Jaycoxe v VNO Bruckner Plaza, LLC
2016 NY Slip Op 30438(U)
February 2, 2016
Supreme Court, Bronx County
Docket Number: 300558/2011
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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DOMENICK J. JAYCOXE,

Plaintiff,

INDEX № 300558/2011

-against-

DECISION/ORDER

VNO BRUCKNER PLAZA, LLC; FOREST CITY RATNER COMPANIES, LLC; FOREST CITY ENTERPRISES, INC.; FC BRUCKNER ASSOCIATES, LP; and FIRST NEW YORK PARTNERS MANAGEMENT, INC, incorrectly s/h/a FIRST NEW YORK MANAGEMENT COMPANY, INC.,

Defendants.

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HON. BETTY OWEN STINSON:

This motion by defendants for summary judgment dismissing the plaintiff's complaint is granted.

On March 27, 2010, plaintiff, an exterminator employed by Colony Pest Management, came to defendants' parking garage to perform a monthly check of live animal traps in the ceiling of the parking garage. It was plaintiff's first time at this location.

Plaintiff testified that, upon arrival, he called a "person" he was supposed to call. Plaintiff did not know who the person was or the person's title or location. The person told plaintiff he should use a ladder located on the roof to check the traps. The ladder plaintiff found on the roof behind a stairwell was the top half of an aluminum extension ladder with no feet. It was about 20 feet long. (Deposition of Domenick Jaycoxe, June 6, 2013 at 21-23).

Plaintiff testified that he texted his boss to complain that the ladder was unsafe and that

more than one person was needed to use that ladder at that location (*id.* at 32-33). When he received no response after 20 to 30 minutes, he proceeded to use the unsafe ladder (*id.* at 33). He climbed up three or four rungs, the ladder slipped and he went down (*id.* at 35-36). Plaintiff's employer did not provide him with a vehicle or a ladder (*id.* at 34). Plaintiff used his own vehicle and was reimbursed for gas and tolls (*id.*). He did, however, have other materials in his vehicle that were provided by his employer for use in his job (*id.* at 34-35).

Pedro Santiago, an employee of the defendants, saw plaintiff going up a ramp toward his vehicle holding a ladder with both hands (deposition, September 13, 2013 at at 41-42). The ladder was silver with yellow tips (*id.* at 65). There were only three ladders stored at the location (*id.* at 32-33). There was an orange extension ladder that did not come apart, a folding 10-foot aluminum ladder that also did not come apart, and a 15-foot wooden folding ladder (*id.* at 32-34). Occasionally the exterminators asked for ladders, but company policy did not allow lending ladders and Santiago did not lend a ladder to plaintiff (*id.* at 56-7).

After his accident, plaintiff commenced suit against the defendants alleging violations of Labor Law §§200, 240(1) and 241(6). Per court computer records, plaintiff filed his Note of Issue on January 28, 2015. Defendants served their motion for summary judgment dismissing the action 119 days later on May 27, 2015, according to the affidavit of service.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

Labor Law §200 codifies common law and imposes a statutory non-delegable duty on general contractors and owners of property where work is performed to maintain a safe work place for all persons employed on the premises and all others lawfully frequenting the premises (*Gasperino v Larsen Ford, Inc.*, 426 F2d 1151 [2d Cir 1970], *cert. denied* 400 US 941). When a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner's liability under §200 or for common law negligence rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it (*Reyes v Arco Wentworth*, 83 AD3d 47 [2nd Dept 2011]). In contrast, when a worker is injured as a result of dangerous or defective equipment used in the performance of his duties, the property owner's liability requires both that the owner or general contractor (1) voluntarily assumed and exercised supervision and control over the methods and tools of the worker, and (2) had notice of the defective or unsafe condition (*id.*; *Comes v NYS Electric*, 82 NY2d 876 [1993]).

