

Ocasio v Queens Fresh Meadows LLC

2013 NY Slip Op 30843(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 116602/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 116602/2008

OCASIO, BRAULIO

vs
QUEENS FRESH MEADOWS, LLC

Sequence Number : 003

SUMMARY JUDGMENT

FILED

APR 23 2013

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 17 **COUNTY CLERK'S OFFICE NEW YORK** on this motion to/for Cross motion. Summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

5

6

Cross-Motion: Yes No

Interim Order + Supplemental papers

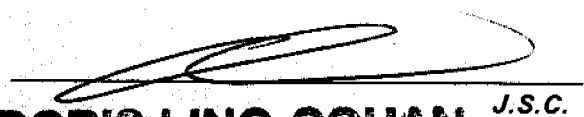
Upon the foregoing papers, it is ordered that this motion & cross-motion

3, 4

7, 8, 9, 10, 11

for summary judgment are decided in accordance with the attached memorandum decision.

Dated: 4/19/13



JUSTICE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
BRAULIO OCASIO,

Plaintiff,

-against-

Index No.
116602/08

QUEENS FRESH MEADOWS LLC, FM INVESTORS, L.P.
and GARDEN STATE MANAGEMENT CO., L.P.,
Defendants.

Motion Seq. No.: 003
-----X

DORIS LING-COHAN, J.:

This matter arises in connection with the injury of the plaintiff, Braulio Ocasio (Ocasio), at the premises known as 67-06 186th Lane, Fresh Meadows, New York (the Building).

According to the complaint, the defendants Queens Fresh Meadows LLC, FM Investors, L.P., and Garden State Management Co., L.P. (collectively, herein, the Owners) owned, managed, and controlled the Building. Ocasio claims that his injuries, occurring at elevation, are the result of Owners' negligence (first cause of action), and calls for the application of the Labor Law of the State of New York, § 200 et. seq, particularly, §§ 200, 240 (1), 241 (6), and 242-a¹ (second cause of action).

On August 12, 2008, Ocasio was working for non-party McFar Contractors (McFar), replacing the roofs of the buildings located in a Queens Fresh Meadows Apartments Complex that includes the Building. Ocasio was tasked, on that day, to remove granular pebbles from the roof of the Building. He and several of his co-workers were directed, by McFar, to empty wheelbarrows filled with these granular pebbles into a vertical chute running along the side of the Building, which emptied into a dumpster located on the ground below.

¹ The court notes that there is no §242-a in the Labor Law.

The Building roof had a ledge of approximately three and one-half feet high running around it. McFar constructed and erected a ramp (the Ramp) to assist in raising the wheelbarrows to the level of the ledge, so that the granular pebbles could be deposited in the chute. According to undisputed allegations of the complaint, plaintiff's deposition testimony and supporting affidavit, the Ramp was eighteen to twenty feet long, consisted of two and one-half eight foot long pieces of plywood running together end to end, and attached to each other by two-by-fours nailed into the plywood, with no supports or handrails.

It is also uncontested that on the day in question, the roof had considerable standing water on it. There was approximately two to three inches of standing water on that portion of the roof where the bottom of the Ramp was located. The entire Ramp apparently became wet and slippery because the workers were forced to push the wheelbarrows through the standing water at the bottom of the Ramp.

Ocasio's accident allegedly occurred as he was pushing a wheelbarrow filled with 250-300 lbs. of granular pebbles up the Ramp. He had almost gotten to the top of the Ramp, and was preparing to empty the granular pebbles into the chute, when the weight of the wheelbarrow started to slide back, pushing him down the Ramp. As Ocasio pushed back against the wheelbarrow he suddenly felt a "pop" in the back of his left leg and pain in his leg. Ocasio stopped sliding back near the bottom of the Ramp. To recover for his injury, Ocasio now brings this action for negligence (first cause of action), and violations of New York State Labor Law (second cause of action). Owners move for summary judgment dismissing the complaint, and Ocasio cross-moves for summary judgment as to liability only.

LABOR LAW § 241(6) CLAIM (UNDER SECOND CAUSE OF ACTION)

Ocasio alleges a violation of Labor Law § 241(6), based upon the Industrial Code (for Protection in Construction, Demolition and Excavation Operations) of the State of New York

(hereinafter, the Industrial Code) under § 23-1.22 (b) (3), which governs structural runways, ramps, and platforms. It is uncontested, and Owners admit, that the Ramp did not meet the standards set forth in that section, and that Ocasio injured himself sliding down the Ramp. *See Doty v Eastman Kodak Co.*, 229 AD2d 961, 962 (4th Dept), *lv dismissed in part, denied in part* 89 NY2d 855 (1996) (implying that sliding down a ramp would implicate Labor Law 241 [6]).

