

NEW YORK COURT OF APPEALS

Salazar v. Novalex Contracting Corp.

18 N.Y.3d 134 (2011) · Decided November 21, 2011

OPINION

PIGOTT, J.

OPINION OF THE COURT Pigott, J. Plaintiff Raul Salazar was injured in May 2004, while working in the basement of a Brooklyn building undergoing renovations. The property was owned by 96 Rockaway, LLC. Salazar was employed by T-Construction Co., Inc.; the general contractor was Novalex Contracting Corp. The accident occurred in the largest room of the basement, which had a trench system for piping.

Salazar and the other workmen were laying a concrete floor. They were directed to pour and spread concrete over the entire basement floor, including the trenches. Before he began work on the day he was injured, Salazar looked for, and visually located, the trenches.¹ The concrete flowed from a truck into wheelbarrows placed in the basement, via a chute fed through a window.

Workmen poured the wet concrete from the wheelbarrows onto the floor of the basement, where Salazar and others “pulled” the concrete with rakes, ensuring that the floor would be level. As Salazar explained the next stage of the process at his deposition, the trench system fills with concrete “by itself because the concrete runs and it fills it out... the concrete kind of slides down or runs down” into the trenches.

Salazar was injured after he stepped into a trench that was partially filled with concrete. He had been walking backwards across the floor, “pulling” concrete with a rake held in front of him, and looking forward, rather than in his direction of motion.

As Salazar recalled the incident, “one of the trenches began to fill out with concrete, and at some point when I was pulling, walking backwards,... my foot got inside, into that hole.” After Salazar’s right foot hit the bottom of the trench, his right leg folded beneath him.

Before being assisted out of the trench by his coworkers, Salazar tried to pull his leg out “on my own, myself, and that’s how I hurt myself.” According to Salazar, the portion of the trench system into which he stepped was about two feet wide and “[b]etween 3 and 4 feet deep.” There was no railing, barricade, or cover around or over the trench. Salazar commenced a lawsuit against 96 Rockaway, LLC, Novalex Contracting Corp., and T-Construction Co., Inc., alleging, among other things, violations of Labor Law § 240 (1) and § 241 (6).

Discovery and a third-party action ensued. T-Construction Co. moved for summary judgment, seeking dismissal of the complaint, and all cross claims against it. 96 Rockaway and Novalex Contracting Corp. cross-moved for identical relief. Supreme Court granted defendants' motions, and dismissed Salazar's complaint in its entirety (2007 NY Slip Op 52680[U] [2007]).

The Appellate Division reversed so much of Supreme Court's order as granted defendants' motions for summary judgment dismissing Salazar's Labor Law § 240 (1) and § 241 (6) claims, *139denied the motions, and reinstated those claims (72 AD3d 418 [2010]). One Justice dissented.

The Appellate Division granted defendants leave to appeal to this Court, certifying the question whether its order had been properly made (2010 NY Slip Op 79687[U] [2010]). We now reverse. Liability under Labor Law § 240 (1) depends on whether the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

The kind of accident triggering section 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shielded] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis removed], quoting *Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501 [1993]). Salazar argues that the trench into which he stepped should have been covered or barricaded in such a way as to prevent his fall. In *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1 [2011]), the plaintiff was injured when a nearby wall that was being demolished fell into two 10-foot-high unsecured metal pipes, causing them to topple onto him.

This Court denied summary judgment to both parties, holding that an issue of fact existed as to whether the worker's injury resulted from the absence of a safety device statutorily prescribed under Labor Law § 240 (1).

In doing so, the Court contrasted the facts of *Wilinski* with other cases in which summary judgment dismissing the complaint would have been warranted: "Here, the pipes that caused plaintiffs injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell.

In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan" (*id.* at 11 [citation omitted]).

Here, the installation of a protective device of the kind that Salazar posits—assuming that such a device, although not *140listed in Labor Law § 240 (1), was an “other deviee[]” within the meaning of the statute—would have been contrary to the objectives of the work plan in the basement. Salazar testified that he was directed to pour and spread concrete over the entire basement floor, a task that included filling the trenches.² Put simply, it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete.

Moreover, the record is clear that the purpose of the work here was to lay concrete over the entire basement. Since the liquid concrete would necessarily fill the trench and pour out over the surrounding floor areas, it would be impractical and contrary to the very work at hand to cover the area where the concrete was being spread, particularly since the settling of concrete requires that the work of leveling be done with celerity.

Given that Labor Law § 240 (1) should be construed with a commonsense approach to the realities of the workplace at issue, defendants are entitled to summary judgment dismissing that claim. Salazar’s Labor Law § 241 (6) cause of action, predicated on a violation of 12 NYCRR 23-1.7 (b) (1) (i), fails for similar reasons.³ That regulation states that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part.” Even assuming that the trench here constituted a “hazardous opening,” 12 NYCRR 23-1.7 (b) (1) (i) cannot be reasonably interpreted to apply to a case like this one, where covering the opening in question would have been inconsistent with filling it, an integral part of the job.

Hence, defendants are also entitled to summary judgment dismissing the Labor Law § 241 (6) claim. Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiffs Labor Law § 240 (1) and § 241 (6) claims dismissed, and the certified question answered in the negative.. Salazar testified at deposition that there were multiple trenches in the room.

The general contractor’s vice-president described a single, continuous trench. This dispute is not relevant to the disposition of the case.. Contrary to the dissent’s reading (see dissenting op at 142), Salazar’s testimony does not suggest that the process of seepage whereby the trench he stepped in had filled with concrete “by itself’ was unintentional..

Although the Appellate Division dissent analyzes 12 NYCRR 23-1.7 (b) (1) (iii), Salazar’s brief makes clear that he relies upon 12 NYCRR 23-1.7 (b) (1) (i).