Lyons v Marvin Pocker, LLC
2016 NY Slip Op 30033(U)
January 7, 2016
Supreme Court, New York County
Docket Number: 153425/14
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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DONNOVAN LYONS and STACEY LYONS,

Plaintiffs,

-against-

MARVIN POCKER, LLC, J. POCKER & SON, INC., METROPOLITAN TRANSPORTATION AUTHORITY and CITY OF NEW YORK,

Defendants.

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Index No. 153425/14

Motion Seq. No. 001

DECISION AND ORDER

HON. MICHAEL D. STALLMAN, J.:

This action arises out of an accident that occurred on April 12, 2013 at the F-line subway station located at Lexington Avenue and 63rd Street in Manhattan. Plaintiff Donnovan Lyons (Lyons) alleges that he was injured while replacing a step chain on an escalator when the step chain jerked back, causing him to fall down the escalator. Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendant City of New York (the City). Defendants Metropolitan Transportation Authority (MTA) and the City (hereinafter, defendants) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Lyons was employed as a Transit Electro Mechanical Maintainer (TEMM) by the New York City Transit Authority (NYCTA) on the date of his accident. Plaintiffs allege that the City was the owner of the escalator.

Lyons asserts that he had an accident at about 10 p.m. at the subway station located at Lexington Avenue and 63rd Street (Plaintiff 9/18/13 50-h hearing tr[1] at 11; Plaintiff aff, ¶ 4). Lyons started working for NYCTA in June 1999 as a mechanical maintainer, where he did routine maintenance, and basic repairs of escalators, elevators, and swing bridges (Plaintiff aff, ¶ 5). In 2007, when Lyons became a TEMM, Lyons no longer did routine maintenance, and did major repairs and replacements of significant parts of escalators and elevators (*id.*, ¶ 6). The step chain is the apparatus that operates within the escalator and causes it to move (Plaintiff 9/18/13 50-h hearing tr at 14-15; Plaintiff aff, ¶ 6). On the date of Lyons's accident, Lyons and his gang were instructed to take over for a prior gang that was in the process of installing a new step chain on escalator #403 (Plaintiff 9/18/13 50-h hearing tr at 15; Plaintiff aff, ¶ 9).

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[1]Lyons's 50-h hearing was conducted on two days: on September 17, 2013 and September 18, 2013.

The escalator is located one long flight below street level where the clerk's booth and turnstiles are located (Plaintiff 9/18/13 50-h hearing tr at 12; Plaintiff aff, ¶ 9). According to Lyons, his gang had to install a new step chain because "they stretch, and . . . the machine would bend. There is no adjustment, so you have to replace the chain" (Plaintiff 9/17/13 50-h hearing tr at 26). The prior crew had removed all of the escalator's steps, the old step chain, and partially installed the replacement step chain (Plaintiff 9/18/13 50-h hearing tr at 16; Plaintiff aff, ¶ 11). Lyons was stationed at the top landing of the escalator to oversee the project and spot any problems (Plaintiff 9/18/13 50-h hearing tr at 16-17; Plaintiff aff, ¶ 12).

According to Lyons, at the time of the accident, the pulley pushing the chain got snagged on a beam (Plaintiff 9/18/13 50-h hearing tr at 20; Plaintiff aff, ¶ 14). Lyons stepped onto the step chain and used a two-by-four to pry the snag loose, which caused one of the nylon straps to break and the escalator to jerk (Plaintiff 9/18/13 50-h hearing tr at 20; Plaintiff aff, ¶ 16). Lyons lost his balance and fell about 30 feet down the escalator when his left leg got caught in the side of the escalator (*id.*). He continued to fall another 50 feet to the bottom of the escalator (Plaintiff 9/18/13 50-h hearing tr at 20-21; Plaintiff aff, ¶ 16).

Matthew Benzinger (Benzinger), Lyons's supervisor, testified that he considered oiling and greasing to be routine maintenance, while replacing a step chain is a larger component job that is not routine maintenance (Benzinger EBT at 35-39). The reason the workers were changing the step chain was because "[t]he chain was worn and there were bad tracks in the machine that needed replacement" (*id.* at 51). Benzinger testified that a prior inspection had discovered that the step chain needed to be replaced (*id.* at 52). He stated that "[w]hen the chain becomes so stretched . . . it needs to be replaced. It's normal wear and tear" (*id.* at 42). Benzinger also testified that the typical life span of a step chain depends on usage; on a highly used escalator, the life span is about five years (*id.*).

