Storrs v Altec Indus., Inc.
2018 NY Slip Op 30165(U)
January 26, 2018
Supreme Court, New York County
Docket Number: 160400/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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THOMAS STORRS and ELIZABETH STORRS,

Plaintiffs

Index No.160400/2014

v

DECISION AND ORDER

ALTEC INDUSTRIES, INC., ORANGE AND ROCKLAND UTILITIES, INC., and SISTERS OF LIFE

Defendants.

MOT SEQ 006, 007

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from an accident at a construction site, the plaintiffs move pursuant to CPLR 3212 for summary judgment on the issue of liability on the cause of action to recover for violation of Labor Law § 240(1), insofar as asserted against the defendant Orange and Rockland Utilities, Inc. (ORU) (SEQ 006). ORU separately moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it (SEQ 007).

The plaintiffs' motion is granted, and ORU's motion is granted in part.

II. BACKGROUND

While working for SPE Utilities, Inc. (SPE), as a foreman/journeyman electrical lineman, the plaintiff Thomas Storrs was dispatched to work on a utility pole conveying electrical cables, located adjacent to property owned by the defendant Sisters of Life in Suffern, New York. That pole had recently been taken out of service by ORU, which had installed a new pole nearby as a replacement. SPE was retained by ORU, and Storrs was assigned the task of releasing an electrical line from the pole that had been taken out of service but not yet removed. SPE provided Storrs and his coworkers with a "backyard machine" (the machine) that was equipped with an aerial bucket to allow work on the upper portions of any existing pole.

During the course of Storrs's work, his coworker, Cory Knapp, became trapped in the aerial bucket when the bucket became stuck in an elevated position. SPE mechanic Donald Sullivan was called to the work site to assist Knapp, and Sullivan arrived a short time thereafter, equipped with a bypass switch. Sullivan utilized the bypass switch to override the machine's apparently dysfunctional outrigger sensors, enabling him to retract the machine's boom, and lower the bucket to an elevation where it was safe for Knapp to exit from it. In this manner, Knapp was rescued from the bucket.

Storrs, Knapp, and coworker John O'Connor together removed

the machine from service, and moved it to a flatbed trailer located in the Sisters of Life parking lot. During the time that they were moving the machine, the bucket remained attached to the boom, but had not been completely lowered to ground level. Sullivan left the site, and took the bypass switch with him.

Knapp and O'Connor loaded the machine onto the trailer, but did not detach the bucket from the boom when securing the machine on the trailer because the prior malfunction rendered the boom inoperable and left the bucket in a partially elevated position. Without the bypass switch, the boom could not be extended in order to set the bucket on the ground before detaching the bucket from the boom. Storrs and his coworkers stood on the bed of the trailer and attempted to detach the bucket from the boom while the bucket, which weighed 125 to 150 pounds, hung approximately 18 inches above the bed of the trailer. After Storrs removed the second pin that attached the bucket to the boom, the bucket fell and ultimately struck him on the left arm, causing him to sustain injuries.

Storrs, and his wife suing derivatively, commenced this action, asserting causes of action to recover from ORU for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6).

III. DISCUSSION

A. Labor Law § 240(1)

> "Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results in injury regardless of whether they supervised or controlled the work."

Ragubir v Gibraltar Mgt. Co., Inc., 146 AD3d 563, 564 (1st Dept. 2017). It is well settled that in order to establish entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1), the plaintiff "must establish that the statute was violated and that such violation was a proximate cause of his [or her] injury." Barreto v Metropolitan Transp. Auth., 25 NY3d 426, 433 (2015).

Work undertaken in connection with the installation, removal, or replacement of a free-standing utility pole falls within the ambit of Labor Law § 240(1), since the pole is a structure, and this type of work constitutes construction or demolition. See Smith v Shell Oil Co., 85 NY2d 1000 (1995); Rhodes-Evans v 111 Chelsea, LLC, 44 AD3d 430 (1st Dept. 2007); Dedario v New York Tel. Co., 162 AD2d 1001 (4th Dept. 1990).

To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]) or "required securing for the purposes of

the undertaking" (Outar v City of New York, 5 NY3d 731, 732 [2005]), and that it fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute." Narducci, supra, at 268; see Fabrizi v 1095 Ave. of Ams., LLC, 22 NY3d 658 (2014). "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of . . . a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991).

The plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action against ORU by showing that (a) the bucket required securing for the purposes of the particular undertaking, and (b) ORU, as the owner of utility poles comprising the project site, did not provide Storrs with any type of device or protection to assure that the bucket could either be lowered properly or detached from the boom without risk of it falling onto him and his coworkers. See Paredes v 1668 Realty Assoc., LLC, 110 AD3d 700 (2nd Dept. 2013). ORU fails to raise a triable issue of fact in opposition to that showing.

