SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 61

OTAIR S. SCOLARI, MARIA JOSE GARCIA SCOLARI, RAUL GONCALVES and ROSA GONCALVES,

Plaintiffs

-against-

CONSOLIDATED EDISON CO. OF NEW YORK, INC.,

Defendant

Louise Gruner Gans, J.:

Defendant Consolidated Edison Co. of New York, Inc., moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. Plaintiffs Otair S. Scolari, Maria Jose Garcia Scolari, Raul Goncalves and Rosa Goncalves cross-move for an order granting summary judgment against Con Edison or, in the alternative, dismissing Con Edison's first affirmative defense based upon plaintiffs' culpable conduct.

In the complaint, Otair Scolari and Raul Goncalves allege that they sustained personal injury on October 10, 1998, while employed as construction workers by nonparty Felix Industries, Inc., at a construction site owned by Con Edison. By agreement dated June 15, 1995, Con Edison had retained Felix Industries to repair and replace steam pipes in the City of New York. On the date of the accident, Felix Industries was engaged in excavating and repairing a ruptured steam pipe near the intersection of Second Avenue and 72nd Street in Manhattan. Plaintiffs allege that the accident occurred while Scolari and Goncalves were standing in the trench they were excavating around the pipe and steam erupted from beneath the pipe, scalding both men for several minutes.

Plaintiffs assert causes of action based on sections 200, 240 and 24 1(6) of the Labor Law on allegations that Con Edison negligently failed to shut off the steam flowing into the pipe and negligently failed to provide adequate artificial lighting and properly placed ladders so as to permit plaintiffs to escape quickly from the trench.

Con Edison now seeks summary judgment dismissing the Labor Law § 200 claims on the ground that the undisputed record conclusively establishes that Con Edison did not owe plaintiffs a tort duty of care.

In opposition, plaintiffs contend that Con Edison actively directed and controlled Felix Industries' work performance and is, therefore, liable for plaintiffs' injuries.

Summary judgment dismissing the Labor Law § 200 claims is granted. Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a reasonably safe place to work (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). A well-recognized exception to this general rule exists where the work itself creates the danger. It has long been established that a plaintiff "cannot recover for injuries received while doing an act to eliminate the cause of the injury," (Kowalsky v Conreco, 264 NY 125, 128; Skinner v G & T Realty Corp. of N.Y., 232 AD2d 627 [2d Dept 1996]; Wolfe v Teele 223 AD2d 854; McCullum v. The Barrington Co., 192 AD2d 489). The rationale behind this exception "is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe," (Kowalsky v Conreco, supra, 264 NY, at 129). Here, plaintiffs allege that they were injured by steam escaping from a ruptured steam pipe which they had been hired to fix. In these circumstances, there can be no viable common-law negligence claim against Con Edison.

In addition, plaintiffs have failed to raise a friable issue regarding whether Con Edison retained any measure of control over the manner in which Felix Industries performed its work under its contract with Con Edison. To be held liable under Labor Law § 200, an owner or general contractor must be shown to have had actual or constructive notice of the condition and to have exercised sufficient control over the worksite to correct or avoid the hazard (Comes v New York State Elec. & Gas Corp., 82 NY2d 876[1993]; Lombardi v Stout, 80 NY2d 290 [1992]). Kevin Kelly, a Con Edison construction inspector, attests that a Con Edison inspector would occasionally visit a particular Felix Industries job site, including the site where the subject accident occurred, and review the progress of the work, but would not direct, supervise or control the manner in which Felix Industries performed its work. Kelly further attests that Felix Industries bore sole responsibility for the safety of its employees. Kelly's testimony is supported by Felix Industries. Anselmo Saiz, a Felix Industries project manager, attests that "Con Ed did not direct, supervise or control the manner in which Felix employees performed their work generally or on [the date of the accident]. A Con Ed inspector would occasionally come to a job site to review the progress of the work, but would not participate in the manner that the work was to be performed," (Saiz aff, Apr. 15, 2000, at ¶ 2 [emphasis omitted]). Contrary to plaintiffs' contention, the fact that an owner or general contractor "may have dispatched persons to observe the progress and method of the work does not render it actively negligent inasmuch as this sort of activity does not bespeak supervision of the kind of which would render a property owner liable and common law for injuries sustained by [plaintiffs] at the worksite" (Aragon v 233 W. 21st St., Inc., 201 AD2d 353,354 [1st Dept 1994]).

Contrary to plaintiffs' contention, there is no evidence that the fact that Con Edison did not turn off the steam feeding into the type prior to the commencement of work renders it subject to liability here. Kelly attests that Felix Industries would determine whether the repair work required that the steam be turned off to a particular pipe and would then instruct con Edison to turn the steam off and that Con Edison would then do so. Kelly further attests that Felix Industries did not request Con Edison to turn off the steam on the date of the accident. Saiz similarly attests that Felix Industries more of the responsibility of determining whether the steam should be turned off and that Con Edison would do so upon request. Saiz further attests that Felix Industries did not request Con Edison to turn off the steam on the date of the accident.

For these reasons, the Labor Law § 200 claims are dismissed.

Also dismissed are plaintiffs' claims asserted under the scaffolding law (Labor Law § 240). Plaintiffs do not oppose that branch of the motion to dismiss these claims and, in any event, there is absolutely no evidence that the accident resulted from a change in elevation (see, Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, supra).

Con Edison next seeks summary judgment dismissing the Labor Law § 241(6) claims on the ground that plaintiffs have failed to plead violations of relevant and sufficiently concrete Industrial Code sections.