Labor Law 241 (6) obliges owners and contractors (and their agents) to operate and conduct construction sites so “as to provide reasonable and adequate protection and safety to the persons employed therein” The standards for “reasonable and adequate protection” are generally drawn from the rules promulgated by the Commissioner of the Department of Labor, *i.e.* the Industrial Code. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 (1993); *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 (1982)..

Despite this, Owners argue that they are not liable for Ocasio’s accident because they did not “direct, control or supervise the work being done at the work site, and did not provide any materials, tools or safety devices used at the work site.” Reply Aff., ¶ 36. Relying on *Morris v Pavarini Constr.* (9 NY3d 47 [2007], citing *Allen*, 44 NY2d at 297), Owners rightly maintain that a non-delegable duty will only be enforced “where the regulation in question contains a ‘specific, positive command.’” However, here, there is, indeed, a ‘specific, positive command’ offered in Industrial Code § 23-1.22 (b) (3). Notably, the section does not use terms such as ‘adequate,’ ‘effective,’ ‘proper,’ merely to incorporate an ordinary tort duty of care (*see Ross*, 81 NY2d at 502, 503-04), or to flatly reiterate common-law standards (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]); rather, the section offers specific measures, materials, and methods for construction of the subject safety device.² *See generally Buckley v Columbia Grammar and*

²The Industrial Code provides that ramps constructed for the use of wheelbarrows be, inter alia, at least 48 inches in width, constructed of planking at least two inches thick full size or metal of equivalent strength, substantially supported and braced to prevent excessive spring or

* 5]
Preparatory, 44 AD3d 263, 271 (1st Dept 2007), *lv denied* 10 NY3d 710 (2008).

Finally, the purpose of Labor Law § 241 (6) is to “compel owners and general contractors to become more concerned with the safety practices of subcontractors, because they would be exposed to liability *without regard to control over the work.*” *Monroe v City of New York*, 67 AD2d 89, 105 (2nd Dept 1979) (emphasis added), *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998). Therefore, Owners’ argument that they did not control the Building, and are, therefore, not subject to liability, is without merit. As it is undisputed by Owners that the Ramp did not meet the standards set forth in the Industrial Code, Owners are subject to liability under Labor Law § 241 (6) as a matter of law. Thus, Ocasio’s cross-motion for summary judgment as to liability under Labor Law § 241 (6) is granted, and Owners’ motion for summary judgment dismissing this portion of the complaint is denied.

LABOR LAW § 240 (1) CLAIM (UNDER SECOND CAUSE OF ACTION)

Owners’ motion for summary judgment dismissing the claim under Labor Law § 240 (1) is denied and Ocasio’s cross-motion for summary judgment as to liability under §240(1) is granted, as detailed below. Section 240 (1) of the Labor Law provides that “[a]ll contractors and owners and their agents” must furnish adequate ladders and similar safety devices to protect employees engaged in certain types of construction work. The purpose of Labor Law § 240 (1) is to “impose a ‘flat and unvarying’ duty upon the owner and contractor despite any contributing culpability on the part of the worker.” *Bland v Manocherian*, 66 NY2d 452, 461 (1985), citing *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 (1985). As such, § 240 (1) imposes absolute liability for any breach of the statutory duties contained therein which proximately causes injury to a worker involving extraordinary elevation risks. *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). It is well settled that § 240 (1) “is to be

deflection, and provided with timber curbs at least two inches by eight inches full size.

construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.” *Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280, 292 (2003); *Runner v. New York Stock Exchange*, 13 NY3d 599 (2009); *Harris v. City of New York*, 83 AD3d 104, 108 (1st Dept 2011).

Owners argue that they are not liable under § 240 (1) because: (i) Ocasio did not fall from an elevated worksite; (ii) the Ramp in this matter neither broke nor shifted; and (iii) Owners did not have any authority at the work site, nor did they direct, supervise, or control Ocasio’s work.

