Allen v DeMatteis
2014 NY Slip Op 33351(U)
December 11, 2014
Supreme Court, Suffolk County
Docket Number: 10-10335
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 10-10335

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-29-14
ADJ. DATE 9-16-14
Mot. Seq. # 009 - MD

EDWARD W. ALLEN and MARIA ALLEN,

Plaintiffs,

-against-

LEON D. DEMATTEIS CONSTRUCTION CORP., CONSENTINI ASSOCIATES, INC., RJR MECHANICAL, INC., COASTAL ELECTRIC CONSTRUCTION, GWATHMEY, SIEGEL & ASSOCIATES ARCHITECTS, LLC, JACOBS ENGINEERING NEW YORK, INC.,

Defendants.

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LEON D. DEMATTEIS CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

RJR MECHANICAL, INC., INTERSTATE FIRE & CASUALTY COMPANY and ANRON SHEET METAL CORP.,

Third-Party Defendants.

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RJR MECHANICAL, INC.,

Second Third-Party Plaintiff,

- against -

ANRON SHEET METAL CORP., FIREMAN'S FUND INSURANCE COMPANY/ INTERSTATE FIRE INSURANCE CO., LIBERTY MUTUAL/PEERLESS INSURANCE COMPANY and THE SCHAEFER AGENCY, INC.,

Second Third-Party Defendants.

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Upon the following papers numbered 1 to 37 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 28 - 32 ; Replying Affidavits and supporting papers 33 - 37 ; Other The parties' Memoranda of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Edward Allen for partial summary judgment on his complaint as against defendant/third-party plaintiff Leon DeMatteis Construction Corp. is denied; and it is further

ORDERED that the court, sua sponte, grants defendants summary judgment dismissing plaintiff's claims under Labor Law §240(1).

Plaintiff Edward Allen commenced this action to recover damages for personal injuries allegedly sustained on January 5, 2009, when he fell into an open shaft from a crawl space located in the basement mechanical equipment room of a building housing the United States Mission to the UN, located at 799 1st Ave, Manhattan, New York. At the time of the accident, plaintiff was responding to a change order issued by the project engineers which required the moving of a piece of HVAC equipment known as a VAV box. The accident occurred after plaintiff, having climbed into the crawl space, took several steps towards the edge of the floor and fell sideways into an open shaft, dropping seven to ten feet to the ground. The building is owned by the United States federal government, and managed by the General Services Administration (the "GSA"). The GSA hired defendant/third-party plaintiff Leon DeMatteis Construction Corp. ("DeMatteis") as the general contractor for the project. DeMatteis hired defendant/third-party defendant RJR Mechanical Inc. ("RJR") to perform the HVAC and mechanical work for the project. RJR subcontracted a portion of its work to plaintiff's employer, defendant/third-party defendant Anron Sheet Metal ("Anron"). Other defendants to this action include the electrical contractor for the project, Coastal Electric Construction, the project engineers, Cosentini Associates, Inc., and Jacobs Engineering New York, Inc., and the project architect, Gwathmey, Siegel & Associates Architects, LLC. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff's wife, Maria Allen, for damages related to loss of services and the payment of medical expenses. Issue was joined and DeMatteis subsequently brought a third-party action against Anron, RJR, and RJR's insurance carrier, Interstate Fire & Casualty Company.

Plaintiff now moves for summary judgment on his complaint as against DeMatteis, arguing that it violated Labor Law §§240 (1) and 200 by failing to provide him with a safe place to work or with adequate safety equipment such as guardrails, hole coverings, or other protective devices designed to prevent or break his fall. Plaintiff further asserts that DeMatteis violated 12 NYCRR §23-1.7(b)(1)(i) and 12 NYCRR §23-1.16 (b), which regulate, respectively, the covering of hazardous openings and the use of safety belts, harnesses and lifelines. DeMatteis opposes the motion, arguing that the building should be treated as a federal enclave, since it was acquired by the United States and, therefore, current New York Labor Law rules providing for strict liability are inapplicable. Alternatively, DeMatteis asserts that plaintiff failed to demonstrate his prima facie entitlement to summary judgment, as triable issues exist as to whether he was provided with adequate safety equipment, and whether his own negligent conduct in failing to heed signs warning of the open utility shaft was the sole proximate cause of the accident.

