Robinson v HVA 125 LLC
2020 NY Slip Op 30243(U)
January 31, 2020
Supreme Court, New York County
Docket Number: 152003/2012
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** IAS MOTION 31

Justice

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ALLEN ROBINSON,

Plaintiff,

- v -

HVA 125 LLC,35 W. 124TH STREET LLC, HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., UNITED HOISTING & SCAFFOLDING CORP.

Defendant.

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INDEX NO. 152003/2012

MOTION DATE 10/23/2019, 10/23/2019

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 97, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 116

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 99, 111, 112, 113, 114, 115, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequences 002 and 003 are consolidated for disposition. Motion Sequence 002 is plaintiff's motion for summary judgment pursuant to CPLR 3212, which defendants oppose. Motion Sequence 003 is defendants' motion for summary judgment, which plaintiff opposes. Plaintiff argues that defendants are liable under Labor Laws 240(1), 241(6) and 200.

This action stems from an accident on December 19, 2011 in which plaintiff allegedly tripped on debris of some kind while carrying a steel beam. Defendant HVA 125 LLC, via its sole member Village Academy Network, Inc., owns the subject property and had entered into a contract with defendant 35 W 124th Street, LLC, a developer, who then entered into a contract as agent for owner with defendant Hunter Roberts Construction Group, LLC as general contractor, who then entered into a contract with defendant United Hoisting and Scaffolding Corp. as a subcontractor. Plaintiff's employer at the time – New Town Corp. – is not a party.

Labor Law 240(1) Analysis

In *Toefer v. Long Is. R.R.*, the Court of Appeals analyzed the protections to be found in Labor Law 240(1):

Labor Law § 240(1) provides in pertinent part:

> "All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building of 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."

In *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991), we discussed the occupational hazards against which this statute was directed. We pointed out that, while the hazards themselves are not spelled out in the statute, they can be inferred from the "protective means" set forth in the statute "for the hazards' avoidance"--scaffolding, hoists, stays, ladders and so forth (*id.* at 513). We explained:

> "The various tasks in which these devices are customarily needed or employed share a common characteristic. All entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. The contemplated hazards are those 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. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides." (*Id.* at 514.)

Applying this reasoning in *Rocovich*, we held that a worker who had been injured when he slipped into a 12-inch-deep trough carrying a stream of hot oil had not suffered injury from an elevation-related risk, and so was not within the protection of the statute.

The above-quoted language from *Rocovich* identifies two distinct sources of elevation-related risk: "the relative elevation at which the task must be performed" and the elevation "at which materials or loads must be positioned or secured." In *Narducci v. Manhasset Bay Assoc.* (96 N.Y.2d 259, 267 [2001]), we described cases involving these risks as "falling worker" and "falling object" cases respectively. But, as we said in *Narducci*, "[n]ot 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)" (*id.*). In some cases involving falls of workers and objects, we have held that where a plaintiff "was exposed to the usual and ordinary dangers of a construction site, and not

> the extraordinary elevation risks envisioned by Labor Law 240(1)," the plaintiff cannot recover under the statute (*Rodriguez v. Margaret Tietz Ctr. for Nursing Care, Inc.*, 84 N.Y.2d 841, 843 [1994]).

