

<b>Witt v Brookfield Props. OLP, Co, LLC</b>
2020 NY Slip Op 31854(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 157343/2015
Judge: Alan C. Marin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

\_\_\_\_\_  
ROBERT WITT,

Plaintiff,

-against-

BROOKFIELD PROPERTIES OLP, CO, LLC,  
BROOKFIELD OFFICE PROPERTIES, INC,  
BROOKFIELD OFFICE PROPERTIES, and  
TURNER CONSTRUCTION COMPANY,

Defendants.

ORDER

Index no. 157343/2015

Motion no. 002

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BROOKFIELD PROPERTIES OLP, CO, LLC,  
BROOKFIELD OFFICE PROPERTIES, INC,  
BROOKFIELD OFFICE PROPERTIES, and

Third-Party Plaintiffs,

-against-

P.E. STONE, INC.,

Third-Party Defendant.

\_\_\_\_\_  
TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

-against-

P.E. STONE, INC.,

Third-Party Defendant.

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The Court has considered cfiled documents 76 through 92<sup>1</sup>; 94 through 104; 106 through 108.

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Robert Witt, an experienced electrician, was injured while operating a core drill at a renovation project at 165 Liberty Street in lower Manhattan. Brookfield Properties<sup>2</sup> owns the Liberty Street building and Turner Construction was the project general manager. The job extended over seven floors, and Mr. Witt, an employee of P.E. Stone Inc., was working on the 28<sup>th</sup> floor.

A core drill is used to make holes in concrete for various wiring. The core drill was attached to a steel platform, and the drill came up to Witt's chest and weighed about 80 pounds. The platform, 12 feet by 12 feet, was three or four inches off the floor. Witt, along with co-worker Reece Newman, had completed drilling five holes, and in his February 14, 2018 deposition, described what happened next:

I was core drilling . . . And I was telling Reece to keep as much water as possible under the conditions of the machine. And I was putting just very gentle pressure going down so it wouldn't jam . . . And then it jammed . . . I heard a noise, in that split second it just started spinning . . . The whole machine. The drill bit was stuck and the whole machine spun around . . . It happened so fast. I believe I let go and tried to get away from the machine as fast as possible . . . It hit me, it hit me and I fell down [onto the floor].

Plaintiff brought suit under sections 200, 240 and 241 (6) of the Labor Law. Defendants move here to dismiss these causes of action; plaintiff, for his part, moves for summary judgment on section 240.

An injury based on a section 240 claim must directly flow from the application of the force of gravity (*Wilinski v 334 E. 92<sup>nd</sup> Hous. Dev. Fund Corp.*, 18 NY3d 1). Section 240 can be implicated with a slight differential in height if a significant amount of force is generated as, for example, the 1,500 pound weight that fell on plaintiff in *Jordan v City of New York*, 126 AD3d 619, 1<sup>st</sup> Dept. Also gravity-related was the injury caused by an 800-pound reel of wire that was rolled down a staircase in *Runner v New York Stock Exch., Inc.* 13 NY3d 599. What happened to Mr. Witt was not gravity-related.

As for section 200 of the Labor Law, claims against a premises owner or contractor can arise from either the manner in which the work is performed or a dangerous or defective condition at

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<sup>1</sup> The stipulation discontinuing the third party actions is document 82, and also document 66, which contains all necessary signatures.

<sup>2</sup> Brookfield Properties OLP Co. LLC and Brookfield Office Properties Inc. answered the complaint, stating that the third named defendant, "Brookfield Office Properties" was "incorrectly sued" (document 12, p 1); plaintiff made no objection thereto. Paragraphs 5 and 6 of document 12 state that Brookfield Properties OLP Co. LLC "is the owner and landlord of the building located at 165 Broadway." For ease of reference, this Order will use "Brookfield" or "Brookfield Properties" to refer to the building owner.

the work site that it created or had notice of (*Martinez v City of New York*, 73 AD3d 993, 2d Dept). For the former, the owner or contractor is liable only if it exercised supervision or control of the work that led to the injury (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343).

The drill belonged to P.E. Stone and plaintiff argues that it was defective and that the broken water pump was a significant factor in why the accident happened. Clearly then, neither Brookfield no Turner created the condition or was in a position to receive notice and correct any defect.

Stephen McGann, the senior property manager for Brookfield, testified in his January 18, 2019 deposition that Brookfield inspects the ongoing work, but he was not familiar with the P.E. Stone company and had never seen the subject core drill. In short, Brookfield is not subject to section 200.