DeMatteis also asserts that the motion should be denied as premature, since no witness from plaintiff's employer possessing knowledge of what safety devices and instructions were given to plaintiff has been deposed. Additionally, DeMatteis argues that plaintiff failed to state a cause of action under Law §241(6), since he failed to demonstrate that 12 NYCRR §23-1.7(b)(1)(i), which regulates hazardous openings, is applicable under the circumstances of this case, or that its alleged violation was a proximate cause of his accident. With respect to plaintiff's claims under the common law and Labor Law §200, DeMatteis argues that it cannot be held liable for any alleged breach of these rules, since it neither controlled nor supervised plaintiff's work, and it did not have actual or constructive notice of the alleged dangerous condition.

Initially, the Court notes that DeMatteis failed to establish that the premises in question is a federal enclave and that current Labor Law and construction safety regulations are inapplicable to plaintiff's accident. Significantly, DeMatteis failed to adduce any evidence that New York State ceded exclusive federal jurisdiction of the premises to the United States, or that United States formally accepted such jurisdiction (*see* ***Abdi v Brookhaven Sci. Assocs., LLC***, 447 FSupp2d 221 [E. D. N.Y. August 16, 2006]; ***Bachman v Fred Meyer Stores, Inc.***, 402 F Supp 2d 1342 [D. Utah, Oct. 6, 2005]; ***Fuller v Tennessee Valley Authority***, 2007 WL 2077639 (E.D.Tenn. Jul 13, 2007]; ***Sinicki v General Elec. Co.***, 2005 WL 1592961 [N. D. N.Y. July 7, 2005]). DeMatteis' mere submission of a copy of an order, dated November 19, 1957, by the United States District Court for the Southern District of New York granting the United States possession of the subject premises is insufficient to establish that the premises is a federal enclave (*see* ***Abdi v Brookhaven Sci. Assocs., LLC***, *supra*; ***Bachman v Fred Meyer Stores, Inc.***, *supra*; ***Fuller v Tennessee Valley Authrotity***, *supra*).

Nevertheless, the branch of plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim is denied. "The extraordinary protections of Labor Law §240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (***Nieves v Five Boro A.C. & Refrig. Corp.***, 93 NY2d 914, 915-916, 690 NYS2d 852 [1999], *quoting* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). Liability under the statute exists when a worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (***Broggy v Rockefeller Group, Inc.***, 8 NY3d 675, 681, 839 NYS2d 714 [2007]). The existence of a lower level

below the floor where a plaintiff performs his work, without more, does not create an elevation-related risk, nor does his mere proximity to a trench or an opening in the floor give rise to the extraordinary statutory protections of Labor Law §240 (1) (*see* ***Coleman v Crumb Rubber Mfrs.***, 92 AD3d 1128, 940 NYS2d 170 [3d Dept 2012]; ***Pursel v Wellco, Inc.***, 6 AD3d 1096, 775 NYS2d 626 [2d Dept 2004]; ***Paolangeli v Cornell Univ.***, 296 AD2d 691, 745 NYS2d 593 [3d Dept 2002]; ***D'Egidio v Frontier Ins. Co.***, 270 AD2d 763, 765-766, 704 NYS2d 750 [3d Dept 2000]; *see also* ***Salazar v Novalex Contr. Corp.***, 18 NY3d 134, 936 NYS2d 624 [2011]). Rather, "a work site is elevated within the meaning of the statute where the required work itself must be performed at an elevation . . . such that one of the devices enumerated in the statute will safely allow the worker to perform the task" (***Leshaj v Long Lake Assoc.***, 24 AD3d 928, 929, 805 NYS2d 692 [3d Dept 2005]; *see* ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]).

