Wise v Roosevelt Is. Operating Corp.
2018 NY Slip Op 33001(U)
November 27, 2018
Supreme Court, New York County
Docket Number: 158554/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ROBERT WISE

INDEX NO. 158554/15

MOT. DATE

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MOT. SEQ. NO. 003

ROOSEVELT ISLAND OPERATING CORPORATION

The following papers were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action arising from a workplace accident in which plaintiff lost two fingers on his left hand. Defendant now moves for summary judgment dismissing plaintiff's Labor Law and common law negligence claims. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. On November 26, 2014, plaintiff's accident occurred while he was working at the premises known as the Roosevelt Island Tramway, located on Roosevelt Island and owned by the defendant. As part of plaintiff's job, he performed routine maintenance as supervisor for the tram operator and maintainer, non-party Leitner-Poma.

Specifically, plaintiff was injured when his left hand became caught between a cable and a bull wheel (sometimes "machine"), which plaintiff described as "like a giant pulley." Plaintiff explained that when his hand became caught, he was "getting pulled down because the cable wants to come around." After his accident, plaintiff testified at his deposition that the machine was shut off, presumably by his coworker.

At the time of his accident, plaintiff was attempting to remove fragments or worn rubber liner off of the haul rope of the south bull wheel, by standing and reaching into the bull wheel from a catwalk while it slow turned. Plaintiff explained during his deposition that he was responding to an alarm sound which indicated that the tram had stopped. After he entered the control room, plaintiff noted a fault code which indicated a problem with the bull wheel. Plaintiff took photographs of the machine approximately five minutes before the accident occurred. Those photographs have been provided to the court.

Plaintiff further testified at his deposition that he was aware of a lockout-tagout procedure which would shut power off to the machine:

Dated: 11/27/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Q: Now returning to the day of your incident, are you familiar with a lockout-tagout procedure?

A: Can you repeat that?

Q: Are you familiar with a lockout-tagout procedure?

A: Yeah, I know what it is.

Q: And what is it?

A: It would be to lock out the system to allow power to turn on, to not allow the power to turn on.

Q: And what were the circumstances that the lockout-tagout procedure would be employed?

A: Not - I never used the lockout-tagout procedure.

Q: Well, that you never used [the procedure] doesn't mean that you didn't understand it. Did you understand that the purpose of the procedure was to be sure that when you approached the machine the power was down, the power was off?

A: After my injury, yes, I was taught that, told that. Prior to, no.

Q: ... No one had ever indicated to you that the lockout-tagout procedure was applicable at all times in approaching the machinery?

A: I don't remember.

It is undisputed, however, that plaintiff participated in a two-week training course given by Leitner Poma when he began working at the Roosevelt Island Tramway in 2011. During that training, plaintiff testified that he was "given pamphlets, paperwork regarding different aspects of the Tramway" and was taught the dynamics of the machinery. Indeed, the photographs which plaintiff took prior to his accident depict a conspicuous orange and black sign on the subject equipment which states: "CAUTION THIS MACHINE MUST BE LOCKED OUT PRIOR TO SERVICING."

Defendant produced Shelton Haynes, its Vice President of Operations. Haynes testified that the Leitner Poma was responsible for day-to-day operation and routine maintenance of the tramway, as well as safety. Further, he represented that defendant did not supervise the operation or maintenance of the tram. Defendant has provided to the court a copy of the operating agreement between it and Li-etner-Poma. According to that agreement, Leitner-Poma was to "recruit and train personnel to operate and maintain the Tramway", "maintain the Tramway stations and equipment in a neat, orderly, safe and sanitary condition" and was otherwise responsible for "maintenance for all aspects of the tramway".

Plaintiff has asserted causes of action for violations of Labor Law §§ 240[1], 241[6] and 200. In support of its motion, defendant argues that: [1] the Labor Law §§ 240[1] and 241[6] claims should be dismissed because plaintiff was performing routine maintenance; [2] the Labor Law §§ 240[1] and 241[6] claims should be dismissed because plaintiff was the sole proximate cause of his accident and/or a recalcitrant worker; [3] the Labor Law § 240[1] claim should be dismissed because plaintiff was not injuried as a result of a fall or due to gravity or a height differential; [4] the Labor Law § 241[6] claim should be dismissed because plaintiff has not alleged an applicable and sufficiently specific Industrial Code violation; and [5] the Labor Law § 200 and common law negligence claims should be dismissed.

In opposition, plaintiff argues that he was not performing routine maintenance, but rather repair work, Labor Law § 240[1] is applicable because plaintiff was pulled horizontally into the bull wheel, and there is a triable issue of fact as to whether defendant had constructive notice of the deteriorated rubber liner on the bull wheel. Finally, plaintiff maintains that he cannot be considered the "sole proximate cause" of his accident.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, plaintiff did not oppose defendant's motion to the extent that defendant seeks dismissal of the Labor Law § 241[6] claim. Therefore, that portion of the motion is deemed conceded and is granted without opposition.

The court now turns to the Labor Law § 240[1] claim. Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... 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."

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

The court finds that defendant is entitled to summary judgment dismissing the Labor Law § 240[1] claim because plaintiff's accident did not fall within the ambit of the statute. Plaintiff's argument that be-

cause he was pulled vertically into the machine, Section 240[1] is implicated, is a red herring. Indeed, plaintiff cannot point to any protective device which would have protected plaintiff from a harm directly flowing from the application of gravity which would have prevented his accident (see *Narducci*, *supra*; see also *Gasques v. State,* 15 NY3d 869 [2010]). Nor is it of any moment that plaintiff was standing on a catwalk, since his location on an elevated platform did not give rise to the accident. Therefore, the Labor Law § 240[1] cause of action must be severed and dismissed. In light of this result, the court declines to consider the parties' remaining arguments.

The court next considers the Labor Law § 200 and common-law negligence claims. These claims also fail for the following reasons. Defendant has established that the allegedly defective condition, the worn rubber liner of the bull wheel, was not a proximate cause of plaintiff's accident. In turn, plaintiff is unable to raise a triable issue of fact on this point. Even if plaintiff could rebut defendant's showing, plaintiff has failed to raise a triable issue of fact as to notice.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]).

There can be no dispute that Leitner Poma was contractually, and in actuality, responsible for the day-to-day operation and maintenance of the tram, including the south bull wheel. It is therefore of no moment whether defendant submitted evidence regarding repair records of the bull wheel, since it was not responsible for same (*cf. Guzman v. Haven Plaza Housing Development Fund Co., Inc.*,69 NY2d 559 [1987]). Likewise, plaintiff's argument that "that the deteriorated condition of the rubber liner on the bull wheel had existed for a sufficiently long period of time that defendant [], upon a reasonable inspection of the area, should have discovered and remedied the condition." Leitner Poma has therefore demonstrated that it did not have constructive notice of the defective condition sufficient to warrant summary judgment in its favor.

Accordingly, defendant's motion is granted in its entirety and plaintiff's complaint is dismissed.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 11/27/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.