LEXSEE 2010 NY SLIP OP 6074

Analysis
As of: Jul 20, 2010

[*1] **Richard J. Erickson, appellant, v Cross Ready Mix, Inc., et al., defendants, Turner Construction Company, defendant third-party plaintiff-respondent; Commodore Construction Corp., third-party defendant-respondent. (Index No. 11947/05)**

2009-04396

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2010 NY Slip Op 6074; 2010 N.Y. App. Div. LEXIS 6162

July 13, 2010, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

PRIOR HISTORY: *Erickson v. Cross Ready Mix, Inc., 2009 N.Y. Misc. LEXIS 4783 (N.Y. Sup. Ct., Apr. 17, 2009)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff laborer appealed an order by the Nassau County Supreme Court (New York) that vacated a prior order denying defendant general contractor's cross-motion for summary judgment in his *Labor Law § 241(6)* cause of action, and thereupon granted the cross-motion.

OVERVIEW: The laborer was injured when a cement truck struck him at a construction while backing into the area where he was working, without being guided by another person who was properly positioned. The appellate court found, inter alia, that the trial court properly granted the contractor's motion for summary judgment to the extent the laborer's *§ 241(6)* cause of action was predicated upon alleged violations of *12 NYCRR 23-1.23(a), (b), (c), 23-1.5(c)(1),* and *23-1.7(b)(1)(i)* since the laborer was not injured upon a ramp or runway and the hole into which he fell was not a hazardous opening. However, the trial court erred in dismissing so much of the *§ 241(6)* cause of action as was predicated upon an alleged violation of *12 NYCRR 23-9.7(d)*. Evidence that the cement truck backed into the area where the laborer was working, without being guided by another person who was properly positioned, was sufficient to raise a triable issue of fact as to whether the contractor's violation of *12 NYCRR 23-9.7(d)* was a proximate cause of the laborer's injuries. The trial court also erred to the extent that it held that the contractor was not liable under *§ 241(6)* since it did not own or operate the truck.

OUTCOME: The order was modified by deleting the provision thereof that vacated the prior order cause of action insofar as the order was predicated upon an alleged violation of *12 NYCRR 23-9.7(d)* and by substituting therefor a provision adhering to the prior determination; and as so modified, the order was affirmed.

LexisNexis(R) Headnotes

Labor & Employment Law > Occupational Safety & Health > Civil Liability
Labor & Employment Law > Occupational Safety & Health > Construction Standards
[HN1] *12 NYCRR 23-1.5(c)(1)* is a general safety standard; and, thus, is an insufficient predicate for liability under *Labor Law § 241(6)*.

Labor & Employment Law > Occupational Safety & Health > Construction Standards
[HN2] See *12 NYCRR 23-9.7(d)*.

Labor & Employment Law > Occupational Safety & Health > Civil Liability
Labor & Employment Law > Occupational Safety & Health > Construction Standards
[HN3] *Labor Law § 241(6)* creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where a specific, positive command or a concrete specification of a regulation promulgated by the Commissioner of the Department of Labor has been violated.

COUNSEL: [**1] Massimo & Panetta, P.C., Garden City, N.Y. (Frank C. Panetta of counsel), for appellant.

Malapero & Prisco LLP, New York, N.Y. (Frank J. Lombardo of counsel), for defendant third-party plaintiff-respondent.

Conway, Farrell, Curtin & Kelly, P.C., New York, N.Y. (Jonathan T. Uejio of counsel), for third-party defendant-respondent.

Andrea G. Sawyers, Melville, N.Y. (David R. Holland of counsel), for defendant Cross Ready Mix, Inc.

JUDGES: REINALDO E. RIVERA, J.P., RUTH C. BALKIN, JOHN M. LEVENTHAL, SHERI S. ROMAN, JJ. RIVERA, J.P., BALKIN, LEVENTHAL and ROMAN, JJ., concur.

OPINION

DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Martin, J.), entered April 21, 2009, as, upon renewal, in effect, vacated the determination in an order entered September 30, 2008, denying that branch of the cross motion of the defendant third-party plaintiff, Turner Construction Company, which was for summary judgment dismissing the cause of action to recover damages for violations of *Labor Law § 241(6)* [**2] insofar as asserted against that defendant, and thereupon granted that branch of the cross motion.

ORDERED that the order entered April 21, 2009, is modified, on the law, by deleting the provision thereof, upon renewal, in effect, vacating the determination in the order entered September 30, 2008, denying that branch of the cross motion of the defendant third-party plaintiff, Turner Construction Company, which was for summary judgment dismissing so much of the *Labor Law § 241(6)* cause of action as was predicated upon an alleged violation of *12 NYCRR 23-9.7(d)* and thereupon granting that branch of the cross motion, and substituting therefor a provision, upon renewal, adhering to the determination in the order entered September 30, 2008, denying that branch of the cross motion; as so modified, the order entered April 21, 2009, is affirmed insofar as appealed from, without costs or disbursements.

