

Saffioti v Trinity Bldg. & Constr. Mgt. Corp.
2016 NY Slip Op 31232(U)
June 27, 2016
Supreme Court, New York County
Docket Number: 158423/13
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JOHN SAFFIOTI,

Index No. 158423/13

Plaintiff,

Motion Seq. # 003

-against-

TRINITY BUILDING AND CONSTRUCTION
MANAGEMENT CORP., THE CENTER BAR
RESTAURANT and THE RELATED COMPANIES,

DECISION & ORDER

Defendants.

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KELLY O'NEILL LEVY, J.:

Defendants Trinity Building and Construction Management Corp., the Center Bar Restaurant, and The Related Companies, L.P. move for summary judgment seeking dismissal of all claims made by plaintiff John Saffioti. Plaintiff opposes the motion.

Plaintiff alleges that on July 30, 2013, he was injured while working as a carpenter for Gotham Installations, Inc. at 10 Columbus Circle in Manhattan. He alleges that the injuries were sustained as he carried wall segments up four flights of stationary escalator stairs. A number of the facts surrounding the injury are disputed, but on a motion for summary judgment, the court must view disputed facts in the light most favorable to, and draw all reasonable inferences in favor of, the non-moving party. *See, e.g., Roses v. Da Ecib USA*, 259 A.D.2d 258 (1st Dep't 1999). Plaintiff alleges that the injury occurred when a co-worker pulled the wall segment he was carrying, causing him to lose control. Plaintiff claims a wall segment fell on him and caused him to fall down several steps.

To prevail on a motion for summary judgment, the movant must establish entitlement to judgment as a matter of law. *See Blanc v. Wyndham Mountain Club, Inc.*, 454 N.Y.S.2d 383 (1st Dep't 1982). Defendants make three arguments in support of their application. First, that

because the accident occurred on a permanent staircase, it is not covered by Labor Law § 240(1). Second, they contend they are not liable under Labor Law § 200 or on a common-law negligence theory because they had no control over Plaintiff's work. Finally, they argue that Plaintiff's Labor Law § 241(6) and Industrial Code Rule 23 claims lack sufficient specificity.

The court addresses each argument in turn. Defendants first argue that accidents which occur on "permanent staircases" are not covered by Labor Law § 240(1).¹ It is well established that § 240(1) is to be liberally construed. See *Harris v. City of New York*, 83 A.D.3d 104 (2011).² However, the broad protections only apply if it can be established that the violation was the proximate cause of plaintiff's injury. See *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 803 N.E.2d 757 (2003). The "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652, 653-4 (1st Dep't 2012) (citing *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2009)). As Defendants note, there is a long line of cases finding no liability where the § 240(1) violation was not the proximate cause of the injury, though the accident occurred at an elevation, and even if the injury was caused by gravity and/or during construction work. See, e.g., *Rocovich v. Consolidated Edison Co.*, 583 N.E.2d 932 (1991) (§ 240(1) did not apply where worker slipped into trough while carrying boiling oil); see also *Gallagher v. Andron Constr. Corp.*, 21 A.D.3d

¹ Labor Law 240(1) states: "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."

² For example, courts have found that "the duty imposed by Labor Law § 240(1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993).

988 (2d Dep't 2005). However, Defendants misapply the precedent when they claim that accidents occurring on permanently installed stairways are *per se* not a violation of § 240(1). Regardless of whether the accident occurred on a permanent stairway, the question is whether the claimed injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. *See DeRosa*, 96 A.D.3d at 653-4. Defendants rightly note that permanent staircases are not “erected for the performance of” the labor; as § 240(1) requires, but the issue here centers on the lack of other safety devices that allegedly should have been provided.

The most informative case on this issue is *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2009). In *Runner*, a group of workers attempted to move a reel of wire down a set of permanent stairs and the absence of sufficient safety equipment resulted in a worker becoming severely injured. *Id.*, at 866. The Court of Appeals found that § 240(1) applied because the lack of adequate protection, combined with the physically significant elevation differential (created by the stairs), was the proximate cause of the injury. In the instant case, plaintiff alleges that the absence of sufficient safety equipment resulted in his becoming severely injured when a physically significant elevation differential (created by the stationary escalator stairs) caused the wall segment to fall on him. The possibility remains that Plaintiff's injury was the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. As such, Defendants have not met their burden of establishing entitlement to judgment as a matter of law on the § 240(1) claim.

