Hua Kun Chen v RHS Grand LLC
2018 NY Slip Op 32868(U)
November 7, 2018
Supreme Court, Queens County
Docket Number: 15422/2015
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

HUA KUN CHEN,
Plaintiff,

-against-

RHS GRAND LLC, NEW YORK BROOKLYN WHOLESALE CENTER, INC.,

Defendants.

Index No.: 15422/15

Motion Date: 7/25/18

Motion Seq. No.: 3

The following papers numbered 1 to 4 read on this motion by defendant RHS Grand LLC for summary judgment dismissing the complaint against it

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Memorandum of Law	4

Upon the foregoing papers it is ordered that the motion is granted.

I. The Facts

Plaintiff Hua Kun Chen allegedly sustained personal injury while at work at premises known as 51-18 Grand Avenue, Queens, New York. Defendant RHS Grand LLC owns the property which it leases to defendant New York Brooklyn Wholesale Center, Inc. (Wholesale Center). The tenant occupied space in a warehouse building and in an office building which were connected by a hallway which crossed a strip of land about ten feet wide and 200 feet long. Wholesale Center intended to subdivide its rented space into smaller units which it would rent to others. Defendant RHS did not provide the plans or diagrams

that were to be used in the project, nor did it provide any tools or materials used on it. Wholesale Center hired a company to prepare the plans, buy insurance, and apply for permits, and Wholesale Center also hired Lin Sui Guan (Lin) to perform the construction work. Lin hired plaintiff Chen to do work at the construction site, and from June to August, 2015, Chen performed interior demolition and partitioning work. On August 3, 2015, Lin told Chen to do outside work involving the removal of a tree that had already been cut down and was laying on the ground. The tree was about fifteen feet long and about two feet in diameter and without branches.

Chen intended to cut the tree into pieces that he would throw into a dumpster. Helped by another worker (Guang Ming), Chen began to cut the tree into pieces by using a power saw that belonged to Lin. and that Lin had told him to use. Chen held the tree to stabilize it, and Ming began to cut it. The saw got stuck, so Chen stood on the tree to stabilize it. Ming completed the cut at which time the free end of the trunk rolled, causing Chen, who was standing on the tree, to fall and to allegedly sustain personal injury (the fracture of the left elbow)..

Plaintiff Chen began this action by the filing of a summons and a complaint on December 30, 2015. He asserts causes of action for common law negligence and violation of Labor Law §§ 200,240, and 241(6).

II. Discussion

A. Common Law Negligence and Labor Law §200

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***." (*Gordon v Muchnik*, 180 AD2d 715 [2nd Dept, 1992]; *Zhili Wang v. Barr & Barr, Inc*., 127 AD3d 964 [2nd Dept.2015].) The common law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work. (*See*, *Comes v New York State Electric and Gas Corp*.,82 NY2d 876 [1993]; *Torres v. Perry Street Development Corp*., 104 AD3d 672 [2nd Dept 2013].) "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v New York State Electric and Gas Corp*.,, *supra*, 877 ; *Chowdhury v. Rodriguez* , 57 AD3d 121 [2nd Dept 2008],) The principles of common law negligence determine liability under the statute. (*Chowdhury v. Rodriguez, supra*.) The duty owed may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control. (*See*, *Smith v. Nestle Purina Petcare Co.,* 105 AD3d 1384 [4th Dept. 2013]; *Clavijo v.*

Universal Baptist Church, 76 AD3d 990 [2nd Dept. 2013]; *LaGiudice v. Sleepy's Inc.*, 67 AD3d 969[2nd Dept. 2009] .) Where a worker sustains an injury because of a defective condition on the premises, a property owner or general contractor is liable for common law negligence and a violation of Labor Law § 200 when the defendant created the dangerous condition which caused the injury or when the defendant failed to remedy the dangerous condition of which he had actual or constructive notice. (*Mikelatos v. Theofilaktidis*, 105 AD3d 822 [2nd Dept. 2013][general contractor]; *LaGiudice v. Sleepy's Inc.*, *supra*, [owner];) Unlike injuries arising from the method of work, where the injury arises from a condition of the job site, it is not necessary to prove supervision and control over the worker. (*Urban v. No. 5 Times Square Development, LLC,* 62 AD3d 553 [1st Dept. 2009]; *Murphy v. Columbia University*, 4 AD3d 200 [1st Dept. 2004].)