Owners’ arguments with regard to control of the Building are without support in the law. “[A] violation of section 240 (1) or the first five subdivisions of section 241 creates absolute liability.” *Zimmer*, 65 NY2d at 522. The law was so intended. *See Haimes v New York Tel. Co.*, 46 NY2d 132, 136 (1978) (§ 240 [1] was specifically redrafted to fix “ultimate responsibility for safety practices where such responsibility actually belongs, on the owner and general contractor”), citing NY Legis. Ann., 1969, p. 407. If Owners assumed a non-delegable duty under Labor Law § 240 (1), they must respond in damages for the violation (*see Ross*, 81 NY2d at 500-501), and, *as to owners*, the exercise of supervision or control is completely irrelevant (*id.* at 502; *Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]; *but see Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 136 [1st Dept 1989], *affd* 76 NY2d 172 [1990], citing *Russin v Picciano & Son*, 54 NY2d 311, 318 [1981] [(a) subcontractor becomes responsible to the general contractor as the latter’s Labor Law § 240 (1) agent only if the subcontractor has authority to supervise and control the work”] [emphasis added]).

In addition, Owners’ argument that the Ramp in this matter neither broke, nor shifted, as occurred in many cases involving ramps, is meaningless. None of the cases cited by Owners set out specific requirements, but, rather, as admitted by Owners, involve those elements only as

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“constants.” Nonetheless, courts have been quite clear that absolute liability under Labor Law § 240 is intended to address a fall from an elevated work surface or where a worker is struck by an object falling from an elevated work surface. *Staples v Town of Amherst*, 146 AD2d 292, 293 (4th Dept 1989); *see also Ross*, 81 NY2d at 501. Moreover, the injuries covered “do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.” *Ross*, 81 NY2d at 501.

Owner’s argument that dismissal of Ocasio’s §240(1) claim is warranted, because Ocasio did not suffer from a fall from an elevated work-site, alleging that plaintiff merely slid down a ramp, did not fall and was not struck by a falling object, is also misplaced. The Court of Appeals in *Runner v New York Stock Exchange*, 13 NY3d 599 (2009), construed §240(1) more expansively than it had in the past, and determined that there can be liability under such statute, *even where the worker had not fallen and was not struck by a falling object*. Rather, according to the Court of Appeals, the decisive issue is “whether [a] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential”. *Id.* at 603. The Court of Appeals specifically stated that, “[t]he relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is...whether the harm flows directly from the application of the force of gravity to the object”. *Id.* at 604; *see also Fernandes v Equitable Life Assur. Society of the U.S.*, 4 AD3d 214 (1st Dept 2004)(§240(1) protection provided to a worker who did not fall but was injured when he lost his balance attempting to prevent himself from falling). It is noted that in *Runner*, the plaintiff was afforded §240(1) protection despite that the plaintiff failed to fall and was not struck by a falling object, but, rather the plaintiff was dragged horizontally, by an 800-pound reel of wire, down a small set of stairs. Based on the Court of Appeals’ decision in

Runner, supra., here, Ocasio is not precluded from recovery under Labor Law §240(1), based upon defendant's argument that Ocasio neither fell, nor was struck by a falling object, and defendant's motion for summary judgment of dismissal of plaintiff's Labor Law §240(1) claim is denied.

Moreover, in its cross-motion, Ocasio has established entitlement to summary judgment on his §240(1) claim, in that, from the within record, it is clear that defendants failed to provide Ocasio with adequate safety protections, which was the proximate cause of Ocasio's gravity-related injuries. *See Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 (1st Dept 2011)(plaintiff entitled to summary judgment on §240(1) claim where unsecured plank supplied by defendants was not a sufficient safety device, adequate to protect plaintiff from elevation-related hazard, which was the proximate cause of plaintiff's injuries); *Ervin v Consolidated Edison of New York*, 93 AD3d 485 (1st Dept 2012)(plaintiff awarded summary judgment on §240(1) claim and court indicated that "[i]t 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" [citations omitted]); *Reisch v Amadori Construction Co., Inc.*, 273 AD2d 855 (4th Dept 2000)(plaintiff injured when he slipped and fell off a wet plank granted summary judgment on §240(1) claim as court found "plaintiff sustained a gravity-related injury where a protective device was called for because the elevation differential between the work site and a lower level").

Here, Ocasio was injured when the effects of the force of gravity on both the 250-300-pound wheelbarrow and Ocasio, caused plaintiff to slide down an unsecured, wet ramp, from a higher elevation to a lower elevation, of approximately 3 1/2 feet. The ramp which plaintiff was required to use did not provide him with adequate protection against a injury, arising from a

