Hiseni v Consolidated Edison Co. of N.Y., Inc.

2022 NY Slip Op 30266(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 150577/2017

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34

Justice

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INDEX NO. 150577/2017

ADEM HISENI,

MOTION DATE 04/08/2021

Plaintiff,

MOTION SEQ. NO. 005

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC., THE CITY OF NEW YORK,

Defendants.

DECISION + ORDER ON MOTION

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

DANELLA CONSTRUCTION OF NY, INC.

Defendant.

Third-Party Index No. 595558/2017

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 311, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 446, 454, 455, 456, 457, 485, 486

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action to recover damages for personal injuries pursuant to Labor Law §§ 200, 240(1) and 241(6), plaintiff Adem Hiseni (plaintiff), now moves pursuant to CPLR 2221 for leave to reargue the portion of the Court's March 25, 2021 decision and order denying the branches of plaintiff's cross-motion for summary judgment against co-defendants Consolidated Edison Company of New York, Inc. (Con Ed) and the City of New York (City) pursuant to Labor Law §§ 240(1) and 241(6), premised upon Industrial Code §§ 23-1.21(b)(3)(i), 23-1.7(d) & (e)(2), 23-9.2(a), and 23-9.4(b)(1) & (3). Con Ed opposes the motion. For the following reasons, plaintiff's motion is granted, and upon reargument, plaintiff's cross-motion is granted in part.

FACTUAL BACKGROUND

Plaintiff stated that on the date of his accident he was driving the backhoe toward the worksite located at 57th Street and 10th Avenue, New York, New York. Plaintiff further

indicated that the backhoe he was operating was experiencing transmission problem, and that he stopped the backhoe at 57th Street and Madison Avenue to check the transmission fluid level of the backhoe and to retrieve his construction gear, including his helmet, from another backhoe parked at that location. Plaintiff stated that he exited the vehicle using a "fixed ladder mounted on the outside of the machine" (NYSCEF doc no 60 at ¶ 10). According to plaintiff, the fixed access steps were the sole means of access to the cab of the backhoe.

Plaintiff stated that the fixed access steps consisted of two steps. The first step, according to plaintiff, was "wet and smelled of diesel that had spilled onto the steps due to the tank's being overfilled by other workers back at the yard" (*id.* at ¶ 14). The step below the first was indented inward. Plaintiff stated that as he attempted to descend the steps, he "slipped and fell due to the slippery and broken steps of [the] ladder" (*id.* at ¶ 16). As discussed in the previous decision, a photograph of the access steps reveal that the lower step was indented inward toward the machine, a flat landing immediately adjacent to the cab, and a black handle near the entrance to the cab.

DISCUSSION

CPLR 2221(d) permits a party to move for leave to reargue a decision upon a showing that the court overlooked or misapprehended the law, but shall not include any matters of fact not offered on the prior motion (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Pezhman v Chanel Inc.*, 126 AD3d 497 [1st Dept 2015]). "A motion for reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Matter of Setters v AI Props. And Devs. (USA) Corp.*, 139 AD3d 492 [1st Dept 2016]).

Labor Law § 240(1)

It is well established that the protection of Labor Law § 240(1) applies to tasks that "entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The hazards contemplated by section 240(1) are "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*id.*). Section 240(1) is to be construed as liberally as necessary to effectuate its purpose (*Zimmer v Chemung Cty. Performing Arts, Inc.*, 65 NY2d 513, 521 [1985]).

As discussed in the previous decision, plaintiff may not maintain a claim under Labor Law § 240(1). Instructive is the Appellate Division, First Department's decision in *Molloy v Long Island R.R.* (150 AD3d 421 [1st Dept 2017]). In *Molloy*, the plaintiff was injured when he fell while exiting the cab of the locomotive on which he was a brakeman (*id.*). While descending, the plaintiff used two footholds to descend from the side of the locomotive, when "[h]e was caused to fall due to the fact that there was a side view mirror attached to the locomotive's handrail, which prohibited him from getting a good grip on it; the footholds were slippery due to

the accumulation of muddy water on the tunnel floor; and as the locomotive was on a ramp, he ran out of footholds to put his feet in as there was a greater distance between the bottom of the locomotive and the tunnel floor" (*Molloy v Long Island R.R.*, 2015 NY Slip Op 31795[U] [Sup Ct New York County 2015]). In affirming the lower court's dismissal of plaintiff's Labor Law § 240 claim, the First Department held that "[a]s a matter of law, alighting from a construction vehicle does not pose an elevation-related risk calling for any of the protective devices listed in Labor Law § 240(1)" (*Molloy*, 150 AD3d at 422, citing *Bond v York Hunter Constr*., 95 NY2d 883, 884–885 [2000]). Here, like in *Molloy*, plaintiff was injured as he was alighting, or descending, from a construction vehicle. Accordingly, plaintiff's accident does not fall within the scope of Labor Law § 240(1).