In cases involving "manner of the work" or "methods and means," such as the case at bar, a defendant owner or contractor may be found liable only if he exercises a sufficient level of supervision and control over the plaintiff's work. (*See*, *Allan v. DHL Exp. (USA), Inc*. 99 AD3d 828 [2nd Dept 2012]; *LaRosa v. Internap Network Servs. Corp.*, 83 AD3d 905 [2nd Dept 2011]; *Ortega v. Puccia*, 57 AD3d 54 [2nd Dept 2008].) In the case at bar, RHS did not hire plaintiff Chen and was not present at the premises when the construction work was done. Lin hired Chen and gave him his work instructions. RHS is entitled to summary judgment dismissing the causes of action based on common law negligence and Labor Law §200.

B. Labor Law §240

Labor Law § 240(1) provides: "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." (*See, Blake v. Neighborhood Housing Services of New York City, Inc*. 1 NY3d 280 [2003].)

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]), and a violation of the duty results in absolute liability. (*Wilinski v. 334 East 92nd Housing Development Fund,* 18 NY3d 1 [2011]; *Bland v Manocherian*, 66 NY2d 452 [1985]; *Jamindar v. Uniondale Union Free School Dist.*, 90 AD3d 612 [2nd Dept 2011] ; *Paz v. City of New York*, 85 AD3d 519 [1st Dept 2011].)

"The purpose of Labor Law § 240(1) is to protect workers from elevation-related risks ." (*Reinoso v. Ornstein Layton Mgmt., Inc*., 19 AD3d 678, 678 [2nd Dept 2005.) Labor Law §240(1) protects workers against hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or 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. Consol. Edison Co.*, 78 NY2d 509, 514 [1991]; *Yost v. Quartararo*, 64 AD3d 1073 [3d Dept 2009].) For a cause of action based on Labor Law §240, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Runner v. New York Stock Exchange, Inc*., 13 NY3d 599, 603 [2010]; *Wilinski v. 334 East 92nd Housing Development Fund ,* 18 NY 3d 1 [2011].)

The case at bar does not fall within the scope of Labor Law §240(1) because the plaintiff did not fall from a significant height calling for the use of protective devises, and he was not struck by a falling object that was improperly hoisted or inadequately secured. (*See*, *Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494 [1993].) Defendant RHS is entitled to summary judgment dismissing the cause of action based on that statute.

The court nots that "tree cutting and removal, in and of themselves, are not activities subject to Labor Law § 240(1) ***.. Those activities are generally excluded from statutory protection because a tree is not a building or structure, as contemplated by the statute but, rather, a product of nature. (*Moreira v. Ponzo*, 131 AD3d 1025, 1026 [2d Dept 2015] [citations and quotation marks omitted].) The tree cutting and removal must be ancillary to acts enumerated in the statute. (*Moreira v. Ponzo, supra.)*

C. Labor Law §241(6)

" Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and 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 ***." (*Lopez v. New York City Dep't of Envtl. Prot*., 123 AD3d 982, 983 [2nd Dept 2014]; *Tamarez De Jesus v. Metro-N. Commuter R.R.*, 159 AD3d 951 [2nd Dept 2018].)

Labor Law §241(6) provides, inter alia, that areas in which construction, excavation or demolition is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement

the statute, and that owners, contractors, and their agents shall comply with them. (*See, Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998].) The duty imposed by Labor Law § 241(6) upon owners and contractors is nondelegable..(*Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp.*, 82 NY2d 876 [1993]) Because an owner's or general contractor's liability under Labor Law § 241(6) is vicarious, notice of the hazardous condition is irrelevant. (*Burnett v. City of New York,* 104 AD3d 437 [1st Dept 2013].)

A plaintiff asserting a cause of action under Labor Law §241(6) has the burden of establishing that there was a violation of the Industrial Code and that such violation was a proximate cause of his injuries. (*See, Melchor v. Singh,* 90 AD3d 866 [2nd Dept 2011]; *Blair v. Cristani*, 296 AD2d 471 [2nd Dept 2002]; *Beckford v. 40th Street Associates*, 287 AD2d 586 [2nd Dept 2001].) A cause of action based on Labor Law § 241(6) "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 123)." (*Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 317 [3d Dept 1987)]; *Spence v. Island Estates at Mt. Sinai II, LLC,* 79 AD3d 936 [2d Dept 2010]; *Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995].) Plaintif Chen did not carry this burden as he failed to show that RHS violated any section of the Industrial Code, and defendant RHS is entitled to summary judgment dismissing the cause of action based on Labor Law §241(6).

Dated: November 7, 2018

J.S.C.