Here, inasmuch as plaintiff was walking on the permanent floor of the utility room's crawl space, and was not engaged in any task that created an elevation-related risk at the time of the accident, he failed to establish, prima facie, a violation of Labor Law §240 (1) (*see* ***Coleman v Crumb Rubber Mfrs.***, *supra*; ***Pursel v Wellco, Inc.***, *supra*; ***Wells v British Am. Dev. Corp.***, 2 AD3d 1141, 770 NYS2d 161 [3d Dept 2003]; ***Paolangeli v Cornell Univ.***, *supra*; ***Mancini v Pedra Constr.***, 293 AD2d 453,740 NYS2d 387 [2d Dept 2002]; *compare* ***Pitts v Bell Constructors, Inc.***, 81 AD3d 1475, 916 NYS2d 731 [4th Dept 2011] [Although a fall into an open trench from the ground is generally insufficient to establish a violation of Labor Law §240(1), plaintiff established his prima facie case for violation of the statute when he fell while performing working on a column that was suspended over an open trench]). Further, in view of this determination, the court searches the record pursuant to CPLR 3212(b), and grants, sua sponte, summary judgment dismissing plaintiff's Labor Law §240(1) claims against all of the defendants in this action.

As to the branch of plaintiff's motion for summary judgment on his Labor Law §241(6) claims against DeMatteis, the statute requires owners and general contractors 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 (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). To recover damages on a cause of action alleging a violation of Labor Law §241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). Further, the rule or regulation alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, plaintiff's bill of particulars asserts violations of Article 1926 of OSHA and various provisions of the New York Industrial Code, including, among others, 12 NYCRR §23-1.7 (b) (1). It is noted that the alleged violation of an OSHA standard does not provide a basis for liability under Labor Law §241(6) (*see* ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***McSweeney v Rochester Gas & Elec. Corp.***, 216 AD2d 878, 629 NYS2d 356 [4th Dept 1995]).

Nevertheless, 12 NYCRR §23-1.7 (b) (1), which regulates " hazardous opening into which a person may step or fall," sets forth a specific, positive command (***D'Egidio v Frontier Ins. Co.***, *supra* at 765). The regulation requires hazardous openings into which a person may step or fall to be "guarded by a substantial cover fastened in place or by a safety railing" (12 NYCRR §23-1.7 [b] [1] [I]). Thus, where, as here, it is undisputed that the shaft in question was large enough for plaintiff to fall through to a lower area and no cover, safety railing, or other device was in place to prevent such fall, the complaint sufficiently alleges a violation of Labor Law §241(6) (*see* ***Messina v City of New York***, 300 AD2d 121, 123, 752 NYS2d 608 [2002]; ***Alvia v Teman Elec. Contr.***, 287 AD2d 421, 423, 731 NYS2d 462 [2001], lv denied 97 NY2d 749, 742 NYS2d 607 [2002]). However, since the proven violation of 12 NYCRR §23-1.7 (b)(1) constitutes only "some evidence of negligence" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 502, 601 NYS2d 49 [1993]), plaintiff may not be granted partial summary judgment on the claim. Rather, evidence of such a violation raises factual issues to be determined by the trier of fact as to "whether [the] violation was a proximate cause of [plaintiff's] injury, as well as questions regarding his comparative fault" (***Wells v British Am. Dev. Corp.***, *supra* at 1144; *see* ***Milanese v Kellerman***, 41 AD3d 1058, 838 NYS2d 256 [3d Dept 2007]; ***Copp v City of Elmira***, 31 AD3d 899, 819 NYS2d 167 [3d Dept 2006]).

Finally, inasmuch as the accident arose out of an alleged dangerous condition on the premises, plaintiff failed to demonstrate his prima facie entitlement to summary judgment on his common law and Labor Law §200 claims by eliminating triable issues of fact as to whether DeMatteis had actual or constructive notice of the alleged dangerous condition, whether the condition was open and obvious, and whether plaintiff was aware of the condition prior to his accident (*see* ***Baten v Wehuda***, 281 AD2d 366, 722 NYS2d 534 [1st Dept 2001]; ***Bombard v Central Hudson Gas & Elec. Co.***, 229 AD2d 837, 645 NYS2d 909 [3d Dept 1996]; ***Krempa v F&B Constr.***, 233 AD2d 918, 649 NYS2d 559 [4th Dept 1996]; ***Brezinski v Olympia & York Water St. Co.***, 218 AD2d 633, 631 NYS2d 23 [1st Dept 1995]). Accordingly, the branch of plaintiff's motion for partial summary judgment on his common law and Labor Law §200 claims as against DeMatteis also is denied.

Dated DEC 11 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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