Tapia v 875 Third Ave., LLC
2018 NY Slip Op 30446(U)
March 7, 2018
Supreme Court, New York County
Docket Number: 157616/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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MIGUEL TAPIA,

Plaintiff,

- v -

875 THIRD AVENUE, LLC and EASTGATE REALTY,

Defendants.

INDEX NO. 157616/2015

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action to recover for personal injuries, defendants move for summary judgment dismissing the complaint against them. Plaintiff opposes.

Plaintiff alleges that he suffered a broken leg when he and a coworker, both of whom were employees of Nielsen Elfante Nurseries, Inc., attempted to move a scissor lift owned by defendants, in order to remove holiday decorations in the lobby of 875 Third Avenue, New York, NY. Plaintiff and his coworker attempted to move the scissor lift from where it was being stored when, apparently as a result of improper manipulation of one of the lift's handles by his coworker, it fell over on plaintiff.

The movant on a motion for summary judgment must satisfy its initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," after which the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; *see Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 [1st Dept 2017].) Labor Law § 240 (1) applies to "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." "[D]ecorative modifications" (*Panek v County of Albany*, 99 NY2d 452, 457-458 [2003]) that do not constitute "a significant physical change to the configuration or composition of the building" do not fall within the ambit of those activities (*Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 746 [2d Dept 2016]; *see Saint v Syracuse Supply Co.*, 25 NY3d 117, 125 [2015]; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 419 [1st Dept 2009], *affd* 14 NY3d 751 [2010]). Labor Law § 241 (6) similarly only applies to "construction, excavation or demolition work." (*See Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003].) Here, plaintiff was engaged in removing holiday decorations at the time of the alleged incident. There is nothing to show that installing or removing the decorations required any kind of significant physical change to the building and, thus, the claims pursuant to these sections of the Labor Law must fail.

Common-law negligence and Labor Law § 200 are broader than §§ 240 (10) and 241 (6) in the sense that liability may attach for incidents involving all types of physical labor, but they are more limited in terms of the entities to which they apply. Under this framework, liability does not attach to an owner unless it exercises control or supervision over the worksite (sometimes referred to as the means-and-methods standard), or creates or has actual or constructive notice of a dangerous condition (sometimes referred to as the premises-liability standard). (*See Maddox v Tishman Constr. Corp.*, 138 AD3d 646 [1st Dept 2016]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 626-627 [1st Dept 2015]; *Alonzo v Safe Harbors of the Hudson*

Hous. Dev. Fund Co., Inc., 104 AD3d 446, 449 [1st Dept 2013]; *Lopez v Dagan*, 98 AD3d 436, 437-438 [1st Dept 2012], *lv denied* 21 NY3d 855 [2012].)

Defendants' evidence established, prima facie, that the lift that plaintiff used was properly functioning and it had never before caused an injury similar to the one experienced by plaintiff. They also established that they neither controlled nor supervised plaintiff's work. Thus, the burden shifted to plaintiff to raise a triable issue of fact.

Plaintiff's theory in this regard is that defendants failed "to provide a safety protocol to actively monitor the retrieval and use of the scissor lift that [they] provide to individuals like [plaintiff] who work on the premises." (Doc. No. 29.) The theory is flawed, however, because it fails to raise a question of fact as to whether the lift was, on its own, either dangerous or defective and that defendants were actually or constructively on notice of the defect. (*See e.g. Guodace v AP Wagner, Inc.*, 96 AD3d 1263 [3d Dept 2012] [summary judgment appropriate where defendant had no notice that a forklift could "spontaneously rise from a stationary position"]; *Arredondo v Valente*, 94 AD3d 920 [2d Dept 2012] [summary judgment appropriate where an acetylene torch was seemingly functioning properly and, to the extent it was defective, defendant had no notice of same]; *compare e.g. Jaycoxe v VNO Bruckner Plaza, LLC*, 146 AD3d 411 [1st Dept 2017] [ladder lacked footing]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959-590 [2d Dept 2013] [Bobcat excavation machine missing working backup alarm]; *Murillo v Porteus*, 108 AD3d 753. 754 [2d Dept 2013] [table saw missing a guard].)

Plaintiff essentially concedes that the injury resulted because of "the manner in which [plaintiff and his coworker] performed [their] work" rather than as a result of a defective or dangerous condition existing in the lift itself. (*Mammone v T.G. Nickel & Assocs., LLC*, 114 AD3d 761 [2d Dept 2016]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 131-132 [2d Dept 2015];

Alvarez Corpus Christi R.C. Church, 227 AD2d 223 [2d Dept 1996]; *cf. Connor v Taylor Rental Ctr.*, 278 AD2d 270 [2d Dept 2000].) He asserts that defendants should have exercised more direct supervision over the use of the machine, but plaintiff and his coworker took and used the lift without informing defendants that they were doing so or inquiring as to how the lift should be operated. Plaintiff's contention that defendants failed to guard the lift misconstrues the term "guard," which, historically, has generally referred to physical guards that prevent contact with dangerous parts of a machine rather than locking away equipment to protect it from individuals who lack knowledge as to its proper use. (*See e.g. Basel v Ansonia Clock Co.*, 216 NY 356 [1915]; *Scott v International Paper Co.*, 204 NY 49 [1912].) Plaintiff failed to raise a question of fact as to any material issue.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint against them is granted, the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

3/7/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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