Vatavuk v Genting N.Y. LLC
2014 NY Slip Op 33154(U)
July 3, 2014
Supreme Court, Queens County
Docket Number: 28121/11
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

BRANKO VATAVUK

Plaintiff,

-against-

GENTING NEW YORK LLC, RW NEW YORK LLC and TUTOR PERINI CORPORATION

Defendants.

Index Number: 28121/11

Motion Date: March 5, 2014

Motion Seq. No. 1

The following papers numbered 1 to 3 read on this motion by defendants Genting New York, LLC and Tutor Perini Corporation for summary judgment dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Answering Affidavits - Exhibits.....	5 - 6
Reply Affidavits.....	7 - 8

Upon the foregoing papers it is ordered that the motion is granted. The complaint insofar as it is asserted against the defendants, Genting New York, LLC and Tutor Perini Corporation, is dismissed.

I. The Facts

Defendant Genting New York LLC holds a lease on Resorts World Casino located at Aqueduct Racetrack. Defendant Genting, as owner, entered into a contract with defendant Tutor Perini Corporation (TPC), as construction manager, for construction work to be done at the casino. Keating Building Company is a wholly owned subsidiary of TPC. Defendant TPC subcontracted work to Donaldson Interiors, the employer of plaintiff Branko Vatvuk.

On September 2, 2011, the plaintiff, a carpenter, worked on the third floor of the casino, installing cold-core boards, a type of sheetrock which is placed onto metal studs or frames. He received supervision only from Donaldson foremen.

The plaintiff picked up a ten foot long piece of cold board which weighed approximately 70-80 pounds, and placed it on the floor next to a wall. As he stood on the floor, he lifted the cold board up against the studs. He held onto the sides of the board with his hands slightly above shoulder level. The top section of the cold board snapped and fell on him, knocking him out and allegedly causing physical injury. The board snapped on a line about one foot above his head.

When he regained consciousness, he saw that about three feet of the top of the board had fallen forward, remaining attached to the rest of the board only by the paper on the front side. The board had broken in a straight line across , not a jagged edge, as though someone had cut it with a tool. The plaintiff testified at his deposition: " Usually, it does not snap in a straight line. I mean, if it would snap, it snaps, it breaks, it goes jagged edges. It would not snap like that. It looks like, you know, somebody might have cut it before, the whole thing. I don't know. I don't know."

This action for personal injury ensued on or about December 15, 2011. The complaint asserts causes of action based on common law negligence and violations of Labor Law §§200. 240, and 241(6).

II. The Cause of Action Based on Common Law Negligence

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Defendant Genting and defendant TPC successfully carried this burden.

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***." (*Gordon v Muchnik*, 180 AD2d 715.) The common law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work. (*See*, *Comes v New York State Electric and Gas Corp*., 82 NY2d 876; *Torres v. Perry Street Development Corp*., 104 AD3d 672.) This duty may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control. (*See*, *Smith v. Nestle Purina Petcare Co.,* 105 AD3d 1384; *Clavijo v. Universal Baptist Church*, 76 AD3d 990.) This case does not involve the dangerous or defective

condition of the premises itself. Insofar as the danger arose from plaintiff Vatavuk's activities, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence ***." (*Gasques v. State of New York,* 59 AD3d 666, 668 [2009], *affd on other grounds,* 15 NY3d 869 [2010]; *Allan v. DHL Exp. (USA), Inc.* 99 AD3d 828 [2012]; *Austin v. Consolidated Edison, Inc.*, 79 AD3d 682 [2010].) The defendants successfully made a prima facie showing that they did not have a degree of supervision over the plaintiff's work sufficient to impose common law negligence liability upon them. In opposition, the plaintiff failed to raise a genuine issue of fact.

III. The Cause of Action Based on Labor Law §200

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 877; *Blessinger v. Estee Lauder Companies, Inc*, 271 AD2d 343.) " Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed ***." (*LaGiudice v. Sleepy's Inc.*, 67 AD3d 969, 972.) This case falls into the second category. Where a general contractor or construction manager just gives general instructions on what needs to be done, not how to do it, and just monitors and oversees the timing and quality of the work there is an insufficient basis for imposing liability for negligence or for a violation of Labor Law§ 200. (*See*, *Paz v. City of New York*, 85 AD3d 519*;Dalanna v. City of New York,* 308 AD2d 400.) Moreover, the general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons does not suffice for liability to attach for negligence or for a violation of Labor Law §200. (*Paz v. City of New York, supra; Dalanna v. City of New York*, *supra*.) The defendants are entitled to summary judgment dismissing the cause of action based on Labor Law §200.

