

Dalesandro v Alpha Gen. Contractors of NY, Inc.

2013 NY Slip Op 30420(U)

February 27, 2013

Supreme Court, New York County

Docket Number: 110116/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.C.
Justice

PART 2

Index Number : 110116/2010
DALEASANDRO, ANTHONY
vs.
ALPHA GENERAL CONTRACTORS
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying decision*

FILED
MAR 01 2013
NEW YORK
COUNTY CLERK

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

Dated: 2/27/13

Lou B. York, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
ANTHONY DALESANDRO,

Plaintiff,

Index No. 110116/10

-against-

ALPHA GENERAL CONTRACTORS OF NY, INC.,
ANLAR, LLC, 130 WEST 44TH HOTEL ASSOCIATES, LLC,
HAMPSHIRE & RESORTS, LLC, MANHATTAN
INITIATIVE, INC., and JCR CONSTRUCTION CORP.,

Defendants.

FILED

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MAR 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

Plaintiff Anthony Dalesandro (“Dalesandro”) moves for summary judgment, pursuant to CPLR 3212, on his claims based upon Labor Law §§200, 240(1) and 241(6). Defendants Alpha General Contractors of New York, Inc. (“Alpha”), 130 West 44th Hotel Associates, LLC (“130 West 44th LLC”), Hampshire Hotels and Resorts, LLC (“Hampshire”), and Manhattan Initiative, Inc. (“Manhattan Initiative”) oppose it. Defendants Anlar, LLC and JCT Construction Corp. did not appear in this action.

BACKGROUND

Anthony Dalesandro, a carpenter and an employee of C&A Seneca Construction (“Seneca”), was injured on June 9, 2010, while working in the sub-basement of 130 West 44th Street, New York City. The building was undergoing renovation to accommodate the Chatwal Hotel. A pool had been installed in the sub-basement a few weeks before the accident and

covered with plywood. Plaintiff testified that a continuous trench was left on all sides of the pool in order to install drainage pipes, and that its width and depth were between two and four feet. Dalessandro alleged that on the day of the accident he was asked by his Seneca supervisor to inspect a sump pump in the trench adjacent to the wall. For access to the pump, he had to cross a trench separating a concrete floor and the plywood over the pool on a plank about 12 inches wide and four to five feet long. After a few steps, the plank began to wobble. According to Dalesandro, the plank gave way and he fell backwards, hitting his back on the edge of the concrete floor and rolling into the trench.

Dalessandro moves for partial summary judgment, on liability only, against 130 West 44th and Manhattan Initiative, Inc. as owners of the property, Hampshire as the managing agent for owners, and against Alpha as a general contractor under three sections of Labor Law – §§ 200, 240(1) and 241(6). Defendants contest their status as owners and contractors, and claim that the protections afforded by Labor Law do not apply to the facts of plaintiff's accident.

DISCUSSION

Defendants' status under Labor Law

Sections 240(1) and 241 of the Labor Law impose nondelegable duties on owners, general contractors and their agents to insure the safety of workplaces.

It is undisputed that 130 West 44th LLC is a lessee of the whole property situated at this address, and that it signed a contract for the construction of a new hotel. Accordingly, it is the owner of the property in the sense of Labor Law. Zaher v. Shopwell, Inc. 18 A.D.3d 339; 795 N.Y.S.2d 223 [1 Dept 2005].

Defendant Manhattan Initiative's claim that it is not an owner is belied by documentary evidence. Plaintiff introduced a deed listing Manhattan Initiative as a fee owner of a lot at 130 West 44th Street and a lease between Manhattan Initiative and 130 West 44th LLC.

According to plaintiff, Hampshire, a managing agent for the owner, 130 West 44th LLC, qualifies as a statutory agent and is subject to the provisions of Labor Law sections 240(1) and 241(6). Frank Piscitello ("Piscitello") was employed by Hampshire, was onsite daily, and performed walk throughs of the premises several times a day. He inspected for safety, and had the authority to issue stop work orders (Piscitello EBT, September 2, 2011, PP. 30-31). Hampshire cites Piscitello's deposition testimony to show that his responsibility at the site were limited to keeping work on schedule, making sure that there were no floods or fire and controlling delivery of materials (*id.*, PP.7-8, 21) He never instructed workers on the site where to work or how to do their work. Piscitello attended weekly project meetings with various contractors, but solely for the purpose of coordinating deliveries and schedules (*id.*, PP. 27-28, 32-33).

"Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241." Voultepsis v Gumley-Haft-Klierer, Inc., 60 AD3d 524, 525; 875 N.Y.S.2d 74. [1st Dept 2009], citing Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 318; 445 N.Y.S.2d 127 [1981]).*See, also, Parra v. Allright Parking Management, Inc.* 59 A.D.3d 346, 873 N.Y.S.2d 623 [1 Dept 2009] (manager of parking garage did not have the authority to control capital improvements being performed in the garage, and therefore could not be held liable under scaffold law or Labor Law § 241(6); agreement between garage owner and garage manager required garage manager to cooperate with owner's contractors and subcontractors on a capital improvement

project, not to control or supervise them). Plaintiff failed to make out a *prima facie* case that Hampshire was a statutory agent for the owner.

Dalesandro asserts that Alpha was a general contractor on the construction project on the ground that it employed various subcontractors. In addition, Alpha performed some construction work in the cellar and sub-cellar, according to the deposition testimony of Frank Piscitello (Piscitello EBT, March 6, 2012, P.14-15). Defendants introduced other parts of the same testimony, in which Piscitello considered Alpha a carpentry subcontractor, like C&A Seneca, but working in guest rooms on the upper floors (Piscitello EBT, September 2, 2011, PP. 22-23). There is a factual dispute about the exact role of Alpha at the construction site.

Plaintiff's status as a person protected under the Labor Law.

Defendants contend that Dalesandro does not belong to the class of persons protected by the Labor Law. The task in which an injured employee was engaged must have been performed during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240). When the accident happened, plaintiff was not in the course of performing his normal tasks, such as framing and installing sheet rock. Defendants claim that checking a sump pump is not construction activity (Def. Memo of Law in Opposition, p. 19).

Plaintiff counters that the sump pump was used to prevent ground water from entering the work zone. The task of inspecting and testing the pump in the construction zone was incidental to performing his regular duties and thus covered by Labor Law (Gennarelli Reply Aff., p. 7).

It is sufficient that Dalesandro was part of a construction team and was working on a task related to the construction of a swimming pool. O'Connor v Lincoln Metrocenter Partners, L.P.,

* 6]

266 AD2d 60; 698 N.Y.S.2d 632 [1st Dept 1999](plaintiff was clearly acting at the direction of his employer, and was present at the construction site as a person employed in the erection of a building or structure as contemplated in Labor Law § 240(1)). Moreover, preparation for a task related to construction counts as part of construction work. Augustyn v City of New York, 95 AD3d 683, 684; 944 N.Y.S.2d 146 [1st Dept 2012] (plaintiff was engaged in protected activity under Labor Law § 240(1) at the time he fell from a sidewalk bridge while walking across the bridge to set up a tent in preparation for lead paint removal work; this work was part of the overall lead paint removal project and was performed at an elevated level, thus requiring proper protection from falling off the bridge).

Labor Law 240 (1).

“To establish a cause of action under § 240(1), a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries. The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one” Jones v 414 Equities LLC, 57 AD3d 65, 69; 866 N.Y.S.2d 165 [1st Dept 2008](internal quotations omitted).

In the present case Dalesandro argues that the plank which he used to cross the trench was the functional equivalent of scaffolding – he calls it “makeshift scaffolding.” (Gennarelli Reply Aff. ¶11). On his account, the pool was surrounded by open trenches on three sides, with concrete between trenches and the walls of the sub-basement. The trench with the pump, by contrast, was against a wall, and could be approached only from plywood on top of the pool.

There was no ramp or bridge across the trench, and plaintiff saw only one means of crossing it - the plank. He admitted that he had not used a plank for such purposes on other occasions, and did not remember seeing it on the preceding day. He did not examine whether the plank was secured to the floor (Dalesandro EBT, June 20, 2011, PP. 44-45).

