

Morales v Webster Leasing, LLC
2014 NY Slip Op 3131 €(U)
April 4, 2014
Supreme Court, Bronx County
Docket Number: 304893/2009
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 304893/2009

LUIS MORALES

-against-

Present:
HON. NORMA RUIZ

WEBSTER LEASING, LLC and REGIONAL
SCAFFOLDING & HOISTING CO., INC.

Defendants.

The following papers numbered 1 to 6 Read on this motion SUMMARY JUDGMENT
Noticed on 3/27/13 and duly submitted as No. 13 on the Motion Calendar of 5/20/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1- 2
Notice of Cross Motion and Answering Affidavits.....	3
Replying Affidavits	4
Memorandum of Law	5-6

Other:

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Webster Leasing, LLC (“Webster Leasing”) and Regional Scaffolding & Hoisting Co. Inc. (“Regional”) motion for summary judgment is decided as set forth below.

In this labor law action, the plaintiff seeks damages for injuries he allegedly sustained in a work related accident on April 20, 2009.

The accident occurred at the property owned by Webster Leasing, located at 550 East 241st Street in the Bronx, referred to throughout this litigation as the “Bullard property”. According to one of its principals Paul Mazzucca (“Mazzucca”), the property is about four to five acres, partially improved as a parking lot. At his deposition, Mazzucca stated that a portion of the property was leased to the plaintiff’s employer, Windham Enterprises, a structural steel and bearing replacement

company. The parking lot was leased to New York Police Department. The property was also leased to defendant Regional Scaffolding and to a painter Mazzucca identified only as "Anthony." Both Windham Enterprises and Regional leased a small unimproved part of the lot towards the back of the property. Mazzucca testified that there was common ownership among Regional Scaffolding, Windham Enterprises and Webster Leasing. He further testified that he manages Windham Enterprises, which mostly uses the property as a storage facility.

Plaintiff was deposed and testified that he was initially hired by Regional in 2001. He was laid off and later called back to work for Windham in 2009. Prior to the accident, "Jerry" allegedly informed the plaintiff that he would be transferred back to work for Regional at the Bullard property. On the day of the accident "Jack" - the plaintiff's supervisor- told him he wanted to fix a leak in the roof. Plaintiff described the roof as a sheet of metal referred to as a "decker" twenty feet high (the maximum height the forklift could reach) with a hole of approximately five inches through which rain water would leak. He asked the plaintiff to climb on the legs of the forklift and then lifted him up so that he could apply silicone to the roof. This was the first time the plaintiff made such type of repairs. First, the plaintiff climbed onto the forklift legs and was raised by Jack to the roof of the hut. Because materials were stored on the roof, they had to look for a spot that was clear so that the plaintiff could climb on top of the roof. With the plaintiff on the forklift legs, raised 20 feet in the air, it traversed approximately 10 feet. Then, Jack told the plaintiff the forklift could not move any further and he had to get off. However, because there was no access to the roof due to stored materials, plaintiff so informed Jack and instructed him to move forward. He then climbed onto the roof and began patching it. Workers inside the hut were pointing to the location of the holes. Plaintiff patched a total of approximately 15 to 20 holes. Plaintiff then returned to the forklift and was lowered to the ground level by Jack. They entered the hut to patch the roof holes from the inside. Jack again instructed plaintiff to climb onto the forklift blade. This time, the plaintiff grabbed a skid so that he could have a platform to stand on while patching the roof. He placed the skid on the forklift blades and Jack raised him 16-17 feet high, driving to the areas to be patched. At this height, the plaintiff head was just about at the same height as the beams used to support the roof. Plaintiff sealed the holes, after which Jack began to drive toward the left side of the hut. As the forklift moved, it began to shake, forcing the plaintiff to hold onto the "gate" of

the forklift to avoid falling. The plaintiff was then pushed into a beam and fell down to the ground. According to the plaintiff, there were no ladders or scaffold and he was not provided any safety devices.

As a result of the accident the plaintiff alleges he sustained the following injuries: crush injury to the chest with pneumopericardium, bilateral pulmonary contusions/hemorrhage, right hemothorax severe depressed sternum fracture, fracture of the 6th, 7th and 8th ribs, pleural effusion, concussion, heart contusion with open wound into the throat, subcutaneous emphysema; bilateral knee sprains, aggravation of pre-existing and asymptomatic lumbar spine degeneration; left shoulder derangement and cervical spine sprain.