Defendants' second argument, that they are entitled to summary judgment on the Labor Law § 200 or common-law negligence claims because they had no control over Plaintiff's work, is premature. Labor Law § 200 is a codification of the common-law obligation that owners,

contractors, and their agents must provide a safe place to work. Both parties recognize that the resolution of the section 200 and common law claims depends on whether Defendants possessed the implicit precondition of “the authority to control the activity bringing about the injury.” *See, e.g., Russin v. Lousi N. Picciano & Son*, 429 N.E.2d 805 (1981); *see also Buckley v. Columbia Grammar and Preparatory Sch.*, 44 A.D.3d 263 (1st Dep’t 2007) (“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or § 200. Thus, section 200 applies only to owners and contractors who actually exercise control or supervision over the work and had actual or constructive notice of the unsafe condition.” (citations omitted)).

Plaintiff alleges that Defendants, through the supervisory authority of a Mr. Kellogg, a construction superintendent employed by Defendant Trinity, controlled the work at the site. Defendants argue that Plaintiff mischaracterizes Mr. Kellogg’s role and that it is unquestionable that Plaintiff’s work was exclusively controlled by employees of Atlantis. Defendants present an interpretation of the facts, particularly the deposition of Mr. Kellogg, that raises questions regarding Plaintiff’s characterization of Mr. Kellogg’s role. However, movant’s burden of proof on a motion for summary judgment is considerably higher than cogency. Defendants must show that Plaintiff “cannot produce evidence to justify submitting the question of...control and/or supervision to a trier of fact.” *Ross v. Curtis-Palmer Hydro-Electric Co.*, 618 N.E.2d 82 (1993). The question of who possessed control in this case is not resolved notwithstanding the documentation provided by defendants. *See generally, e.g., id.* (“[Summary dismissal] is, manifestly, premature, despite [defendant]’s submission of an affidavit by its Safety Superintendent disclaiming supervision of any of its subcontractors.”). Accordingly, Defendants

have not met their burden of establishing entitlement to judgment as a matter of law on the Labor Law § 200 claim.

Defendants' final argument is that Plaintiff's Labor Law § 241(6) and Rule 23 claims lack sufficient specificity. Labor Law § 241(6) requires owners and contractors to "provide reasonable and adequate protection and safety" for workers. The law sets out specific safety rules and regulations with which they must comply.³ Plaintiff must plead and prove the violation of an Industrial Code provision that constitutes a specific, positive command to prevail. *See Zimmer v. Chemung County Performing Arts, Inc.*, 482 N.E.2d 898 (1985), *Strunk v. Buckley*, 251 A.D.2d 491, 492 (2d Dep't 1998). Violation of the regulation must also be the proximate cause of the plaintiff's injury. *See id.* Considering the high level of specificity required, "failures to measure up to such general regulatory criteria as 'adequate,' 'effective' and 'proper,' are not sufficient to give rise to a triable claim for damages under Labor Law § 241(6)." *Ross*, 618 N.E.2d, at 82.

The complaint states only that Defendants "violated the applicable provisions of the Labor Laws of the State of NY, Section 240(1) as well as Rule 23 of the Industrial Code of the State of NY." The question is whether this is sufficiently specific. Rule 23 is voluminous and made up of a great number of subsections. Plaintiff narrowed his claim in opposition papers, citing to Rule 23-1.5, "General Responsibility of Employers," which courts have found is too general to constitute a basis for a § 241(6) claim. *See, e.g., Sihly v. N.Y. Transit Auth.*, 282 A.D.2d 337 (1st Dep't 2001); *see also Hawkins v. City of New York*, 275 A.D.2d 634 (1st Dep't 2000).

³ Unlike the Labor Law § 200 issue, Labor Law § 241(6) is nondelegable, rendering the issue of control moot. *See, e.g., Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 159 (1982).

