Washington v New York State Urban Dev. Corp.
2015 NY Slip Op 30177(U)
January 21, 2015
Supreme Court, Kings County
Docket Number: 502477/2012
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
ANTHONY WASHINGTON,

Plaintiff,

Index No: 502477/2012

-against-

DECISION AND ORDER

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORP., FOREST CITY RATNER COMPANIES, LLC, BROOKLYN ARENA, LLC and HUNT CONSTRUCTION GROUP, INC.,

Defendants,

x

Recitation as required by CPLR 2219(a), of the papers considered in this motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	2
Reply Papers.....	3
Memorandum of Law.....	4, 5

Upon the foregoing cited papers, the Decision/Order on this motion:

In this action to recover damages for personal injuries, defendants move for an order pursuant to CPLR 3212 granting them summary judgment, dismissing the plaintiff's complaint which alleges causes of action under Labor Law §§ 240(1), 241(6) and 200.

On August 10, 2012, plaintiff, a journeyman union ironworker, was allegedly injured when he fell off a flat bed truck while working in the course of his employment at the construction site known as the Barclay's Arena located in Brooklyn, New York. Plaintiff's employer, non-party Egan Glass and Metal [Egan], was hired by defendant general contractor Hunt Construction Group, Inc., [Hunt] to install curtain walls for the building. The site was owned by defendants New York State Urban Development Corporation d/b/a Empire State Development Corp., Forest City Ratner Companies, LLC, and Brooklyn Arena, LLC [collectively Owners].

Plaintiff testified that on the date of his accident he was assigned to help unload curtain wall panels from a flatbed truck located at a staging area outside of the construction site. Plaintiff had to do the rigging work, which consisted of installing clamps on the curtain panels so that the panels could be lifted off the truck by a crane and placed on the ground. In order to reach the surface of the flatbed, plaintiff had to climb up the steel steps mounted on the cab of the truck. Plaintiff testified that his accident happened when after reaching the top step on the cab, he placed his right foot on the top of the flatbed, and immediately his right foot slipped out from beneath him causing him to fall four to five feet to the ground below. After his accident, plaintiff observed that the trailer was wet with beads of a mixture of water and grease. Plaintiff testified that it had rained earlier that day, but was not raining at the time of his accident.

In order to trigger the extraordinary protections of Labor Law §240(1), a worker must be performing a task that inherently entails "a significant risk...because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Labor Law § 240(1) applies to "'extraordinary elevation risks,'" and not the "'usual and ordinary dangers of a construction site'" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, [2011], quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843[1994]). Contrary to plaintiff's contention, his rigging work, including getting on and off the flatbed, does not trigger the protections of Labor Law §240(1) "because there was no exceptionally dangerous condition posed by the elevation differential between the [floor] of the truck and the ground, and there was no significant risk inherent in the particular task plaintiff was performing because of the relative elevation at which he was performing that task" (*Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1168 [4th Dept 2007]) quoting *Tillman v Triou's Custom Homes*, 253 AD2d 254 [4th Dept 1999]). A four to five foot fall from a flatbed truck does not present the type of elevation-related risk that triggers Labor Law §240(1) coverage (*see Toefer v. Long Island R.R.* 4 NY3d 399 [2005]). The safety devices provided for in the statute were designed for much more dangerous activities then that of a worker descending from (or ascending to) the surface of flatbed of a truck (*see Toefer, supra*)[1]. Therefore,

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[1] The post-*Toefer* cases cited by plaintiff are distinguishable as the plaintiffs in those cases were injured while performing tasks at an elevation above that of the surface of the flatbed (*see Ford v HRH Constr. Corp.*, 41 AD3d 639 [2d Dept 2007] (plaintiff injured when he fell from the top of wooden braces securing ten foot high stacks of curtain wall located on platform of flatbed truck), *Worden v. Solvay Paperboard, LLC*, 24 AD3d 1187 [4th Dept 2005]) (plaintiff exposed to elevation related risk when working on construction materials that were four to five feet above the surface of flatbed) *Naughton v The City of New York,* 94 AD3d 1 [1st Dept 2012] (plaintiff injured when he was knocked off curtain wall that was stacked ten to eleven feet above surface of flatbed), *Intelisano v Sam Greco Constr. Inc.*, 68 AD3d 1321 [3rd Dept 2009] (plaintiff injured

plaintiff's claim based upon a violation of Labor Law §240(1) claim is dismissed.

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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). A plaintiff must establish the violation of an industrial code provision which sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In his verified bill of particulars, plaintiff asserts that defendants violated Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 3-5, 23-6, 23-7, 23-8, 23-9. Defendants assert that the cited provisions are not applicable to the facts of this case and that plaintiff's Labor Law § 241(6) claims should be dismissed. Plaintiff only opposes that part of defendants' motion seeking dismissal of his Labor Law §241(6) claim based upon violations of Industrial Code §§ 23-1.7(d) and (f).

Industrial Code §23-1.7(d), entitled slipping hazards, provides, in pertinent part, that no employee shall be permitted "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition." Here, plaintiff's testimony, which indicates that the surface of the flatbed, from which he was to perform his work, was slippery due to an accumulation of water and grease, raises a triable issue of fact as to whether there was a violation of the regulation, and, if so, whether that violation was a proximate cause of the accident (*see Cafarella v Harrison Radiator Div. of GM*, 237 AD2d 936 [4th Dept 1997]). Accordingly, that part of defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) cause of action based upon an alleged violation of Industrial Code §23-1.7(d) is denied.

Industrial Code §23-1.7(f), entitled "[v]ertical passage," provides that "[stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature of the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Despite plaintiff's argument, the surface area of the flatbed truck is not a "working area above ground requiring a stairway, ramp, or runway under that section" (*Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 713 [2d Dept 2007] *lv denied* 10 NY3d 701 [2008]; and see *Amantia v Barden & Robeson Corp.*, *supra*). Accordingly, that part of defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) cause of action based upon an alleged violation of Industrial Code §23-1.7(f) is granted.

As to plaintiff's Labor Law §200 and common law negligence claims, plaintiff opposes that part of defendants' motion for summary judgment as it pertains to Hunt only and

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when falling from ten foot high bundles of insulation stacked on flatbed surface).

does not oppose the motion as it relates to the owners.

Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Harshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888 [2d Dept 2013]). Where, as here, a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it had actual or constructive notice of the dangerous condition (*see Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]. Here, there is no evidence to suggest that Hunt created the unsafe wet and greasy condition that caused plaintiff's accident or that it had actual or constructive notice of same. The deposition of Hunt's safety manager on the date of plaintiff's accident, Sam Laforte, indicates that Hunt employees did not inspect the flatbed trucks that came onto the site and did not inspect this specific flatbed truck prior to plaintiff's accident. Mr. Laforte also testified that Hunt did not provide any ladders or equipment to Egan employees and were not involved in directing their work. The affidavit of plaintiff's co-worker, Odinga Sanderson, which indicates that complaints were made to Hunt's safety representatives about the lack of ladders, does not raise a triable issue of fact as to constructive notice of the alleged condition that caused plaintiff's accident. Accordingly, that part of defendants' motion for summary judgment dismissing the causes of action alleging Labor Law §200 and common law negligence is granted.

This constitutes the decision/order of the court.

Dated: January 21, 2015

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court