

Lopez v Edge 11211 LLC
2014 NY Slip Op 33904(U)
June 13, 2014
Supreme Court, Richmond County
Docket Number: 102221/2012
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

KIRK LOPEZ,

Plaintiff,

-against-

EDGE 11211 LLC, DOUGLAS DEVELOPMENT
and LEVINE BUILDERS,

Defendants.

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 102221/2012

Motion No. 4015-001

The following papers numbered 1 through 3 were fully submitted on the 13th day February, 2013.

Papers Numbered

Defendants' Notice of Motion, dated October 1, 2013, with Exhibits and Supporting Papers _____ 1

Plaintiff's Affirmation in Opposition, dated December 2, 2013, with Exhibits and Supporting Papers _____

Defendants' Reply Affirmation, dated December 27, 2013 _____

RICHMOND COUNTY CLERK
20th JUN-20 P 3: 21
DIVISION OF LAW & ENFORCEMENT

The motion of defendants EDGE 11211 LLC, DOUGLAS DEVELOPMENT and LEVINE BUILDERS (hereinafter "Defendants") to dismiss the complaint of plaintiff KIRK LOPEZ (hereinafter "Lopez"), pursuant to CPLR 3212, is granted with respect to those claims of Lopez which are predicated on defendants' violations of Labor Law §240(1) and Labor Law §241(6). In addition, that part of defendants' motion which seeks the dismissal of Lopez's Labor Law §200 and common law negligence claims is also granted.

Lopez was injured during the course of his employment as a tile setter after he slipped on

protective rosin paper that had been placed on a three-step tile staircase which was located inside a swimming pool. Lopez had used the steps as means of ingress and egress to the pool in order to measure and set tile for the border around the outer edge of the pool. The staircase had already been tiled prior to plaintiff's incident and had been covered by the paper for protection.

Defendants move to dismiss Lopez's causes of action which were based on Labor Law §240(1), §241(6), and §200. The "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 Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*Chance v. Felder*, 33 AD3d 645, 645-646 [2006]).

"Labor Law 240(1) impose liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards, where such failure is a proximate cause of the accident" (*Henry v. Eleventh Avenue, L.P.*, 87 AD3d 523, 524, quoting *Balzer v. City of New York*, 61 AD3d 796, 797 [2009]). The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509). However, in order to "establish a prima facie violation of Labor Law §240(1), a plaintiff must demonstrate that the defendants violated the statute and the violation was the proximate cause of his or her injuries" (*Henry, supra., citations omitted*).

Plaintiff claims that Labor Law §240(1) is applicable because the pool concrete steps are the "functional equivalent of a ladder" and/or that stairway was a "safety device" because it was the sole

means for the plaintiff to access the "elevated" work area (*Beharry v. Public Storage, Inc.*, 36 AD3d 574 [2007]). However, it is apparent that the staircase is a permanent appurtenance to the pool and was not designed as a safety device to protect Lopez from an elevation-related risk (*Linkowski v. City of New York*, 33 AD3d 971 [2006], *Caruna v. Lexington Vil. Condominiums at Bay Shore*, 23 AD3d 509 [2006], *Norton v. Park Plaza Owners Corp.*, 263 AD2d 531 [1999]). Accordingly, Lopez' cause of action pursuant to Labor Law §240(1) is dismissed.

Labor Law §241(6) requires contractors, owners, and agents "to provide reasonable and adequate protection and safety for workers and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ramos v. Patchogue-Medford School District*, 73 AD3d 1010 [2010] quoting *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502). "To establish liability under Labor Law §241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident" (*Ramos, supra.*, quoting *Seaman v. Bellmore Fire Dist.*, 59 AD3d 515, 516 [2009]).

In support of his Labor Law §241(6) claim, Lopez alleges that the defendants violated Industrial Code §23-1.7(d) which provides, as follows: "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing" (12 NYCRR 23-1.7). Plaintiff contends that the unsecured rosin paper qualifies as a "foreign substance" as set forth in the regulation. It is evident that the paper was used to protect the newly installed tile and to prevent workers from slipping on the stairs. Lopez has failed to establish that the rosin paper was a foreign substance as contemplated by the regulation and defendants have

provided sufficient support that the paper was an integral part of the tile installation project (*Gonzalez v. Magestic Fine Custom Home*, 115 AD3d 798 [2014], *Ramsy v. Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720 [2010]). Accordingly, Lopez' cause of action pursuant to Labor Law §240(6) is dismissed.

Lastly, Lopez acknowledges that he had no knowledge as to who had placed the protective paper on the steps on the day of his accident. Plaintiff's counsel corroborates this assertion by concluding that "there is no evidence in this record, whatsoever, as to who put the paper on the steps in this negligent fashion which created this slipping hazard". Accordingly, as there is no evidence to establish that the defendants had caused, created or had prior notice of the alleged defective or dangerous condition or that the defendants controlled or directed anyone to place the rosin paper on the steps, plaintiff causes of action premised on Labor Law §200 and common law negligence claims are dismissed (*Grant v. City of New York*, 109 AD3d 961 [2013]).

Accordingly, it is

ORDERED, that the motion of defendants EDGE 11211 LLC, DOUGLAS DEVELOPMENT and LEVINE BUILDERS to dismiss the complaint of plaintiff KIRK LOPEZ, pursuant to CPLR 3212. is granted in its entirety.

This shall constitute the decision and order of the Court.

Dated: June 13, 2014

ENTER, 
HON. PHILIP G. MINARDO

GRANTED
JUN 17 2014
Stephen J. Flaherty