In partial opposition, plaintiffs do not dispute Con Edison's contentions that 12 NYCRR §§ 23-1.31 ("Excavation Operations - approval of materials and devices"), 23-4.1(b) ("Excavation Operations - General requirements"), 23-4.2 ("Excavation Operations - Trench and area type Excavations"), and 23-1.8(b) ("Excavation Operations Personal

protective equipment - Respirators") either impose only general safety standards or are not relevant in the circumstances presented here. Instead, plaintiffs allege that Con Edison violated 12 NYCRR §§ 23-1.30 ("Excavation Operations -Illumination") and 23-4.3 ("Excavation Operations Access to excavations") and that these sections support viable claims under Labor Law § 241(6).

As a threshold matter, the court notes that, contrary to Con Edison's contention, the supplemental verified bill of particulars in which plaintiffs allege for the first time violations of sections 23-1.30 and 23-4.3 of the Industrial Code was properly served prior to plaintiffs' filing of the note of issue. The affidavit of service demonstrates that the supplemental bill was served on Con Edison's counsel on October 27, 1999, more than one month prior to the filing of the note of issue on December 1, 1999, (see, CPLR 3042 [b]).

Section 241(6) of the labor law imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety for construction workers and to comply with the specific safety rules and regulations promulgated by the commissioner of the Department of Labor. To prevail under this section, a plaintiff must establish the violation of a rule or regulation that mandates a specific standard of care rather than a general one. Ross v. Curtis-Palmer Hydro-Electric Co., 81NY2d 494, supra. In addition to the violation must be the proximate cause of the accident (Ares v. State of New York, 80 NY2d 959 [1992]).

Section 23-1.30 of the Industrial Code requires that illumination sufficient for safe working conditions be provided in excavation operations (12 NYCRR § 23-1.30). The section has been held sufficiently specific to support a claim for relief under Labor Law § 241 (6) (see. e.g., Herman v. St. John's Episcopal Hosp., 242 AD 2d 316 [2d Dept

1997]; Gawel v. Consolidated Edison Co. of NY., Inc., 237 AD2d 138 [1st Dept 1997]). Here, however, plaintiffs have failed to raise any triable issues regarding whether the elimination was insufficient and whether that insufficiency was a proximate cause of their injuries. There is no dispute that the accident occurred out-of-doors at about 2 p.m. on a bright sunny day. In addition, both Scolari and Goncalves testified at deposition that they were not able to find the ladders because they were disoriented by the explosion and because the steam obscured their vision, rather than because no artificial lighting had been provided. Specifically, Scolari testified that, "[at] the moment of the explosion, my back hit the sheeting, [lining the trench], I felt disoriented in the smoke, I didn't know where I was. With my hand like that, I felt the sheeting and was able to get up. . . . At that moment I didn't look for the ladder, I looked for a way out. I didn't know where I was, my head was confused," (Scolari Jul.19, 1999, ebt tr at 48 18]). Goncalves similarly testified that, at the moment the accident happened, "I can't believe how strong that explosion was. I was thrown back against the sheeting and I tried to get out. I couldn't see because of the steam. I couldn't see the ladders, one couldn't see the ladders," (Goncalves Jul. 19, 1999, ebt tr at 18 [li 4-9]). In these circumstances, Scolari's later self-serving and conclusory allegations that the trench was dark and that he could not quickly climb out of the trench because artificial lighting had not been provided fail to raise a triable issue regarding the applicability of section 23-1.30 (see, Herman v St. John's Episcopal Hosp., 242 AD2d 316, supra).

Plaintiffs' reliance on section 23-4.3 of the Industrial Code is similarly misplaced. Although the section has been held to be sufficiently specific to support a claim under Labor Law § 24 1(6) (see, e.g., Allen v Hodorowski & DeSantis Bldg. Contrs., 220 AD2d 959),

here, the undisputed record demonstrates that the ladders were properly placed. The section requires that ladders be placed in every excavation more than three feet in depth and that the ladders be accessible to allow persons to enter or leave without more than 25 feet of lateral travel (12 NYCRR § 23-4.3). Here, there is no dispute that the trench measured approximately six feet by eight feet and contained two ladders, one wooden and the other, metal, within three feet of each man. Therefore, the record conclusively establishes that the ladders were properly placed in accordance with the requirements of the section.

The last two sections of the Industrial Code cited by plaintiffs are similarly unavailing. Section 23-3.3(c) ("Demolition by hand - Walls and partitions"), although held to contain sufficient concrete specifications rendering a Labor Law 241(6) claim viable (see, Gawel v Consolidated Edison Co. of N.Y., Inc., 237 AD2d 138, supra; 12 NYCRR § 23-3.3[c]), is irrelevant in the circumstances presented here. Section 23-1.5(a) ("General responsibility of employers") has been held to lack the requisite specificity and, therefore, cannot sustain a Labor Law § 24 1(6) claim (see, Gordineer v City of Orange, 205 AD2d 584 [U2d Dept 1994]; 12 NYCRR § 23-1.5[a]).

Accordingly, it is

ORDERED that the summary judgment motion is granted in favor of defendant Consolidated Edison Co. of New York, Inc., and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further the requirements of the section.

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specifications rendering a Labor Law 241(6) claim viable (see, Gawel v Consolidated Edison Co. of N.Y., Inc., 237 AD2d 138, supra; 12 NYCRR § 23-3.3[c]), is irrelevant in the circumstances presented here. Section 23-1.5(a) ("General responsibility of employers") has been held to lack the requisite specificity and, therefore, cannot sustain a Labor Law § 24 1(6) claim (see, Gordineer v City of Orange, 205 AD2d 584 [U2d Dept 1994]; 12 NYCR.R § 23-1.5[a}).

Accordingly, it is

ORDERED that the summary judgment motion is granted in favor of defendant Consolidated Edison Co. of New York, Inc., and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

This constitutes the decision and order of the Court.

Dated: September 28 2000

ENTER

J.S.C
HON. LOUISE GRUNER GANS