Piscitello denies that all trenches around the pool were open for days. He testified that the whole area over the pool, including the trenches, was covered by plywood. When workers needed access to a trench, they removed part of the plywood, but restored it at the end of the working day. If he had seen an open trench at the end of his shift, he would have ordered it covered (Piscitello EBT, September 2, 2010, PP. 43-44, 46). Shown a picture of the plank that was allegedly involved in the accident, he identified it as one of those used to support plywood. He never saw a plank like this used as a walkway to get from one side of the trench to the other (*id.*, PP. 55, 58).

Courts have found that various safety devices not directly listed in Labor Law §240 (1) (scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes) may nevertheless serve an equivalent protective function. They are bridges (Augustyn v City of New York, 95 AD3d 683, 684); elevated ledges (Soltero v City of New York, 93 AD3d 578; 940 N.Y.S.2d 491 (Mcm) [1st Dept 2012]), planks (Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 8-9; 917 N.Y.S.2d 130 [1st Dept 2011]; Miraglia v H & L Holding Corp., 36 AD3d 456; 828 N.Y.S.2d 329 [1st Dept 2007]); Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043, 1045-46; 947 N.Y.S.2d 566 [2d Dept 2012]). “It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford [plaintiff] proper protection from a gravity-related risk.” Ervin v Consol. Edison of New York, 93 AD3d 485; 940 N.Y.S.2d 223, [1st Dept 2012]. Devices in these cases were structures routinely used by

employees, necessary to perform their duties or recommended by their employers. In the present case it is not alleged that an unsecured plank was ever used except on the day of the accident, that an employer suggested that workers use it to cross the trench, and there is no information as to who put it in place. Defendants raised a material issue of fact whether, in the circumstances, the plank was a safety device.

Defendants' second objection to the claim under Labor Law §240(1) concerns the height at which the plank was situated. They maintain that the distance of two to four feet from the plank to the bottom of the trench is *de minimis* and not a "physically significant elevation differential," citing Runner v New York Stock Exch., Inc., 13 NY3d 599, 603; 895 N.Y.S.2d 279 [2009)]. There is no bright line determining when a height differential is sufficient for the purposes of scaffolding law. Plaintiff is correct that even falling from a height of two feet could in a particular case trigger Labor Law 240(1). Soltero v City of New York. This determination is made on a case-by-case basis, and the relevant issue is whether the plank was an equivalent of scaffolding, and not its height. "As the temporary stairway was being used to facilitate plaintiff's access to a different elevation level, and therefore indisputably an elevation device within the meaning of Labor Law § 240(1) the shortness of the distance of plaintiff's fall—at least two feet according to plaintiff, no more than 16 inches according to defendants—is irrelevant." Megna v Tishman Const. Corp. of Manhattan, 306 AD2d 163, 164; 762 N.Y.S.2d 63 [1st Dept 2003].

Finally, defendants raise an issue about the precise manner in which the accident occurred. There were no witnesses to Dalessandro's fall, and only he could provide an account of it. He testified that he injured his back before rolling into the trench (Dalesandro EBT, P. 51). The concrete floor was at the level of the plank. Falling on concrete floor, defendants argue, may cause serious injury, but it is not the kind of injury from which the scaffolding law is intended to

protect. (Defendants' Memo of Law, P.20). This case, in their opinion, may be no different from that in which plaintiff falls after stepping on any other unsecured and unsteady piece of construction material (*id.*, p, 21).

In similar circumstances, an issue of fact “whether plaintiff fell between the ceiling joists and hit his face while falling, or whether plaintiff fell forward onto a ceiling joist, hit his face and then lowered himself to the floor” (Pilato v Nigel Enterprises, Inc., 48 AD3d 1133, 1134; 850 N.Y.S.2d 799 [4th Dept 2008] prevented the grant of summary judgment to a plaintiff on Labor Law §240(1). “Whether a violation of section 240(1) was a contributing cause of the accident is generally a jury question, and a directed verdict on the issue of liability is appropriately limited to those cases in which the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries.”Cammon v City of New York, 21 AD3d 196, 200; 799 N.Y.S.2d 455 [1st Dept 2005]. Determination of the exact circumstances of the injury must await trial. For this reason summary judgment on this cause of action cannot be granted.

Labor Law 241(6).

Dalesandro relies on Labor Law § 241(6), which requires 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. Plaintiff argues that defendants violated section 12 NYCRR 23-1.7(b)(1)(i) of the Industrial Code which reads: “Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing”.