ORU, in connection with its own motion, fails to demonstrate, prima facie, that Storrs was the sole proximate cause of his own accident. His failure to recall Sullivan to the

job site with the bypass switch, or to await the delivery of some other sort of device that could lower the bucket to ground level, would constitute, at most, comparative negligence, which is not a defense to liability under Labor Law § 240 (1). See Barreto v Metropolitan Transp. Auth., supra; Rocovich v Consolidated Edison Co., supra; Sulem v B.T.R.E. Greenbush, Inc., 187 AD2d 816 (3rd Dept. 1992).

Hence, the plaintiffs are entitled to summary judgment on the issue of liablity on the Labor Law § 240(1) cause of action, and that branch of ORU's motion which is for summary judgment dismissing that cause of action against it is denied.

B. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon general 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) (citation and internal quotation marks omitted); see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than generalized regulations for worker safety. Ross, supra, at 505. Labor Law § 241(6) requires

a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation was a proximate cause of his or her injuries. See Zimmer v Chemung County Performing Arts, 65 NY2d 513 (1985). Contrary to ORU's contention, 12 NYCRR 23-9.2(a)(3), which provides that, with respect to power-operated equipment, "[u]pon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement," is sufficiently specific to support a Labor Law § 241(6) cause of action. See Misicki v Caradonna, 12 NY3d 511 (2009). Since the machine was not being used as a derrick at the time of the accident, but for the purpose of lowering the bucket, which usually relies on a power source, it is properly classified as a power-operated piece of equipment. Moreover, the fact that ORU claims not to have been given notice of the defective nature of the machine does not establish its prima facie entitlement to judgment as a matter of law, since notice is not essential to a Labor Law § 241(6) cause of action. See Wrighten v ZHN Contr. Corp., 32 AD3d 1019 (2nd Dept. 2006).

Since ORU fails to make the necessary prima facie showing, that branch of its motion which is for summary judgment dismissing the Labor Law § 241(6) cause of action as against it must be denied, regardless of the sufficiency of the plaintiffs' opposition papers.

C. Labor Law § 200 and Common-Law Negligence

"Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work." Hartshorne v Pengat Tech. Inspections, Inc., 112 AD3d 888, 889 (2nd Dept. 2013); see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993). An owner may only be held liable under Labor Law § 200 and the common law for hazards arising from the means and methods of the work, which is alleged here, if it had authority to supervise the work being done. See Wunderlich v Turner Constr. Co., 147 AD3d 598 (1st Dept. 2017); Ortega v Puccia, 57 AD3d 54 (2nd Dept. 2008). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant "bears the responsibility for the manner in which the work is performed." Ortega v Puccia, supra, at 61; see Marquez v L & M Dev. Partners, Inc., 141 AD3d 694 (2nd Dept 2016); see also Griffin v Clinton Green S., LLC, 98 AD3d 41 (1st Dept. 2012).

ORU demonstrates, prima facie, that it did not have the authority to supervise Storrs's work, and the plaintiffs fail to raise a triable issue of fact in opposition to that showing. Hence, the Labor Law § 200 and common-law negligence claims against ORU must be dismissed.

D. Cross Claims

"A tortfeasor who has obtained his [or her] own release from liability shall not be entitled to contribution from any other person." General Obligations Law § 15-108(c). ORU has established, prima facie, that the action was discontinued against the defendants Altec Industries, Inc. (Altec), and Sisters of Life, and that those defendants thus obtained releases from liability from the plaintiffs. ORU has thus demonstrated its prima facie entitlement to judgment as a matter of law dismissing the cross claims for contribution asserted against it by those defendants. Since those defendants did not oppose ORU's motion, they fail to raise a triable issue of fact in opposition to that showing. Consequently, their cross claims for contribution must be dismissed.

Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff's injuries. See Hawthorne v South Bronx Community Corp., 78 NY2d 433 (1991); Structure Tone, Inc. v Universal Servs. Group, Ltd., 87 AD3d 909 (1st Dept. 2011); Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc., 59 AD3d 311 (1st Dept. 2009). ORU has demonstrated, prima facie, that any liability that could be imposed upon Altec and Sisters of Life was not vicarious, since the allegations in the complaint against Altec were that it was directly negligent for

defectively designing and manufacturing the machine and failing to provide adequate instructions for removing the bucket from the boom, and the allegation against Sisters of Life was that it was directly negligent for failing to maintain the machine in good working order while it was stored on its property. Since those defendants do not oppose ORU's motion, their cross claims for common-law indemnification against ORU must be dismissed.

IV. CONCLUSION

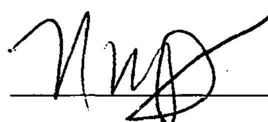
Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action against the defendant Orange and Rockland Utilities, Inc. (SEQ 006), is granted; and it is further,

ORDERED that the motion of the defendant Orange and Rockland Utilities, Inc., for summary judgment (SEQ 007) is granted to the extent that the Labor Law § 200 and common-law negligence causes of action and all cross claims are dismissed as against it, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: January 26, 2018

ENTER: 

J.S.C.

HON. NANCY M. BANNON