SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

----------x

Burnett Williams and Delores Williams,

Plaintiff(s),

- against -

INDEX. NO.: 23644/05

City of New York, Metropolitan Transportation Authority, New York City Transit Authority and PAL Environmental Safety Corp.,

Defendant(s).

----------x

City of New York, Metropolitan Transportation Authority, and New York City Transit Authority,

Third-Party Plaintiff(s),

- against -

PAL Environmental Safety Corp.,

Third-Party Defendant(s).

----------x

HON. JOHN A. BARONE:

The motion by plaintiff for an order pursuant to CPLR Sec. 3212 granting summary judgment against the defendants City of New York, Metropolitan Transportation Authority, and New York City Transit Authority on the issue of liability is granted. The cross-motion by defendant PAL for summary judgment dismissing all claims, cross-claims and counter-claims is also granted.

Plaintiff has brought this action seeking damages for personal injuries allegedly sustained in an accident on August 18, 2004 at approximately 11:00 a.m. at the 170th Street Subway Station on Jerome Avenue, Bronx, NY. At the time of the accident said subway station

was undergoing demolition and construction including the stairways, mezzanine, train platforms, canopy rooms, bathrooms and token booths. Defendant NYCTA as agent of defendant MTA was the General Contractor at the site.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY 2d 320. Once movant meets his initial burden, then burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 NY 2d 557. The Court of Appeals has stated in the case of Friends of Animals v. Associated Fur Mfrs., 46 NY 2d 1065:

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the Court as a matter of law in directing judgment' in his favor (CPLR 3212[b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case... .

In support of the motion, plaintiff has provided the court with a copy of plaintiff's Notice of Claim, the 50-H hearing of plaintiff Burnett Williams, the pleadings, plaintiff's Bill of Particulars, plaintiff's Notice to Admit and Responses, a copy of the lease between The City of New York and the New York City Transit Authority, the deposition of plaintiff Burnett Williams, the deposition of the New York Transit Authority by Alfred Chin, the deposition of non-party witness John Hunker, photographs of the scene, and an accident report filled out by plaintiff. Defendant NYCTA hired Lilo-Kasner to perform lead paint abatement at the site.

Plaintiff Burnett Williams was an employee of Lilo-Kasner and was assigned to the project as a lead inspector who's job was required to inspect all work involving steel. Plaintiff's accident occurred on the mezzanine level of the construction site. The mezzanine level was elevated approximately thirteen to seventeen feet above the sidewalk. The NYCTA was involved in a complete renovation of the mezzanine level. As part of this renovation the defendant's carpenters had laid down a temporary plywood walkway, that also served as the framing for cement that was to be poured. To be secure the plywood was supposed to be screwed into place. At the time of the accident on August 18, 2004, plaintiff was at the construction location doing his work as a lead inspector. Plaintiff would conduct the inspection while the ironworkers employed by defendant NYCTA were removing old steel. A NYCTA employee on a manlift asked plaintiff to hand him a socket, which was on the plywood plank. Plaintiff went to pick up the socket and when he stepped on the plywood the plywood flipped upward causing plaintiff to fall through an opening towards the street. Plaintiff did not fall through to the street. Plaintiff's right leg went down through the flooring, struck the steel beam below, and landed on his buttocks. The plaintiff saw that the plywood plank that collapsed had not been properly secured. The submissions by plaintiff on this motion make out a prima facie case that plaintiff is a covered person under Labor Law Sec. 240(1). Labor Law Sec. 240(1) is intended to apply where the work being performed subjects those involved to risks related to elevation differentials. The statute contemplates that the injuries are related to work being done is related to the effects of gravity where protective devices are called for because of the differential between the elevation level of the required work and a lower level .Gordon v. Eastern Railway Supply, Inc., 82 NY 2d 555; see also Racovitch v. Consolidated Edison Co., 78 NY 2d 509. The evidence submitted by plaintiff herein shows that no devices were provided to protect against this elevated related occurrence.

Plaintiff is also seeking summary judgment on his claim under Labor Law Sec. 241(6). Labor Law Sec. 241(6) provides that:

All areas in which construction, excavation or demolition work is

> being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

A violation of Labor Law Sec. 241(6) necessarily requires a failure to comply or adhere to external rules and statutes. Plaintiff must demonstrate that a defendant violated a specific command of the rules and regulations promulgated by the Commissioner of the Department of Labor. Plaintiff maintains that Industrial Code (12 NYCRR) Sec. 23-1.7(b)(1) requires that every hazardous opening into which a person may step or fall be guarded by a substantial cover fastened in place. The Appellate Division, First Department, in the case of O'Connor v. Lincoln Metrocenter Partners, 266 AD 2d 60, has found that 12 NYCRR 23-1.7(b)(1) is a section that can be alleged as a specific violation of the Industrial Code and stated that "...These code provisions require all hazardous openings to be covered and even temporary flooring to be secured against movement". Plaintiff has shown that this section is applicable in the instant case, and the submissions have proven a prima facie case for summary judgment.

