Vera v Cole Muffler Realty LLC
2015 NY Slip Op 30188(U)
January 8, 2015
Supreme Court, Bronx County
Docket Number: 310396/11
Judge: Mark Friedlander
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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

HUGO VERA,

Plaintiff,

-against

COLE MUFFLER REALTY LLC and
MAVIS TIRE NY, INC.,

Defendants.

MEMORANDUM DECISION/ORDER
Index No. 310396/11

HON. MARK FRIEDLANDER

Plaintiff moves for an order: (1) pursuant to CPLR§3212 and Labor Law §240(1), granting summary judgment to plaintiff and against defendants, Cole Muffler Realty LLC ("Cole") and Mavis Tire NY, Inc. ("Mavis") on the issue of liability; and (2) setting this matter down for a trial on the sole issue of plaintiff's damages. Defendants, Cole and Mavis, cross-move for an order, pursuant to CPLR§3212: (1) granting defendants Cole and Mavis summary judgment in their favor, dismissing plaintiff's claims sounding in the violation of Labor Law §§240(1) and 241(6); and (2) denying plaintiff's motion for summary judgment on plaintiff's Labor Law §240(1) claim. The motion and cross-motion are decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on January 12, 2011, at the building located at 2525-27 South Salinas Street, Syracuse, New York ("the Building"), as a result of the extension ladder he was standing upon slipping out from under him. Plaintiff alleges that, in addition to being liable for common law negligence, defendants violated Labor Law §§200, 240(1) and 241(6), as well as Rule 23 of the New York State Industrial Code, including §23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), and 23-1.21(b)(4)(v).

In support of the motion, plaintiff submits, *inter alia*, a copy of the pleadings, the deed to the Building, the Lease Agreement between Cole and Mavis, transcripts of the deposition testimony of plaintiff and of non-party witness Travis Smith, who is an employee of Mavis Tire Supply Corp. ("MTS"), plaintiff's affidavit, photographs, and Forms C2 (Employer's Report of Work-Related Injury/Illness) and C-3 (Employee Claim to Workers' Compensation Board).

As a preliminary matter, defendants object to the admissibility of the deposition transcripts on the ground that: (1) "... not one transcript annexed as exhibits to plaintiff's moving papers have been executed by the witnesses deposed"; (2) there is no indication in plaintiff's moving papers that the transcripts were mailed to the respective deponents' attorneys for execution by the deponents; and (3) absent such proof, the transcripts may not be deemed executed pursuant to CPLR§3116(a). The Court is somewhat perplexed by the objection.

First, contrary to the contention of defendants' attorney, Smith's deposition transcript was signed and notarized on May 29, 2013, and is thus admissible. Second, in support of their cross-motion for summary judgment defendants attach copies of same deposition transcripts they assert are inadmissible. Further, annexed to defendants' cross-motion are copies of transmittal letters from the attorneys for both plaintiff and defendants, dated November 16, 2012 and September 18, 2012, respectively, showing the mailing of the original and one copy of both deposition transcripts, requesting their execution and return of the original, pursuant to CPLR§3116(a), with the notation that if they are not returned within sixty days, the transcripts shall be deemed executed.

Accordingly, the transcripts are admissible. Parenthetically, even if the depositions transcripts were not signed and notarized, an unsigned deposition transcript is still admissible as

evidence if it was certified as accurate and no party challenges the accuracy of the testimony as transcribed. *Martin v. City of New York,* 82 A.D.3d 653 (1st Dept. 2011); *White Knight LTD v. Shea,* 10 A.D.3d 567 (1st Dept. 2004).

The facts, as culled from the pleadings, deposition transcripts, plaintiff's affidavit and exhibits, are as follows: Cole is the owner of the Building. By Lease Agreement, dated November 14, 2006, Cole leased the Building to Mavis. MTS, under a franchise-like agreement, operated approximately 150 retail tire garages in the northeastern United States, including the one at the Building. In or about 2008, MTS acquired the Cole Muffler Inc. retail chain, containing approximately 40 Cole Muffler retail locations, including the one located at the Building. These retail locations did not have security cameras. Thereafter, MTS undertook to upgrade the retail locations ("shops"), including the Building, with security camera systems.

Smith testified at his deposition that he is employed by MTS. He does not have a job title, but is in charge of accounts receivable. He also oversees the installation and management of security cameras at the shops. All cameras would run off Ethernet wires. These wires would come from a camera to a centralized switch, almost like a computer modem, that is, in turn, connected to a computer. A monitor would be set up for real-time viewing of what the security cameras are showing. Running the wires would sometimes entail having to drill into walls or other structural components of the shops. Camera installation would normally take between three and five days. He would visit the various shops, draw a quick diagram, and mark where he wanted the cameras installed. Cameras were installed only by employees of MTS. Where the wiring was to go or how the wiring was to be done was to be determined the MTS's employees who would be doing the installation.

