SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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VITO RACANELLI,

Plaintiff,

-against-

JEMSA REALTY, LLC,

Defendants.

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JEMSA REALTY, LLC,

Third-Party Plaintiff

-against-

NOUVEAU ELEVATOR INDUSTRIES, INC.,

Third-Party Defendant.

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Index No. 160119/2014
Motion Seq. No. 001

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendant Jemsa Realty, LLC (Defendant, or Jemsa) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Vito Racanelli's (Racanelli) Labor Law § 240 (1) and Labor Law § 241 (6) claims. Plaintiff opposes the motion and cross moves for partial summary judgment as to liability under both Labor Law provisions.

BACKGROUND

Plaintiff alleges that, on January 15, 2014, he was injured when he fell at a building owned by Jemsa in midtown Manhattan. Plaintiff was, at the time, an employee of third-party defendant Nouveau Elevator Industries, Inc (Nouveau). On that day, he was called to the subject building, which he had only visited once before, to repair a malfunctioning door on one of the elevators in the building (Racanelli tr at 19, NYSCEF doc No. 72).

Initially, Plaintiff took his tools in the elevator "motor room," then he went to the top floor of the building call the elevators and see if they were functioning properly (*id.* at 21-22). Plaintiff described the roof as being two-leveled, and the motor room being accessible by the second level of the roof. In order to get to the motor room, Plaintiff walked up a makeshift stairwell made of cinderblocks that, apparently, had three steps up (*id.* at 22-23). Before he reached the top of the makeshift stairwell, it collapsed: "I felt," Plaintiff testified, "my left foot get caught from under some type of piece of metal on the edge of the roof. And then the cinderblocks gave and I just went right down fast" (*id.* at 31).

Plaintiff filed the Complaint on October 15, 2014. Plaintiff alleges that Jemsa is liable under Labor Law §§ 241 and 241 (6), as well as Labor Law § 200 and common-law negligence. Jemsa brought a third party action against Nouveau, which was subsequently discontinued. In this motion, Jemsa argues that Plaintiff was engaged in routine maintenance and, thus, is not covered by the protections afforded by Labor Law § 240 (1) and 241 (6). Plaintiff argues that his work overlapped with and was pursuant to a project to renovate the elevators in the subject building.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... 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 Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Activity

Section 240 (1) specifically enumerates seven activities that qualify under the statute as covered activity: "erection, demolition, repairing, altering, painting, cleaning or pointing." In contrast, if a worker is involved in "routine maintenance," courts have found that the worker is not covered by the protections of the statute (*see e.g. Smith v Shell Oil Co.*, 85 NY2d 1000

[1995] [a worker injured while changing a lightbulb on an illuminated sign was involved only in routine maintenance and was not engaged in activity covered by the statute]).

The Court of Appeals has held that a task characterized as "routine maintenance" is excluded "in recognition of the fact that such a task generally does not involve the type of heightened elevation-risks that justify extension of the provision's special protection" (*Soto v J. Crew Inc.*, 21 NY3d 562, 568 [2013] [holding that a worker who was injured while dusting a 6-foot display shelf from 4-foot ladder was not entitled to the protections of the statute]). However, the Court of Appeals has held that courts should take a broad view of the work in question, as "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth of N.Y. and N.J.*, 100 NY2d 878, 882 [2003]).

In *Prats*, the Court of Appeals held that the plaintiff was entitled to the protections of the statute even though he was only engaged in the non-enumerated activity of inspection at the time of his injury. The factors that led the Court of Appeals to this decision were: the plaintiff's "position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred" (*id.* at 883).

In support of its argument that Plaintiff's injury arose in the context of routine maintenance, rather than work covered by the statute, Jemsa submits a Vertical Transportation Preventive Maintenance Service Contract dated May 29, 2009 (the Maintenance Contract) (NYSCEF doc No. 77). The contract covers maintenance of the three elevators in the subject building. Jemsa also submits the deposition transcript of Jason Elo (Elo), its managing member,

who testified that there was elevator modernization work done on the three elevators in the building (NYSCEF doc No. 73 at 20-21). John Jones, Jemsa's superintendent of the building, testified that Plaintiff came to the building to service the elevator (NYSCEF doc No. 74 at 46).