In opposition to the motion the City of New York, Metropolitan Transportation Authority and the New York City Transit Authority has provided the court with an attorney's affirmation and reliance or the depositions submitted by plaintiff. It is the contentions of these defendants that the work being done by plaintiff did not place him in the category of doing construction related work. This, however, is not accurate, and the case law shows that a person in plaintiff's position was a person intended to be covered under Labor Law Sec. 240(1) and 241(6). Plaintiff's work in the instant case was integral and necessary for the construction project to move forward, and whether he, or someone else, was there everyday is not a relevant factor. The instant case is very similar to the case of Ianelli v. Olympia & York Battery Park Co., 190 AD 2d 775 which involved a plaintiff employed as supervisor and steel inspector.

The Appellate Division, Second Department, found that:

> It is evident from the facts of this case that plaintiff was exposed to the risks inherent in an elevated work site (see, Lombardi v. Stout, 80 NY 2d 290; Rocovich v. Consolidated Edison Co., 78 NY 2d 509; Bland v. Manocherian, 66 NY 2d 452, 459; Zimmer v. Chemung County Performing Arts, 65 NY 2d 513), and that his work involved the erection of a building (see, Lombardi v. Stout, supra; cf., Jock v. Fien, 80 NY 2d 965). Therefore, Labor Law §240(1) is applicable and O&Y had the nondelegable duty of furnishing or erecting devices "which shall be so constructed, placed and operated as to give proper protection to a person so employed". There is absolutely no evidence in this case that there were any safety devices in place to prevent the plaintiff from falling from the third floor to the second floor.

The instant case is also similar to the case of Crowther v. City of New York, 262 AD 2d 519, when the plaintiff was employed to inspect steel work and fire proofing at a construction project. The court found that plaintiff was in the class of people protected by the Labor Law as his work was integral to the completion of the project. The defendants, City of New York, Metropolitan Transportation Authority and the New York City Transit Authority have failed to raise an issue of fact in the face of the prima facie case set forth by the plaintiff. These defendants have also failed to show that Labor Law Sec. 241(6) is inapplicable in this situation in that plaintiff has set forth evidentiary facts showing a violation of the Industrial Code, 12 NYCRR Sec. 23-1.7(b)(1), which requires that every hazardous opening into which a person may step or fall be guarded by a substantial cover fastened in place. The plywood in question herein was not guarded by a cover, or even sufficient screws to keep it in place. (O'Connor v. Lincoln Metrocenter Partners, LP, 266 AD 2d 60). The motion by plaintiff for summary judgment against defendants City of New York, Metropolitan Transportation Authority and the New York City Transit Authority for summary judgment on the issue of liability pursuant to Labor Law Secs. 240(1) and 241(6) is granted.

The cross-motion by defendant PAL Environmental Safety Corp., for summary judgment and dismissal of plaintiff's complaint and the third-party complaint is granted. In

support of the cross-motion defendant PAL Environmental Safety Corp., has submitted copies of the pleadings, plaintiff's Bill of Particulars as to said defendant, a stipulation of discontinuance signed by PAL Environmental and the attorneys for the NYCTA defendants, the deposition of plaintiff William Burnett, the deposition of John Hunker, the deposition of Branco Kleva, the deposition of Albert Chin, the deposition of Saul Calle, and the contract between NYCTA and PAL Enterprises. Through their exhibits defendant PAL Enterprises has shown that their work was during the demolition portion of the project. PAL Enterprises is an asbestos, lead and mold remediation company, hired to perform asbestos abatement only. No other trades worked at the site when PAL Enterprises did their work, and that its work was finished over a year before plaintiff's accident. All parties agree that NYCTA carpenters put in the plywood planking. The opposition by plaintiff does not raise a question of fact as to defendant PAL Enterprises and the opposition submitted by NYCTA does not mention the cross-motion. Deposition testimony shows the PAL Enterprises was not there at the time of plaintiff's injury and plaintiff testified that he saw no any asbestos abatement work between May, 2004 and August, 2004, and that the demolition phase was over by the time construction began. Furthermore, PAL Enterprises did not have any actual or constructive notice of any problem with the plywood floor as they did not put it down, and were long gone from the site. The cross-motion for summary judgment is granted and plaintiff's complaint, and any counter and cross-claims brought by the other defendants are dismissed.

Settle Order on motion.

Settle Order on cross-motion.

This constitutes the decision of this Court.

Date: 2/18/10

John A. Barone, JSC

23644/05