Collymore v 1895 WWA, LLC
2012 NY Slip Op 32385(U)
September 10, 2012
Supreme Court, Suffolk County
Docket Number: 10-27975
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 10-27975
CAL. No. 12-00135OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-24-12 (#001)
MOTION DATE 3-22-12 (#002)
ADJ. DATE 6-7-12
Mot. Seq. # 001 - MotD
002 - XMD

---X

GARY COLLYMORE,

Plaintiff,

- against -

1895 WWA, LLC,

Defendant.

---X

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Upon the following papers numbered 1 to 17 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers 12 - 13 ; Answering Affidavits and supporting papers 14 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other ___; it is,

ORDERED that this motion by the defendant is granted to the extent that it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action based upon Labor Law §§ 200 and 241 (6), and common law negligence, and is otherwise denied; and it is further

ORDERED that this cross-motion by the plaintiff for partial summary judgment on the issue of the defendant's liability pursuant to Labor Law § 240 (1) is denied.

In this action, the plaintiff seeks to recover damages for personal injuries which he allegedly sustained on March 24, 2009, while performing work on behalf of non-party Cunningham Duct Cleaning Company ("Cunningham") at premises owned by the defendant. The plaintiff alleges that he sustained serious injuries when he fell off an eight foot ladder while he was in the process of cleaning an air conditioning duct. In his complaint, he alleges, in effect, that the defendant is liable for his injuries pursuant to Labor Law §§ 240, 241(6) and 200, and common law negligence.

The defendant now moves for summary judgment dismissing the complaint. Specifically, the defendant contends: (1) the claims seeking recovery pursuant to Labor Law §§ 240 (1) and 241 (6) must

be dismissed because the activity that the plaintiff was engaged in at the time of his accident, to wit, vacuuming an air conditioning duct, is not an enumerated activity entitling him to protection under such provisions; and (2) the claims seeking recovery pursuant to Labor Law § 200 and common law negligence must be dismissed as the defendant did not exercise supervision or control over the plaintiff's work and the record is devoid of any evidence of a defect on the premises which contributed to the plaintiff's accident and of which the defendant had actual or constructive knowledge. The plaintiff cross-moves for partial summary judgment on the issue of the defendant's liability pursuant to Labor Law § 240 (1).

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, the defendant submits, *inter alia*, the deposition testimony of the plaintiff, the deposition testimony of Daniel Byrnes, a copy of the proposal for the work to be performed by Cunningham for the defendant, the affidavit of Daniel Byrnes, and the affidavit of Martin Racanelli. As is relevant to this motion, the plaintiff testified that, on the date of the accident, he was working for Cunningham and that his job duties included cleaning ducts and vents for air conditioning systems. He testified that these duct lines were present in the ceiling and that he was required to utilize a ladder in order to vacuum and clean them. The plaintiff testified that when he arrived at the subject premises on the date of the incident, his supervisor from Cunningham instructed him on the work to be performed and its location. According to the plaintiff, no one other than his supervisor instructed him on the work to be performed. Immediately prior to the accident, the plaintiff was instructed by his supervisor to go up the ladder that was present in the subject room and to vacuum the ducts in the ceiling. The ladder present in the room, an A-frame ladder that was approximately eight feet in height, was fully opened. The ladder was placed on top of a cloth tarp. The ladder had been set up by his supervisor prior to the time he entered the room. He had not used the ladder prior, did not observe the subject ladder prior to the date of the accident, and did not know who owned the subject ladder. The plaintiff did not check the ladder prior to climbing it and did not look at the floor where the ladder was placed. He went up the ladder, stood approximately three steps from the top, and used both hands to begin vacuuming out the duct. After approximately thirty seconds, the ladder gave way and fell out from under him. Prior to that time, he had not seen or felt anything indicating that the ladder was falling. His hand remained stuck in the duct line when the ladder fell, and he, thereafter, fell to the ground. He did not look at the ladder after the accident to see if there was anything was wrong with it. The plaintiff testified that he was alone in the room at the time of his accident.