4 N.Y.3d 399, 406-407 (2005); *see also O'Brien v. Port Auth. of New York and New Jersey*, 29 N.Y.3d 27 (2017). In the present case, plaintiff was not elevated, nor were any of the co-workers who were also carrying the beam, but it is argued that the beam that allegedly fell on plaintiff qualifies as a "falling object" under Labor Law 240(1). However, "[t]he fall of an object carried by hand…does not implicate the special protections afforded by Labor Law § 240(1)." *Outar v. City of New York*, 286 A.D.2d 671 (2nd Dep't 2001) (*aff'd* 5 N.Y.3d 731 [2005]); *see also Rodriguez v. Margaret Tietz Ctr. for Nursing Care, Inc.*, 84 N.Y.2d 841 (1994) ("In placing a 120-pound beam onto the ground from seven inches above his head with the assistance of three other co-workers, Rodriguez was not faced with the special elevation risks contemplated by the statute."); *Makarius v. Port Auth. of New York and New Jersey*, 76 A.D.3d 805 (1st Dep't 2010) ("Since the hazards that Labor Law § 240(1) is intended to prevent are those that by virtue of height differentials, e.g., work being performed at elevations or loads being hoisted or positioned above a worker, relate to the effects of gravity, there can be no liability under the statute where the work is not being performed at an elevated level or where there is no appreciable height differential between a worker and the falling object that strikes him or her."); *Carerra v. Westchester Triangle Hous. Dev. Fund Corp.*, 116 A.D.3d 585 (1st Dep't 2014); *Winters v. Main LLC*, 96 A.D.3d 428 (1st Dep't 2012); *Jackson v. Hunter Roberts Constr. Grp., LLC*, 161 A.D.3d 666 (1st Dep't 2018) ("the impetus for the pipe's descent was plaintiff's loss of balance, rather than the direct consequence of the force of gravity."); *Ghany v. BC Tile Contractors, Inc.*, 95 A.D.3d 768 (1st Dep't 2012) ("the impetus for the heavy stone's fall was plaintiff's tripping

on ground level, rather than the direct consequence of gravity. Accordingly, the protections of section 240(1) are not implicated.").

In this case, the impetus for the beam's fall was plaintiff's tripping, rather than the direct consequence of gravity. Accordingly, the protections of section 240(1) are not implicated. The lack of a sufficient elevation differential separates this case from the cases on which plaintiff relies, such as *Runner v. New York Stock Exchange*. *See* 13 N.Y.3d 599 (2009). *See also Bonaerge v. Leighton House* Condominium, 134 A.D.3d 648 (1st Dep't 2015); *Aramburu v. Midtown West B.* LLC, 126 A.D.3d 498 (1st Dep't 2015); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993) (Labor Law 240(1) does "not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity.").

Plaintiff cites to expert Nicholas Bellizzi's conclusion that Labor Law 240(1) was violated, but Mr. Bellizzi is mistaken and the court is not bound by his opinion. "Expert opinion as to a legal conclusion is impermissible." *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP,* 301 A.D.2d 63, 69 (1st Dept 2002); *see also Singh v. Kolcaj Realty Corp.,* 283 A.D.2d 350, 351 (1st Dept 2001) ("Where the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected."). The court need not reach defendant's argument that Mr. Bellizzi is unqualified to opine on labor law matters.

Accordingly, defendants cannot be held liable under Section 240(1) and summary judgment on the Labor Law 240(1) claims is granted to the defendants.

Labor Law 240(2) and 240(3) Analysis

Plaintiff's complaint alleges violations of Labor Law § 240(2) and Labor Law § 240(3). Defendant seeks summary judgment dismissing these aspects of plaintiff's complaint and

plaintiff has not opposed. The facts alleged in this case do not implicate these provisions and, accordingly, summary judgment on the Labor Law 240(2) and Labor Law 240(3) claims is granted to the defendants.

Labor Law 241(6) Analysis

Labor Law § 241(6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-502 (1993). Like that of Labor Law § 240(1), the duty imposed by Labor Law § 241(6) to comply with the Commissioner's regulations is non-delegable. *See id.* at 502. Therefore, Plaintiff need not show that Defendant exercised supervision or control over his worksite to establish liability under the statute. *See id.*

"In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct." *Ortega v. Everest Realty LLC*, 84 A.D. 542, 544 (1st Dep't 2011); *see also Ross*, 81 N.Y.2d at 502-503. Plaintiff claims that defendants failed to comply with Sections 23-1.7(d) and (e) and 23-1.32, as well as Administrative Code / Building Code § 27-127 and 27-128.[1]

12 NYCRR 23-1.7(d) relates to "Slipping hazards" such as "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing." Plaintiff alleges to have tripped[2] on scaffolding material and so the relevant regulation is 12 NYCRR 23-1.7(e) – "Tripping and other hazards."

