

Rodriguez v Antillana & Metro Supermarket Corp.

2018 NY Slip Op 31298(U)

May 3, 2018

Supreme Court, Bronx County

Docket Number: 301012/2014

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Decision and Order

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Randy Polanco Rodriguez,

Plaintiff

-against-

Index No. 301012/2014

Antillana & Metro Supermarket Corp.,
d/b/a Antillana Superfood Supermarket and
Boss Realty Company, LLC

Defendants

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Antillana & Metro Supermarket Corp.,
d/b/a Antillana Superfood Supermarket and
Boss Realty Company, LLC

Third-Party Plaintiffs

-against-

J & C Refrigeration Corp.,

Third-Party Defendant

Howard H. Sherman

JSC

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The following papers numbered 1-7 read on this motion of Defendant BOSS REALTY COMPANY and the motion of PLAINTIFF for summary judgment

Notice of Motion , Affirmation , Exhibits A-J [BOSS]	1
Affirmation in Support - [Antillana]	2
Affirmation in Opposition, Exhibits A-D	3
Affirmation in Reply	4
Notice of Motion , Affirmation , Exhibits A-L [PLTF.]	5
Affirmation in Opposition , Exhibit 1 [BOSS]	6
Affirmation in Opposition , Exhs. A-E	7

Facts and Procedural History

In this action alleging common law negligence and causative violations of Labor Law §§ 200, 240(1), and 241(6), plaintiff seeks damages for injuries sustained on October 12, 2013 while he was in the course of employment for third-party defendant J & C Refrigeration Corp. (J & C) at commercial premises maintained by defendant

Antillana & Metro Superfood Supermarket d/b/a Antillana Superfood Supermarket (Antillana Supermarket) located at 1339 Jerome Avenue, Bronx, New York. Antillana Supermarket is the lessee in possession of the subject premises, having entered into a lease with Jerome Avenue Storage Associates, LLC (Jerome). Jerome had leased the building from defendant owner Boss Realty, LLC (Boss Realty) under the terms of a triple net building lease.

After taking over the former warehouse, Antillana commenced a build-out, and the supermarket was opened for business on September 20, 2013. Three weeks later, plaintiff was in the store's basement¹ storage area to install used refrigeration equipment that had been purchased by the supermarket's principal that had been delivered to the store that day. While kneeling on top of the "walk-in" refrigeration unit, plaintiff began the process of connecting the pipe, and after using an acetylene torch for about a minute to disconnect an old piece of pipe, he took it out, and a fire ignited. His clothing caught fire, and plaintiff sustained second and third degree burns throughout his bilateral upper extremities from elbow to wrist.

Motions and Contentions of the Parties

Boss Realty moves for summary judgment dismissing: the **Labor Law § 200** and common-law negligence claim contending that plaintiff's accident was caused by the means

¹The supermarket owner testified that while called the "basement", the storage area was located on the street level [64].

and methods employed, and the out-of-possession owner, neither supervised nor controlled the performance of plaintiff's work , let alone the injury-producing task; the **Labor Law § 240 (1)** claim as the claimed injuries were not caused by the application of force of gravity to object or person, and the **Labor Law § 241(6) claim** because at the time of the accident, plaintiff was not engaged in construction, excavation or demolition as defined under this section because the build out of the commercial space had terminated, and the store had been open for business for weeks. It is also argued that plaintiff cannot identify any applicable causative Industrial Code violations .

Antillana Supermarket supports the motion and requests that the court search the record to award it summary judgment dismissal of the 240 (1) and 241 (6) claims.

Plaintiff opposes the motion and contends that there is a triable issue of fact with respect to the common law negligence/Labor Law 200 claim , specifically, "whether . in the exercise of reasonable care defendants should have discovered the dangerous condition of the oil residue built up in the piping and corrected same prior to the incident." Plaintiff has no objection to that branch of the motion seeking dismissal of the 240(1) claim.

Plaintiff argues that he was engaged in "construction " for purposes of the application of Labor Law 241(6), and he separately moves for dispositive relief on the claim as predicated on violation of four Industrial Code provisions pertaining to welding and flame cutting operations : 23-1.25 (f) ; 23-1.25 (e)(1) ; 23-1.25 (d) , and 23-1.25(e)(3). Plaintiff

submits the affidavit of Nicholas Bellizzi, P.E., [Exhibit C], who opines to a reasonable degree of engineering certainty that the owner and lessee violated each of the code provisions.²

Boss Realty and Antillana Supermarket oppose the motion, each submitting reports of experts. Boss Realty's expert opines within a reasonable degree of certainty in the context of HVAC practices and procedures that plaintiff was at fault for using an acetylene torch, as opposed to the mechanical pipe cutter³, to remove the 10 inch pipe connected to the condensing unit and to place a coupling over the area of the cut in order to make a connection with the new pipe. The expert also opines that plaintiff was at fault for using the torch before testing if the unit was pressurized by pressing the button on the torch's

² 23-1.25 provides in pertinent part the following:

(d) Protection of persons. All persons engaged in welding or flame-cutting operations shall be provided where necessary with proper scaffolds installed and used in compliance with this Part (rule). Such persons shall be provided with approved eye protection suitable for the work involved and appropriate protective apparel. When arc welding is performed near other persons, such other persons shall be protected from the arc rays by opaque screens or by approved eye protection.

(e) Fire protection.

(1) Oily and greasy substances shall be kept away from the areas where cylinders, hose and torches are being used. Cylinder valves and connections shall not be lubricated.

3) Whenever welding or flame-cutting operations are performed in the vicinity of any combustible material there shall be provided, within easy reach of the persons performing such work, at least one approved fire extinguisher or fire pail filled with an appropriate fire extinguishing agent.

(f) Explosion hazard. Before any welding or flame cutting is done on any tank or container that contained any materials which may generate a flammable vapor upon the application of heat, all piping connected to such tank or container shall be disconnected or blanked off. Any residual flammable material shall be removed and the tank or container shall be completely purged with a suitable purging agent.

³ Plaintiff testified that he had used a mechanical pipe cutter on the day of the incident [49].

changing valve. If he had done so, a sound would have alerted him to the danger in continuing to use the torch. Co-defendant's expert, who inspected the walk-in freezer at the store, opines to a reasonable degree of engineering certainty that due to factors including the site at which the torch was applied, and the refrigerant oil's low flammability, and the relatively small quantity that would accumulate at the location of the pipe joint, any residual oil in the pipe could not cause an explosion or fire. The expert finds an alternative cause for the fire, i.e., that pressurized refrigerant escaped the system and ignited the fire when the pipe joint became loose and the pipe was removed because plaintiff failed to ensure that the shutoff valve was in the closed position.

Discussion and Conclusions

Labor Law 240(1)

Upon consideration of the record here, and the applicable law, defendant has met its burden to prove as a matter of law that there is no triable issue of fact that plaintiff's injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 97, 30 N.E.3d 154 [2015], quoting Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 603, 922 N.E.2d 865 [2009]) O'Brien v. Port Auth. of N.Y. & N.J., 29 N.Y.3d 27, 74 N.E.3d 307 (2017), and as a consequence, the claim under the "Scaffold Law" should be dismissed. Plaintiff concedes this prima facie showing.

Labor Law 200

Defendant has also made the requisite showing for summary judgment dismissal of the common law negligence/Labor Law 200 claim asserted against it, by demonstrating that there is no issue of fact that the owner had the authority to control the activity bringing about the injury" (Russin v. Picciano & Son, 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805). Where, as here, " the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (Lombardi v. Stout, 80 N.Y.2d 290, 295, 590 N.Y.S.2d 55, 604 N.E.2d 117). " Comes v. N.Y. State Elec. and Gas Corp., 82 N.Y.2d 876, 877, 631 N.E.2d 110 (1993). In opposition, plaintiff comes forward with no proof to rebut this showing and any argument attempting to characterize the causative defect alleged as a dangerous premises condition is unavailing (see, Ortega v. Puccia, 57 A.D.3d 54, 62, 866 N.Y.S.2d 323, 330 (2d Dept.2008)).