Labor Law § 241(6)

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

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]).

The Court finds that it overlooked relevant caselaw in the previous decision. Industrial Code § 23-1.7(d), states, in relevant part, that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition." Viewed in the light most favorable to plaintiff, as the court must on a motion for summary judgment, plaintiff's testimony that he slipped on a wet, slippery substance on the access steps, which were the sole means for plaintiff to access his work area, establishes that his accident occurred in a "passageway" within the meaning of Industrial Code § 23–1.7(d) (*see Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 1277-1278 [3d Dept 2009] [holding that a battery cover used as step by plaintiff was the sole means of access to the cab of backhoe constituted a passageway within the meaning of Industrial Code § 23-1.7(d)]: *see also Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012] ["We also find that the reference in 12 NYCRR 23–1.7(d) to 'passageways' can encompass a permanent staircase, when that staircase is the sole access to the work site"]).

Industrial Code § 23-1.21(b)(3)(i) states that "[a]ll ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: . . . (i) If it has a broken member or part." Here, plaintiff fails to demonstrate that the access steps were the functional equivalent of a ladder. Other than using the vertical access steps to climb to or from the cab of the backhoe, there is no indicia that the steps are the equivalent of a ladder. Indeed, a plain review of the photograph submitted by Con Ed reveals that the subject steps are not a

ladder. Further, the caselaw cited by plaintiff is distinguishable in that they do not address whether Industrial Code § 23-1.21(b)(3)(i) is applicable to access steps affixed to a backhoe.

The other Industrial Code sections cited by plaintiff are inapplicable. Industrial Code § 23-1.7(e)(2) states, in substance, that the floors, platforms and similar areas where persons work, or pass shall be kept free from accumulations of dirt and debris. Here, the access steps were not a working area or floor.

Plaintiff's claim under Industrial Code section 23-9.2(a) also fails, since there is no evidence that the alleged defective conditions were identified or discovered prior to plaintiff's accident (*see Misicki v Caradonna*, 12 NY3d 511, 520 [2009] ["In sum, an employee who claims to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law § 241(6) based on an alleged violation of 12 NYCRR 23–9.2(a)"]). Plaintiff's arguments concerning Industrial Code § 23-9.4(b) fail since they are identical to the arguments made in the underlying motion, and in any event, there is no factual basis to find that the failure to inspect the vehicle was a proximate cause of plaintiff's accident.

The City

As for the branch of plaintiff's motion seeking leave to reargue the portion of the previous decision denying plaintiff's cross-motion against the City, the Court finds that it overlooked the fact that the note of issue has not yet been filed, and thus, plaintiff's motion was timely (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

It is well settled that the court has authority to search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (*Dunham v Hilco Const. Co.*, 89 NY2d 425, 429–430 [1996]). As discussed above, plaintiff's accident does not fall within the protections of Labor Law § 240(1), and thus, that claim is dismissed against the City.

The Court of Appeals has held "[t]hat ownership of the premises where the accident occurred—standing alone—is not enough to impose liability under Labor Law § 241(6) where the property owner did not contract for the work resulting in the plaintiff's injuries; that is, ownership is a necessary condition, but not a sufficient one. Rather, we have insisted on 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest' " (*Morton v State*, 15 NY3d 50, 56 [2010], quoting *Abbatiello v Lancaster Studio Assocs.*, 3 NY3d 46, 51 [2004]). While the City owned the roadway where plaintiff was injured, plaintiff fails to present any evidence demonstrating a nexus between the City and plaintiff. Indeed, the City did not contract for the work and there is no evidence of any permits having been issued concerning the relevant work. Accordingly, plaintiff's cross-motion against the City is denied.

Accordingly, it is hereby,

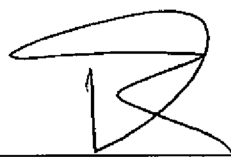
ORDERED that plaintiff's motion pursuant to CPLR 2221 seeking leave to reargue portions of the previous decision is granted, and upon reargument, plaintiff's cross-motion for summary judgment on his claims against Con Ed under Labor Law § 241(6), premised upon a violation of Industrial Code § 23-1.7(d) is granted, with the determination of damages to await trial, and is otherwise denied; and it is further;

ORDERED that plaintiff's Labor Law § 240(1) claim is dismissed as against the City; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

This constitutes the decision and order of the Court.



1/20/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE