

Fanizzi v Cauldwell-Wingate Co., LLC

2016 NY Slip Op 30007(U)

January 5, 2016

Supreme Court, New York County

Docket Number: 150356/14

Judge: Joan M. Kenney

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

DECISION & ORDER
Index No.: 150356/14

ROBERT FANIZZI,

Plaintiff,

-against-

CAULDWELL-WINGATE COMPANY, LLC,
HWA 1290 III LLC, HWA 1290 IV LLC, HWA
1290 V LLC, COLUMBIA UNIVERSITY MEDICAL
CENTER d/b/a COLUMBIA DOCTORS MIDTOWN
RADIOLOGY and THE TRUSTEES OF COLUMBIA
UNIVERSITY OF THE CITY OF NEW YORK,

Defendants.

CAULDWELL-WINGATE COMPANY, LLC and
THE TRUSTEES OF COLUMBIA UNIVERSITY
OF THE CITY OF NEW YORK,

Third-Party Action
Discontinued

Third-Party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.,

Third-Party Defendants.

Kenney, J.:

This is an action to recover damages for personal injuries sustained by an electrician on December 23, 2012, when he fell off a ladder after being shocked by 277 volts of electricity, while working at a construction site located at Columbia University, 1296 6th Avenue, New York, New York (the Premises).

Defendants Cauldwell-Wingate Company, LLC (Cauldwell), HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V LLC (collectively, the HWA defendants), Columbia University Medical Center d/b/a Columbia Doctors Midtown Radiology (Columbia University) and the Trustees of Columbia University of the City of New York (together, the Columbia defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, the HWA defendants owned the Premises where the accident occurred. Defendant Caldwell served as general contractor on a project underway at the Premises, which entailed the complete build-out renovation of certain medical offices (the Project). The Columbia defendants, who leased the Premises from the HWA defendants, were the project owners of the job. Plaintiff was employed as an electrician and sub-foreman by non-party Five Star Electric Corporation (Five Star), the subcontractor Caldwell hired to install the Project's electrical system, including the outlets, switches and lights.

Pursuant to plaintiff's deposition testimony and affidavit, at the time of the accident, he and his Five Star coworker, Louie Georgians, were attempting to trace a circuit, in order to make sure that it was not live before they began installing track lighting in the ceiling. At this time, plaintiff and Georgians were working in the lobby area of the third floor of the Premises. Before beginning their work, plaintiff studied the plans of the electrical system, which were provided by Five Star, and identified the circuit that they would be working on.

Plaintiff explained that, as the drop ceiling was already installed before the electrical work on the Project was completed, in order for the electricians to gain access to the ceiling's electrical, carpenters had to remove various ceiling panels. Plaintiff climbed up a ten-foot fiberglass ladder, which was provided by Five Star, and squeezed his body into the ceiling between the pipes, electrical system and duct work located there. Plaintiff identified the circuit he was looking for at one end, and Georgians identified it at the other end. Plaintiff described the circuit as being located within an electrical box that also housed approximately 40 other circuits, which powered the entire floor. The men tested both ends of the circuit with wire testers, and

both ends tested as dead.

Thereafter, as plaintiff attempted to exit the ceiling and descend the ladder, a wire nut, which served as a protective cap, came off another wire that was hanging loose in the ceiling (the Loose Wire). As plaintiff let go of the wire that he was holding and that he had just tested, the Loose Wire sprung back and struck him on his hand, shocking him with 277 volts of electricity and causing him to fall from the ladder and sustain injuries. In addition to burns to his hand, plaintiff also sustained injuries to his back.

In his deposition, plaintiff testified that, as Five Star's sub-foreman, he "would get everything together, go over to the men and lay out all the work for them . . . [and] tell them what to do" (plaintiff's tr at 17). Plaintiff's work was directed by two Five Star employees, Mike LaChance and Nick Ciasi, as well as Cauldwell's superintendent, Mike Grebinsky. When asked if Grebinsky directed the means and methods of his work, plaintiff responded, "He was basically pointing us in the direction of what needed to be done on the job" (*id.* at 18). Plaintiff further explained,

"Like if we were going to do a certain area that needed to be done at this time, he would tell us, 'listen, I need this area done from this point to this point'. There was a schedule that we had, we were going on that schedule, but a lot of times it was so many change orders"

(*id.*).

When asked if he made sure that all the wires in his work area were de-energized before beginning work, plaintiff responded, "There [are] about 40 circuits in there. No, I would not, I would shut off the circuit I was working on" (*id.* at 32).