During his deposition, Daniel Byrnes testified that he was employed as superintendent of Racanelli Construction, a construction company with an office located within the subject premises. He testified that the subject premises also had other tenants. Byrnes did not know who owned the premises in which Racanelli's office was located and had nothing to do with the maintenance work performed at the subject premises. Byrnes testified that he had never heard of the defendant. Byrnes first became aware of the plaintiff's accident shortly after its occurrence when the foreman from Cunningham notified him. He went to the location of the accident and spoke to the plaintiff. He was told that the plaintiff fell off a ladder while cleaning air conditioning ducts. Byrnes testified that he did not know who contracted with the plaintiff's employer for performance of work in the building and never saw any written agreement for the work which was being performed. He admitted that a written proposal agreement with which he was presented during his deposition appeared to be a written agreement between Racanelli and Cunningham for the performance of duct cleaning work at the subject premises, but testified that he had no knowledge of such agreement. Byrnes testified that he had never been involved with Cunningham prior to the date of the accident and had never been involved with the hiring of a duct cleaner at any properties owned by either Racanelli or any of Racanelli's corporate subsidiaries.

In his affidavit, Daniel Byrnes avers that although he was not asked during his deposition, the plaintiff was not using a ladder owned by Racanelli Construction at the time of his accident.

In his affidavit, Martin Racanelli avers that he is Senior Partner of the defendant, and that the defendant owns the subject premises. Racanelli avers that in February of 2009, his company hired Cunningham to clean the duct work at the premises. The contract for the work, which he signed and dated February 24, 2009, was signed on behalf of Racanelli Construction, which was another one of the companies that he owned. Racanelli avers that at no time did anyone from either the defendant or Racanelli Construction provide the plaintiff with a ladder to use in the performance of his job. It was Racanelli's understanding that Cunningham was going to supply all of the tools and equipment necessary to perform their work, including the ladders.

The copy of the proposal of work to be performed by Cunningham at the subject premises, which was dated February 24, 2009, indicated that the scope of work was HVAC duct cleaning and sanitizing, and that the total price of the work was $ 9,500.00. This proposal explained the cleaning process, the cleaning equipment that would be used and "decontaminations."

The branch of the defendant's motion seeking summary judgment dismissing the plaintiff's cause of action to recover damages pursuant to Labor Law § 240 (1) is denied. Section 240 (1) of the Labor Law requires all contractors and property owners and their agents: "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [to] 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." Notably, this section applies only where an employee is engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" at the time of his injury (Labor Law § 240 [1]; *see* ***Esposito v N.Y. City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]; ***Martinez v City of New York***, 93 NY2d 322, 690

NYS2d 524 [1999]; ***Enos v Werlatone, Inc.***, 68 AD3d 713, 890 NYS2d 109 [2d Dept 2009]), and summary judgment dismissing a claim based on this section is appropriate where the evidence submitted establishes that the plaintiff was not engaged in an enumerated activity at time of injury (*see e.g.* ***Beehner v Eckerd Corp.***, 3 NY3d 751, 788 NYS2d 637 [2004]; ***Esposito v N.Y. City Indus. Dev. Agency***, *supra*; ***Martinez v City of New York***, *supra*). The issue of whether any particular task "falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work" (***Prats v Port Auth. of N.Y. & N.J.***, 100 NY2d 878, 883,768 NYS2d 178 [2003]; *see* ***Fox v H&M Hennes & Mauritz, L.P.***, 83 AD3d 889, 922 NYS2d 139 [2d Dept 2011]).