Labor Law §241(6) requires owners, contractors and their agents involved in construction, demolition or excavation to see that the work is performed in compliance with specific safety rules and regulations so as to keep safe all persons employed there or lawfully frequenting the

premises. This is a non-delegable duty regardless of whether owners or contractors exercise direct supervision or control over the work performed. Persons carrying out routine maintenance, however, are not engaged in construction for purposes of the statute (*Robinson v City of New York*, 211 AD2d 600 [1st Dept 1995]). Furthermore, although violations of OSHA standards may provide some evidence of negligence under §200 or common law (see *Ramos v Baker*, 91 AD3d 930 [2nd Dept 2012]), they do not provide a basis for liability under §241(6) (*Greenwood v Shearson*, 238 AD2d 311 [2nd Dept 1997]).

Labor Law §240(1) imposes liability on owners and general contractors for failure to provide proper equipment for gravity-related hazards to covered persons. Covered persons are employees involved in erecting, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. "Structure" is defined as "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Joblon v Solow*, 91 NY2d 457 [1998]). "Altering" requires making "a *significant* physical change to the configuration or composition of the building (*id.*). Persons involved or engaged in routine maintenance or decorative modifications as opposed to the above-mentioned activities are not covered persons under the statute (*id.*).

In support of their motion, defendants offered copies of the pleadings, the bill of particulars, and the depositions of plaintiff and Pedro Santiago as set forth above. The bill of particulars alleged plaintiff suffered a fractured radius.

In opposition, plaintiff offered an affidavit of Professional Engineer Stanley Fein, and a print-out showing defendants filed their motion on May 28, 2105. Plaintiff argued that the defendants' motion should be denied as untimely.

Stanley Fein stated on June 26, 2015 that he reviewed the pleadings and deposition transcripts in this case and concluded that defendants, in providing plaintiff with the ladder described therein, violated Labor Law §200, Industrial Code (12 NYCRR) §23-1.21(b) and Occupational Safety & Health Administration ("OSHA") part 1926, subpart 1926.450(a)(10). That last regulation requires that "portable ladders in use should be tied, blocked or otherwise secured to prevent their being displaced". Fein stated that defendants' "violation of these statutes, rules and regulations were each a proximate cause of the accident". Plaintiff argued in addition that the defective ladder's presence on the premises constituted a dangerous condition by itself and constituted common law negligence and a violation of §200 for that reason as well.

Defendants have made a *prima facie* showing of entitlement to summary judgment which plaintiff has not refuted with admissible evidence. There is an issue of fact as to whether defendants provided plaintiff with the ladder he described in his deposition. But even assuming the truth of that allegation, defendants are entitled to summary judgment.

A note of issue is in effect the date it is filed. A motion, on the other hand, is made when served. Therefore, defendants' motion was timely as noted above: its service did not exceed 120 days after filing of the note of issue.

Plaintiff argued that there is an additional issue of fact as to whether defendants are liable under common law or §200. They were on notice of the defective condition of the ladder, a dangerous condition on their premises constituting an OSHA violation and a violation of the Industrial Code, and thus failed to offer plaintiff a safe place to work. To be found liable under §200 or under common law for failure to provide proper equipment to a worker, however, it is necessary to have both notice of a dangerous condition *and* to have voluntarily assumed and

exercised supervision and control over the work being done by plaintiff (see *Reyes*, 83 AD3d 47). Even assuming the first requirement, the second has not been met. The ladder was *equipment* plaintiff allegedly used causing his fall and injury. It is indisputable that defendants were *not* directing or controlling plaintiff's work checking live animal traps. When plaintiff was dissatisfied with the ladder he found, it was his own boss he contacted for direction, not defendants.

For liability under §§240(1) or 241(6), a plaintiff must be a "covered person" (*Joblon*, 91 NY2d 457) and plaintiff is not a person covered by these statutes. There is no question he was involved in routine maintenance. Monthly checking of live animal traps is akin to replacement of light bulbs (see *id.*) and does not constitute erection, demolition, repairing, altering, painting, cleaning or pointing a building.

Movants are directed to serve a copy of this decision on the Clerk of Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: February 2 , 2016
Bronx, New York

BETTY OWEN STINSON, J. S.C..