Plaintiff testified at his deposition that he was employed by MTS. His job was to install security cameras at MTS shops. Camera installation involved physical work. Plaintiff had to carry cables, boxes with cables, tools and ladders, and did distribution of cable, opening of holes, installing cameras and setting them up. Plaintiff was part of a two-person team, working with Angelo Polanco ("Polanco"). Polanco was plaintiff's immediate supervisor. Plaintiff received his instructions from either Polanco or Smith. Before commencing a job, Plaintiff and Polanco would go MTS's warehouse in Midwood, New York, and pick up everything they needed, including cable boxes, the computer, the cameras, and their tools, as well as two aluminum ladders. One ladder was a six foot A-Frame ladder. The other ladder was a big, very heavy folding ladder with four sections, and when fully extended, was twenty to twenty-four feet long., *Both ladders* were very worn, as the ladders had been used for a long time. Plaintiff had previously complained orally about the condition of the ladders to Polanco, Smith and Alberto (another supervisor), but was told he had to work with it.

The day before his accident, plaintiff and Polanco arrived at the Building at approximately 5:00 P.M. Smith had been to the Building previously and decided where the cameras were to be installed. Plaintiff and Polanco scouted the Building to see where they would put the cables. There were several entrances to the Building. Plaintiff described the Building layout as a box, with a place where the shop received customers, and six bays, where cars enter. In the rear, there was a store area, with storage and store merchandise. Plaintiff and Polanco were intending to install between sixteen and eighteen cameras, or more, as the Building was very long. In addition to the cameras and cables, they would be putting in a switch and would connect to the internet, so that the video could be seen remotely. At this time, plaintiff did not

take notice of the ground in the area where the accident took place.

The following day, plaintiff and Polanco arrived at the Building at approximately 8:00 A.M. They had drilled approximately six holes passing through the concrete or brick walls between each bay, using a drill hammer. The diameter of these holes was between one and two inches. The cables were being affixed to the sides of the wall through the edge (the crease where the wall and ceiling meet each other). They always wanted the cables "seen the least." There were always some pipes that run through, so they would tie the cables to the pipes with tape or tip ties. The ceiling was more than twenty or twenty-two feet high.

Both plaintiff and Pollanco had set the folding ladder, which was fully extended, diagonally against the wall. Plaintiff was on the ladder with his tools (a screwdriver, the pin for cutting, and zip ties) running cable. Polanco was holding the ladder. Cable was hanging from the ceiling to the floor. Plaintiff was trying to grab the cable but was unable to reach it. Polanco then moved from the ladder and went to grab the cable from the floor level and swing it over to where plaintiff could reach it, when the ladder slipped, fell backwards and plaintiff fell, landing on a tire changing machine.

Plaintiff, in his affidavit, states that the floor had an oily or greasy residue and was slippery. Contrary to the contention of defendants' attorney, this statement in plaintiff's affidavit does not contradict his deposition testimony. While plaintiff testified at his deposition that, the day before his accident, he did not notice the ground of the area where his accident occurred, he was never asked any questions about what the ground looked like on the day of his accident. Plaintiff's affidavit further states that the ladder on which he was working at the time of the accident was not tied off or secured in any fashion to prevent it from moving.

Labor Law §240(1) provides in relevant part:

> "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."

" '[A]ltering,' within the meaning of Labor Law §240(1), requires making a *significant* physical change to the configuration or composition of the building or structure." *Joblon v. Solow,* 91 N.Y.2d 457, 465 (1998). Plaintiff's deposition testimony that he had been assigned to install over sixteen security cameras and, to accomplish this task, he had to drill through concrete and or bricks, run cables through the drilled holes, affix the cables and install a centralized switch, establishes that plaintiff was engaged in a task protected by the statute. *Kochman v. City of New York,* 110 A.D.3d 477 (1st Dept. 2013); *LaGiudice v. Sleepy's Inc.,* 67 A.D.3d 969 (1st Dept. 2009).

Defendants argue that, at the time of plaintiff 's accident, he was in the process of affixing cable to the ceiling of a garage where the ceiling meets the walls, using tape and/or zip ties, and this does not constitute "altering," and the fact that plaintiff or Polanco may have used a power tool to make six one to two inch holes to pass cable through before the accident is immaterial. This argument lacks merit. It is neither pragmatic nor consistent to isolate the moment of injury and ignore the general context of the work. The intent of the statute is to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts. *Prats v. Port Auth. of N.Y. & N.J.,* 100 N.Y.2d 878 (2005). See also, *Belding v. Verizon*

New York, Inc., 65 A.D.3d 414 (1st Dept. 2009). The case of *Rhodes-Evans v. 111 Chelsea, LLC*, 44 A.D,3d 430 (1st Dept. 2007), is readily distinguishable. *Rhodes-Evans* involved an injury that occurred while the worker was splicing *pre-existing* fiber cable for one tenant in a building, a substantially different situation. *Kochman v. City of Neww York, supra.*

Plaintiff has made a *prima facie* showing of proximate cause with his unrefuted testimony that the ladder slipped causing him to fall. *LaGiudice v. Sleepy's Inc., supra*; *Belding v. Verizon New York, Inc., supra.*

In opposition to plaintiff's motion, defendants assert that plaintiff was not engaged in an activity protected by Labor Law §240(1). This argument lacks merit for the reasons stated above. Defendants' contention that plaintiff was the sole proximate cause of the accident is not supported by the evidence.

