

Gonzalez v McFar Contrs., Inc.
2015 NY Slip Op 30773(U)
May 4, 2015
Supreme Court, Queens County
Docket Number: 18086/13
Judge: Darrell L. Gavrin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

 JOSE GONZALEZ,

Index No. 18086/13

Plaintiff,

Motion

Date December 1, 2014

- against-

MCFAR CONTRACTORS, INC.,

Motion

Cal. No. 71

Defendant.

Motion

Seq. No. 1

The following papers numbered 1 to 12 read on this motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law § 240 (1); and cross motion by defendant McFar Contractors, Inc. (McFar), to dismiss plaintiff's claims pursuant to Labor Law §§ 200, 240 (1) and 241(6).

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-8
Other.....	9-12

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

In this Labor Law action, plaintiff seeks damages for personal injuries sustained when he fell from a roof while removing and replacing a gutter system. The location is owned by non-party, Park Ridge Condominiums (Park Ridge). At the time of his accident, plaintiff was employed by non-party, JG Seamless Gutters. McFar Contractors, Inc. (McFar), was the general contractor retained by Park Ridge to repair and replace the second story gutter system. McFar subcontracted the work to plaintiff's employer.

Facts

Plaintiff appeared for a partial deposition on April 4, 2013, and testified as follows: on March 7, 2011, he was employed by his brother, Jesus Gonzalez (Gonzalez). Plaintiff's work

included installation and maintenance of gutters. On April 5, 2013, the weather was clear and free of precipitation. Gonzalez provided the address where plaintiff was to remove the old gutters and install new ones. Gonzalez did not inform plaintiff as to any details of the work nor did he instruct plaintiff to bring or use any particular equipment. All of the equipment to be used was already on the truck which plaintiff and his two co-workers used to go to Park Ridge. The equipment consisted of ladders, drills, saws, hammers, scissors, and a machine to fabricate gutters. Plaintiff testified that he was unaware of whether there were any safety harnesses or hard hats on the truck. Plaintiff was familiar with a safety harness, but never requested one.

Upon arrival at Park Ridge, plaintiff and his coworkers spoke with the person-in-charge of the condominiums, Michael McCormack. McCormack walked with them and showed them where they were to work. McCormack remained at the location for approximately 10 minutes as plaintiff began to work, and then left and did not return at any point prior to the accident. Other than the brief interaction with McCormack, no one from the condominium nor anyone from McFar supervised or controlled plaintiff's work. Indeed, plaintiff testified that he had never heard of McFar.

Plaintiff testified that he started to remove the old gutters and accessed these gutters by leaning a 24 or 26 foot-high extension ladder against the building. Hector (a coworker) held the ladder while plaintiff climbed it. McCormack was present when plaintiff first ascended the ladder to the roof. Plaintiff described the shingle roof as "old" and "worn" with "sand from the roof itself" due to wear and tear. Plaintiff began to remove the gutter, which consisted of three separate pieces by measuring it and removing the large nails with a hammer. He was working for approximately one and a half hours before the accident occurred. Plaintiff was kneeling on his left knee removing portions of the gutter. After plaintiff had completed removing the middle piece of the gutter and it had fallen to the ground, he began to get up but before he was able to do so, he fell to the ground. Plaintiff testified that his "shoes did not hold onto the roof."

McCormack testified that he was the property manager for Park Ridge on April 5, 2013. A few weeks before the accident, he had contacted McFar to verbally request that McFar repair the gutters at buildings 11 and 12. On April 5, 2013, McCormack instructed plaintiff and his coworkers as to the location where they were to work. McCormack observed the three workers removing old gutters on Building 12 and beginning to construct a new one. McCormack had the ability to stop the work if it was being done in an unsafe manner.

Jesus Gonzalez (Gonzalez) testified that he was the owner of JG Seamless, which he operated from his home. Gonzalez testified that he keeps both safety harnesses and helmets on the truck that plaintiff uses in the course of his employment. Gonzalez testified that he told plaintiff to wear the helmets and safety harnesses every day. He further required plaintiff to wear a safety harness whenever he performed work on a roof. Gonzalez testified that McFar did not supervise or control the work of JG Seamless; plaintiff was the foreman on the job site and was not supervised by anyone in the performance of his work. Finally, Gonzalez testified that plaintiff was not only provided with a safety harness but also with a safety device in the

form of a ladder. Gonzalez stated that work would customarily be done from a ladder but that “it depends” the work might be performed either from the ladder or on the roof.

It is noted that plaintiff was not fully deposed by defendants. It was expected that the deposition would continue at another time in order for defendants to have an opportunity to depose plaintiff.