When Mazzucca was deposed he explained that in order to safeguard the stored items from the rain, a "quonset hut" ("hut") was built. He explained that the hut was built using four sea shipping containers. Two containers are stacked on top of each other, then steel beams are placed on top and "Q decking" is placed on top. Mazzucca was unable to say with certainty which legal entity built the hut or owned the materials used to build it. The "Q decking" is what the plaintiff was allegedly repairing.

Mazzucca stated that Regional was a company that has been around for 40 years, I managed by one of the owners, Greg Blin. Regional is a scaffold and hoisting company which also used the Bullard property for storage. Mazzucca believed that Regional may have used a bay area under the hut for storage.

Mazzucca claims that he was told by either Fedor Debache ("Fedor") or Jack Godoy ("Jack") that the plaintiff had an accident as he was allegedly walking along a beam and fell. Upon hearing this, he sent his employee Jerry Atkinson ("Jerry") to the yard to see what happened. Mazzucca could not say who employed Fedor and Jack at the time of the accident. He believed that there were occasions when Fedor moved from Windham Enterprises' payroll over to Regional's payroll. However, in the affidavit submitted with the instant motion, Mazzucca averred that the plaintiff worked for Windham. He took direction from Jack, who also worked for Windham, but that neither Webster nor Regional exercised any supervisory control over Windham's activities or its employees.

A couple of days after the accident, Mazzucca learned that the plaintiff was alleging a different version of how the accident happened. The plaintiff claimed that he was on the raised forklift in

order to caulk a leak in the roof and was crushed between the forklift blades and the steel rafters of the roof. Mazzuca denied ever permitting a forklift to be used in such fashion. When questioned who owned the forklift in question, Mazzuca opined it probably belonged to a Regional mechanic because they had several.

Gerald Atkinson, also known as "Jerry" was likewise deposed. He testified that on the date of the accident he was employed by Regional. He stated that he believed the plaintiff worked for him for about two to three years. On the day of the accident, however, the plaintiff worked for Windham. Jerry testified that the hut belonged to Regional. At the location, they had a Lull (a telescoping forklift that was an all-terrain machine with independent suspensions) to move the stored equipment around. He estimated the forklifts of the Lull where approximately four feet long and could go as high as 30 feet. Jerry believed Regional owned Lull and Windham employees were allowed to use it.

When Jerry arrived at the hut, the plaintiff was lying on the ground with Jack standing over him. The plaintiff was breathing "funny" and unable to talk. About a week later, Jerry visited the plaintiff in the hospital. At that time, the plaintiff allegedly told him that Jack was talking to Fedor who was standing on the side of the machine, was not watching and as a result, crushed him against the beam with the Lull.

Jerry questioned about the roof, testified that prior to the plaintiff's accident, the Lull was used in the same fashion to repair holes in the roof.

Defendants now move for summary judgment on the grounds that the plaintiff was not within the protected class covered by Labor Law; plaintiff's accident does not fall within the purview of the Labor Law because it did not involve a structure; Regional was not a general contractor and had no supervisory control or authority under the Labor Law; Webster did not supervise or control the plaintiff's work and had no notice of any defective condition on the premises.

In support of the motion, defendants annexed the pleadings, the affidavit and deposition testimony of Mazzuca and the plaintiff's deposition testimony.

The court is unpersuaded by defendants' arguments. Labor Law § 240(1) reads as follows:

All contractors and *owners* and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

First, the court finds that the hut where the plaintiff's accident occurred was a structure as defined by the Labor Law. The Court of Appeals defined a "structure for purposes of Labor Law § 240(1) as any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Joblon v. Geller Electric Construction & Maintenance, Inc*, 91 NY2d 457, 464 [1998]). Based on this definition, the hut is clearly a structure.

Second, the court finds that since the plaintiff was repairing a roof he was engaged in protected activity (*Mendoza v. Highpoint Assoc.*, 83 AD3d 1 [1st Dept 2011][Repairing a roof is a protected activity under Labor Law § 240[1]).

Third, Webster is the owner of the property and there is some evidence that Regional is the owner of the materials used to construct the hut and of the Lull (see Jerry's deposition transcript annexed to the plaintiff's opposition papers).

Lastly, the court agrees that there is no evidence that the defendants supervised or controlled the Plaintiff's work.

Accordingly, the defendants motion is granted only to the extent that the plaintiff's Labor Law § 200 claims are dismissed. The balance of the motion is denied.

This constitutes the decision and order of the court.

Dated: 4/04/14
Bronx, New York


HON. NORMA RUIZ, J.S.C.