Rodriquez v 250 Park Ave.LLC
2015 NY Slip Op 31393(U)
July 7, 2015
Supreme Court, Suffolk County
Docket Number: 12-14785
Judge: Mark D. Cohen
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MEMORANDUM

INDEX No. 12-14785
CAL No. 14-00016MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 28 - SUFFOLK COUNTY

PRESENT:

Hon. MARK D. COHEN
Acting Justice of the Supreme Court

MOTION DATE 5-2-14 (001)
MOTION DATE 6-3-14 (002)
ADJ. DATE June 30, 2015
Mot. Seq. # 001 -MotD
002 -MD

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MIGUEL RODRIGUEZ, JR.,

Plaintiff,

- against -

250 PARK AVENUE, LLC and COLLIERS ABR, INC.,

Defendants.

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The plaintiff, Miguel Rodriguez, Jr., [plaintiff herein] was injured on January 13, 2010. At the time the plaintiff was working on a freight elevator modernization project when his left arm was caught in a pinch and/or nip joint of an elevator sheave. The plaintiff was employed as an elevator mechanic for Thyssenn Krupp Elevator Corporation. The property was owned by the defendant, 250 Park Avenue, LLC, and the Property Manager was the defendant , Colliers Abr, Inc. [defendants herein]. Thyssenn Krupp had contracted with the defendants for the modernization of the elevator and the plaintiff was the Mechanic in Charge of this project. The incident occurred in a work area known as the secondary. The secondary was at the top of the elevator shaft, which was enclosed by concrete on all sides, and is accessed by a small access hatch from the elevator motor room. The height of the ceiling was approximately three feet so that moving around required walking on your hands and knees and/or "duck walking." There was only a single light bulb in the area, that failed to illuminate the entire secondary area. The modernization project did not include any changes to be made to the secondary sheave or the flooring of the secondary.

On the date of the incident, the plaintiff and a helper, Daniel Bratic, a apprentice elevator

mechanic, had been cleaning in the motor room on the roof. The plaintiff received a call that there was a delivery of construction materials. The plaintiff went to the secondary to clean and measure the rope gripper while Mr. Bratic went to accept the delivery, although Mr. Bratic did not know that the plaintiff was in the secondary. The plaintiff believed that Mr. Bratic would utilize the passenger cab not the freight cab[1]; the freight cab being approximately 10 feet below the metal grating floor of the secondary.[2] Mr. Bratic yelled up to the plaintiff that he was going to move the cab, at which time the plaintiff yelled clear and starting to egress the secondary. After the elevator cab moved, while duck walking in the secondary, the plaintiff's right foot was caught in a gap in the flooring and he began to fall. In the secondary, there was a rotating device called a sheave. This was a round big piece of metal with cables on it, but was not encased and which hung low to the ground. The plaintiff reached out to prevent himself from falling and his left arm got caught in the moving wire cable, causing injuries.

The plaintiff commenced this action sounding in common-law negligence and violation of sections 200, 240 and 241(6) of the Labor Law. The plaintiff particularized a violation of the Industrial Code of section 12 NYCRR §§ 23-1.12(e); (g)[3] plus 12 NYCRR 23-1.7(e) under section 241(6) of the Labor Law.[4] Presently, the defendants have moved for summary judgment and the plaintiff has moved for partial summary judgment on the cause of action sounding in

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[1]. The freight elevator was to be shut down and no longer open for normal passenger or freight use. A temporary run box was installed to use the car during the work period.

[2]. The plaintiff indicated that he had placed flattened cardboard boxes atop some of the grating.

[3]. 12 NYCRR 23-1.12(e) Belts, pulleys and flywheels. All belts except conveyor belts and all pulleys and flywheels which are less than seven feet above the ground, floor, working platform, runway or equivalent surface where persons work or pass and which are not protected by location from accidental contact by persons, shall have all moving parts guarded by substantial enclosures or by safety railings constructed and installed in compliance with this Part (rule) which will prevent persons from approaching within a horizontal distance of 18 inches. Enclosures required by this Part (rule) may be temporarily removed when starting a machine or for machine adjustment or maintenance, but shall be replaced immediately thereafter.

(g) Wire rope. The nip points between power winches or sheaves and wire ropes shall be guarded by substantial enclosures or by safety railings constructed and installed in compliance with this Part (rule).

[4]. Of course, only Industrial Codes promulgated by the Commissioner of Law can be used for a cause of action under section 241(6) of the Labor Law. Nostrom v. A.W. Chesterton Co., 15 N.Y.3d 502; Misicki v. Caradonna, 12 N.Y.3d 511. Therefore, the other codes cited by the plaintiff are not applicable under this remaining cause of action. It is noted that as there is no evidence of supervision nor control by the defendants, the other codes could not be used as a basis of a duty under negligence as established by the common-law or Labor Law. Furthermore, there is evidence that the defendants had knowledge of a dangerous condition as alleged by the plaintiff. Gaffney v. Norampac Industries, Inc., 109 A.D.3d 1210.

violation of the Labor Law 241(6).

Initially, by letter dated January 7, 2014, and in the opposition to the defendants' motion, the plaintiff's attorney agreed to withdraw the claims sounding in common-law negligence and sections 200 and 240 of the Labor Law. In any case, the accident is not a gravity related incident covered by section 240 of the Labor Law. Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134. Furthermore, there was no evidence that the defendants supervised or controlled the work so that negligence could be found. See Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607. Therefore, that part of the defendants' motion for summary judgment based upon the causes of action sounding in common-law negligence, violations of sections 200 and 240 of the Labor Law is granted.

