Marin v 55 West 95th St. Owners, Inc.
2015 NY Slip Op 31430(U)
July 30, 2015
Supreme Court, New York County
Docket Number: 152910/2012
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ROBERT MARIN,

Plaintiff,

-against-

55 WEST 95TH STREET OWNERS, INC, and
AKAM ASSOCIATES, INC,

Defendants.

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Index Number: 152910/2012

Motion Seq. No.:

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Notice of Cross-Motion - Affirmation - Exhibits 2
Affirmation in Opposition to Cross-Motion 3
Reply Affirmation in Further Support of Cross-Motion 4

Background

On January 24, 2012, plaintiff, Robert Marin, an employee of Standard Waterproofing, sustained serious injuries while performing work at the premises located at 55 West 95th Street, New York, NY. Plaintiff's job on the day of the accident was to build a scaffold in order to remove loose materials from the exterior of the building. Plaintiff served as the foreperson and was working with two other employees from Standard Waterproofing.

The workers were required to bring pulleys, cables and ropes up to the roof of the building to build the scaffold. Then they would lower the ropes and pulleys from the roof to a wooden platform on the ground which was then raised to the upper floors of the building. Once the scaffold was constructed, the workers would have the means of removing the loose materials from the exterior of the building.

The superintendent of the building instructed the workers, including plaintiff, to take a stairway that ran from the sidewalk to the basement. From the basement, the workers were to take the freight elevator to the roof. The stairway in question was constructed in 1921 and never replaced. On the day of the accident, at approximately 8:00 AM, plaintiff intended to transport two metal hooks to the roof of the building.

In the complaint, plaintiff alleges that as he was placing his right foot on the stairs from the landing, he tripped on a broken portion of cement at the edge of the landing, where there was a piece of metal strip exposed, and fell down the flight of stairs. Plaintiff states he had seen this broken or missing portion of the cement at the edge several times days before the accident and informed the superintendent. Plaintiff alleges violations of Labor Law §§ 200, 240, 241, and 242-a.

In their answer, defendants raise several defenses: (1) plaintiff's injuries and damages were caused solely and wholly by reason of the plaintiff's carelessness and negligence; (2) plaintiff fails to state a viable cause of action against defendants; (3) plaintiff had knowledge or, appreciated and voluntarily assumed the risks incident to the activities in which he was engaged.

Defendants 55 West 95th Street Owners, Inc. and Akam Associates Inc. (collectively, defendants), now move to dismiss plaintiff's complaint. Defendants argue that (1) a permanent staircase is outside the reach of Section 240(1); (2) plaintiff's claim pursuant to Labor Law § 241, predicated on 12 NYCRR 23-1.5, and 1.5(a) ©, is insufficient; (3) plaintiff's claim pursuant to Labor Law § 242 is non-existent.

Plaintiff now cross-moves, pursuant to CPLR 3212, for summary judgment on his Labor Law §§ 240(1) and 241(6) claims. In support of his cross-motion, plaintiff argues that: (1) plaintiff was a scaffold worker for whom the staircase in question was the sole means of access to perform work; (2) a staircase, although a permanent structure, may fall within the scope of Labor Law § 240(1) if it is the sole means of access to the work area; (3) defendants are liable under Labor Law § 241(6) predicated on violations of Industrial Code 23-1.7(e) and (f). Plaintiff does not oppose dismissal of his Labor Law § 242-a claim.

Discussion

A. Defendants' Motion for Summary Judgment

Labor Law § 200 simply "reiterates the general common-law standard of care." Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). In Vasquez v Urbahn Ass. Inc., 79 AD3d 493, 495 (1st Dep't 2010), the court stated that

> since a fact issue existed as to whether the corporation and the LLC had prior notice that the stairs were defective and thus a question as to whether it was foreseeable that they could fail or collapse, summary judgment in their favor with respect to the common law negligence and Labor Law § 200 claim was properly denied.

Here, defendants failed to meet their burden of establishing the absence of any material issues of fact and entitlement to judgment dismissing plaintiff's Labor Law § 200 claim as a matter of law. Plaintiff and the superintendent of the building present conflicting testimony as to the alleged notice to defendants that the stairway was defective, raising an issue of fact.

