Eherts v Shoprite Supermarkets, Inc.
2020 NY Slip Op 34886(U)
July 9, 2020
Supreme Court, Sullivan County
Docket Number: Index No. 2018-1899
Judge: Mark M. Meddaugh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

DOUGLAS EHERTS and MICHELLE EHERTS,

Plaintiffs,

Decision & Order

-against-

SHOPRITE SUPERMARKETS, INC.,

Defendant,

Motion Return Date: July 6, 2020
Index No.: 2018-1899

Appearances:

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MEDDAUGH, J.,

In this action Plaintiff, Douglas Eherts, (hereinafter "Ehrets") a self-employed plumber, seeks to recover compensatory damages pursuant to NYS Labor Law for injuries allegedly sustained while responding to a service call on January 1, 2018 at Defendant, Shoprite Supermarket's, (hereinafter "Shoprite") store. Plaintiff's wife maintains a claim for loss of consortium. Shoprite seeks summary judgment pursuant to CPLR Section 3212 dismissing Ehret's complaint as to each count alleged under NYS Labor Law Sections 200 and 240(1). Ehrets opposed the motion and cross-moved for partial summary judgment pursuant to CPLR Section

[* 1]
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3212 on the issue of liability under NYS Labor Law Section 240(1). Defendant replied and opposed the cross-motion. The matter is now deemed to be fully submitted.

Factual Background

Ehrets is the sole owner and operator of Mr. Septic, a plumbing company. Ehrets alleges that on or about January 1, 2018, Mr. Septic was contracted to provide services to Shoprite and that he had done work for Shoprite since 2001. In 2018, Ehrets was subject to a five-year contract with Shoprite that had commenced in 2014.[1] Ehret's deposition testimony reflects that his company conducted all plumbing-related repairs and service at the Monticello Shoprite location, except for sprinklers.

Ehrets alleges that on January 1, 2018, he received an emergency service call for the Monticello Shoprite. Anthony J. Faber, Shoprite's store manager at that time, testified at his deposition that Shoprite was experiencing a water pressure issue due to a water main break. Ehrets testified that upon his arrival he observed Shoprite's parking lot was full of water due to what he believed was a water main break. Shoprite alleges that Ehrets was called to shut off the water main connection inside the store that went from the parking lot into the store, the hot water heater and the ice machine. Ehrets testified that he first shut off the water main connection and the ice machine. He then needed to turn off the gas connection to the hot water heater and the electric switch for the hot water heater, both of which were located on the unit itself. Ehrets is alleged to have sustained his injuries while attempting to shut off the elevated hot water heater located in the rear of the store.

[1] It should be noted that neither party has submitted the contract in connection with this motion practice. Ehrets also testified that he has employed up to 14 people through Mr. Septic.

Ehrets testified that the hot water heater at issue was replaced by his company in 2016. He also testified that Mr. Septic had constructed a new platform in 2016 on which the hot water heater was presently located. He described that the platform and heater are located above a freezer/refrigeration unit in the back of the Shoprite. In order to access the hot water heater, it is necessary to use a ladder and then walk on inventory shelves to reach the heater. The inventory shelves were described as being eight feet wide by thirty inches deep.[2] It is alleged that since 2001, the method by which to access the hot water heater (both the old unit and the one installed in 2016) was by way of stepping on the inventory shelves and then onto the hot water heater platform.

Shoprite provided Ehrets with a ladder. Ehrets testified that the ladder did not appear defective. There is no allegation that he fell from the ladder, or that the ladder malfunctioned. Ehrets alleges that after he climbed the ladder and stepped onto the inventory shelving, the shelving gave way almost immediately, causing him to fall approximately 12 feet to the ground. He sustained injuries to his left ankle and broke his right leg.

Ehrets alleges that the shelves were not properly "braced" in the area where the shelves gave way, causing him to fall. Specifically, he alleges that the shelves were secured only by sheetrock screws and not a threaded rod. Ehrets testified that he had accessed the hot water heater on many occasions and that he believed it was sufficient to hold his weight. At the time of the accident, Ehrets weighed approximately 380 pounds. Notably, Ehrets acknowledged that regarding the inventory shelves, it was his understanding that the sole purpose of the shelves was to store materials or supplies and that they were not intended to be used as a walking surface.

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[2] Plaintiff's complaint describes the inventory shelf as a "balcony-type shelve" that was not "braced" by the defendant nor "so constructed, placed and operated as to give proper protection to" the plaintiff herein, resulting in plaintiff falling from the "balcony-type shelve" to the ground, thereby suffering serious permanent personal injuries.

