. However, the court also finds that the work performed by Plaintiff was not the type of work related to the effects of gravity for which safety devices would have been required. Therefore, it is not a covered activity under Labor Law §240(1). Consequently, Defendant's motion for Summary Judgment with respect to Plaintiff's Nineteenth cause of action under Labor Law §240(1) is granted and Plaintiff's motion for Summary Judgment for these causes of action is denied.

Finally, as Plaintiff has not opposed Defendant's motion with respect to the Twentieth and Twenty-First causes of action, Defendant's motion to dismiss as to these is granted.

ACCORDINGLY, Defendant's motion for Summary Judgment and for dismissal of Plaintiff's Complaint is granted as to the Nineteenth, Twentieth, and Twenty-First causes of action and denied as to the First and Eighteenth causes of action. Plaintiff's cross-motion for Summary Judgment on the First, Eighteenth, and Nineteenth causes of action is denied.

SO ORDERED.

GRANTED

MAY 07 2012

BY Mollie E. Redmond
MOLLIE E. REDMOND
COURT CLERK

Shirley Troutman
SHIRLEY TROUTMAN, J.S.C.