

COURT OF APPEALS OF THE STATE OF NEW YORK

Morris v. Pavarini Construction

9 N.Y.3d 47, 874 N.E.2d 723, 842 N.Y.S.2d 759 (2007) · Decided July 2, 2007

SUMMARY

The New York Court of Appeals considered whether 12 NYCRR 23-2.2(a), requiring concrete forms to be braced or tied to maintain their position and shape, could support liability under Labor Law § 241(6). The court held that the regulation contains specific requirements, but that the record was insufficient to determine whether it applied to the object that injured the plaintiff. The court reversed summary judgment for the defendants and remitted the matter for further proceedings.

CASE DETAILS

COURT	Court of Appeals of the State of New York
WRITING FOR THE COURT	Smith, J.; Chief Judge Kaye; Judge Ciparick; Judge Graffeo; Judge Read; Judge Pigott; Judge Jones; Judge Smith
JURISDICTION	New York
DECIDED	July 2, 2007
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed from an Appellate Division order reversing Supreme Court's denial of defendants' motion for summary judgment on the Labor Law § 241 (6) claim. The Court of Appeals granted leave to appeal.
STANDARD OF REVIEW	Summary judgment is improper where the record is insufficient to resolve a material issue; when the interpretation of specialized regulatory terms depends on technical matters, the court may need to hear expert evidence before deciding the legal question.
PRECEDENTIAL VALUE	Published and precedential decision of the New York Court of Appeals.
PARTIES	Glenford Morris v. Pavarini Construction, Other respondents

TOPICS

- construction law
- statutory interpretation
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether 12 NYCRR 23-2.2 (a)'s requirement that forms be braced or tied together so as to maintain position and shape is sufficiently specific to support liability under Labor Law § 241 (6).
2. Whether summary judgment dismissing Morris's Labor Law § 241 (6) claim was proper when the record did not establish whether the regulation applied to the incomplete form component that injured him or what technical measures could have stabilized it.

HOLDINGS

1. The portions of 12 NYCRR 23-2.2 (a) requiring forms to be braced or tied together so as to maintain position and shape impose sufficiently specific requirements to serve as a basis for liability under Labor Law § 241 (6). By contrast, the phrases "structurally safe" and "properly" are not sufficiently specific.
2. Summary judgment dismissing the Labor Law § 241 (6) claim was premature because the record was insufficient to determine whether the regulation applied to the incomplete form component and what the specialized construction terms required.

KEY QUOTATIONS

"The words "structurally safe" and the adverb "properly" are not specific enough to be a basis for Labor Law § 241 (6) liability, but the words "braced or tied together so as to maintain position and shape" impose more specific requirements." (50)

"It was premature for the Appellate Division to grant summary judgment on this record." (51)

FACTUAL BACKGROUND

Morris, a carpenter working on construction of a Manhattan building, was injured when a large object that he described as a form fell on his hand. The object was not a completed concrete form but part or all of one of its metal sides, and the record did not clearly establish its construction or dimensions. Morris alleged that the object was unsafe because it violated 12 NYCRR 23-2.2 (a), which requires forms to be braced or tied together to maintain their position and shape.

PROCEDURAL HISTORY

Morris, a carpenter, sued the construction manager and property owner after a portion of a concrete form fell and injured his hand. Supreme Court dismissed his other claims but denied defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim. The Appellate Division reversed and ordered that claim dismissed; the Court of Appeals reversed and remitted for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The matter was remitted to Supreme Court for further proceedings consistent with the opinion, including development of a more complete record concerning the nature of the object that caused the injury and expert opinions regarding whether the regulation can sensibly apply to anything other than completed forms.

CASES CITED

- Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993)
- Allen v. Cloutier Construction Corp., 44 N.Y.2d 290 (1978)
- Millard v. City of Ogdensburg, 274 A.D.2d 953 (4th Dep't 2000)

OPINION

SMITH, J.

9 N.Y.3d 47 (2007) 874 N.E.2d 723 842 N.Y.S.2d 759 GLENFORD MORRIS, Appellant, v. PAVARINI CONSTRUCTION et al., Respondents. (And a Third-Party Action.) Court of Appeals of the State of New York. Argued June 6, 2007. Decided July 2, 2007. *48 Sacks and Sacks, LLP, New York City (Scott N. Singer of counsel), for appellant. London Fischer LLP, New York City (Daniel Zemann, Jr., Anthony D. Capasso and Daniel P. Mevorach of counsel), for respondents.