In his affidavit, plaintiff stated that, during the course of the job, Cauldwell and Columbia

University instructed Five Star “to only shut the circuits we were working on because they needed lights and electrical power available for the other trades working in the building” (*id.*).

Plaintiff complained to his foreman that Cauldwell and Columbia University were

“rushing the job and making it unsafe by closing the ceiling before electrical work was done, leaving loose wires in the ceiling. This is unsafe because you then have to go into the closed ceiling, into the box, open it up with limited visibility and there may be live circuits nearby. Cauldwell-Wingate and Columbia University directed the carpenters to close the ceilings before the electrical work was complete. As a result there were live wires in the ceiling that were not in an electrical box”

(*id.*). In fact, plaintiff personally witnessed three similar accidents, also occurring in the ceiling on the third floor of the Premises. Plaintiff noted that he was not provided with any “scaffolds, safety harnesses/lines or other safety devices . . . insulated mats, clothing, gloves or other equipment” (*id.*).

John Ford, Cauldwell’s project executive, testified that he sometimes went to the job site to “meet with [his] project team and to visit the job site and check on projects and progress and issues” (Ford tr at 10). He explained that Cauldwell superintendents hired the trades, supervised the Project and made sure that safety protocols were followed.

Ford testified that Five Star was the only electrical trade company hired on the Project, and that Five Star provided its own ladders, insulated gloves and clothing for its workers. When specifically asked to identify which entity was responsible for the Project’s electrical work, Ford responded, “Five Star Electric” (*id.* at 112). He also maintained that Five Star “determined voltage levels of all the power lines on the third floor” and ascertained whether they were live or not (*id.* at 57). As such, it was not Cauldwell’s responsibility to shut off the electrical circuits on the third floor before work there was to be performed, advise Five Star employees as to the

[1st Dept 2002]].

Initially, while defendants filed the instant motion three days past the court's summary judgment deadline, in light of the fact that plaintiff has alleged no prejudice as a result of the delay, defendants have offered good cause for the delay, and as the case is not yet on the court's trial calendar, in its discretion, and in the interests of justice, the court will determine the motion (see *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Cooper v Hodge*, 13 AD3d 1111, 1112 [4th Dept 2004]). Defendants move to dismiss the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims.

The Labor Law § 240 (1) Claim

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

“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.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in

section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein”

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Defendants argue that they are not liable under Labor Law § 240 (1), because, although plaintiff was working at an elevated height at the time of his accident, his injuries were caused by the electrocution, and not by his fall. Labor Law § 240 (1) liability does not exist “where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place” (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008], citing *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]).

However, a review of the bill of particulars reveals that, not only did plaintiff receive injuries to his hand due to his electrocution, he also suffered injuries from his fall from the ladder. “[T]he fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240 (1) for injuries sustained as a result of the fall from the ladder” (*Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 [2d Dept 1995]; see *Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 533 [1st Dept 2009] [the plaintiff, who was injured when he received an electric shock and fell from an unsecured ladder, was entitled to partial summary judgment on his Labor Law § 240 (1) claim]).

That said, “[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff “met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground”]).

“[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions ‘for no apparent reason [citation omitted]’” (*Quattrocci v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2009]). “Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials” (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504-505 [1st Dept 2013]).

Further, contrary to defendants’ argument, plaintiff is not required to demonstrate that the ladder was defective, as “[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent” (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]).

Here, it was foreseeable that plaintiff, an electrician in the process of testing wires, might experience electrocution during the performance of his work. As such, additional safety devices to prevent him from falling were required. “[T]he availability of a particular safety device will

not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures”

(*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

In sum, other means of vertical elevation, like a device with rails, such as a Baker scaffold, and/or other fall protection, such as a harness and horizontal safety line, would have been more suitable for the job in order to prevent plaintiff from falling (see *Vukovich v 1345 Fee, LLC*, 61 AD3d at 534 [Labor Law § 240 (1) liability found where “[t]he ladder provided to plaintiff was inadequate to prevent him from falling . . . to the floor after being shocked, and was a proximate cause of his injuries”]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 762-763 [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

Thus, defendants are not entitled to summary judgment dismissing the Labor Law § 240 (1) claim against them.

The Labor Law § 241 (6) Claim

Labor Law § 241 provides, in pertinent part, as follows:

“All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6) imposes a nondelegable duty “on owners and contractors to ‘provide reasonable and adequate protection and safety’ to workers” (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.13 (b) (2) - (5), plaintiff does not address these Industrial Code violations in his opposition papers, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff’s Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 23-1.13 (b) (2) - (5)

Initially, Industrial Code 23-1.13, which provides guidelines intended to protect workers against electrocution, is sufficiently specific to support a Labor Law § 241 (6) claim (*see Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006]; *Rice v City of Cortland*, 262 AD2d 770, 773 [3d Dept 1999]).

