Priore v 33 Terrace Place Realty, LLC
2020 NY Slip Op 34546(U)
December 7, 2020
Supreme Court, Westchester County
Docket Number: 63190/2018
Judge: Linda S. Jamieson
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To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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DOMENICO PRIORE and JOSEPHINE PRIORE, Index No. 63190/2018

Plaintiffs,

DECISION AND ORDER

-against-

33 TERRACE PLACE REALTY, LLC,

Defendant.

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The following papers numbered 1 to 8 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmation and Exhibits	2
Memorandum of Law	3
Affirmation and Exhibits in Opposition	4
Memorandum of Law in Opposition	5
Affidavit and Affirmation in Reply	6
Affidavit, Affirmation and Exhibit in Opposition	7
Reply Affirmation	8

There are two motions for summary judgment before the Court. The first is filed by defendant, the owner of a two-family rental house at which plaintiff Domenico Priore was injured. The second motion, filed by plaintiffs, seeks (1) summary judgment on the issue of liability pursuant to New York State Labor Law §§ 240(1), 241(6) and 200; and (2) pursuant to CPLR § 3025(b),

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granting leave to serve a Supplemental Bill of Particulars to allege that defendants violated 12 NYCRR § 23-1.7(b)(1)(iii).

The facts are sharply disputed. Plaintiff was an electrician who was working on the premises owned by defendant. According to the deposition testimony of one of defendant’s principals, Steven Lazarro, ConEd informed defendant that it needed to make some changes to some work that plaintiff was performing at the premises. This required the cutting back of some tree branches. Mr. Lazarro stated at his deposition that he told plaintiff that information, and told him that he would be calling the landscaper to come do the tree work. The next day, before the landscaper arrived, plaintiff decided to do the work himself. He took a four-foot ladder, opened it properly, and set it on the deck of the premises. Mr. Lazarro testified at his deposition that the deck had a railing. Throughout their papers, plaintiffs’ counsel repeatedly states that the area was “an elevated and open area off of the deck.” It is thus unclear whether the area in which plaintiff was standing was open on the sides, or had a railing.

There is no dispute that there was nothing wrong with the ladder. Plaintiff testified at his deposition that he was not wearing a hard hat or a harness at the time of his injury. This was because there was “no harness required for our duties that

particular day." When asked "Was that just based on the height you were working at?," plaintiff responded "Correct."

How the accident occurred is hotly contested. Plaintiff contends that he was standing on the ladder, on the second step. In contrast, defendant asserts that plaintiff was not standing on the ladder at all, but instead was standing on a tree trunk.[1] Regardless of which version is accurate, what is not in dispute is that, as plaintiffs explain, "Mr. Priore cut off a branch from the tree; it fell onto the electrical wire that was to be raised. He became concerned that the weight of the branch would cause the wire to be pulled down from the utility pole and/or the house. To avoid this potentially hazardous problem, Mr. Priore tugged on the branch in an attempt to free it from the electrical wire." The branch snapped, and flung him to the ground, where he was injured.

"Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites. To prevail on a Labor Law § 240 (1)

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[1]This version of the accident comes from an affidavit submitted by the police officer who responded to the accident. He states in his affidavit that this is what plaintiff told him when he arrived at the scene. Plaintiffs argue that this is hearsay, and must be disregarded. However, in his second affidavit, the police officer not only recounts what plaintiff told him, but also establishes that the uncertified police report is a business record which contains an admission by plaintiff against his interest. *See generally Yassin v. Blackman*, 188 A.D.3d 62, 67, 131 N.Y.S.3d 53, 57 (2d Dept. 2020).

cause of action, a plaintiff must establish that the statute was violated and that the violation proximately caused his or her injuries." *Orellana v. 7 W. 34th St., LLC*, 173 A.D.3d 886, 887, 103 N.Y.S.3d 496 (2d Dept. 2019). Plaintiff has not made this showing here.

As the Court of Appeals has explained,

> 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). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. . . .
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> Labor Law § 240 (1) applies to both 'falling worker' and 'falling object' cases. With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured. Thus, for section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute.
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> In addition, the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a 'falling object' case, because a different type of hazard is involved. . . . The hazard posed by working at an elevation is that, in the absence of adequate safety devices (*e.g.*, scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device (*e.g.*, ropes, pulleys, irons) also enumerated in the statute.

Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 267-68 (2001).

In this case, the object that fell, causing plaintiff to fall off the deck to the ground, was a tree branch. There is no

evidence to show that if the tree branch had not fallen, plaintiff would still have been in danger, simply because he was working at an elevation. The Second Department has explained that "An object needs to be secured if the nature of the work performed at the time of the accident posed a significant risk that the object would fall. However, here, it was not the nature of the work that caused an object to fall on the plaintiff. Rather, it was allegedly the defective condition of the ropes in the shaft. Where a falling object is not a foreseeable risk inherent in the work, no protective device pursuant to Labor Law § 240(1) is required." *McLean v. 405 Webster Ave. Assocs.*, 98 A.D.3d 1090, 1095-96, 951 N.Y.S.2d 185, 191 (2d Dept. 2012). In this case, the snapping of the tree branch was not a foreseeable risk inherent in the work of an electrician.

The case of *Seales v. Trident Structural Corp.*, 142 A.D.3d 1153, 1156, 38 N.Y.S.3d 49, 53-54 (2d Dept. 2016), is instructional. In that action, the Second Department held that "the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking. For section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. However, Labor Law § 240(1) does

not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected." That is precisely the case here; no securing or hoisting device for the tree branch would have been expected, or would have helped in this situation. The claims arising under Labor Law § 240(1) are dismissed.

Turning next to the motions regarding Labor Law § 241(6), plaintiffs seek to supplement their Bill of Particulars to include the specific section of the Industrial Code. As the Second Department has explained, "With respect to a claim pursuant to Labor Law § 241(6), the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code. A failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim. Rather, leave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant." *Jara v. New York Racing Ass'n, Inc.*, 85 A.D.3d 1121, 1123, 927 N.Y.S.2d 87, 90-91 (2d Dept. 2011).

Here, plaintiffs assert that Industrial Code 12 NYCRR § 23-1.7(b)(1)(iii) applies. This section, which applies to

"hazardous openings," provides, in relevant part that "Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (b) An approved life net installed not more than five feet beneath the opening; or (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage." Although defendant alleges that it would be prejudiced if the Court were to allow the amendment, the Court finds that this is not the case. All along, plaintiffs have contended that a safety net or belt would have made all the difference here. This is nothing new. (As for the issue of whether the deck was a "hazardous opening," this is an issue for the jury to decide, as it is not clear, based on these papers, whether there was an adequate railing or not.) The motion to amend the Bill of Particulars is thus granted.

Finally, the Court denies both motions with respect to Labor Law § 200 and common law negligence. There are simply too many open questions here about how the accident occurred (ladder or tree trunk); whether there was an adequate railing or not; and whether plaintiff should have waited until the landscapers came to do the tree work, among other things.

All other requests for relief are denied. The parties are directed to appear for a Settlement Conference in the Settlement Conference Part, on a date to be determined by that Part.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
December 7, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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