Chief Judge KAYE and Judges CIPARICK, GRAFFEO, READ, PIGOTT and JONES concur. *49
OPINION OF THE COURT SMITH, J. The issue is whether a Labor Department regulation requiring "forms" to be "braced or tied together so as to maintain position and shape" (12 NYCRR 23-2.2 [a]) has been violated.

We hold that the question cannot be answered on this record. Facts and Procedural History Plaintiff, a carpenter, was working on the construction of a new building in Manhattan when a large object, which he says was a "form," fell on and injured his hand.

The record shows that the word "form" can refer to several different things, but for present purposes it is a kind of mold used in the fabrication of concrete walls. Such a form is made of two metal sides with a space between them, into which liquid concrete is poured; the form is removed after the concrete has hardened.

The only description in the record of the object that fell on plaintiff is from his deposition; the description is neither clear nor complete. The object was not a completed form, but was part or all of one of a form's sides.

The side was constructed of metal plates, estimated by plaintiff to be two feet wide and four feet long, joined together in a way plaintiff's testimony does not explain. Plaintiff testified that the wall that was to be shaped using the form would be very large"like 30 feet high and maybe the same amount in length"and so presumably the side of the form was, or was to be, of at least that size.

Plaintiff sued the construction manager and the owner of the premises, claiming among other things that the object that fell on him was rendered unsafe by the violation of a Labor Department regulation governing concrete work and that defendants were therefore liable for his injuries under Labor Law § 241 (6). Supreme Court dismissed his other claims, but denied defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim.

On defendants' appeal, the Appellate Division reversed and ordered the Labor Law § 241 (6) claim dismissed. We granted leave to appeal, and now reverse the Appellate Division's order and remit the case to Supreme Court for further proceedings. *50 Discussion Defendants did not direct or control the work that plaintiff was doing when he was injured.

Thus, they can be liable to him only if Labor Law § 241 (6) imposes on them a nondelegable duty, making them liable for the conduct of others. Labor Law § 241 (6) says: "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." This statute, we have explained, is, "in a sense, a hybrid" (Ross v Curtis-Palmer Hydro-Elec.

Co., 81 NY2d 494, 503 [1993]). Its first sentence merely reiterates common-law standards of care, and thus cannot be a basis for civil liability by persons who are not themselves negligent; the first sentence "cannot by itself be relied upon as the source of an owner's or general contractor's nondelegable duty" (id. at 504).

The second sentence, however, requiring owners and contractors to comply with rules of the Commissioner of Labor, does create a nondelegable duty but only where the regulation in question contains a "specific, positive command[]" (Allen v Cloutier Constr. Corp., 44 NY2d 290, 297 [1978]), not where the regulation itself, using terms like "adequate," "effective," "proper," "safe," or "suitable," merely incorporates "the ordinary tort duty of care" (Ross, 81 NY2d at 504).

Thus, plaintiff here can recover only if he shows a violation of a specific regulatory requirement. The regulation he relies on is 12 NYCRR 23-2.2 (a), which says in relevant part: "Forms... shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape."

The words "structurally safe" and the adverb "properly" are not specific enough to be a basis for Labor Law § 241 (6) liability, but the words "braced or tied together so as to maintain position and shape" impose more specific requirements. Plaintiff *51 has alleged that those requirements were violated. Defendants assert, and the Appellate Division held, that there was no violation.

The gist of defendants' argument is that the regulation is inapplicable here because it cannot apply to anything but a completed form. It does not make sense, defendants say, to require one side of a form to be "braced or tied together so as to maintain position and shape." Plaintiff disagrees, relying on the affidavit of an engineer; the affidavit uses the words "metal concrete forms" to refer to objects of the kind that injured plaintiff, and says "[t]he metal concrete forms could have been tied together via wood or straps or both to secure the metal forms to each other and provide stability."

Plaintiff's engineer offers no further explanation of what he says should have been done; defendants submitted no expert testimony. It was premature for the Appellate Division to grant summary judgment on this record.

The interpretation of the regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination (see *Millard v City of Ogdensburg*, 274 AD2d 953, 954 [4th Dept 2000]).

Here, a more complete record is necessary, both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for proceedings consistent with this opinion. Order reversed, etc.