B. Plaintiff's Cross-Motion for Summary Judgment

On the other hand, plaintiff met his burden of establishing prima facie entitlement to judgment on his Labor Law § 240(1) and § 241(6) claims, and defendants failed to identify any material issues of fact requiring a trial. Labor Law § 240(1) provides, in part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Many First Department cases flesh out the scope of § 240(1). For example, in Gory v Neighborhood Hous. Dev. Fund Co., Inc., 113 AD3d 550 (1st Dep't 2014), the trial court stated

> . . . the fact that the stairway on which plaintiff was working when he was injured was originally constructed as a permanent structure does not remove it from the reach of Labor Law Section 240(1). Not only had the stairway provided the sole means of access to the floors of the building during the demolition phase, but, in addition, it was an elevated surface on which plaintiff was required to work to complete his task of breaking up the marble pieces covering each step.

Additionally, in McGarry v CVP 1 LLC, 55 AD3d 441 (1st Dep't 2008), the trial court correctly granted summary judgment on plaintiff's 240(1) claim as "the makeshift staircase was being used as access to different levels of the work site, including the floor where the injured plaintiff's safety equipment was stored in a Bovis shanty, and served as the functional equivalent of a ladder."

The aforementioned decisions strongly suggest that the stairway in question falls within the broad scope of 240(1). Although plaintiff was constructing a scaffold, ironically a safety device, the defendants should have provided him with an adequate means to access the elevational differences. Runner v New York Stock Exch., Inc., 13 NY3d 599 (2009) (240(1) covered injured worker when heavy spool fell down staircase). Plaintiff had no other means to execute his work as the superintendent admittedly told all employees to use that specific stairway. Furthermore, defendants own all elements of the building, which includes the stairway, making them "owners" under the definition of Labor Law § 240(1).

Defendants provide two cases from the Second and Third Department purportedly adopting a narrow view of the scope of Labor Law § 240(1). However, they fail to distinguish any of the First Department cases cited by plaintiff. It is well settled that strict liability under Labor Law § 240 is meant to cover a fall from an elevated work surface. See generally Vasquez v. Cohen

Brothers Realty Corp., 105 AD3d 595 (1st Dep't 2013). Plaintiff clearly falls within the class of people the statute was meant to protect, and therefore is entitled to summary judgement on his Labor Law § 240(1) claim.

Labor Law § 241(6) provides, in part, as follows:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

"To prevail under Labor Law 241(6), the plaintiff is required to establish a violation of an implementing regulation that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles." Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). The Industrial Code sets forth a specific standard of care, and enumerates several methods of providing a safe workplace. Therefore, 241(6) is applicable if predicated upon alleged violations of the Industrial Code. Plaintiff predicated his 241(6) claims on Industrial Codes 23-1.7(e) and (f).

Industrial Code 23-1.7(e)(1) refers to passageways and states: All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. Industrial Code 23-1.7(f) refers to vertical passages and states: Stairways, ramps or runways shall be provided as a means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which ladders or other safe means of access shall be provided.

Defendants classify the staircase as a "passageway," which means they are conceding that plaintiff predicated his 241(6) claims upon the appropriate Industrial Codes. As the First Department explained in McGarry v CVP LLC, supra, the trial court erred

> in summarily dismissing the section 241(6) claim because defendants CVP (the property owner) and Avalon Bay (the general contractor) failed to establish that Industrial Code (12 NYCRR) § 23-1.7 (f), governing vertical passageways, was inapplicable to the facts of this case. Inasmuch as plaintiffs have plainly demonstrated the unsafe nature of the staircase as the means of access to different working levels, summary judgment is properly granted in their favor.

Furthermore, in Miano v Skyline New Homes Corp., 37 AD3d 563, 565 (2007), the court stated

> The court's determination that the sole proximate cause of the accident was the "plaintiff's own failure to exercise due care by attempting to reach the basement via wooden forms which he knew, or should have known, were never intended to be used as

> stairs," was not established as a matter of law by the record. To the contrary, at his deposition, the plaintiff testified that he had been specifically directed to perform work in the basement area on the day of the accident, despite the fact that access to the basement was normally through the area where the wooden forms had been placed.

Here, as in McGarry and Miano, plaintiff's injuries were not a result of plaintiff's own negligence in choosing the particular method of descending from the elevated work site. Plaintiff testified that he was told by the superintendent to use the stairway in issue; defendants failed to refute plaintiff's testimony. Defendants were obligated to provide plaintiff with an alternative means to access the various elevations, as per Industrial Code 23-1.7(f), which they did not. Under these circumstances, plaintiff has established entitlement to summary judgement on his Labor Law § 241(6) claim.

Conclusion

Defendants' motion to dismiss plaintiff's Labor Law § 200 claim is denied. Plaintiff's cross-motion for summary judgment on the issue of liability under Labor Law § 240(1) and § 241(6) is granted.

Dated: July 30, 2015

Arthur F. Engoron, J.S.C.