In the instant matter, the evidence submitted by the defendant was insufficient to demonstrate a *prima facie* entitlement to summary judgment dismissing the cause of action seeking recovery pursuant to Labor Law § 240 (1) on the grounds that the plaintiff was not engaged in an enumerated activity at the time of his injury. The evidence submitted demonstrates that the plaintiff was cleaning air conditioning ducts on behalf of non-party Cunningham at the time of his accident. "Cleaning" is an enumerated activity under Labor Law § 240 (1). In interpreting the term "cleaning," the Court of Appeals has held that it is not limited to cleaning that was "part of a construction, demolition, or repair project" (***Broggy v Rockefeller Group, Inc.***, 8 NY3d 675, 680, 839 NYS2d 714 [2007]; *see* ***Dahar v Holland Ladder & Mfg. Co.***, 18 NY3d 521, 941 NYS2d 31 [2012]). As the defendant correctly contends, where a plaintiff is engaged in "routine maintenance" at the time of his injury, Labor Law § 240 (1) is inapplicable (*see* ***Selak v Clover Mgt., Inc.***, 83 AD3d 1585, 922 NYS2d 891 [4th Dept 2011]; ***Pound v A.V.R. Realty Corp.***, 271 AD2d 424, 706 NYS2d 886 [2d Dept 2000]; *see e.g.* ***Picaro v New York Convention Ctr. Dev. Corp.***, 97 AD3d 511, __NYS2d__ [1st Dept 2012]; ***Gleason v Gottlieb***, 35 AD3d 355, 826 NYS2d 633 [2d Dept 2006]; ***Detraglia v Blue Circle Cement Co.***, 7 AD3d 872, 776 NYS2d 342 [3d Dept 2004]), and courts have found that, under certain circumstances, cleaning activities may, in fact, constitute "routine maintenance" (*see* ***Soto v J. Crew Inc.***, 95 AD3d 721, 945 NYS2d 255 [1st Dept 2012]; ***Anderson v Olympia & York Tower B Co.***, 14 AD3d 520, 789 NYS2d 190 [2d Dept 2005]; ***Pound v A.V.R. Realty Corp.***, *supra*; ***Noah v IBC Acquisition Corp.***, 262 AD2d 1037, 692 NYS2d 283 [4th Dept 1999]; *see also* ***Dahar v Holland Ladder & Mfg. Co.***, *supra*). However, the evidence submitted here fails to demonstrate, as a matter of law, that the work being performed by the plaintiff at the time of his accident was "routine maintenance" versus protected "cleaning" activity (*see* ***Swiderska v New York Univ.***, 10 NY3d 792, 856 NYS2d 533 [2008]; ***Parraguirre v 27th St. Holding, LLC***, 71 AD3d 594, 898 NYS2d 114 [1st Dept 2010]; ***Weisman v Duane Reade, Inc.***, 64 AD3d 643, 883 NYS2d 137 [2d Dept 2009]). Indeed, the record is devoid of any evidence in support of such a finding (*see e.g.* ***Fox v H&M Hennes & Mauritz, L.P.***, *supra*).

In light of the defendant's failure to make a *prima facie* showing of entitlement to summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law § 240 (1), the branch of the motion seeking dismissal of such claim is denied without consideration of the plaintiff's opposition papers.

The branch of the defendant's motion which seeks summary judgment dismissing the plaintiff's cause of action to recover pursuant to Labor Law § 241 (6) is granted. Liability under Labor Law § 241 (6) is limited to accidents where the work being performed involves "construction, excavation or

