

MacGregor v MRMD NY Corp.
2020 NY Slip Op 30983(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 153702-2016
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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SHANNON MACGREGOR,

Plaintiff,

-against-

Index No.:153702-2016

MRMD NY CORP. and MORRIS PARK AVE LLC,

Defendants.
-----x

COHEN, J.:

Defendant Morris Park, LLC (Morris), moves, pursuant to CPLR 3212, for an order dismissing plaintiff Shannon MacGregor’s complaint and all cross claims.

Plaintiff cross-moves, pursuant to CPLR 3212, for an order granting partial summary judgment and holding Morris liable for a violation of Labor Law §§ 240 (1) and 241 (6).

FACTUAL ALLEGATIONS

Plaintiff testified that the subject accident occurred on February 23, 2016 at 1:30 p.m. while he was working at a project located at 1801 Amethyst Street in the Bronx, New York. Plaintiff was working as an ironworker for King C Ironworks (King), a steel fabrication and construction company. The project was for the construction of a residential building. Plaintiff testified that Eliron Galapo was the owner of King. Plaintiff’s co-workers at the site included Miguel, who worked as a crane operator; Dashawn and Kay, who were ironworkers; and Sal who was a foreman. Plaintiff maintains that he did not know the names of the owner or the general contractor at the site.

Plaintiff testified that the weather conditions played a role in his accident as there was a nor’easter storm in progress. Plaintiff testified that the workers were utilizing a spider crane

which was removing steel beams from a truck. He maintains that the crane only had the capacity to lift about 8,000 pounds. This meant that only two beams of steel could be lifted at one time. He recalls that ten pieces of steel were brought to the site in the morning and that the remaining five pieces were brought after lunch. He maintains that after lunch, the work became hurried because the storm was strengthening. Plaintiff testified that Sal had become more frantic regarding what work needed to be done.

Plaintiff recalls that the truck with the steel was located on a hill because of the incline at the worksite. He maintains that the steel beams on the truck were loose. Sal brought the truck to the area in which plaintiff was working. The truck had three to four beams. Plaintiff testified that because the storm conditions had strengthened, the beams were going to be offloaded by hoisting them over a fence which surrounded the property.

At the time of his accident, plaintiff was standing on top of the cab of the truck and was located ten and a half feet above the ground in order to rig the beams to be off loaded. The beams, which were sitting on poles and were elevated off the cab, were between 15 and 20 feet long, and weighed 3,500 pounds each. Plaintiff testified that the beams were stacked with two beams next to one another, and another beam located on top of those beams.

Although plaintiff believed that the crane's weight capacity was to lift two beams only, at the direction of his foreman, plaintiff was told to rig all three beams together. Plaintiff recalls that the crane operator was located on the other side of the fence and dropped the cable for plaintiff to tie it. Sal was to act as a signal person to tell the crane operator when to lift the beams.

Plaintiff testified that, at the time of his accident, the workers were rigging the final piece of steel, when the owner of the property told Sal to go and fix a fence door which had swung

open due to the weather conditions. Plaintiff believes that Miguel, who was operating the crane, mistook a signal from Sal, and accidentally did something to make the steel bounce. The beams proceeded to jump off the truck about six inches, became loose, spread out, and shot off the front of the truck. The beams stuck plaintiff's leg and knocked his feet from under him. Plaintiff was caused to fall off of the truck and to the ground. He maintains that the steel crushed the cab of the truck.

Plaintiff also submitted an affidavit dated May 29, 2019. Plaintiff states that at the time of his accident, he was standing on top of the cab of the truck for the hoisting process. As the three beams were set in the middle of the cab, plaintiff had to stand within a foot of the edge of the cab. He states that next to the edge was an eleven-foot drop to the pavement.

Plaintiff states that there were no tag lines used to steady the load of the beams while they were being hoisted. Plaintiff's employer, King, rarely had plaintiff utilize tag lines or any other device to steady the loads of steel during the hoisting process. He states that if tag lines had been utilized, there would have been one tag line placed around each end of the bundle. The tag line tied around the end of the bundle would have secured the three beams, would have kept the beams from spreading out when the load bounced, and would have kept the beams from knocking him off of the truck.

Plaintiff states that each tag line could have been held by a worker standing on the ground so that they could guide the hoisted load into position. He states that the workers could have held the tag line so that there would be no slack which would have prevented the load from coming towards him.

Haim Levy (Levy) testified that he is a "member" of Morris. He states that Morris develops properties and owned the premises at 1801 Amethyst Street. He testified that Morris

decided to construct a building at the premises in January of 2016 and that Morris had an agreement with King for structural work.

Levy testified that he never saw workers at the site utilize a mechanical crane or a hoist to move steel beams. He testified that Morris did not provide any steel, mechanical hoists or cranes for moving beams, that King would have brought any cranes or mechanical hoists, and that Morris did not provide any workers for ironwork. Levy was not sure if Morris had anyone working at the jobsite for oversight purposes.