Faber, Shoprite's store manager, testified that the incident occurred in the middle of the store warehouse and that he found Ehrets laying on the floor with a bunch of boxes underneath him. He stated that he had been the store manager for approximately seven years. He described that there was a shelf hanging from a platform that was across the whole back room that spanned approximately 100 feet. Faber testified that Ehrets was turning off the hot water heater so that the motor did not burn out because there was no water going to the hot water heater. He described that in order to access the hot water heater a ladder would be put up against the shelf and they would climb up the ladder, step on the shelf and go onto the meat cooler, which is where the hot water heater was located. Faber testified that this had been done frequently and acknowledged that there was no other practical means by which to access the water heater. He acknowledged that the shelf was affixed to the wall by screws through the back of the shelf into the wall and rods from the ceiling to the outer edge of the shelf, sporadically through the whole length of the shelf. He testified that there was one rod and some screws in the area where the accident occurred.

Standard and Analysis

On a motion for summary judgment, the movant must make a *prima facie* showing, by tendering evidentiary proof in admissible form, of its entitlement to judgment as a matter of law. See *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). After the movant has made this *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of a genuine material triable issue of fact. See *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986); *Zuckerman*, 49 NY2d at 562. In a premises liability action, as the moving party in a motion for summary judgment, the defendant has the initial burden of demonstrating that it had maintained the property in a reasonably safe condition and that it did not create or have actual or constructive notice of the specific alleged dangerous condition that resulted in plaintiff's injury. *VanDuser v.*

Mount Saint Mary, 176 AD3d 1532 (3rd Dept. 2019). See also *Firment v. Dick's Sporting Goods, Inc.*, 160 AD3d 1259 (3rd Dept. 2018). Constructive notice is established where the condition is visible and apparent and has existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action. *VanDuser at 1532.* See also *Bloomfield v. Jericho Union Free School District*, 80 AD3d 637 (2nd Dept. 2011). When triable issues of fact are raised as to whether a defendant permitted a plaintiff to work under hazardous conditions and whether such conditions were the proximate cause of his injuries, summary judgment is not an appropriate remedy. See *Springer v. Keith Clark Pub. Co.,* 171 AD2d 914, 916 (3rd Dept. 1991).

Liability Under Labor Law § 240(1)

Under Labor Law § 240(1) contractors and owners engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" must provide "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." *O'Brien v. Port Authority of New York and New Jersey*, 29 NY3d 27, 33 (2017); See *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 499-500 (1993); *NYS Labor Law Section 240 (1)*. The legislative purpose behind this enactment is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident. *Rocovich v. Consolidated Edison Company*, 78 NY2d 509, 513 (1991), *internal citations and quotations omitted.*

Although the statute is meant to be liberally construed to accomplish its intended purpose, absolute 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." Liability

may…be imposed under the statute only where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." As we have made clear, the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1). *O'Brien* at 33. Labor Law Section 240(1) imposes the duty to furnish safety equipment which will protect workers from hazards related to elevating themselves or their materials at a work site. *Springer v. Keith Clark Pub. Co.*, 171 AD2d 914, 915 (3rd Dept. 1991).

As a predicate to the strict liability imposed under Labor Law § 240(1), Plaintiff Ehrets must establish that the hot water heater is part of the structure of the building that houses Defendant Shoprite. Contrary to Plaintiff's assertions, the facts do not support a scenario where the hot water heater would be deemed as part of the structure to qualify for the protections provided under §240(1). As such, the case is distinguishable from the fact pattern in *Caraciolo v. Second Avenue Condominium*, 294 AD2d 200 (1st Dept. 2002), which Plaintiff points to. In that case, the Plaintiff sustained injuries from a fall caused by a ladder that was attached to the building's roof-top water tank. The Court determined in that case that the water tank was part of the building. In contrast, Ehret's deposition details that his company replaced the Defendant's hot water heater in 2016 and constructed a new platform for it. As such, Plaintiff cannot establish as a matter of law that while attempting to shut off the hot water heater due to the water main break, he was engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Nor does Plaintiff establish that this was a construction worksite. In the case at bar, Shoprite provided Ehrets with a free-standing ladder, to which Plaintiff concedes was not defective. Plaintiff climbed the ladder without incident, but sustained injuries when he stepped onto inventory shelving which collapsed, due at least in part, to Plaintiff's weight. Therefore, Plaintiff is

precluded from categorizing the inventory shelving as scaffolding for purposes of a § 240(1) claim. Additionally, notwithstanding that the inventory shelving was utilized as a secondary means to gain access to the location of the hot water heater, it is undisputed that the purpose of the shelving was not to serve as makeshift scaffolding. Plaintiff acknowledged during his deposition that the sole purpose of the shelves was to store materials or supplies and that they were not intended to be used as a walking surface.

Further, in addressing Plaintiff's motion for summary judgment on the issue of strict liability under Labor Law § 240(1), the Court notes that the application does not set forth a *prima facie* case based on cognizable evidentiary proof that would establish Ehret's entitlement to judgment as a matter of law. The Court is also otherwise unpersuaded that the inventory shelving should be construed as makeshift scaffolding, because Ehrets was performing repairs, rather than routine maintenance, for purposes of imposing strict liability under the Labor Law § 240(1).