demolition work" (*see* ***Toefer v Long Island R.R.***, 4 NY3d 399, 795 NYS2d 511 [2005]; ***Esposito v N.Y. City Indus. Dev. Agency***, *supra*; ***Peluso v 69 Tiemann Owners Corp.***, 301 AD2d 360, 755 NYS2d 17 [1st Dept 2003]). Construction work is further defined by regulation as "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure" (12 NYCRR 23-1.4 [b] [13]; *see* ***Mosher v State***, 80 NY2d 286, 590 NYS2d 53 [1992]; ***Enos v Werlatone, Inc.***, *supra*; ***Peluso v 69 Tiemann Owners Corp.***, *supra*). Here, it is undisputed that the plaintiff was not working in a construction area at the time of his accident and that his accident did not arise from construction, excavation or demolition work (*see* ***Enos v Werlatone, Inc.***, *supra*; ***English v City of New York***, 43 AD3d 811, 844 NYS2d 320 [2d Dept 2007]; ***Gleason v Gottlieb***, 35 AD3d 355, 826 NYS2d 633 [2d Dept 2006]). Accordingly, the defendant established, as a matter of law, that the plaintiff does not have a viable claim under Labor Law § 241 (6) (*see* ***Hurtado v Interstate Materials Corp.***, 56 AD3d 722, 868 NYS2d 129 [2d Dept 2008]; ***Bedneau v New York Hosp. Med. Ctr. of Queens***, 43 AD3d 845, 841 NYS2d 689 [2d Dept 2007]; ***Anderson v Olympia & York Tower B Co.***, *supra*; ***Detraglia v Blue Circle Cement Co.***, *supra*). In opposition, the plaintiff failed to raise a triable issue of fact (*see* ***Hurtado v Interstate Materials Corp.***, *supra*).

The branch of the defendant's motion which seeks summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action to recover pursuant to Labor Law § 200 and common law negligence is also granted. Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Gasques v State of New York***, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; ***Dooley v Peerless Importers***, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). When a worker's injuries result from an unsafe or dangerous condition existing at a work site, the liability of a party will depend upon whether the party had control of the place where the injury occurred, and whether it either created, or had actual or constructive notice of, the dangerous condition (*see* ***Cook v Orchard Park Estates, Inc.***, 73 AD3d 1263, 902 NYS2d 674 [3d Dept 2010]; ***Harsch v City of New York***, 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). When a worker's injuries result from the use of dangerous or defective equipment at the job site, or the method and manner of the work at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323[2d Dept 2008]; *see* ***Mancuso v MTA N.Y. City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; ***Dooley v Peerless Importers***, *supra*). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see* ***La Veglia v St. Francis Hosp.***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, *supra*; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see* ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007];

McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; ***Perri v Gilbert Johnson Enters.***, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work was performed (*see* ***La Veglia v St. Francis Hosp.***, *supra*; *cf.* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007]).

In the instant matter, the evidence submitted establishes that the plaintiff's injuries arose from the use of allegedly dangerous or defective equipment at the job site, to wit, a defective ladder, and that the defendant did not own, maintain or control this allegedly defective equipment. Moreover, the evidence submitted, including the plaintiff's own testimony, demonstrates that the defendant did not direct, supervise or control the means or methods by which the plaintiff performed his work (*see* ***La Veglia v St. Francis Hosp.***, *supra*; ***Rivera v 15 Broad St.***, 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; ***Dooley v Peerless Importers***, *supra*; ***Blessinger v Estee Lauder Cos.***, 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]; *see e.g.* ***Gleason v Gottlieb***, 35 AD3d 355, 826 NYS2d 633 [2d Dept 2006]). Thus, the defendant established a *prima facie* entitlement to summary judgment dismissing so much of the complaint as seeks to recover damages for a violation of Labor Law § 200 and common law negligence. In opposition, the plaintiff failed to raise a triable issue of fact as to the defendant's liability on these claims.

The cross-motion by the plaintiff for partial summary judgment on the issue of the defendant's liability pursuant to Labor Law § 240 (1) is denied, without prejudice, as procedurally defective. The plaintiff has failed to submit a complete set of the pleadings in support of his cross-motion for summary judgment, as required by CPLR 3212 (b). Accordingly, he is not entitled to summary judgment and denial of his cross-motion is required (*see* ***Ahern v Shepherd***, 89 AD3d 1046, 933 NYS2d 597 [2d Dept 2011]; ***Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.***, 84 AD3d 1153, 924 NYS2d 276 [2d Dept 2011]; ***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]).

Dated: September 10, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**