At his deposition, Plaintiff was asked about the nature of his work on the day of his accident:

> "Q: Did you get a call that morning to go there for something that you had to fix or was it routine maintenance or something else?
> A: They called me and sent me there to check all the elevators and check the safety"

(NYSCEF doc No. 72 at 18).

Jemsa also submits deposition testimony from Donald Cristiano (Cristiano) Nouveau's general manager of service. Cristiano testified that Nouveau hired Plaintiff as a maintenance mechanic (NYSCEF doc No. 75 at 9). Cristiano noted that, as a maintenance mechanic, he does "troubleshooting, maintaining, and housekeeping of the equipment" (*id.* at 36). Cristiano also stated that Plaintff is "not a repair mechanic. He's not a modernization mechanic" (*id.*).

Here, Plaintiff's own testimony that he was called to inspect the elevators in the subject building provides Jemsa with a *prima facie* showing that Plaintiff's accident arose in the context of routine maintenance rather than one of the activity's covered under the statute. An inspection is plainly part and parcel of routine maintenance. This showing is buttressed by Cristiano's testimony as to what a maintenance mechanic does, which indicates that modernization work is outside of Plaintiff's expertise and responsibilities, as well as the Maintenance Contract, which shows that Jemsa contracted with Nouveau to perform routine maintenance.

In opposition, Plaintiff argues, citing to *Diresta v 150 W. End Ave. Apt Corp* (15 Misc 3d 1146 [A] [Sup Ct, Richmond County 2007) that an elevator re-modernization project falls within the ambit of activity covered by section 240 (1). Moreover, Plaintiff argue that work on the

elevator modernization project was still ongoing at the time of Plaintiff's accident and that Nouveau conducted the renovation work.

In support, Plaintiff cites to Jones's deposition transcript. Specifically, Jones, Jemsa's superintendent, testified that the renovation work did was completed until "around 15" (NYSCEF doc No. 74 at 46). At his deposition, Jones was asked specifically whether Plaintiff worked on the re-modernization project:

> "Q: Mr. Racanelli, was he there on the day of the accident as part of that remodelizing (sic) project?
> A: They always come to service, and he came to service"

(*id.*).

Here, Plaintiff fails to raise an issue of fact as to whether he was involved in covered activity. While it is clear that Nouveau did modernization work on the subject elevators, it is equally clear that Plaintiff's work was pursuant to the separate Maintenance Contract. This circumstance is distinguishable from *Prats*, as Plaintiff did not regularly engage in an enumerated activity and while his company contracted to engage in an enumerated activity, his work was done pursuant to a separate maintenance contract. As Plaintiff was engaged in routine maintenance, the branch of Jemsa's motion seeking summary judgment dismissing Plaintiff's section 240 (1) claim must be granted, and the branch of Plaintiff's motion seeking partial summary judgment as to liability on that claim must be denied.

Labor Law § 241 (6)

The activities covered by Labor Law § 241 (6) are more tightly circumscribed than the activities covered by section 240 (1). Only "construction, excavation or demolition" are covered under the statute. As discussed above, Plaintiff was engaged in routine maintenance at the time of his accident. As such, the branch of Jemsa's motion seeking summary judgment dismissing

Plaintiff's section 241 (6) claim must be granted, and the branch of Plaintiff's motion seeking partial summary judgment as to liability on that claim must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Jemsa Realty, LLC's motion for summary judgment dismissing Plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action are granted; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment is denied; and it is further

ORDERED that counsel for defendant shall serve of copy on this decision, along with notice of entry, on all parties within 15 days of entry.

Dated: December 3, 2018

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.