Contrary to the plaintiff's contention, the Supreme Court properly granted, upon renewal, that branch of the cross motion of the defendant third-party plaintiff, Turner Construction [*2] Company (hereinafter Turner), which was for summary judgment dismissing the *Labor Law § 241(6)* cause of action insofar [**3] as asserted against Turner to the extent it was predicated upon alleged violations of *12 NYCRR 23-1.23(a), (b), (c), 23-1.5(c)(1),* and *23-1.7(b)(1)(i).*

Turner made a prima facie showing that *sections 23-1.23(a), (b),* and *(c)* of the Industrial Code (12 NYCRR) were not applicable to the facts of this case, since the plaintiff was not injured upon a ramp or runway (*see Waszak v State of New York, 275 AD2d 916, 713 N.Y.S.2d 397*; *Doty v Eastman Kodak Co., 229 AD2d 961, 962, 646 N.Y.S.2d 474).* Turner also made a prima facie showing that, although *12 NYCRR 23-1.7(b)(1)(i)* is sufficiently specific to support a cause of action under *Labor Law § 241(6)* (*see Scarso v M.G. Gen. Constr. Corp., 16 AD3d 660, 661, 792 N.Y.S.2d 546),* the hole into which the plaintiff fell in this case was not a "hazardous opening" within the meaning of that section (*Barillaro v Beechwood RB Shorehaven, LLC, 69 AD3d 543, 544, 894 N.Y.S.2d 434*; *see Miller v Weeden, 7 AD3d 684, 777 N.Y.S.2d 516*; *Rice v Board of Educ. of City of N.Y., 302 AD2d 578, 579, 755 N.Y.S.2d 419*; *Alvia v Teman Elec. Contr., 287 AD2d 421, 423, 731 N.Y.S.2d 462).* In opposition to Turner's prima facie showing of entitlement to judgment as a matter of law in

this regard, the plaintiff failed to raise a triable issue of fact with respect to the applicability of those Industrial [**4] Code provisions (*see generally Alvarez v Prospect Hosp., 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923*).

Moreover, contrary to the plaintiff's contention, [HN1] *12 NYCRR 23-1.5(c)(1)* is a general safety standard and, thus, is an insufficient predicate for liability under *Labor Law § 241(6)* (*see Gasques v State of New York, 59 AD3d 666, 668, 873 N.Y.S.2d 717*; *Maday v Gabe's Contr., LLC, 20 AD3d 513, 797 N.Y.S.2d 914*; *Sparkes v Berger, 11 AD3d 601, 602, 783 N.Y.S.2d 390)*. Furthermore, to the extent that the plaintiff argues on appeal that *12 NYCRR 23-1.7(e)* and *23-4.2(h)* are applicable to the instant case, he failed to allege violations of these sections in his bill of particulars. Accordingly, the issue is not properly before this Court.

However, the Supreme Court erred in granting, upon renewal, that branch of Turner's cross motion which was for summary judgment dismissing so much of the *Labor Law § 241(6)* cause of action as was predicated upon an alleged violation of *12 NYCRR 23-9.7(d)*. That provision requires that [HN2] "[t]rucks shall not be backed or dumped in places where persons are working nor backed into hazardous locations unless guided by a person so stationed that he sees the truck drivers and the spaces in back of the vehicles" (*12 NYCRR 23-9.7[d]*). Evidence that the cement [**5] truck which struck the plaintiff at the construction site backed into the area where he was working, without being guided by another person who was properly positioned, is sufficient to raise a triable issue of fact as to whether Turner's violation of *12 NYCRR 23-9.7(d)* was a proximate cause of the plaintiff's injuries (*see generally Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 351, 693 N.E.2d 1068, 670 N.Y.S.2d 816).*

To the extent that the Supreme Court held that Turner, as the general contractor, was not liable under *Labor Law § 241(6)* since it did not own or operate the truck, the Supreme Court erred. [HN3] *Labor Law § 241(6)* "creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where . . . a specific, positive command [] or a concrete specification of a regulation promulgated by the Commissioner . . . has been violated" (*Toefer v Long Is. R.R., 4 NY3d 399, 409, 828 N.E.2d 614, 795 N.Y.S.2d 511* [citations and internal quotation marks omitted]; *see Rizzuto v L. A. Wenger Contr. Co., 91 NY2d at 349-350*). Accordingly, upon renewal, the Supreme Court should have adhered to the determination in its prior order denying that branch of Turner's cross motion which was [**6] for summary judgment dismissing the *Labor Law § 241(6)* cause of action insofar as it was predicated upon an alleged violation of *12 NYCRR 23-9.7(d).*

RIVERA, J.P., BALKIN, LEVENTHAL and ROMAN, JJ., concur.