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[1] Notably, plaintiff alleges in papers that Industrial Code 23-2.1 was violated but such a violation was not alleged in pleadings and cannot be alleged for the first time in motion papers.
[2] While plaintiff's counsel sometimes refers to plaintiff "slipping", the record demonstrates that the fall was a trip. *See* Robinson Deposition, 143:19-144:9 (Plaintiff testified that it felt like his foot got "caught in a hook.").

12 NYCRR 23-1.7(e)(1) relates to hazards in passageways, but the roof at issue in this case is not a passageway. *See, e.g., Purcell v. Metlife Inc.*, 108 A.D.3d 431 (1st Dep't 2013) ("plaintiff's accident did not take place in a "passageway" within the meaning of that provision; rather, it occurred in an open-work area on the eighth-floor roof setback of the work site.").

The roof does qualify as a "working area" pursuant to 12 NYCRR 23-1.7(e)(2), which states:

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

However, it is a question of fact as to what plaintiff tripped on. The protections of 12 NYCRR 23-1.7(e)(2) extend only "insofar as may be consistent with the work being performed" and courts have recognized an exception when a worker trips on something that is a direct product of the work being done. In *Zieris v. City of New York*, the plaintiff was in a working area and was engaged in rivet removal when he tripped on a rivet. *See* 99 A.D.3d 479 (1st Dep't 2012). The court held that this did not violate 12 NYCRR 23-1.7(e)(2):

> [P]laintiff testified that he tripped on the rivet after he entered the common, open work area…plaintiff was engaged in rivet removal, such work was ongoing in various parts of the bridge, and all falling parts could not be caught while plaintiff and his coworkers were actively engaged in the removal work, establish[ing] that the rivet stem resulted from the work plaintiff was performing. Plaintiff's argument that the rivet did not originate from the work that he himself was performing is unavailing, as rivets left by his coworkers, who were performing the same rivet removal work, could still be deemed an integral part of the work.

Id. at 480-481. Similarly, plaintiff in this case was in a working area and was engaged in scaffolding removal when he tripped on what may have been scaffolding material—such as a scaffolding frame. If plaintiff tripped on scaffolding material resulting from the work plaintiff was performing, there is no violation of 12 NYCRR 23-1.7(e)(2) because the alleged lack of safety was "consistent with the work being performed." *See also Solis v. Sixth Ave. Co. LLC*, 38

A.D.3d 389 (1st Dep't 2007) ("Nor is 12 NYCRR 23-1.7(e)(2) applicable, because the debris covering the scaffold resulted directly from the masonry work plaintiff and his coworker were performing..."); *Cabrera v. Sea Cliff Water Co.*, 6 A.D.3d 315 (1st Dep't 2004) ("the sheetrock dust and sawdust appear to have been an unavoidable and inherent result of the cutting of the sheet rock and plywood..."); *Salinas v. Barney Skanska Constr. Co.*, 2 A.D.3d 619 (2nd Dep't 2003). As there are questions of fact best left to a trier of fact, summary judgment is denied to both parties relating to violation of 12 NYCRR 23-1.7(e)(2).

Plaintiff's bill of particulars alleges that Rule 23-1.32 was also violated, though no mention was made of it in motion papers. The written notice that is required to trigger the protections of Rule 23-1.32 is not present in this case. Accordingly, there is no violation of Rule 23-1.32. *See, e.g., Mancini v. Pedra Const.*, 293 A.D.2d 453 (2nd Dep't 2002).

Lastly, plaintiff pleads violations of Administrative Codes § 27-127 and 27-128 but both of those provisions have been repealed—and were repealed before the incident allegedly occurred. *See, e.g., Miki v. 335 Madison Ave., LLC*, 30 Misc.3d 1214(A) (Sup. Ct. N.Y. Cty. 2011) ("That portion of defendants' motion for summary judgment seeking to dismiss plaintiff's cause of action based on violations of NYC Adm. Code §§ 27-127 and 27-128 is granted. These Building Code sections were repealed on July 1, 2008.").