The basis for the defendants' motion for summary judgment under section 241(6) are that the Industrial Code was promulgated in 1972 and the building, including the elevator, was built in 1924 and that the secondary had equipment therein "guarded by location," as that term is utilized under the New York State Industrial Code, and these did not require any additional safeties to be employed with respect to the equipment in that area . The defendants refer to the plaintiff's deposition where he indicates that the secondary is completely blocked off and isolated to establish the secondary as a "guarded by location" area. The defendants also argue that Part 23 of the Industrial Code does not apply to elevators, since there is a separate part, Part 8, for elevators. Finally, the defendants argue that the plaintiff was the sole proximate cause of his injuries.

"The legislative intent of section 241(6)[5] is to ensure the safety of workers at construction sites." Morris v. Pavarini Const., 22 N.Y.3d 668, 673. It is with this policy background that the motions must be addressed. Of course, the law requires safety for the worker at the time of the incident, and does not focus on the age of the building, but requires utilization of safety equipment and procedures in order to minimize potential dangers today. Furthermore, elevators are not excluded from Part 23 of the Industrial Code. See e.g. Moscoso v. Overlook Towers Corp., 121 A.D.3d 438; Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263.[6] Thus, some of the defendants' general arguments must be rejected.

Even though there are clear legislative and judicial mandates for maximum worker protection under the Labor Law, there are some caveats. In determining whether the cause of action is viable under section 241(6), the regulation, which provides the necessary predicate, must have a specific not general command. See Ross v. Curtis–Palmer Hydro–Electric Co., 81

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[5] Labor Law § 241(6) states that
"[a]ll 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."

[6]. The plaintiffs in these cases lost as a matter of fact based upon the application of the Industrial Code, but the Courts did apply the regulations to elevators.

N.Y.2d 494. The regulation must be sufficiently specific in order to provide a cause of action under the Labor Law. Vanderwall v. 1255 Portland Ave. LLC, 128 A.D.3d 1446. This is because the non-delegable duty imposed upon the party, not necessarily in direct control of the work site, should provide specific requirements to be met. Ross v. Curtis–Palmer Hydro–Electric Co., supra. The particular regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply set forth general safety standards. Misicki v. Caradonna, supra. at 515.
Under section 23-1.4. the following definition is applicable.

(a) General descriptive terms. As used in this Part (rule), such general terms as adequate, effective, equal, equivalent, firm, necessary, proper, safe, secure, substantial, sufficient, suitable and other similar terms when used to describe materials, devices, structures, methods and procedures required by this Part (rule) shall mean that such materials, devices, structures, methods and procedures shall be of such kind and quality as a reasonable and prudent man experienced in construction, demolition and excavation operations would require in order to provide safe working conditions for himself in the performance of such work.

Both of the regulations cited by the plaintiff under subsections 23-1.7 require "substantial enclosures or by safety railings..." Both of the terms, of "substantial" and "safe[ty]," are general terms. See Fisher v. WNY Bus Parts, Inc., 12 A.D.3d 1138. Unlike other sections of the regulation, there is no concrete specification. See e.g. Doto v. Astoria Energy II, LLC, _ A.D.3d _, 2015 WL 3480876 (N.Y.A.D. 2 Dept.)(23-1.7. Protection from general hazards (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. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.). Consequently, these regulations cannot be used as a basis for a cause of action under section 241(6) of the Labor Law. See Longo v. Long Island Railroad, 116 A.D.3d 676.[7]
However, it is clear that 12 N.Y.C.R.R. 23-1.7(e)(1) and (2)[8] are concrete regulations. Smith v.

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[7]. The defendants present a strong argument that the plaintiff was a substantial cause of his injuries. The plaintiff testified that as the mechanic in charge, he would be solely responsible for any hazardous condition. Furthermore, the gaps were open and obvious, being known to the plaintiff. As noted, the plaintiff had placed cardboard boxing to cover some of the gaps, although not all in the secondary. The plaintiff did not lock out the elevator while he was in the secondary and indicated that he was clear when the elevator was being used and moved about the secondary while the elevator was in motion. See Kerrigan v. TDX Const. Corp., 108 A.D.3d 468; Serrano v. Popovic, 91 A.D.3d 626. However, it cannot be held, as a matter of law, that the plaintiff was the sole proximate cause. See Guanopatin v. Flushing Acquisition Holdings, LLC, 127 A.D.3d 812.

[8] 12 NYCRR 23-1.7(e) Tripping and other hazards.

McClier Corp., 22 AD3d 369. The defendants are correct that there is no evidence that the plaintiff fell on dirt and debris, so that subdivision 12 NYCRR 23-1.7(e)(2) is not applicable. With respect to subdivision (e)(1), the issue is whether the secondary could be defined as a passageway. As the defendants correctly note, although not defined in the regulations, courts have defined a passageway "to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area." Steiger v. LPCiminelli, Inc., 104 A.D.3d 1246, 1251. Passageways should be broadly construed to apply to all part of the work area. Smith v. McClier Corp., 22 A.D.3d 369. The defendants do not argue that the secondary was an "open area." As the plaintiff testified, he was duck walking to leave the secondary after he had taken measurements for the rope gripper device. Because there was a ladder with access to the secondary, the movement from each area could be found, as a matter of fact, a passageway. Therefore, there is an issue of fact, warranting a denial of the defendants' motion for summary judgment under section 241(6) of the Labor Law. Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607.[9]

Settle order, granting the parts of the defendants' motion to dismiss under section 200 and 240 of the Labor Law and common law negligence, and denying the part of the motion under section 241(6) of the Labor Law and denying the plaintiffs motion for summary judgment.

Dated: July 7, 2015 _____

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MARK D. COHEN, A.J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

[9]. The "guarded by location" applies to actions under 23-9.2(d). See Shields v. First Ave. Buildings LLC, 39 Misc.3d 1223(A), affd. 118 A.D.3d 588. The regulation applies to interior moving parts, which has not be raised here.