

Seise v 31 Leonard St., LLC
2024 NY Slip Op 35720(U)
October 22, 2024
Supreme Court, Bronx County
Docket Number: Index No. 810300/2021E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 1A2

-----X
JUAN SEISE,

Plaintiff,

-against-

Decision and Order

Index No. 810300/2021E

31 LEONARD STREET, LLC, SILVERA PROPERTIES,
LLC and KENTAL, LLC,

Defendants.

-----X
31 LEONARD STREET, LLC and KENTAL, LLC,

Third-Party Plaintiffs,

-against-

EASTERN CUTTING,

Third-Party Defendant.
-----X

Elizabeth A. Taylor, J.

In Motion Sequence No. 1, defendants 31 Leonard Street, LLC ("31 Leonard") and Kental, LLC ("Kental") move for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability dismissing all claims against them

In Motion Sequence No. 2, defendant Silvera Properties, LLC ("Silvera Properties") moves for an Order pursuant to CPLR 3212, granting Silvera Properties summary judgment dismissing plaintiff's claims against it as well as all cross claims asserted by defendants 31 Leonard and Kental.

FACTS

On November 4, 2020, plaintiff, an employee of Eastern Cutting Corp. ("Eastern"),¹ was

¹ A third-party action against Eastern was discontinued.

allegedly injured at a construction site located at 29-31 Leonard Street in New York County. The property was owned by defendant 31 Leonard, and Kental served as the Construction Manager. Defendant Silvera Properties through its principal, David Silvera, who was managing director of both 31 Leonard and Kental, acted as the site supervisor.

Plaintiff travelled to 29-31 Leonard Street in Manhattan on behalf of his employer Eastern Cutting, to estimate the cost of brick cutting work needed in connection with the renovation work. His work at the job site did not involve anything other than gathering information for his proposal. He arrived at the job site at approximately 7:20 a.m. and called Silvera to let him know he arrived. Silvera arrived at the job site less than ten minutes later. Silvera asked the plaintiff to follow him into the building. Silvera climbed onto a platform that was 20 inches in height, four feet long and four to five feet wide. (See photograph annexed at the end of this Decision as an Appendix.) The platform was in place for the use of a dingo that brought debris from inside of the building to a container at the end of the platform but was also used to exit and enter the building.

Plaintiff placed his right foot on a board running around the platform horizontally, intending to then step onto the platform with his left foot, but he "didn't have the momentum to reach all the way up" and fell backwards. He claimed that his left foot slipped on "a little bit" of "scattered" debris, consisting of pebbles, rocks, and dirt; however, his left foot had not made it fully onto the platform when he fell. At the time that he allegedly slipped, the plaintiff's entire body weight was on his right foot, that was already on the platform. Plaintiff did not fall to the ground when he fell, rather, his right shoulder struck an adjacent scaffolding pole. Plaintiff did not believe that the platform was unsafe before he attempted to climb up. Plaintiff admits that he did not know what caused him to slip, but assumed it was debris, because he saw debris on the platform before he attempted to climb up.

The job estimate prepared by Eastern is addressed to Silvera Properties LLC at 29 Leonard Street, New York, NY 10013. It also indicates that Silvera Properties LLC is to be billed. The document was sent to David Silvera at 29 Leonard Street. Additionally, on page 2, it is noted that two lines were crossed out and initialed by David Silvera and another line at the bottom was initialed by David Silvera. David Silvera signed the document, addressed to Silvera Properties, LLC, with an indication that Silvera Properties was to be billed and sent to David Silvera at 29 Leonard Street. David Silvera also signed page 4 of the document.

Silvera testified at his EBT that he had no independent recollection of plaintiff, of meeting him at the job site, or of the occurrence of any accident. He did recall that Eastern sent a representative to provide a job estimate. The platform was used for ingress and egress, as well as by a small tractor – a dingo—which crossed over the platform to dump debris into a dumpster. He stated that the photograph of the platform accurately represented its appearance. (See the Exhibit appended to the end hereof.)

With respect to the job estimate, Silvera testified that the quote was made out to Silvera Properties in error. Admittedly, he had not attempted to have the error corrected as he failed to see the mistake.

ARGUMENT

Defendants 31 Leonard and Kental argue, relying on *Gibson v. Worthington Division of McGraw-Edison Company*, 78 N.Y. 2d 1108, 585 N.E.2d 376, 578 N.Y.S.2d 127 (1991), that plaintiff's firm had not been hired to perform any construction work on the premises at the time the accident occurred, and thus plaintiff was not a person "employed" to carry out the repairs as that term is used in section 200, 240(1) and section 241(6) of the Labor Law. Further, they maintain

that plaintiff's accident did not result from the existence of a dangerous condition. Initially, there was only "a little bit" of "scattered" debris on the platform, not an accumulation, and plaintiff admitted that he saw the scattered debris, and despite its presence, he did not believe that the platform was unsafe before he attempted to climb up. In addition, plaintiff merely assumed that he slipped on debris. In addition, the defendants argue that plaintiff did not establish notice of the condition.