Industrial Code 23-1.13 (b) (2) - (5) state, in pertinent part, as follows:

“(2) Determination of voltages. Before work is begun at any construction, demolition or excavation site, the employer shall determine the voltage levels of all energized power lines and power facilities around or near such site. Where two or more voltages are available at a job site, all electrical equipment and circuits shall be appropriately identified. Such identification shall include voltage level and phase.

(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.

(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contract such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.

* * *

(5) Guarding of switches or other circuit interrupting devices. If protection for employees consists of de-energizing circuits, employers shall cause open switches or other circuit interrupting devices to be guarded against inadvertent closing until such employees are no longer exposed.”

Initially, defendants argue that, since Industrial Code (12 NYCRR) 23-1.13 (b) specifically refers to “employers,” as the owners and general contractor of the Project, the statute does not apply to them. However, “[i]t has been recognized that provisions of the Industrial Code (*see* 12 NYCRR part 23) - - like the one on which plaintiff relies, i.e., 12 NYCRR 23-1.13 - - which refer only to the duty of employers, also impose a duty upon owners,” (*Rice v City of Cortland*, 262 AD2d at 773).

Furthermore, as a lessee who contracted for work on their behalf, the Columbia defendants cannot escape liability under Labor Law § 241 (6), on the ground that they are not owners or general contractors. “The meaning of ‘owners’ under Labor Law § 240 (1) . . . has not been

limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit [citation omitted]'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008] [defendant deemed to be an owner for the purposes of Labor Law § 240 (1) "when it hired the plaintiff's employer . . . to perform the siding work on the building, from which it derived a benefit in the operation of its business"], citing *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004] [other citations omitted]).

As defendants have failed to demonstrate that no issues of fact exist as to whether the voltage levels and phases of the circuit, which fed electricity to the Loose Wire, were properly determined and identified, defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.13 (b) (2).

In addition, defendants are not entitled to dismissal of section 23-1.13 (b) (3), because they have not sufficiently established that the subject circuit was properly investigated to determine whether or not it was located in a place where a worker, like plaintiff, might come into contact with it, or that plaintiff received proper warnings regarding the circuit's location.

Further, defendants are not entitled to dismissal of section 23-1.13 (b) (4), as the accident was clearly caused by their failure to ensure that the Live Wire was de-energized while plaintiff was working in proximity to it (*see Lorefice v Reckson Operating Partnership*, 269 AD2d 572, 573 [2d Dept 2000]).

However, as there is no indication in the record that the accident was caused due to the inadvertent closing of any circuit interrupting device, defendants cannot be held liable under section 23-1.13 (b) (5).

The Common-Law Negligence and Labor Law § 200 Claims

Labor Law § 200 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” [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; see also *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. 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.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (see *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

“Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over the plaintiff’s work, “because the injury arose from the condition of the work place created by or known to contractor, rather than the method of [the] work”]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200

for defects or dangers arising from a subcontractor's methods or materials, such as the alleged improper placement of the ladder in this case, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input into the method of moving the beam]).

As set forth previously, as plaintiff was attempting to descend the ladder from the ceiling, the Loose Wire, which was allowed to hang free, and which was not properly de-energized, sprung back and struck his hand, shocking him and causing him to fall from the ladder. Therefore, the accident was caused due to the means and methods of the work.

Here, a question of fact exists as to whether defendants had the authority to supervise and control the injury-producing work, i.e., the improper storage of the Loose Wire, as well as the failure to de-energize it before plaintiff was to work near it. While plaintiff stated in his affidavit that Cauldwell and Columbia University instructed him "to only shut the circuits [they] were working on because they needed lights and electrical power for the other trades working in the building" (plaintiff's aff), in his deposition, Ford maintained that Five Star was the only entity in charge of electrical work on the Project, and that it was Five Star's responsibility, and not Cauldwell's responsibility, to identify and shut off the electrical circuits on the third floor before work there was to be performed.

Thus, defendants are not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.


For the foregoing reasons, it is hereby

ORDERED that Cauldwell-Wingate Company, LLC, HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V LLC, Columbia University Medical Center d/b/a Columbia Doctors Midtown Radiology and the Trustees of Columbia University of the City of New York's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the parties proceed to mediation/trial, forthwith.

DATED: January 5, 2016

ENTER:



JOAN M. KENNEY
J.S.C.