Plaintiff cites to expert Nicholas Bellizzi's conclusion that Labor Law 241(6) was violated, but the court is not bound by his opinion and declines to adopt it. *See Russo*, 301 A.D.2d at 69; *see also Singh*, 283 A.D.2d at 351. The court need not reach defendant's argument that Mr. Bellizzi is unqualified to opine on labor law matters.

Accordingly, there is a question of fact that precludes summary judgment on Labor Law 241(6) relating to an alleged violation of 12 NYCRR 23-1.7(e)(2). All of the other violations alleged by plaintiff are dismissed.

Labor Law 200 Analysis

Labor Law § 200(1) "codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143 (1st Dep't 2012). The court in *Cappabianca* identified two main kinds of Labor Law § 200(1) claims:

> claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.

Cappabianca, 99 A.D.33d at 143-44 (internal citations omitted); *see Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876, 877 (1993); *see also Mendoza v. Highpoint Associates, IX, LLC*, 83 A.D.3d 1, 9 (1st Dep't 2011). In this case, there is a question of fact as to the critical issue of what plaintiff tripped over.

If the item tripped over was created by the manner in which plaintiff's employer performed its work, then defendants cannot be held liable under section 200. *See Dalanna v. City of New York*, 308 A.D.2d 400 (1st Dep't 2003). In *Dalanna*, the appellate division upheld the lower court's dismissal of plaintiff's Labor Law 200 claims:

> [P]laintiff's employer was instructed to cut down the protruding bolts so they would be level with the surrounding surface, but it apparently missed the one on which plaintiff tripped. Thus, the protruding bolt was not a defect inherent in the property, but rather was

> created by the manner in which plaintiff's employer performed its work. Accordingly, defendants cannot be held liable under section 200…

See also Maddox v. Tishman Const. Corp., 138 A.D.3d 646 (1st Dep't 2016) ("the double-stacking of the sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work…Defendants established prima facie that they exercised no supervision or control over plaintiff's work and therefore cannot be held liable for plaintiff's injuries under common-law negligence principles or Labor Law § 200…"); *Johnson v. 923 Fifth Ave. Condo.*, 102 A.D.3d 592 (1st Dep't 2013) ("With respect to plaintiff's Labor Law § 200 and common-law negligence claims, the record demonstrates that plaintiff's injury was caused by the way he performed his work, not by a dangerous condition of the work site, and that defendants exercised no supervision or control over plaintiff's work (citation omitted). To the extent plaintiff's injury was caused by a tripping hazard on the sidewalk, it does not avail him, since the hazard was created by his employer's placement of the materials on the sidewalk."); *Cappabianca*, 99 A.D.33d at 145-146 ("the water would not have been present but for the manner and means of plaintiff's injury-producing work. Since the water was directly caused by work over which the City defendants and Skanska had no control, holding them liable for it under section 200 would make them responsible for Job Opportunities' negligence. However, section 200 does not impose vicarious liability on owners and general contractors."). Here, however, the item that plaintiff tripped over is a question of fact best left to a trier of fact, so summary judgment is denied.

Plaintiff cites to expert Nicholas Bellizzi's conclusion that Labor Law 200 was violated, but the court is not bound by his opinion. *See Russo*, 301 A.D.2d at 69; *see also Singh*, 283 A.D.2d at 351. The court need not reach defendant's argument that Mr. Bellizzi is unqualified to opine on labor law matters.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that defendants' motion for summary judgment is granted as to Section 240(1) as well as all aspects of 241(6) except as relates to a violation of 12 NYCRR 23-1.7(e)(2); and it is further

ORDERED, that defendants' motion for summary judgment is denied as to Section 200 and Section 241(6) as it relates to a violation of 12 NYCRR 23-1.7(e)(2).

This constitutes the decision and order of the court.

January 31, 2020
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED	☐ DENIED	GRANTED IN PART		X	OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT			REFERENCE