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

----------X

WILLIAM SPENCER, DECISION/ORDER

Plaintiff, Index no. 160133/2014

-against- Mot Seq. 002

322 PARTNERS, L.L.C.,

Defendant.

----------X

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

MEMORANDUM DECISION

This is an action for personal injury. Defendant, 322 Partners, L.L.C. ("Defendant") now moves pursuant to CPLR 3212 for summary dismissal of the complaint ("Complaint") of plaintiff, William Spencer ("Plaintiff").

Factual Background

Plaintiff was employed as a "cable splicer" for Verizon at the time of his accident. Plaintiff alleges that Defendant owned the building where his accident took place (the "premises"). Plaintiff further claims that on the day of his accident, a tenant called him to the premises in order to service multiple non-functioning telephone lines. Plaintiff claims that in order to repair the phone line, he was required to access the wires within the "splice box." The splice box was affixed to a wall in a stairway of the premises. Plaintiff additionally claims that he was standing on his ladder while working on the splice box when he fell off and was injured. Plaintiff thereafter filed the Complaint alleging violations of Labor Law §§ 200/common law negligence, 240(1), 241(6).

Defendant's Motion

In support of its motion, Defendant argues that Plaintiff was not engaged in an enumerated activity under the Labor Law at the time of his accident. Specifically, Defendant contends that Plaintiff was called to the premises to repair a customer's telephone lines and only replaced component parts that were damaged as a result of normal wear and tear. Defendant further contends that Plaintiff was engaged in routine maintenance, and did not alter a structure, at the time of his accident. Further, Defendant argues that it did not authorize or have notice of Plaintiff's presence in the premises. Defendant contends that a utility worker seeking to enter the premises would be required to check in at the front desk and have their Identification scanned, but here, no record exists of Plaintiff being in the premises on the date of the accident. Next, Defendant argues that Plaintiff's Labor Law § 200 claim should be dismissed since Defendant did not control Plaintiff's work.

Additionally, Defendant argues that it was not the proximate cause of Plaintiff's alleged injuries. Specifically, Defendant contends that, first, Plaintiff is unable to establish that his injuries were substantially caused by any of the violations or negligence alleged in the Complaint since Plaintiff's injury is a degenerative condition and the result of wear and tear. Second, Defendants contend that the alleged unsafe condition was solely in Plaintiff's control, since he determined how the work was to be performed and what tools and equipment he needed to perform the work.

Plaintiff's Opposition

In opposition, Plaintiff argues that he was engaged in an enumerated activity at the time of his injury. Specifically, Plaintiff contends that in order to repair the non-functioning telephones, he had to open the splice box. Plaintiff further argues that the splice box was part of

the premises and that cutting, prying open and removal of the permanently sealed metal cover to the box was an "alteration" under the Labor Law. Moreover, the act of stripping, cutting and splicing the wires was an enumerated activity. Next, Plaintiff argues that Defendant was an "owner" subject to Labor Law liability since Plaintiff's employer was hired by one of Defendant's tenants. Plaintiff further argues that Defendant was not unaware of Plaintiff's presence at the premises, since Plaintiff testified that he checked in at the front desk prior to performing the subject work. Further, Plaintiff argues that Defendant violated Labor Law § 240(1) since it failed to provide Plaintiff with proper protection from the elevation-related risks associated with the work he was performing. Moreover, Plaintiff argues that the "proximate cause" defense is inapplicable, since Plaintiff was not provided with an adequate safety device. Finally, Plaintiff argues that his injuries were related to the accident, as Plaintiff's medical records indicate that Plaintiff suffered injuries related to his fall.

Defendant's Reply

In reply, Defendant argues that the splice box is neither a part of the premises, nor a structure within the meaning of Labor Law § 241(1). Further, Defendant argues that the cases cited by Plaintiff are distinguishable.

Discussion

Summary Judgment

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a *prima facie* right to judgment as a

matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*id.*).

Labor Law 240(1)

Labor Law § 240 (1) "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v. Fien*, 80 N.Y.2d 965, 967-968 [1992]). To prevail under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 290 [2003]).

"The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury' " (*Panek v. County of Albany*, 99 N.Y.2d 452, 457 [2003], quoting *Joblon v. Solow*, 91 N.Y.2d 457, 465 [1998]). Under Labor Law § 240(1), a worker must establish that injuries were sustained while engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." " '[A]ltering' within the meaning of Labor Law § 240 (1) 'requires making a *significant* physical change to the configuration or composition of the building or structure.' " (*Rhodes-Evans v. 111 Chelsea LLC*, 44 A.D.3d 430 [1st Dept 2007], quoting *Panek*, 99 N.Y.2d 457-58 [emphasis in original]). Whether the particular work being performed by plaintiff falls within the scope of section 240 (1) "must be determined on a case-by-case basis, depending on the context of the work" (*Prats v. Port Auth. of New York & New Jersey*, 100 N.Y.2d 878, 883 [2003]). Moreover, "[t]he intent of

[Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* at 882).

Here, Defendants make a *prima facie* showing that the splicing of the subject wires was not an enumerated activity under the labor law. Plaintiff's testimony indicates that the work to be performed that day was to remove the malfunctioning wire and reconnect (splice) them to the already existing wire (Defendant MOL, Ex. F, Spencer Trans., 17:14-18:11) (*Rhodes-Evans*, 44 A.D.3d at 432 [noting that "(s)plicing a fiber into pre-existing fiber optic cable in a building does not amount to an alteration" pursuant to the Labor Law]).