Motion by plaintiff

Plaintiff moves for summary judgment on the issue of liability alleging a violation of Labor Law § 240 (1). In moving for dismissal, plaintiff alleges that there were no fall protection devices in place at the time of the accident. Defendant, however, contends that not only were there safety harnesses and ladders available, but that plaintiff was instructed daily to use the devices at hand. Defendant contends that the motion is premature as the examination before trial of plaintiff is not completed to date. “A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated” (*Matter of Fasciglione*, 73 AD3d 769, 770 [2d Dept 2010]; see CPLR 3212 [f]; *Jones v American Commerce Ins. Co.*, 92 AD3d 844, 845 [2d Dept 2012]). This is especially so where the motion for summary judgment is made prior to the parties conducting depositions (see *Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526 [2d Dept 2013]; *Bond v DeMasco*, 84 AD3d 1292, 1293 [2d Dept 2012]; *Cardone v Poidamani*, 73 AD3d 828, 828 [2d Dept 2011]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 755 [2d Dept 2008]). Here, an award of summary judgment would be premature at this stage of the action. The plaintiff's motion for summary judgment was made prior to the completion of plaintiff's deposition. In light of the fact that defendant contends that plaintiff was, in fact, provided with safety devices and instructed daily to use it, defendant should be afforded the opportunity to complete depositions (see *Wesolowski v St. Francis Hosp.*, 108 AD3d at 526; *Jones v American Commerce Ins. Co.*, 92 AD3d at 845; *Gardner v Cason, Inc.*, 82 AD3d 930, 931 [2d Dept 2011]). Accordingly, the plaintiff's motion is denied, without prejudice, to renewal upon the completion of discovery.

Cross Motion by defendant

The branch of the cross motion by McFar is to dismiss plaintiff's claims pursuant to Labor Law § 200, is granted. “Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 906 [2d Dept 2013]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). There are “two broad categories under which liability may be imposed under Labor Law § 200” (*Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 147 [2d Dept 2010]). One category of liability relates to negligence arising from the means, methods, and materials employed in the work: “[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or

control the performance of the work” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; see *Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876 [1993] [liability may not be imposed pursuant to Labor Law § 200 “solely because the owner had notice of the allegedly unsafe manner in which the work was performed”]; *Singh v Black Diamonds LLC*, 24 AD3d 138 [1st Dept 2005] [“liability can only be imposed if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition”]). Here, there is no evidence in the record that McFar exercised control or supervision over the injury-producing work, or that McFar had the authority to do so.

However, liability may also be imposed where the injury is proximately caused by a dangerous or defective condition on the premises itself: “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*Ortega v Puccia*, 57 AD3d at 61; *Ramirez v Metro. Transp. Auth.*, 106 AD3d 799, 800–802 [2d Dept 2013]). Plaintiff testified that he felt a sand-like substance on the roof after he removed the gutter, thus suggesting that plaintiff may have slipped as a result of the substance. However, there is no evidence in the record that McFar created or had notice of this alleged dangerous condition at the work site.

That branch of the motion to dismiss plaintiff’s claims pursuant to Labor Law § 240 (1), on the ground that plaintiff was not engaged in one of the statute’s enumerated activities, is denied. “Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering” (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as “whether the work in question was occasioned by an isolated event as opposed to a recurring condition” (*Dos Santos v Consolidated Edison of N.Y.*, 104 AD3d 606, 607 [1st Dept 2013]); whether the object being replaced was “a worn-out component” in something that was otherwise “operable” (*Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 697, 954 N.Y.S.2d 113 [2d Dept 2012]); and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement (*Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 [1st Dept 2012]). Applying these criterion to the facts at hand, the court concludes that plaintiff was not engaged in routine maintenance at the time of the subject accident.

That branch of McFar’s cross motion to dismiss plaintiff’s claims pursuant to Labor Law § 241 (6), is granted. “Labor Law § 241 (6) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Norero v 99–105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012], citing *Comes v New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 878 [1993]). “To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific,

applicable safety standards” (see *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 503–505 [1993]). Since plaintiff has not alleged a violation of any provision of the Industrial Code, defendant has met its *prima facie* burden for summary judgment on the Labor Law § 241 (6) cause of action on the ground that the plaintiff has failed to establish a violation of the New York State Industrial Code as a predicate to liability under the statute.

Conclusion

Plaintiff’s motion for partial summary judgment pursuant to Labor Law § 240 (1), is denied as premature with leave to renew upon completion of discovery.

The branches of McFar’s cross motion to dismiss plaintiff’s claims pursuant to Labor Law §§ 200 and 241 (6), are granted.

The branch of

McFar’s cross motion to dismiss plaintiff’s claim pursuant to Labor Law § 240 (1), is denied.

Dated: May 4, 2015

DARRELL L. GAVRIN, J.S.C.