Levy never had to tell anyone to stop what they were doing due to safety concerns. Levy would walk around the site depending on what stage of the job it was and did not provide daily directions. Levy was not aware of the name of the foreman or supervisor from King. Levy testified that sometimes work would have to take place in the rain or snow.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiff contends that summary judgment must be granted in his favor as to the allegation that Labor Law § 240 (1) was violated, while Morris argues that plaintiff's claim of a violation of Labor Law § 240 (1) must be dismissed.

Labor Law § 240 (1) provides in part:

"[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and internal quotation marks omitted).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001) *citing* *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see also* *O'Brien v Port. Auth of N.Y. & N.J.*, 29 NY3d 27, 33 (2017) (holding "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law 240 [1]").

Morris contends that plaintiff's allegation that Labor Law § 240 (1) was violated must be dismissed because plaintiff has not demonstrated that his fall resulted from a lack of a safety device. Morris maintains that operations were being conducted in an ordinary manner using standard procedure, that plaintiff was in charge of securing the beams to be unloaded, and that plaintiff was not working on a scaffold or a ladder and did not fall through an unprotected opening. Morris argues that courts have held that falling from a short distance, including from a bed of a truck, are not the kind of elevation-related hazards contemplated by the statute.

Plaintiff argues that while generally a fall from the bed of a truck is not an elevation-related hazard contemplated by the statute, Labor Law § 240 (1) may be applicable when certain circumstances implicate the protections of the statute. Plaintiff maintains that the hoisting process was deficient as the crane improperly jerked the beams and the bundle was not secured with tag lines. Plaintiff argues that the deficiencies of the hoisting procedure caused the bundle of the beams to bounce, sway sideways, and knock plaintiff off the cab which was elevated ten feet. Plaintiff maintains that tag lines would have prevented the accident by securing the load.

While Morris argues that courts have held that falling from a short distance is not the kind of elevation-related hazard contemplated by the statute, Labor Law § 240 (1) has been found to apply in cases “where some risk-enhancing circumstances implicates the protection of the statute.” *Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 (3d Dept 2009) (holding that plaintiff demonstrated an elevation-related risk greater than falling from the bed of a trailer. Plaintiff was hanging from a 10-foot high stack of insulation bundles, with his hands 14 feet above the ground, and was trying to swing his body to that height when he fell).

The Appellate Division, First Department, has discussed a factual scenario similar to plaintiff's accident in the case of *Flores v Metropolitan Transp. Auth.*, 164 AD3d 418 (1st Dept 2018). In *Flores*, the Appellate Division held that the motion court erred in denying plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1). There, a plaintiff had fallen off of a flatbed truck when a load of steel beams, also without tag lines, struck him. The court held:

“[p]laintiff established that the accident was proximately caused by defendants' failure to provide safety devices necessary to ensure protection from the gravity-related risks posed by the work he was engaged in, in violation of Labor Law § 240 (1). Here, plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him. The risk of the hoisted load of beams with no tag lines triggered the protections

set forth in Labor Law 240 (1). Based on the same evidence, plaintiff also established his Labor Law 241 (6) claim insofar as the swinging beams lacked tag lines, a violation of 12 NYCRR 23-8.2 (c) (3) which requires tag lines or certain other restraints to be used to avoid hazards posed by swinging loads hoisted by mobile cranes.”

Id. at 419. (citations omitted).

Here, the combined risk of hoisting the two beams which each weighed 3,500 pounds, and the height differential of ten feet between the truck on which plaintiff was standing and the ground on which he fell, constitutes a gravity related risk significant enough for Labor Law § 240 (1) to be applicable. Furthermore, the statute was violated by the failure of defendants to utilize tag lines. There is no question that this violation was a proximate cause of plaintiff’s accident, as the lack of a tag line on the beams caused the beams to swing towards plaintiff, striking him, and causing him to fall from the truck.

Therefore, the part of plaintiff’s motion seeking summary judgment pursuant to Labor Law § 240 (1), must be granted.

Morris argues that plaintiff’s claim that Labor Law § 241 (6) was violated, must be dismissed.

Labor Law § 241 (6) provides, in pertinent part:

"[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(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."

Labor Law § 241 (6) is not self-executing, and in order to demonstrate a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the

defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

In his bill of particulars, plaintiff alleges that defendants violated Industrial Code sections 23-1.16 (a), (b), (c), (d) (e) & (f); 23-5.1; 23-1.17 (a) - (e); 23-5.3; 23-1.7 (a) (1); 23- 1.7 (b) (1) (i); 1.7 (b) (1) (iii) (c); 23-1.19 (a) - (d); 23-2.1(a) (1) & (2); 23-2.3 (a) - (e); 23-5.1 (f); 23-5.1 (h); 23-5.1 (i); 23-5.1 (j) (l); 23-6.1 (a) - (k); 23-6.2 (a) - (e); and 23-8.1 (f) (2) (i). However, in his cross motion, plaintiff only addresses sections 23-2.3 (c) and 23-8.1 (f) (2) (i).