Plaintiffs' complaint seeks recovery under Labor Law §§ 240 (1), 241 (6), 200, and under principles of common-law negligence. Plaintiff Stacey Lyons asserts a derivative claim for loss of consortium.

On January 26, 2015, plaintiffs discontinued their claims against defendants Marvin Pocker, LLC and J. Pocker & Son, Inc.

DISCUSSION

"'On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment'"

(*Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013], quoting *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]).

MTA

Defendants argue that the MTA is an improper party to this action. "It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007]

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[internal quotation marks and citation omitted]). In their reply, plaintiffs agreed to discontinue their claims against the MTA, or alternatively, have the court dismiss their claims against the MTA (Taub reply affirmation, ¶ 35). Accordingly, the MTA is entitled to dismissal of the complaint as against it.

Labor Law § 200 and Common-Law Negligence

In their reply, plaintiffs also agreed to discontinue their Labor Law § 200 and common-law negligence claims against the City (Taub reply affirmation, ¶ 36). Therefore, the court need not address the branch of defendants' motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims.

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in pertinent part, that:

> "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."

"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]). "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). "However, the issue of whether any particular task falls within section 240 (1) must be determined on a case-by-case basis, *depending on the context of the work*" (*Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890 [2d Dept 2011] [internal quotation marks and citation omitted]).

In *Esposito v New York City Indus. Dev. Agency* (1 NY3d 526, 528 [2003]), the plaintiff was injured while attempting to remove a cover from an air conditioning unit. On the date of the accident, the plaintiff was performing a monthly maintenance check of the air conditioning units (*id.*). The Court held that "[t]he work here involved replacing components that require replacement in the course of normal wear and tear. It therefore constituted routine maintenance and not 'repairing' or any of the other enumerated activities" (*id.*).

In *Abbatiello v Lancaster Studio Assoc.* (3 NY3d 46, 49-50 [2004]), a cable television technician was injured while working on an apartment

building's junction box. Relying on *Esposito*, the Court held that the plaintiff was engaged in routine maintenance, noting that:

> "plaintiff determined that the cause of the defective signal was water in the tap, a common problem caused by rainwater accumulating in junction boxes affixed to building exteriors. The remedy would have been to loosen a few screws and drain the water from the tap and, if worn out, replace the tap"

(*id.* at 53).

In *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.* (118 AD3d 524, 527 [1st Dept 2014]), the First Department articulated the following guideposts to distinguish between work that constitutes repair and work that constitutes routine maintenance:

> "[1] '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., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]); [2] 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 [2d Dept 2012]); and [3] 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])."

Plaintiffs argue that Lyons is entitled to coverage under the statute because he was engaged in the "repair" or "alteration" of the escalator. Plaintiffs assert that all of the escalator's steps had to be removed in order to replace the step chain. To support their position, plaintiffs submit an

affidavit from their escalator expert, Patrick Carrajat, which states that the replacement of a step chain is a "major repair" per the Elevator Union National Agreement (Carrajat aff, ¶ 19). Carrajat states that a repair is any job that generally requires two or more men, and that replacement of a step chain can never be maintenance (*id.*). Plaintiffs also rely on: (1) Lyons's supervisor's testimony that oiling and greasing is considered routine maintenance, while a step chain replacement is a repair (Benzinger EBT at 35-40); and (2) Lyons's testimony that he presently does not do maintenance work (Plaintiff 1/13/15 EBT at 13).

Nevertheless, plaintiffs have not shown that the step chain was inoperable or malfunctioning prior to the accident (*see Spiteri v Chatwal Hotels*, 247 AD2d 297, 298 [1st Dept 1998] [worker was engaged in repair of elevator where it was not working on the date in question]), or that the step chain typically did not require replacement as a result of normal wear and tear (*see Soriano*, 118 AD3d at 527 [plaintiff replacing cracked glass panes in church steeple skylight was engaged in repair rather than routine maintenance where the plaintiff, an experienced glazier, showed that the "panes were not being replaced as a result of normal wear and tear, as they were not expected to be regularly replaced"]; *Parente v 277 Park Ave.*

LLC, 63 AD3d 613, 614 [1st Dept 2009] [plaintiff was covered under the statute where there was no evidence that wear and tear caused malfunction of fan, or that only routine maintenance was required to fix the fan]). Plaintiffs have also not established that the activity in which Lyons was engaged in at the time of his accident was an isolated event (*see Dos Santos*, 104 AD3d at 607-608 [plaintiff was engaged in work that was far from routine where he was called upon to address a flooding condition that exceeded the capacity of pumping station]; *Davidson v Ambrozewicz*, 12 AD3d 902, 903 [3d Dept 2004] [exterminator's work removing infestation of bats from commercial building constituted repair of a building where removal of bat infestation was an isolated event]).