Plaintiff argues that the platform, a makeshift temporary wooden ramp with no railings, steps or entry point was approved by David Silvera so that a dingo could remove dirt and debris from inside the building and dump it in a container at the end of the platform. Clearly, it was not intended for people to walk on.

On Motion Sequence No. 2, defendant Silvera Properties argues that the execution of the proposal/contract in Silvera Properties name was an error.

DISCUSSION

Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks. (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 618 NE2d 82, 601 NYS2d 49 [1993]). Labor Law § 240(1) imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work. Where an accident is caused by a violation of the statute, a plaintiff's own negligence will not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. Thus, in order to recover under Labor Law § 240(1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury. (*Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 430, 34 N.E.3d 815, 817, 13 N.Y.S.3d 305, 307 [2015].)

Labor Law § 240(1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7, 959 N.E.2d 488, 935 N.Y.S.2d 551). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (id. at 7.) "The dispositive inquiry does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279; Kandatyan v 400 Fifth Realty, LLC, 2017 N.Y. App. Div. LEXIS 8064, *3-4, 2017 NY Slip Op 07984, 1 [2d Dept. 2017] [worker pushing dolly up ramp, injured as object rolled backward, was within purview of Labor Law 240[1].)

Labor Law § 241(6) imposes on owners and contractors 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. To sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (Yaucan v Hawthorne Vil., LLC, 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017].) "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (Harrison v State of New York, 88 AD3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of

the Department of Labor in the Industrial Code. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241(6).])

Here, plaintiff was in the process of estimating a job. Labor Law § 241(6) is designed to provide protection to workers engaged in renovation, excavation, or construction work (see *Mordkofsky v. V.C.V. Dev. Corp.*, 76 NY2d 573 [1990]). However, "[n]ot every employee lawfully on the property is necessarily affiliated with the construction work ... or is otherwise 'frequenting the premises within the meaning of Labor Law § 241(6)' ... The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation" (*Blandon v. Advance Contr. Co.*, 264 AD2d 550 [1st Dept 1999]; see *Panico v. Advanstar Communications, Inc.*, 92 AD3d 656 [2d Dept 2012]). As the defendants argue, *Gibson v. Worthington Division of McGraw-Edison Company* (78 N.Y. 2d 1108, 585 N.E.2d 376, 578 N.Y.S.2d 127 [1991]), holds that an employee merely furnishing an estimate is not a "worker" protected by the Labor Law. (See *Treacy v. Inspired Event Productions, LLC*, 192 A.D.3d 444, 139 N.Y.S.3d 804 [1st Dept. 2021] [Teamster' Union laborer unloading a truck was not hired to perform any of the construction]; *Lukasinski v. First New Amsterdam Realty, LLC*, 3 A.D.2d 302, 770 N.Y.S.2d 307 [1st Dept. 2004] [taking measurements to provide an estimate is not within the scope of activities protected by the Labor Law]; *Fabrizio v. City of New York*, 306 A.D.2d 87, 762, N.Y.S.2d 41 [1st Dept. 2003] [electrician inspecting vault in order to estimate the cost of electrical work was not within the class of persons protected by the Labor Law].)

As to the plaintiff's common law cause of action, defendant mistakenly argues that plaintiff cannot establish notice of the presence of debris on the platform. However, the burden of proving

the absence of notice is placed on the defendant on summary judgment. Defendant has not established the absence of notice on the platform.

Moreover, plaintiff's theory of negligence is not confined solely to the absence of debris, but rather, extends to the fact that ingress and egress was provided via a platform as opposed to a stair. Whether or not the platform itself was a dangerous condition raises an issue of fact for the jury.

Silvera Properties has established that it did not own or control the premises. Whether or not Silvera Properties contracted for the estimate and work performed by Eastern, liability here turns on control of the premises, as all Labor Law claims have been dismissed. Silvera Properties has established that it did not control the premises.

Accordingly, it is hereby,

ORDERED that the motion of defendants 31 Leonard Street, LLC and Kental, LLC is granted to the extent of dismissing plaintiff's claims under the Labor Law 240(1), and it is further

ORDERED that the motion of defendant Silvera Properties, LLC is granted, and all claims and cross-claims against said defendant are dismissed.

This is the Decision and Order of the Court.

Dated: OCT 22 2024



Hon. Elizabeth A. Taylor, J.S.C.