Labor Law 241(6)

The threshold question to be addressed is whether plaintiff was engaged in a type of work which falls within the scope of Labor Law § 241(6), specifically, whether the injury occurred in an area "in which construction, excavation or demolition work is being performed" (Labor Law § 241[6])

In relevant part, Labor Law § 241(6) states:

“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 [...] The commissioner may make rules to carry into effect the provisions of this subdivision.”

As pertinent here, the Commissioner's rules are set forth in the Industrial Code, 12 NYCRR, part 23, and subsection 1.4(b)(13) defines construction work as follows .

13) Construction work. 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.

It is plaintiff's assertion that he was installing the evaporator and connecting the condenser in connection with a major renovation of the commercial space .

It is not disputed that plaintiff worked at the premises in his capacity as a refrigeration equipment mechanic for J & C during the build-out commencing in April 2013 [RODRIGUEZ EBT: 31], and that before the store opened on September 20th, he and

his assistant, had installed condensers to make three, three thousand pound refrigeration units operational, and that during this process, he was never told that another condenser would be brought in for him to work on [35-36]. Nor is it disputed that the supermarket's principal hired J & C again "[b]ecause, after we opened the store, we know noticed that we needed more space for refrigeration, and that's why I acquire a new -- new equipment in the basement." [GRULLON EBT: 15-16]. That two hundred pound "walk-in" freezer [RODRIGUEZ02] had been purchased by the supermarket owner, and was placed along, but not affixed to, a wall in the storage area [EBT: 63]. A day before the accident, plaintiff met at the supermarket with his boss and the owner and he was told "they were going to install, another equipment, of refrigeration in the basement." [RODRIGUEZ: 36:12-13]. Plaintiff and his assistant's task on October 12, 2013 was to install the equipment that had arrived that day, the evaporator and condenser, and "throw the pipes up, and then do the electricity" [40:15-16], to make the "equipment function." [40:11].

Upon consideration of the record here, and the applicable law, the court finds that defendant has demonstrated as a matter of law that at the time of the incident plaintiff was not engaged in "construction" work within the scope of the statute and any attempt to conflate the extensive build-out renovation process with the subsequent installation, is unavailing not only due to the intervening time period, but because there is no evidence here that installation had been contemplated in the general context

of the renovation. Nor is there an issue of fact that plaintiff's work in altering the refrigeration unit to be operable was part of a construction, demolition or excavation of a structure (see, Rhodes–Evans v. 111 Chelsea LLC, 44 A.D.3d 430, 432-433, 843 N.Y.S.2d 237 [1st Dept.2007] , compare, Hill v. City of New York, 140 A.D.3d 568, 570, 35 N.Y.S.3d 307 [1st Dept. 2016]).

In opposition, plaintiff fails to raise an issue of fact to rebut defendant's prima facie showing.

Upon a search of the record , the court finds that co-defendant Antillana & Metro Superfood Supermarket d/b/a Antillana Superfood Supermarket is entitled to an award of summary judgment dismissing as asserted against it the Labor Law §§ 240[1] and 241[6] claims .

Accordingly, it is

ORDERED that the motion of the DEFENDANT BOSS REALTY , LLC be and hereby is granted in its entirety, and it is

ORDERED that summary judgment be entered in favor of DEFENDANT BOSS REALTY , LLC dismissing the complaint and any and all cross-claims in the above-entitled action , and it is

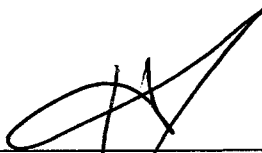
ORDERED that summary judgment be entered in favor of DEFENDANT ANTILLANA & METRO SUPERMARKET , CORP., d/b/a ANTILLANA SUPERFOOD

SUPERMARKET dismissing as asserted against it the Labor Law §§ 240[1] and 241[6] claims , and it is

ORDERED that plaintiff's motion be and hereby is denied.

This shall constitute the decision and order of this court.

Dated: May 3, 2018



Howard H. Sherman