Theodore Anderson was Turner's superintendent for the seven-floor project. Deposed on March 18, 2019, Mr. Anderson, who was on site daily, described his responsibilities as, "I would manage the floor, make sure everyone shows up, make sure everybody is, you know, just -- just shows up and maintain schedule, basically." Anderson explained that the subcontractors go through a Turner site-specific safety discussion: "It covers everything job specific -- lighting, area of work, people below us, just to be cognizant of who you are around, pathway to the site, what is expected of them to come through what elevator, you know, means to the site, and then everyone should have their OSIIA requirement before starting work on our job."

Consider this exchange with Anderson:

Q. In terms of P.E. Stone, in terms of the tools they would use at the site, would Turner conduct any inspections of the tools that were being used? A. No.

Q. In terms of Turner if they saw unsafe work practices, what would they do, if anything?  
A. We would stop work.

Q. And how about if Turner saw equipment that was defective or damaged, would Turner take any action?  
A. Yes, if there was damaged equipment, yes.

Q. What would Turner do?  
A. Take it out of service.

Turner Construction had three other employees on the site including a laborer, who performed "general cleaning." Turner requires that the safety manual be present with the core drill, but does not inspect the "gang box" or the materials for the subcontractors; nor does Turner look at the equipment on site is turned on and off.

In his deposition of February 14, 2018, Witt stated that he did not receive any instructions or supervision from Turner; never had a meeting with them; and the employees he saw from Turner performed clean up. Turner Construction is also not subject to Labor Law 200 liability, given this standard: “ ‘A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed . . . [M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200’ ” (*Boody v El Sol Contr. & Constr. Corp.*, 180 AD3d 863, 864, 2d Dept, quoting *Ortega v Puccia*, 57 AD3d 54, 61-62, 2d Dept).

#### *Section 241.6*

As we know, for an owner or contractor to be subject to liability under section 241(6) of the Labor Law, it must be based upon a regulation of the Commissioner of Labor that is specific, not general in nature.

Plaintiff's expert Kathleen Hopkins cites 12 NYCRR §9.2 (a) on maintaining power-operated equipment in good repair. Subpart 23-9 applies to large equipment such as earth movers (§23-9.2 [i]); power shovels and backhoes (§23-9.4); excavators (§23-9.5); pile drivers (§23-9.10) and mixing machines (§23-9.11).

Ms. Hopkins further cites to 12 NYCRR §23-1.5 [c], "Condition of equipment and safeguards," of which paragraphs (1) and (3) read:

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition;

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

The First Department has ruled that section 23-1.5 [c] is specific enough to serve as a predicate for a section 241(6) cause of action (*Becerra v Promenade Apts. Inc.*, 126 AD3d 557, citing *Misicki v Caradonna*, 12 NY3d 511, in which the Court of Appeals found analogous specificity in 12 NYCRR §9.2 (a), referenced above). Robert Witt has sufficiently alleged a defective core drill and broken water pump; the cause of action under Labor Law §241(6) shall go forward.

While a large tool, anchored at least at one end, use of the core drill is arguably also subject to section 23-1.10, "hand tools," which requires that "Every electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator" (23-1.10[b][1])." See thereon, *Hage v State of New York*, 38 Misc3d 1214 (A)(Court of Claims), which involved a 75-pound Hougén drill which became demagnetized, spun around and crushed plaintiff's finger - - the Court denied defendant's motion to dismiss the section 241(6) claim, citing another case of a drill spinning around and causing injury (*Shields v General Electric*, 3 AD3d 715, 3d Dept).

\* \* \*

NOW therefore, in view of the foregoing,

IT IS ORDERED that motion no. 002 by defendants to dismiss the causes of action is granted with respect to sections 200 and 240 of the Labor Law and denied with respect to Labor Law §241(6); and the cross- motion by plaintiff for summary judgment under Labor Law §240 is accordingly denied.

IT IS FURTHER ORDERED that in view of the June 11, 2018 stipulation discontinuing the third party actions herein, the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

\_\_\_\_\_  
ROBERT WITT,

Plaintiff,

-against-

ORDER  
Index no. 157343/2015  
Motion no. 002

BROOKFIELD PROPERTIES OLP, CO, LLC,  
BROOKFIELD OFFICE PROPERTIES, INC,  
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TURNER CONSTRUCTION COMPANY,

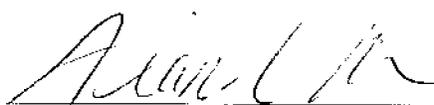
Defendants.

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A copy of this Order with Notice of Entry shall be filed with the County Clerk.

ENTER

June 12, 2020

  
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Alan C. Marin J.S.C.

ALAN C. MARIN  
JUSTICE OF THE SUPREME COURT