Therefore, with the exception of Industrial Code sections 23-2.3 (c) and 23-8.1 (f) (2) (i), all other sections of the Industrial Code are hereby dismissed as they have been abandoned. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (holding that because plaintiff did not oppose the claim for wrongful termination, he has abandoned such claim).

Morris maintains that plaintiff's allegation regarding a violation of Industrial Code section 23-2.3 (c) must be dismissed. Section 23-2.3 (c) provides:

“(c) Tag lines. While steel panels or structural steel members are being hoisted, tag lines shall be provided and used to prevent uncontrolled movement of such panels or members.”

The Appellate Division, First Department, has held that section 23-2.3 (c) of the Industrial Code is specific enough to provide a basis for liability pursuant to Labor Law § 241 (6). *See Martin v State of New York*, 148 AD3d 439, 439 (1st Dept 2017).

Morris argues that tag lines were not in use at the time of plaintiff's accident because the beams were only raised a few inches from their resting place. Morris contends that based upon the factual scenario, even if there was a tag line in use, there was neither time nor the maneuvering room to utilize them. Morris argues that workers would not be holding the tag

lines or keeping them tight because no one was expecting the load to move and they were busy with the fence. Morris further contends that plaintiff's affidavit which states that the use of tag lines could have prevented the accident is contrary to his prior testimony as he testified that the workers were fixing the fence.

In support of his cross motion, plaintiff argues that section 23-2.3 (c) was violated because there were no tag lines and that the tag lines could have prevented the uncontrolled movement of the beams. Plaintiff maintains that tag lines were needed because the steel beams, which weighed 3,500 pounds each, were being hoisted off of a truck and lowered to the ground.

Here, based upon the deposition and the affidavit of plaintiff, there were no tag lines being utilized during the hoisting process to avoid the potential hazard of swinging loads. The beams weighed thousands of pounds and should have been hoisted with the usage of such lines. Therefore, plaintiff has met his burden and has demonstrated a violation of section 23-8.2 (c) (3) of the Industrial Code.

Morris also argues that the part of plaintiff's complaint alleging a violation of section 23-8.1 (f) (2) (i) of the Industrial Code must be dismissed. Section 23-8.1 (f) (2) (i) provides:

"2) During the hoisting operation the following conditions shall be met:
(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions."

Industrial Code section 23-8.1 (f) (2) (i) has been held to be specific enough to provide a basis for liability pursuant to Labor Law § 241 (6). *See McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 309 (1st Dept 2007).

Morris contends that to the extent that there is an allegation that a sudden movement took place, there is no evidence regarding how or why this occurred. Morris argues that it is not known if this was done deliberately, if it was a misunderstanding between the operator and the

foreman, if it was due to an emergency, was caused by weather, or was an uncontrollable occurrence having nothing to do with the actions of any workers. Morris maintains that any conclusions would be speculative.

Here, it remains unclear from the record why the beam lifted in the alleged sudden manner and whether it was due to an emergency condition such as the weather. Therefore, the part of plaintiff's complaint which alleges a violation of Industrial Code section 23-8.1 (f) (2) (i) must not be dismissed.

Finally, Morris contends that plaintiff's cause of action based upon common law negligence and violations of Labor Law §§ 200 and 241 (a) must be dismissed. Plaintiff does not address or oppose Morris' arguments as to these sections. Therefore, the part of Morris' motion seeking to dismiss plaintiff's claims of common law negligence, and based upon violations of Labor Law §§ 200 and 241 (a), must be dismissed.

CONCLUSION and ORDER

Accordingly, it is

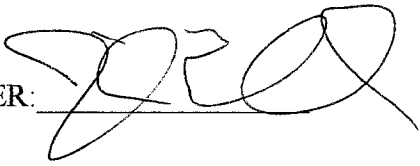
ORDERED that Morris Park, LLC's motion for summary judgment is granted in part, and plaintiff Shannon MacGregor's causes of action pursuant to Labor Law §§ 200 and 241 (a) are dismissed; and it is further

ORDERED that the following Industrial Code sections are dismissed:

23-1.16 (a), (b), (c), (d) (e) & (f); 23-5.1; 23-1.17 (a) - (e); 23-5.3; 23-1.7 (a) (1); 23- 1.7 (b) (1) (i), 1.7 (b) (1) (iii) (c); 23-1.19 (a) - (d); 23-2.1 (a) (1) & (2); 23-2.3 (a) (b) (d) (e); 23-5.1 (f); 23-5.1 (h); 23-5.1 (i); 23-5.1 (j) (l); 23-6.1 (a) - (k); and 23-6.2 (a) - (e); and it is further

ORDERED that plaintiff Shannon MacGregor's cross motion is granted in part as against Morris Park, LLC, and summary judgment is granted as to Labor Law § 240 (1) and Industrial Code section 23-2.3 (c).

Dated: 4-21-2020

ENTER: 
DAVID S. COHEN, J.S.C.