IV. The Cause of Action Based on Labor Law §240

Labor Law § 240(1) provides: "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." (*See, Blake v. Neighborhood Housing Services of New York City, Inc.* 1 NY3d 280.)

While Labor Law § 240(1) does not protect a worker from "any and all perils that may be connected in some tangential way with the effects of gravity," the statute does protect him from such "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured***." (*Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [emphasis in the original].) The harm must flow "directly *** from the application of the force of gravity to an object or person." (*Ross v Curtis Palmer Hydro-Electric Company*, *supra*, 501.) The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509), and a violation of the duty results in absolute liability. (*Wilinski v. 334 East 92nd Housing Development Fund,* 18 NY3d 1; *Bland v Manocherian*, 66 NY2d 452; *Jamindar v. Uniondale Union Free School Dist.*, 90 AD3d 612; *Paz v. City of New York*, 85 AD3d 519.)

"To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries ***." (*Allan v. DHL Express [USA], Inc.*, 99 AD3d 828, 833; *Esteves-Rivas v. W2001Z/15CPW Realty, LLC* 104 AD3d 802, 803.)

In the case at bar, the defendants did not violate Labor Law §240(1). "The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected ***." (*Moncayo v. Curtis Partition Corp.*, 106 AD3d 963, 965.) The plaintiff testified at his deposition that the installation of cold boards is done manually by one person. The plaintiff did not submit an affidavit from an expert showing that some sort of device should had aided the installation of the cold board. Moreover, the absence of a safety device was not the proximate cause of the plaintiff's injury. The plaintiff was not injured because he could not hold the cold board. The plaintiff was injured because someone had previously cut the cold board almost all the way through, and the piece snapped forward as the plaintiff pushed the board against the studs. " Even a violation of [Labor Law § 240(1)] cannot establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury ***." (*Narducci v. Manhasset Bay Associates,* 96 NY2d 259, 267 [internal quotation marks and citations omitted].)

V. The Cause of Action Based on Labor Law §241(6)

Labor Law §241(6) provides, inter alia, that areas in which construction, excavation or demolition is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them. (*See*, *Rizzuto*

v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343.) The duty imposed by Labor Law § 241(6) upon owners and contractors is nondelegable.(*Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp*., 82 NY2d 876) Because an owner's or general contractor's liability under Labor Law § 241(6) is vicarious, notice of the hazardous condition is irrelevant. (*Burnett v. City of New York*, 104 AD3d 437.)

A cause of action based on Labor Law § 241(6) "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 23)." (*Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 317 [emphasis added]; *Vernieri v Empire Realty Co.*, 219 AD2d 593.) In order to prove a cause of action pursuant to Labor Law § 241(6), a plaintiff must show that the defendant " violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles ***." (*Adams v. Glass Fab, Inc*., 212 AD2d 972, 973.) " [T]he particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles ***." (*Misicki v. Caradonna,* 12 NY3d 511, 515.)

In opposing the instant motion, the plaintiff has relied only on Industrial Code Section 23-1.7(a)(1) and (2). Section 23-1.7, "Protection from general hazards," provides in relevant part: "(a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. ***(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas." Section 23-1.7(a)(1) is not applicable to the case at bar because the plaintiff was not working in an area which was "normally exposed to falling material or objects" and which required overhead planking for the protection of workers installing sheetrock. Section 23-1.7(a)(2) is not applicable to the case at bar because the plaintiff was not injured by an inadvertent entry into an area of falling objects. The plaintiff's reliance on *Amerson v. Melito Const. Corp.* (45 AD3d 708 [masonry work]) and *Gonzalez v. TJM Const. Corp*. (87 AD3d 610 [masonry work]) is misplaced because no work was being done above him. The plaintiff has abandoned his allegations of violations of other sections of the Industrial Code by failing to dispute the defendants' showing that they are inapplicable. (*See*, *Vanname v. Rochester Gas & Elec., Inc.,* 111 AD3d 1331.)

Dated: July 3, 2014

J.S.C.