Plaintiff's motion for summary judgment against defendant, pursuant to Labor Law §240(1) is granted. The branch of defendants' cross-motion seeking summary judgment dismissing plaintiff's claim under Labor Law §240(1) is denied.

Defendants' cross-motion also seeks dismissal of plaintiff's claims under Labor Law §200.

Labor Law Section 200(1) state, in pertinent part:

> All places to which this chapter applies 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. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons ...

Labor law §200 is a codification of the common law duty of an owner or employer to provide

employees with a safe place to work. *See, Jock v. Fien,* 80 N.Y.2d 965 (1992). Liability under Labor Law §200 cannot be imposed unless plaintiff establishes that the owner or general contractor supervised or controlled the work, performed or had actual or constructive notice of the unsafe condition which precipitated plaintiff's injury. *Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876 (1993). In *Hughes v. Tishman Construction Corp.,* 40 A.D.3d 305 (1st Dept. 2007), the Court stated that:

> "Where a claim under Labor law §200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. [citation omitted] It is well settled that an implicit precondition to th[e] duty [to maintain a safe construction site] is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [citation omitted]. General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed [citation omitted]."

See, also, Buckley v. Columbia Grammar & Preparatory, 44 A.D.3d 263 (1st Dept. 2007); *Fischetto v. LB 745 LLC, York,* 43 A.D.3d 810 (1st Dept. 2007).

No evidence has been provided that defendants supervised or controlled the work, performed or had actual or constructive notice of the alleged unsafe condition which precipitated plaintiff's injury. Plaintiff testified at his deposition that he was supervised and received instructions only from his superiors at MTS. Accordingly, the branch of defendants' cross-motion for summary judgment seeking dismissal of plaintiff's Labor Law §200 claim is granted and plaintiff's Labor Law §200 claim is dismissed.

Labor Law Section 241(6) provides:

> All areas in which construction, excavation or demolition work

> is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

This section, which imposes a non-delegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers, is not self-executing. In order to establish liability under the statute, a plaintiff must specifically plead and prove the violation of the applicable Industrial Code regulation. The Code regulation must constitute a specific positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury. *Buckley v. Columbia Grammar & Preparatory,supra.*

Industrial Code Provisions, 12 NYCRR §23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), and 23-1.21(b)(4)(v), constitute concrete specifications providing a predicate cause of action under Labor law Section 241(6). See, e.g., *Przyborowski v. A & M Cook, LLC,* 120 A.D.3d 651 (2nd Dept. 2014).

22 NYCRR §23-1.21(b)(4)(ii) provides, in relevant part, as follows:

> All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

22 NYCRR §23-1.21(b)(4)(iv) provides, in relevant part, as follows:

> When work is being performed from ladder rungs between six and 10 feet above the

> ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

22 NYCRR §23-1.21(b)(4)(v) provides, in relevant part, as follows:

> The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

The branch of defendants' cross-motion seeking dismissal of plaintiff's claim under 22 NYCRR §23-1.21(b)(4)(ii) is denied. Plaintiff's affidavit states that the floor had an oily or greasy residue and was slippery. This creates a triable issue of fact as to whether there was a violation of this section, which precludes the granting of summary judgment.

The branch of defendants' cross-motion seeking dismissal of plaintiff's claim under 22 NYCRR §23-1.21(b)(4)(iv) is also denied. It is undisputed that Polanco was initially holding the ladder upon which plaintiff was working. However, Polanco moved from the ladder and went to grab the cable from the floor level, when the ladder slipped, and plaintiff fell. Polanco's letting go of the ladder creates a triable issue of fact as to whether there was a violation of this section, which precludes the granting of summary judgment.

The branch of defendants' cross-motion seeking dismissal of plaintiff's claim under 22 NYCRR §23-1.21(b)(4)(v) is granted. While plaintiff states that the floor had an oily or greasy residue and was slippery, no allegations were made and no evidence produced that the ladder which plaintiff was using was leaning against a slippery surface.

In summary, plaintiff's motion for summary judgment in favor of plaintiff and against defendants, pursuant to Labor Law §240(1), on the issue of liability, is granted. Defendants'

cross-motion for summary judgment is granted, with respect to plaintiff's claims under Labor Law §§200 and under Labor Law §241(6) to the extent that it relies on 12 NYCRR §23-1.21(b)(4)(v), and these claims are dismissed, but denied with respect to the claims under Labor Law §241(6) to the extent that they rely on 12 NYCRR §23-1.21(b)(4)(ii) and 23-1.21(b)(4)(iv). The branch of defendants' cross-motion seeking summary judgment dismissing plaintiff's Labor law §240(1) claim is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: 1/8/15

MARK FRIEDLANDER, J.S.C.