Themistocleous v Whitney Museum of Am. Art
2018 NY Slip Op 32721(U)
October 12, 2018
Supreme Court, New York County
Docket Number: 150370/2014
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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CLIFF THEMISTOCLEOUS and YVONNE THEMISTOCLEOUS,

Plaintiffs

- against -

WHITNEY MUSEUM OF AMERICAN ART and TURNER CONSTRUCTION COMPANY,

Defendants

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Index No. 150370/2014

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiffs sue defendants, claiming their negligence and violation of New York Labor Law §§ 200, 240, and 241(6), to recover damages for personal injuries sustained by plaintiff Cliff Themistocleous and lost services sustained by plaintiff Yvonne Themistocleous on December 4, 2013. Cliff Themistocleous, an employee of nonparty Pook Diemont Ohl, Inc., was working on a construction project where defendant Turner Construction Company was the general contractor, on premises owned by defendant Whitney Museum of American Art. He was injured when a wrench he was using to break a bolt struck him in the right eye while he was still holding the wrench. He was wearing safety glasses, but the wrench knocked them from his face.

Defendants move for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). Plaintiffs do not oppose dismissal of their Labor Law § 200 and negligence claims. For the reasons explained below, the court grants defendants' motion.

I. LABOR LAW § 240

Plaintiffs claim defendants violated Labor Law § 240 because the instability of the scissor lift on which Cliff Themistocleous was working contributed to his injury. Although he was working at an elevation when he was injured, Labor Law § 240(1) does not apply, because he did not fall, and nothing fell on him. Varona v. Brooks Shopping Ctrs. LLC, 151 A.D.3d 459, 459-60 (1st Dep't 2017); Martinez v. 342 Prop. LLC, 128 A.D.3d 408, 409 (1st Dep't 2015). Even assuming the scissor lift was unsteady and its instability contributed to his injury, the lift still prevented him from falling, so the injury did not result from exposure to an elevation related risk or the force of gravity to which Labor Law § 240(1) applies. Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 916 (1999); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993); Tolino v. Speyer, 289 A.D.2d 4, 4-5 (1st Dep't 2001); Tavarez v. Sea-Cargoes, 278 A.D.2d 94, 95 (1st Dep't 2000). See Quishpi v. 80 WEA Owner, LLC, 145 A.D.3d 521, 522 (1st Dep't 2016). Nor did his injury arise from an attempt to prevent himself from falling, to which Labor Law § 240(1) also applies. Serrano v. Consolidated Edison Co. of N.Y. Inc., 146 A.D.3d 405, 406 (1st Dep't 2017); Montalvo v. J. Petrocelli Constr., Inc., 8 A.D.3d 173, 175 (1st Dep't 2004).

Labor Law § 240(1)'s purpose is to prevent injuries caused by a protective device, here the scissor lift, that

> proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. The right of recovery afforded by the statute does not extend to other types of

> harm, even if the harm in question was caused by an inadequate, malfunctioning, or defectively designed scaffold . . .

or, here, scissor lift. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 502 (emphasis in original). The cause of Themistocleous's injury was the propulsion of the wrench toward his eye by the "kinetic energy of the sudden release of tensile strength" that Themistocleous applied with the wrench to the bolt, which then broke. Quishpi v. 80 WEA Owner, LLC, 145 A.D.3d at, 522; Medina v. City of New York, 87 A.D.3d 907, 909 (1st Dep't 2011). Insofar as the lift's instability contributed to his injury, the circumstances were no different than an injury caused by an unstable unelevated surface, due to rocks, gravel, or ice, for example. See, e.g., Tavarez v. Sea-Cargoes, 278 A.D.2d at 95.

In opposition to defendants' motion, plaintiffs claim that defendants violated Labor Law § 240(2) due to the unsteadiness of the scissor lift. Since the complaint does not claim a violation of § 240(2), plaintiffs may not rely on such a claim to defeat defendants' motion. Fajardo v. Trans World Equities Co., 286 A.D.2d 271, 271 (1st Dep't 2001); Smizaski v. 784 Park Ave. Realty, 264 A.D.2d 364, 367 (1st Dep't 1999); Dominguez v. Lafayette-Boynton Hous. Corp., 240 A.D.2d 310, 312-13 (1st Dep't 1997). In any event, as discussed above, since Themistocleous's injury did not result from an elevation related risk, Labor Law § 240(2) does not apply either. Pietrowski v. ARE-East Riv. Science Park, LLC, 86 A.D.3d 467, 468 (1st Dep't 2011); Bryant v.

General Elec. Co., 221 A.D.2d 687, 689 (3d Dep't 1995). See Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 128-29 (2015); Alarcon v. UCAN White Plains Hous. Dev. Fund Corp., 100 A.D.3d 431, 431-32 (1st Dep't 2012); Vergara v. SS 133 W. 21, LLC, 21 A.D.3d 279, 281 (1st Dep't 2005).

II. LABOR LAW § 241(6)

While the complaint does claim that defendants violated various sections of the New York State Industrial Code, 12 N.Y.C.R.R. Part 23, and an unstable scissor lift or Cliff Themistocleous's lack of a face shield may violate one of these regulations, plaintiffs fail to oppose defendants' grounds for dismissing the Labor Law § 241(6) claim based on each of the code violations alleged. Therefore plaintiffs have abandoned any such claim. Henry v. Carr, 161 A.D.3d 424, 425 (1st Dep't 2018); Ng v. NYU Langone Med. Ctr., 157 A.D.3d 549, 550 (1st Dep't 2018); Saidin v. Negron, 136 A.D.3d 458, 459 (1st Dep't 2016); Josephson LLC v. Column Fin., Inc., 94 A.D.3d 479, 480 (1st Dep't 2012). Defendants establish that the Industrial Code provisions defendants allegedly violated are either inapplicable to the circumstances of Themistocleous's injury as alleged by plaintiffs or insufficiently specific to support a Labor Law § 241(6) claim, yet plaintiffs neglect to address, let alone rebut, these defenses to the claimed violations. McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 535 (1st Dep't 2016); Rodriguez v. Dormitory Auth. of the State of N.Y., 104 A.D.3d 529, 530-31 (1st Dep't 2013); Cardenas v. One State Street, LLC, 68 A.D.3d 436,

438 (1st Dep't 2009).

Defendants also point out that plaintiffs' failure to specify which of the several subdivisions of 12 N.Y.C.R.R. § 23-1.7 and which sections of 12 N.Y.C.R.R. Subparts 23-3, 23-5, 23-6, 23-7, and 23-8 defendants violated is further grounds to dismiss plaintiffs' Labor Law 241(6) claim based on these regulations. Plaintiffs' failure either to specify their claims sufficiently or, again, to address in opposition to defendants' motion for summary judgment the lack of specificity is also grounds to consider the claims based on these regulations abandoned. McLean v. Tishman Constr. Corp., 144 A.D.3d at 535.

III. CONCLUSION

Consequently, the court grants defendants' motion for summary judgment in its entirety, and dismisses the complaint, and awards costs and disbursements to defendants as taxed by the Clerk upon their submission of a bill of costs. C.P.L.R. §§ 3212(b), 8201(2), 8301(a), 8401. The Clerk shall enter a judgment in accordance with this decision.

DATED: October 12, 2018

Lucy Billings

LUCY BILLINGS, J.S.C.

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