In opposition, Plaintiff fails to raise a triable issue of fact. Plaintiff's citation of cases such as *Weininger v. Hagedorn & Co.* (91 N.Y.2d 958 [1998]) for the proposition that Plaintiff's act of splicing the wires and removing the cover from the splice box amounted to an alteration under the Labor Law is unsupported. The court in that case held that the plaintiff made an alteration where he ran computer and telephone cable through ceiling to another room in the building, unlike here, where the record does not indicate that Plaintiff installed any new wiring or ran existing wiring through the premises.

Plaintiff's argument that the removal of the splice box cover was an alteration under the Labor Law fares no better. Plaintiff testified that his work on the day of his accident required him to inspect and splice the telephone wires (Defendant MOL, Ex. F, Spencer Trans., 17:14-18:11). Plaintiff also testified that the subject wires were located in the metal splice box rendering the removal of the splice box cover ancillary to his work. Further, the splice box was affixed to the stairway wall within Defendant's building; thus, the box was part of the Defendant's building for the purpose of the Labor Law § 240(1) (*Rhodes-Evans*, 44 A.D.3d at 431). He further indicated that the cover of the splice box was sealed closed and that in order to open the cover he used a

chipping knife and a hammer to "chip it and [] open it up" (Defendant MOL, Ex. F, Spencer Trans., 35:9-20; *see* Spencer Aff. 3, 4). Plaintiff testified that it took him approximately thirty to forty-five minutes to open the cover (*id.*, 35:21-40:2). While Plaintiff did not testify as to the size of the splice box, he submitted photographs depicting the box attached to the upper corner of the wall located in the subject stairway (Opp. Aff., Ex 1).

In light of his testimony, Plaintiff's opening of the splice box was not a "significant physical change" under the Labor Law since it only made a slight change to the physical attributes of the building (*see Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434 [1st Dept 2013] [holding that drilling a few holes and installing a temporary sign did not constitute an alteration under Labor Law § 240(1)]; *Amendola v. Rheedlen 125th St., LLC*, 105 A.D.3d 426 [1st Dept 2013] [plaintiff did not engage in an alteration where his work entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting shades into the bracket]; *Widawski v. 217 Elizabeth St. Corp.*, 40 A.D.3d 483 [1st Dept 2007] [plaintiff's work of dismantling an overhead electrical conduit in preparation for the removal of a mixer bolted to the floor did not constitute an alteration within the meaning of Labor Law § 240(1)]; *Lioce v. Theatre Row Studios*, 7 A.D.3d 493 [2d Dept 2004] [plaintiff who was installing lights was not engaged in an alteration]; *DiBenedetto v. Port Auth.*, 293 A.D.2d 399 [1st Dept 2002], *lv. denied* 98 N.Y.2d 610 [2002] [plaintiff's work involving the removal of two bolts and the replacement of a part of a crane did not involve a significant physical change]; *Croce v. City of New York*, 297 A.D.2d 257 [1st Dept 2002] [plaintiff's work of attaching a three by five bulletin board to a wall was not an alteration]; *compare Panek v. County of Albany*, 99 N.Y.2d 452 [2003] [plaintiff "clearly engaged in a significant change to the building" where he "removed two 200-pound air handlers, requiring two days of preparatory labor, including the dismantling of electrical and

plumbing components of the cooling system, and involved the use of a mechanical lift to support the weight of the air handlers"]; *Joblon v. Solow*, 91 N.Y.2d 457 [1998] [plaintiff extending wire and chiseling hole into concrete wall to install wall clock was an alteration]; *Weininger*, 91 N.Y.2d 959 [1998]).

Labor Law § 200/Common Law Negligence

Labor Law § 200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work (*see Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 [1993]). Liability under section 200 may arise in two circumstances: where workers are injured as a result of the manner in which the work is performed, or where they are injured as a result of a dangerous condition on the site (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 [1st Dept 2012]).

It is well settled that "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes*, 82 N.Y.2d at 877; *see also Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 [1993]).

Defendants makes a *prima facie* showing that it did not control Plaintiff's work. Specifically, Defendant did not provide Plaintiff with any equipment or give him any instructions regarding his work. Plaintiff's opposition fails to address the branch of Defendant's motion to dismiss the Labor Law § 200 claim. Accordingly, the branch of Defendant's motion for summary dismissal of the Labor Law § 200 claim is granted.

Labor Law § 241(6)

In order to bring a claim under Labor Law § 241(6) the plaintiff must demonstrate that he was "engaged in duties connected to the inherently hazardous work of construction, excavation,

or demolition" (*Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 101 [2002]; Labor Law § 241[6]; *see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-502 [1993]). Here, there is no claim, and the evidence on the record does not support, that Plaintiff was engaged in any of the aforementioned acts that give rise to protection under Labor Law § 241(6).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant 322 Partners, L.L.C.'s motion for summary dismissal of the Complaint is granted and the Complaint is dismissed. It is further

ORDERED that the Clerk is to enter judgment accordingly. It is further

ORDERED that counsel for defendant 322 Partners, L.L.C. shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

Dated: February 15, 2018

Hon. Carol Robinson Edmead, J.S.C

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