Defendants assert that this section is not sufficiently specific since it does not define “hazardous opening”. Courts have consistently ruled that violation of this section may give rise to liability under 241(6). Olsen v James Miller Marine Serv., Inc., 16 AD3d 169, 171; 791 N.Y.S.2d 92 [1st Dept 2005]. “‘Hazardous opening’ is not defined in the regulation, however, interpretation of the Industrial Code and whether a particular condition is within the scope of the regulation is a question of law for the court to determine.” Messina v. City of New York, 300 A.D.2d 121; 752 N.Y.S.2d 608 [1st Dept 2002]).

An uncovered trench is a kind of opening into which a person can fall or step. Dalesandro’s co-workers found him at the bottom of a trench. The trench at issue meets the statutory definition of a “hazardous opening.” Whether this trench should have been covered or fenced off is in dispute. Piscatello raised a doubt as to whether the trench around the whole perimeter of the pool was open at the time of the accident. Dalesandro mentioned in his testimony that four to six people were working in the sub-basement at that time (Dalesandro EBT, P.27). There is a fact issue whether covering the trench was “contrary to the objectives of the work plan” in the sub-basement. Salazar v Novalex Contr. Corp., 18 NY3d 134, 139; 936 N.Y.S.2d 624 [2011]. In addition, under section 241(6) --as contrasted with section 240(1) -- culpable conduct by the injured person is relevant. Dalesandro admitted that he did not check whether the plank was securely fastened -- it is a common practice that a nail gun is used for this purpose. A valid defense, including comparative negligence, can be interposed in this case, and though it would not absolve defendants of their liability, it could lead to apportionment of liability between plaintiff and defendants. Rocovich v Consol. Edison Co., 78 NY2d 509, 512; 932, 577 N.Y.S.2d 219 [1991]; Ramputi v Ryder Const. Co., 12 AD3d 260, 261; 784 N.Y.S.2d 548 [1st Dept 2004].

As with liability under Labor Law 240(1), a fact issue exists whether falling into the trench was a proximate cause of plaintiff's injuries or whether he hurt his back on the concrete floor before rolling into the trench.

Labor Law §200.

Labor Law §200 requires that all places "shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." Alleged unsafe conditions in the present case are the unprotected trench that, as plaintiff claims, remained open for days, and an unsecured plank which was the only means to cross the trench.

To be liable under section 200, an owner must have created the unsafe condition or had notice of it. Murphy v. Columbia Univ., 4 A.D.3d 200, 202, 773 N.Y.S.2d 10 [1st Dept 2004] There is no allegation on plaintiff's part that either 130 West 44th LLC or Manhattan Industries had anything to do with the trench. Plaintiff ascribes to Piscitello knowledge of a dangerous condition because he visited the site daily, and must have seen uncovered trenches. Though not stated explicitly, a notice to a managing agent is the equivalent, in plaintiff's opinion, of a notice to the owner. Piscitello testified that the trench did not remain open, that he had not seen a plank used in the manner described by plaintiff, and would have stopped anyone from doing it if he had seen it (Piscitello EBT, September 2, 2011, pp. 51, 58). There is an issue of fact whether the dangerous condition was present on the premises, and if so, whether Piscitello had notice of it.

To be responsible under Labor Law §200 a contractor must control the means by which work is performed to prevent injuries. McParland v. Travelers Ins. Co. 302 A.D.2d 328 [1 Dept 2003]. If liability is to be premised on supervisory control, it must be control over work in which

plaintiff was engaged at time of his injury. Wong v. New York Times Co. 297 A.D.2d 544, 747 N.Y.S.2d 213 [1 Dept. 2002]. Plaintiff did not demonstrate that Alpha was engaged in any work in the sub-basement when he was injured, or that Alpha in any way controlled the way he worked. Plaintiff has not made out a *prima facie* case why Alpha is liable to him.

CONCLUSION

For the foregoing reasons it is

ORDERED that plaintiff Dalesandro's motion for partial summary judgment on liability under Labor Law §§ 200, 240(1) and 241(6) is denied.

Dated: 2/27/13

FILED
MAR 01 2013
NEW YORK
COUNTY CLERK'S OFFICE
ENTER: Ruy

J.S.C.

LOUIS B. ROFF
CLERK OF THE COURT