There is no dispute that Ehrets was called to shut off the water supply, the ice maker and the hot water heater. Ehret's assertion that turning off the water valves constituted an essential systemic repair of the low water pressure malfunction is insufficient to establish strict liability. Ehret's affidavit submitted in support of Plaintiff's cross-motion is speculative and does not affirmatively establish that an inspection of the hot water heater would have resulted in repair work. No evidentiary proof was provided in support of this assertion, such as an invoice or work order establishing that Ehrets was called to investigate and address a specific malfunction, to repair and restore Shoprite's water supply and/or to repair any devices that were malfunctioning due to low-pressure.

Lastly, Shoprite's arguments raised in its reply regarding the untimeliness of Ehrets' cross-motion are unavailing, given the advent of COVID-19, which the Court notes directly impacted

the timeline of this case due to the non-essential nature of the parties' pending litigation. To that end, the Court takes judicial notice of the World Health Organization's March 11, 2020, declaration of the COVID-19 outbreak as a pandemic, New York State Governor Andrew Cuomo's March 7, 2020 Executive Order declaring a Disaster Emergency in the State of New York (No. 202) and subsequent Executive Order on March 20, 2020 resulting in New York State on PAUSE (Policy that Assures Uniform Safety for Everyone) (related No. 202.6, 202.7, 202.8, 202.10 and 202.11).

Accordingly, with respect to Plaintiffs' claim under Labor Law § 240(1), the Court grants summary judgment in favor of Defendant Shoprite and denies summary judgment as to Plaintiff Ehrets.

Liability Under Labor Law § 200

General common-law principles governing a landowner's duty to provide a safe workplace may be found in Labor Law § 200(1). *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 503 (1993). See *NYS Labor Law Section 200 (1)*. Labor Law § 200 is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work. *Doskotch v. Pisocki*, 168 AD3d 1174, 1177 (3rd Dept. 2019). When a claim arises out of alleged facts or defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation. *Ross* at 505. In order to prevail on claims against a landowner under this statute and in common-law negligence, a plaintiff must establish that the owner...both exercised supervisory control over the operation and had actual or constructive knowledge of the unsafe way the work was being performed. This requires a showing that the owner supervised or controlled the very manner or methods by which the plaintiff did his

or her work or that it exercised direct supervision and control over his or her work at the time of the accident. *Doskotch* at 1177.

In the case at bar, Shoprite caused Ehrets to be contacted on January 1, 2018, in response to low/no water pressure in Shoprite's store. Upon arriving, Ehrets was tasked with shutting off the water main connection inside the store that went from the parking lot into the store, the hot water heater and the ice machine. The Court is constrained to categorize these tasks as routine maintenance as Ehrets responded on a holiday, due to an emergency. Likewise, the Court is not persuaded that these actions alone constitute repairs. In the context of this case, the Court views these actions as preventive measures that may have been incident to an eventual repair, but under these circumstances, the Court construes the "shut off" as ministerial or rather, as a predicate to a potential repair.

In any event, it is undisputed by both Ehrets and Shoprite that it was a pattern and practice for many years to utilize the inventory shelving in order to gain access to the hot water heater. Neither party sought fit to provide any additional method of access, outside of a ladder to ensure a safer means of ingress and egress to the hot water heater. It is also undisputed that Shoprite had ongoing actual knowledge of this pattern and practice involving the use of the inventory shelving. Therefore, triable issues of fact have been raised as to Shoprite's supervision, notice and compliance with legal standards governing the safety of employees on site, including subcontractors. *Ross* at 506.

Further, Shoprite's submission does not establish a *prima facie* case warranting a granting of summary judgment, as the deposition provided by Ehrets and Shoprite's manager, Faber, submitted in support of the application, raise material issues of fact as to Shoprite's supervision, notice and control. See *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Notwithstanding that Ehrets failed to oppose Shoprite's motion on the Labor Law § 200 claim(s), the Court is otherwise precluded from granting summary judgment in favor of Shoprite as there are triable issues of fact as to Shoprite's supervision and control.

For the reasons stated herein, the Court is precluded from granting summary judgment in favor of Shoprite on Ehrets' Labor Law § 200 claim(s) alleging common-law negligence.

Based upon the foregoing, it is hereby

ORDERED, that Defendant, Shoprite's motion for summary judgment is granted, in part, with respect to Plaintiff's Labor Law § 240(1) claim(s); and it is further

ORDERED, that Defendant, Shoprite's motion for summary judgment is denied, in part, with respect to Plaintiff's Labor Law § 200 claim(s); and it is further

ORDERED, that Plaintiff, Ehret's motion for summary judgment is denied in its entirety with respect to Plaintiff's Labor Law § 240(1) claim(s); and it is further

ORDERED, that this matter will proceed only on the Plaintiffs' cause of action pursuant to Labor Law § 200 and the accompanying loss of consortium claim by Plaintiff's wife.

This shall constitute the Decision and Order of this Court.

All papers, including the original copy of this Decision and Order, are being forwarded to the Office of the Sullivan County Clerk for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

Dated: Monticello, New York
July 9, 2020

ENTER:

HON. MARK M. MEDDAUGH, A.J.S.C.