significant elevation differential, as required. Here, unlike in the case of *Straight v McCarthy Bros. Co.*, (222 AD2d 775 [3d Dept 1995]), a Third Department case relied upon by defendants, Ocasio was not using the ramp as a passageway, but rather, as a device to assist him in performing his job of removing the granular pebbles, from the roof, with no protective devices. It is noted that it is unrefuted that Ocasio questioned the use of the ramp and wheelbarrow, as opposed to using hoists and pulleys (which plaintiff maintains he previously used for removing granular pebbles from rooftops from other buildings in the Fresh Meadows Complex), however, he was told: “this is the way that they wanted the granular pebbles removed from this roof and if [he] did not want to use the ramp [he] could go home and not come back”. Ocasio Affidavit, 7. It is further noted that in its reply to plaintiff’s cross-motion, defendants merely supply an attorneys’ affirmation, which is insufficient to raise any factual issues; thus, plaintiff’s factual assertions are unrefuted. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Wehringer v Helmsley Spear*, 91 AD2d 585 (1st Dept 1982).

As such, plaintiff’s cross-motion for summary judgment on his Labor Law §240(1) claim is granted. Such ruling is consistent with the public policy in this state of protecting its workers and, thus, the liberal construction of the statutes enacted for such purpose. *See Runner*, 13 NY3d at 603; *Harris v City of New York*, 83 AD3d at 108; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d at 5.

NEGLIGENCE AND LABOR LAW 200 CLAIM (UNDER FIRST AND SECOND CAUSES OF ACTION)

Ocasio also seeks recovery under Labor Law § 200, which contains a statutory codification of liability based upon common law negligence. Thus, what is necessary to support the first cause of action for negligence, and the portion of the second cause of action seeking

recovery under Labor Law § 200, are essentially the same. *See Leon v J & M Peppe Realty Corp.*, 190 AD2d 400, 410 (1st Dept 1993) (Labor Law § 200 “is a reiteration of common law negligence standards”).

To sustain this claim, Ocasio must, as a preliminary matter, show that Owners breached a duty of care, that proximately caused Ocasio’s resulting accident and injury. Further, Ocasio must establish that Owners had the “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” *Russin*, 54 NY2d at 317; *Rizzuto*, 91 NY2d at 352; *Lombardi v Stout*, 80 NY2d 290, 295 (1992). Finally, Ocasio must show that Owners either created the hazardous condition which proximately led to his injury, or had actual or constructive notice of it. *See Maggi v. Innovax Methods Group Co.*, 250 AD2d 576, 578 (2nd Dept 1998); *see also Gordon v American Museum of Natural History*, 76 NY2d 836 (1986).

It is uncontested that Owners: (i) were not present at the work site at the time of Ocasio’s accident; (ii) were not given notice of any defect in the Ramp; and (iii) did not have the authority to control, nor did they control, the activity giving rise to Ocasio’s injury. Owners have established that “they had no authority to supervise or control [Ocasio’s] work or the allegedly defective condition of the worksite,” while Ocasio, in opposition, “failed to raise a triable question of fact on the issue of [Owner’s] supervision and control.” *Matthewson v County of Erie*, 274 AD2d 955, 956 (4th Dept), *lv dismissed* 95 NY2d 931 (2000), citing *Casey v Niagara Mohawk Power Corp.*, 269 AD2d 775 (4th Dept 2000). As such, Owners are not liable under Labor Law § 200. *See Mannino v Seasons Affiliates*, 249 AD2d 34 (1st Dept 1998). The motion for summary judgment dismissing the first cause of action, and the portion of the second cause of action seeking recovery under Labor Law § 200 is granted, and the motion by plaintiff for summary judgment as to these causes of action is, therefore, denied.

The remaining statutory reference in the second cause of action addresses § 242-a of Labor Law, of which there is no section; since such section does not exist, the claims made under such section are dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants Queens Fresh Meadows LLC, FM Investors, L.P. and Garden State Management Co., L.P. for summary judgment dismissing the complaint is granted to the extent that the first cause of action (negligence), and the portion of the second cause of action asserting Labor Law §200 are dismissed; and it is further

ORDERED that the cross-motion of plaintiff Braulio Ocasio for summary judgment as to liability is granted to the extent that summary judgment as to liability only on its claim under the second cause of action for violation of Labor Law §§ 240(1) and 241 (6) is granted; and it is further

ORDERED that as plaintiff Braulio Ocasio is entitled to judgment as to liability on the specified portions of the second cause of action, and that the only triable issue of fact arising on Braulio Ocasio's motion for summary judgment relates to the amount of damages to which he is entitled, such amount of damages shall be determined at a trial, to be scheduled after the parties complete court ordered mediation; and it is further

ORDERED that plaintiff Braulio Ocasio shall, within 30 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto.

FILED

APR 23 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

Dated: April 19, 2013


Doris Ling-Cohan, JSC