State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 7, 2012 513460

RONALD J. BOLSTER et al.,
Appellants-
Respondents,

v MEMORANDUM AND ORDER

EASTERN BUILDING AND
RESTORATION, INC.,
Respondent-
Appellant.

Calendar Date: April 19, 2012

Before: Lahtinen, J.P., Spain, Malone Jr., Kavanagh and McCarthy, JJ.

Harris, Conway & Donovan, P.L.L.C., Albany (Michael J. Hutter of Powers & Santola, L.L.P., of counsel), for appellants-respondents.

Wilson, Elser, Moskowitz, Elderman & Dicker, L.L.P., Albany (Elizabeth Grogan of counsel), for respondent-appellant.

Lahtinen, J.P.

Cross appeals from an order of the Supreme Court (Nolan Jr., J.), entered February 16, 2011 in Saratoga County, which denied plaintiffs' motion for partial summary judgment and partially granted defendant's cross motion for summary judgment dismissing the complaint.

Plaintiff Ronald J. Bolster (hereinafter plaintiff), a state correction officer, was injured while working as a "construction escort" assigned to defendant's work crew.

Defendant had contracted with the state to perform demolition and construction work inside Mount McGregor Correctional Facility in Saratoga County. Plaintiff's duties included escorting defendant's workers to and from the construction site in the facility, making sure that none of the workers' tools (which could become potential weapons in the hands of inmates) were left in the facility, and keeping the area otherwise safe from any inmates. It is undisputed that plaintiff did not engage in any actual physical construction work, but his presence at the site for safety-related reasons was mandatory. The accident occurred when two of defendant's employees removed a heavy steel doorframe, tipped and lowered it part way to the floor, and then dropped it from about waist height. The doorframe struck plaintiff's shin and right foot as it fell.

Plaintiff and his wife, derivatively, commenced this action alleging violations of Labor Law §§ 200, 240 (1) and § 241 (6), as well as common-law negligence. After discovery, plaintiffs moved for partial summary judgment on their Labor Law § 240 (1) cause of action and defendant cross-moved for summary judgment dismissing all causes of action. Supreme Court denied plaintiffs' motion and partially granted defendant's motion, dismissing the causes of action premised upon Labor Law § 240 (1) and § 241 (6). The parties cross-appealed.[1]

We consider first whether plaintiff was a covered person for purposes of Labor Law § 240 (1). Labor Law § 240 (1) affords protection to workers employed in the acts enumerated in the statute as well as duties ancillary to those acts (see Prats v Port Auth. of N.Y. & N.J., 100 NY2d 878, 882 [2003]). The fact-intensive determination of whether work falls within the coverage of the pertinent part of the Labor Law is made "on a case-by-case basis, depending on the context of the work" (id. at 883; see Nelson v Sweet Assoc., Inc., 15 AD3d 714, 715 [2005]; see also

[1] By failing to address the issues in its brief, defendant abandoned its claim to summary judgment as to the causes of action premised upon common-law negligence and Labor Law § 200 (see Jock v Landmark Healthcare Facilities, LLC, 62 AD3d 1070, 1074 n 2 [2009]).

Stringer v Musacchia, 11 NY3d 212, 213 [2008] [volunteer not covered by Labor Law § 240]; Beehner v Eckerd Corp., 3 NY3d 751, 752 [2004] [injury occurring after enumerated activity completed not covered]; Martinez v City of New York, 93 NY2d 322, 326 [1999] [inspection before start of work not covered]). As relevant to the current case, Labor Law § 240 coverage generally does not extend to an individual injured at a construction project whose role is limited to providing security and who does not participate in any construction activity (see Spaulding v S.H.S. Bay Ridge, 305 AD2d 400, 400-401 [2003], lv denied 100 NY2d 514 [2003]; Pryer v DeMatteis Constr. Corp., 253 AD2d 804, 805 [1998]).

Here, plaintiff was employed by the state (the owner of the property) and he was assigned by his employer to a security detail. His duties included walking defendant's employees to the job site, keeping an inventory of the tools used by the workers, and ensuring that the workers were protected from inmates. Although plaintiff's presence in close proximity to the job site was necessary for the work to proceed within the prison setting, he did not engage in any of the demolition or construction work. He characterized such work as "out-of-title" for him, and his role was, in essence, to protect the site from inmates – a role consistent with his job as a state correction officer and not involving activity falling within the legislative intent in enacting the pertinent section of the Labor Law. Accordingly, we find that Supreme Court properly granted defendant's motion for summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action.

Plaintiffs further argue that Supreme Court erred in dismissing the Labor Law § 241 (6) cause of action.[2] "As [this] statute is not self-executing, a plaintiff must set forth a

[2] We note that Labor Law § 241 (6) coverage includes persons "lawfully frequenting" the place of construction. Defendant conceded at oral argument that plaintiff was a covered person under this statute, but challenged whether plaintiffs had established the requisite violation of a specific applicable regulation.

violation of a specific rule or regulation promulgated pursuant to it" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 11-12 [2011]). A regulation that merely recites common-law safety principles is insufficient (see St. Louis v Town of N. Elba, 16 NY3d 411, 414 [2011]). Plaintiffs assert violations of 12 NYCRR 23-3.3 (c), involving inspections during hand demolition operations, and 12 NYCRR 23-3.3 (h), which governs demolition of steel structures by hand.

The alleged regulations sufficiently mandate a distinct standard of conduct to support a Labor Law § 241 (6) claim (see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d at 12-13 [upholding claim based in part on 12 NYRCC 23-3.3 [c]; Charney v LeChase Constr., 90 AD3d 1477, 1479 [2011] [upholding claim based in part on 12 NYCRR 23-3.3 [h]). However, neither regulation governs the circumstances of the particular work that resulted in plaintiff's injury. The accident was not caused by structural instability that could have been noticed and addressed by further inspections (see 12 NYCRR 23-3.3 [c]), but resulted from the planned performance of removing the doorframe from the wall, lowering it to waist height and purposely dropping it to the floor (see Smith v New York City Hous. Auth., 71 AD3d 985, 987 [2010]; Campoverde v Bruckner Plaza Assoc., L.P., 50 AD3d 836, 837 [2008]). Similarly, moving a doorframe from vertical to horizontal – essentially laying it down – on the same floor in the immediate vicinity is not controlled by 22 NYCRR 23-3.3 (h) (see Malloy v Madison Forty-Five Co., 13 AD3d 55, 57 [2004]). Consequently, Supreme Court also properly dismissed this cause of action.

Spain, Malone Jr., Kavanagh and McCarthy, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court