However, a fairly recent line of cases has generated a narrow rule that allows pleading to general rules in specific circumstances. In *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009), the Court of Appeals considered whether section 23-9.2, titled “General requirements,” was too general a section to which to plead. Section 23-9.2(a) reads as follows:

All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.

A divided court in *Misicki* found that:

[T]he first two sentences of section 23-9.2(a)—which employ only such general phrases as “good repair,” “proper operating condition,” “[s]ufficient inspections,” and “adequate frequency”—are not specific enough to permit recovery under section 241(6) against a non-supervising owner or general contractor. We reach the opposite conclusion about the third sentence, however. This portion of the regulation imposes an affirmative duty on employers to “correct[] by necessary repairs or replacement” “any structural defect or unsafe condition” in equipment or machinery “[u]pon discovery” or actual notice of the structural defect or unsafe condition. As a result, the third sentence of section 23-9.2(a) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is precisely the type of ‘concrete specification’ that *Ross* requires.

Misicki, 12 N.Y.3d at 520-21 (internal citations omitted). Thus a party may plead to a “concrete specification” within a general section of Rule 23. In *Becerra v. Promenade Apts. Inc.*, 126 A.D.3d 557 (1st Dep’t 2015), this test was applied to section 23-1.5(c), which reads:

- (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
- (2) All load-carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.
- (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Applying *Misicki*, the court found that sections 23-1.5(c)(1) and 23-1.5(c)(2) were merely general reiterations of common-law principles and did not “mandate a distinct standard of

conduct.” *Becerra*, 126 A.D. at 558 (citing *Ross*, 618 N.E.2d, at 82). But a divided court found that the third paragraph, 23-1.5(c)(3), was an affirmative mandate which could be pled with specificity.⁴ The court found that under the common law, it is not required that things be “immediately repaired or restored or immediately removed,” thus 23-1.5(c)(3)’s mandate is not a reiteration of common-law principles. It is necessary, then, to apply the *Misicki* standard to 23-1.5(a) to determine whether it is sufficiently specific. The text of 23-1.5(a) is as follows:

All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).

The first sentence reiterates common law principles by mandating “reasonable and adequate protection.” However, the second and third sentences mandate compliance with “this Part (rule).” While this is a mandate and not a reiteration of common-law principles, it is a reiteration that each individual regulation of Rule 23 must be followed. While it does not cleanly fit into the *Misicki* framework, 23-1.5(a)’s catch-all mandate is not the “concrete specification” called for in *Ross*.

However, it is also improper to dismiss Plaintiff’s § 241(6) claims as a result. “While a plaintiff asserting a cause of action under Labor Law § 241(6) must allege a violation of a

⁴ The dissent argued that the entirety of 23-1.5 referred only to “general provisions” and could not be pled with specificity. *Becerra*, 126 A.D.3d at 560-561 (Degrasse, J., dissenting).

concrete specification of the Industrial Code, his failure to identify the Code provision in his complaint or bill of particulars need not be fatal to his claim...[and] we have held that it is improper for a court to dismiss a Labor Law § 241(6) claim merely because the Code violation was not set forth in the initial pleadings." *Noetzell v. Park Avenue Hall Housing Dev. Fund Corp.*, 271 A.D.2d 231, 232 (App Term, 1st Dep't 2000) (citing *Snowden v. New York City Tr. Auth.*, 248 A.D.2d 235 (1998)) (citations omitted); *see also Klimowicz v. Powell Cove Assoc., LLC*, 111 A.D.3d 605 (2013). Affording plaintiff the opportunity to amend is not unduly burdensome to Defendants and should be permitted. *See, e.g., Hernandez v. Seadyck Realty Co., LLC*, 137 A.D.3d 656 (1st Dep't 2016).

Accordingly, Defendants' motion is denied. The parties are directed to appear for a status conference on July 6, 2016 at 9:30 a.m. in Part 19 as previously directed.

This constitutes the decision and order of the court.

ENTER:

Dated: June 27, 2016
New York, New York



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.