Morelli v Sakow
2019 NY Slip Op 32614(U)
August 15, 2019
Supreme Court, Kings County
Docket Number: 520278/2016
Judge: Karen B. Rothenberg

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
ITALO MORELLI and ROCIO GUTIEREZ,

Plaintiffs,

Index No: 520278/2016

-against-

DECISION AND ORDER

MARCUS SAKOW, AS TRUSTEE OF THE 216 EAST 29TH STREET TRUST,

Defendants,

x

Recitation as required by CPLR 2219(a), of the papers considered in this motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1
Cross-motion and affidavits annexed.....	2
Answering Affidavits.....	
Reply Papers.....	3
Memorandum of law.....	4

Upon the foregoing cited papers, the Decision/Order on these motions:

In this action to recover damages for personal injuries under Labor Law §§240(1), 241-a, 241(6), 200 and common-law negligence, defendant Marcus Sakow as Trustee of the 216 East 29th Street Trust [Trust] moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing plaintiffs' complaint in its entirety.

This action stems from an accident that occurred on August 29, 2016 at a job site located at 216 E. 29th Street, Apt. 1E, owned by the Trust. On that date, plaintiff Italo Morelli [Morelli], a foreman employed by non-party Castle Construction was allegedly injured when he stepped into a 6" deep opening in the floor that was part of a 6' by 4' foot area [the box] created for the purpose of a concrete pour, causing him to lose his balance and fall cutting his leg on metal edging that surrounded the opening. Morelli testified that metal was used to make the box within which rebar is placed and then over which cement is poured to make a new plank for the floor. Morelli also testified that once the cement is poured it covers the metal and the box becomes flush with the rest of the floor. Morelli

further testified that at the time of his accident he was talking to one of the workers and was looking to his right when he "stepped wrongly into the box."

First, while Kings County Supreme Court Uniform Civil Term Rule C(6) provides that a motion for summary judgment be made within 60 days of the filing of the note of issue, CPLR 3212(a) provides an exception for motions made with leave of court on good cause shown. Here, although the note of issue was filed over a year ago, there was extensive motion practice that resulted in several compliance conference orders providing for the continuation of discovery while the matter remained on the trial calendar and also extending the dates by which dispositive motions were to be filed; the last date being January 25, 2019. In light of such motion practice and the fact that discovery, necessary to the making of the instant motion, was still proceeding after the filing of the note of issue, and since the Trust filed its last motion to extend its time to file a dispositive motion prior to the expiration of the January 25, 2019 deadline, good cause is shown.

Labor Law §240(1)

Labor Law §240(1) requires owners to provide proper protection to those working at a construction site. Absolute liability is imposed when the failure to provide such protection is a proximate cause of the worker's injury (*see Fabrizi v 1095 Ave. of Americas, LLC,* 22 NY3d 658 [2014]). The legislative history of Labor Law §240(1) clearly evinces an intent to "provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured" (*Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500–501 [1993] quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the 6" depression in the floor does not present an elevation-related hazard to which the protective devices enumerated in Labor Law 240(1) are designed to apply (*see Johnson v Lend Lease Construction LMB, Inc.,* 164 AD3d 1222 [2d Dept 2018]; *Rice v. Board of Ed. Of City of New York,* 302 AD2d 578 [2d Dept 2003]; *Alvia v Teman Elec. Contracting, Inc.*, 287 AD2d 421 [2d Dept 2001]). In opposition, plaintiffs fail to raise a triable issue of fact (*see Alvarez v Prosepect Hosp.*, 68 NY2d 320, 324 [1986]).

Labor Law § 241(6) and §241-a

Labor Law § 241(6) imposes on owners a nondelegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Lopez v. New York City Dept. of Envtl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]). In order to state a claim under Labor Law §241(6), a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*D'Elia v City of New York,* 81 AD3d 682, 684 [2d Dept 2011]). Here, the Trust contends that plaintiffs'

Labor Law §241(6) claim is predicated upon alleged violations of Industrial Code Sections (12 NYCRR) §§ 23-1.5, 23-1.7(d), 23-1.8, 23-1.15, and 23-1.32. The Trust argues that these provisions are insufficient and/or inapplicable to the facts of this case and therefore, may not serve to support plaintiffs' Labor Law §241(6) claim. In opposition to the motion, plaintiffs only addresses the Trust's alleged violations of Industrial Code §§ 23-1.7(d) and (e)(1), 1.15, and 1.32. The plaintiffs' failure to address any of the other regulations indicates that he has abandoned these provisions as bases for liability (*see Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]).

With regard to Industrial Code §23-1.7(d), the Trust makes a prima facie showing that this provision is not applicable as there is no evidence that Morelli's accident was due to a slippery condition (*see Francescon v Gucci American, Inc.*, 105 AD3d 503 [1st Dept 2013]). As to §23-1.7(e)(1), even if the court were to consider this alleged violation despite plaintiffs failure to comply with the preliminary conference order dated March 24, 2017 directing service of an amended bill of particulars listing all statutory code violations, Morelli's deposition testimony establishes that the area where he fell was not a passage way subject to §23-1.7(e)(1) but a work area subject to §23-1.7(e)(2) (*see Tucker v Tishman Const. Corp. of New York*, 36 AD3d 417 [1st Dept 2007]), and there is no liability under the latter section because the metal edging on which Morelli cut himself was an integral part of the work being performed (*see Castillo v Starrett City, Inc.*, 4 AD3d 320 [2d Dept 2004]). Moreover, §23-1.15, which sets standards for safety railings, is not applicable as Morelli was not provided with any such device (*see Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept 2009]). Further, as Marcus Sakow's testimony indicates that no violations were received for the work performed in the apartment where the accident took place, §23-1.32, which requires notice and warning of imminent danger, is inapplicable (*see Mancini v Pedra Const.*, 293 AD2d 453 [2d Dept 2002]).

In addition, Labor Law §241-a, which sets forth certain protections for those working in or at elevator shaftways, hatchways, and stairwells, is not applicable to the facts in this matter (*see Desena v North Shore Hebrew Academy*, 119 AD3d 631 [2d Dept 2014]).

In opposition, plaintiffs fail to raise a triable issue of fact (*see Alvarez, supra*).

Labor Law §200 and common law negligence

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see Chowdhury v Rodriquez*, 57 AD3d 121 [2d Dept 2008]). "A cause of action sounding in violation of Labor Law §200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed" (*Pilato v 866 U.N. Plaza Assocs., LLC*, 77 AD3d 644, 645 [2d Dept 2010]). Where injury is

caused, as alleged in the instant case, by defects or dangers in the methods or material of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). "A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). Here, the Trusts' submissions demonstrate prima facie that they had no control or supervisory authority over the work (*see Russin v Louis N. Picciano & Son.*, 54 NY2d 311 [1981]). In opposition, however, plaintiffs raise a triable issue of fact regarding the Trusts' role at the job site as Morelli testified that Marcus Sakow made the final decision as to how the floors were to be repaired including the use of the metal and rebars for the casting (*see Grasso v New York State Thruway Authority*, 159 AD3d 674 [2d Dept 2018]).

In view of the foregoing, it is hereby

Ordered, that the Trust's motion for an award of summary judgment dismissing plaintiffs' Labor Law §240(1) claim is granted, and it is further

Ordered, that the Trust's motion for an award of summary judgment dismissing plaintiffs' Labor Law §§241(6) and 241-a claims is granted, and it is further

Ordered, that Trust's motion for an award of summary judgment dismissing plaintiffs' Labor Law §200 and common-law negligence claims is denied.

This constitutes the decision/order of the court.

Dated: August 15, 2019

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
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