Xochimitl v Balsamo
2015 NY Slip Op 31277(U)
June 30, 2015
Supreme Court, Kings County
Docket Number: 500431/12
Judge: Karen B. Rothenberg

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
FLORENTINO XOCHIMITL,

Plaintiff,

Index No: 500431/12

-against-

DECISION AND ORDER

PATRICIA BALSAMO and GERARD BALSAMO,

Defendants,

x

Recitation as required by CPLR 2219(a), of the papers considered in this motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	2
Reply Papers.....	3

Upon the foregoing cited papers, the Decision/Order on this motion:

In this action to recover damages for personal injuries, plaintiff moves for an order pursuant to CPLR 3212 granting him partial summary judgment under Labor Law §§ 240(1) and 241(6).

On May 23, 2011, plaintiff, who was employed by non-party Lopopolo Iron Works as a laborer, was allegedly injured when he was struck in the head by a falling piece of concrete at the premises located at 1151 Bay Ridge Parkway, Brooklyn, owned by the defendants. Plaintiff testified that on the day of his accident, he and his co-worker, Felix, were instructed by their employer, Joseph Lopopolo, to demolish a second floor porch made of wood and concrete at the defendants' private home. Prior to the demolition work, plaintiff and Felix covered the first floor porch, which was located directly underneath the second floor porch, as well as the stairs leading to the first floor porch, with plywood. Plaintiff and Felix then began breaking up the front area of the second floor porch with a jack hammer. While the men were working, Joseph arrived and asked them to place more plywood on the first floor. The men climbed down to the first floor and began to lay more plywood as instructed. To make sure the wood would not move around, plaintiff began screwing the wood together with the aid of

a drill. As plaintiff was about to begin screwing the pieces of wood together on the front stairs leading to the porch, he was struck in the head by a chunk of concrete that fell off of the second floor porch. Plaintiff testified that he was not wearing a hard hat at the time of the accident and had not been provided one by his employer for his work that day.

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 Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974 [2003]). The statute was designed to protect workers against such "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Liability under Labor Law §240(1), however, is not limited to cases in which the falling object is in the process of being hoisted or secured (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757,758-759 [2008]). Rather, liability may be imposed where the object that fell was a "load that required securing for the purposes of the undertaking at the time it fell" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Here, plaintiff makes a *prima facie* entitlement to judgment as a matter of law on the issue of liability under Labor Law §240(1). Plaintiff has demonstrated that he was engaged in an activity subject to the protections of Labor Law §240(1) (*see Runner v. New York Stock Exch. Inc.*, 13 NY3d 599 [2009]) and that the concrete which fell on him constituted an object that "required securing for the purpose of the undertaking at the time it fell." (*Narducci v. Manhasset Bay Assoc.*, *supra*; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730 [2d Dept 2011].

In opposition, defendants initially argue that plaintiff's motion for summary judgment should be denied because triable issues of fact exist as to whether as owners of the two-family home where plaintiff was injured, they qualify for the homeowner exemption from liability (see Labor Law §240[1]; 241[6]). [1992]). The court is not persuaded. Although defendants might not have been deriving income from the vacant home on the date of plaintiff's accident, the premises had been used exclusively for commercial purposes i.e. a rental property since it was purchased in 1986 (*see Van Amerogen v Donnini*, 78 NY2d 880 [1991] and the work contracted for was for the sole purpose of renovating the home for sale to a third party (*see Freeman v Advanced Design Prods., Inc.*, 27 AD3d 1112 [4th Dept 2006]). Accordingly, defendants fail to raise a triable issue of fact as to their entitlement to the homeowner exemption (*see Lombardi v Stout*, 80 NY2d 290 [1992]).

Defendants also fail to raise a triable issue of fact as to the existence of Labor Law §240(1) violation. Despite defendants' contentions, the work being performed by plaintiff in the area below the demolition site subjected him to a significant risk of being struck by falling debris, and, thus, defendants were obligated to provide appropriate safety devices to secure the material that fell (*see Kyu-To v. Triangle Equities, LLC*, 84 Ad3d 1058 [2d Dept 2011]).

Moreover, as plaintiff's employer specifically directed him to work in the area where the debris fell, defendants failed to show that the plaintiff's actions were the sole proximate cause of his accident (*see Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800 [2d Dept 2010].

Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). A plaintiff must establish the violation of an industrial code provision which sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In his verified bill of particulars, plaintiff asserts that defendants violated Industrial Code (12 NYCRR) §§ 23-1.7(a), 23-1.8(c)(1) and 23-3.3(g). Defendants assert that Industrial Code §§ 23-1.7(a) and 23-3.3(g) are not applicable to the facts of this case and that plaintiff's motion seeking summary judgment for a violation of Labor Law § 241(6) under these sections should be denied.

Industrial Code §23-1.7(a) provides for protection from overhead hazards in areas normally exposed to falling material or objects. The section sets forth specific standards for the planking required and the use of a supporting structure for overhead protection in areas where employees are required to work or pass and provides for barricades, fencing or the equivalent to prevent inadvertent entry in areas where employees are not required to work or pass. Here, plaintiff's deposition testimony and supporting affidavit establish that his work below the demolition site was an area that was normally exposed to falling objects (*cf Portillo v Roby Anne Dev.*, LLC, 32 AD3d 421 [2d Dept 2006]), that he was not provided overhead protection, and as a result he was injured by a piece of concrete that fell down from the demolition site. Plaintiff's testimony also demonstrates that he was free from comparative fault as he was directed by his employer to work in the area where he sustained his injury (*see Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 780 [2d Dept 2015]). Plaintiff thereby demonstrates his *prima facie* entitlement to judgment as a matter of law on the Labor Law § 241(6) cause of action *(see Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 [2d Dept 2008]). In opposition, defendants fails to raise a triable issue of fact as no affidavit is submitted from a party with knowledge or from an expert to support counsel's assertions that the "scope of the project did not allow for the measures" provided by §23-1.7(a) and that "the relatively small work area prevented the use of such a supporting structure."

Plaintiff also establishes, *prima facie*, his entitlement to judgment as a matter of law on his cause of action to recover damages pursuant to Labor Law § 241 (6), predicated on a violation of Industrial Code § 23-1.8 (c) (1). Plaintiff's testimony and affidavit demonstrate that he was not provided with a safety hat and that he was injured when a piece of concrete fell upon him (*see Quinteros v P. Deblasio, Inc.*, 82 AD3d 861 [2d Dept 2011]). In their opposition, defendants do not raise any arguments against the granting of this portion of defendant's motion for partial summary judgment. Plaintiff, however, fails to demonstrate the

applicability of Industrial Code §23-3.3(g) as his deposition testimony reflects that he was not working in an area "within" a building or structure as required by the provision (*cf Murtha v Integral Constr. Corp.*, 253 AD2d 637 [1st Dept 1998]).

Accordingly, plaintiff's motion for partial summary judgment is granted as to his causes of action based upon Labor Law §240(1) and §241(6), solely to the extent predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.7(a) and 23-1.8(c)(1), and otherwise denied.

This constitutes the decision/order of the court.

Dated: June 30, 2015

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court

FILED
KINGS COUNTY CLERK
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