For their part, defendants argue that the step chain was not broken, and that the escalator was working. Rather, according to defendants, the step chain needed to be replaced because it was worn and stretched.

Here, as argued by defendants, the record indicates that, at the time of his injury, Lyons was replacing a worn-out step chain that had a limited life span. Lyons testified that the reason that the step chain had to be replaced was "[t]hey stretch," "the machine would bend," and "[t]here is no adjustment, so you have to replace the chain" (Plaintiff 9/17/13 50-h

hearing tr at 26). Lyons's supervisor also testified that "[w]hen the chain becomes so stretched that there is not much adjustment on the carriage, the life expectancy of it, it needs to be replaced. It's wear and tear" (Benzinger EBT at 42). He further stated that a prior inspection had revealed that the chain was worn and needed to be replaced (*id.* at 51-52). Benzinger testified that the typical life span for a step chain was five years on highly used escalators, and sometimes three years (*id.* at 42). Therefore, Lyons was engaged in routine maintenance at the time of his accident (*see Cordero v SL Green Realty Corp.*, 38 AD3d 202, 202 [1st Dept 2007] [plaintiff's work replacing worn-out slats in a roll-down motorized security gate amounted to component replacement in the course of normal wear and tear, i.e., routine maintenance]; *Arevalo v Nasdaq Stock Mkt., Inc.*, 28 AD3d 242, 243 [1st Dept 2006] [plaintiff who was injured while replacing power box on electric sign was engaged in routine maintenance]).

In their reply, plaintiffs point out that the replacement of the step chain first encompassed the removal of all 105 steps of the step escalator, a very arduous and time consuming task. Plaintiffs also argue that plaintiff's supervisor stated that the work was more extensive than he

previously thought, and that the work turned into more of a rehabilitation (Benzinger EBT at 56). "The amount of work or danger entailed, however, does not bring a case within the confines of the term 'repair' for purposes of determining liability under Labor Law § 240 (1)" (*Barbarito v County of Tompkins*, 22 AD3d 937, 939 [3d Dept 2005]).

Because Lyons was performing routine maintenance and was not engaged in "repairing," "altering" or any other enumerated activity, plaintiffs' Labor Law § 240 (1) claim is dismissed.

Labor Law § 241 (6)

Labor Law § 241 (6) 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:
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> ***
>
> "6. 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 . . . shall comply therewith."

The Industrial Code defines "construction work" as:

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> "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose"

(12 NYCRR 23-1.4 [b] [13]).

In *Nagel v D & R Realty Corp.* (99 NY2d 98, 101 [2002]), the Court of Appeals held that Labor Law § 241 (6) is "meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition." In that case, the plaintiff was injured while performing a two-year safety inspection on an elevator (*id.* at 99). The Court, therefore, held that the plaintiff's claim had to be dismissed because the "protections of Labor Law § 241 (6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context" (*id.*). "The Industrial Code definition of 'construction work,' which includes maintenance, must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*id.* at

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103).

In *Esposito*, the Court held that "the maintenance work involved in this case fell outside [] section[] [241(6)'s] reach" (*Esposito*, 1 NY3d at 528).

In this case, Lyons was engaged in maintenance work that is outside the ambit of section 241 (6). Therefore, plaintiffs' Labor Law § 241 (6) claim must be dismissed.

Loss of Consortium

Finally, the loss of consortium claim must be dismissed, since it is derivative of the other claims (*Hazel v Montefiore Med. Ctr.*, 243 AD2d 344, 345 [1st Dept 1997]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of plaintiffs for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendant City of New York is denied; and it is further

ORDERED that the cross motion of defendants Metropolitan Transportation Authority and City of New York for summary judgment is granted and the complaint is dismissed with costs and disbursements to

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defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 7, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.