Alvarez v 513 W. 26th Realty, LLC
2024 NY Slip Op 31264(U)
April 10, 2024
Supreme Court, New York County
Docket Number: Index No. 150516/2019
Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART 36**
Justice

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JONATHAN CRUZ ALVAREZ and
BIANCA MARIE CRUZ RAMIREZ,
Plaintiffs,

- v -

513 WEST 26TH REALTY, LLC and INTEGRITY CONTRACTING, INC.,
Defendants.

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INDEX NO. 150516/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

513 WEST 26TH REALTY, LLC and INTEGRITY CONTRACTING, INC.,
Third-Party Plaintiffs,

-against-

SC CONTRACTING MANAGEMENT CORP.,
ENVIORONMENTALLY CONSCIOUS BUILDING INC.,
ENVIRONMENTALLY CONSTRUCTION CORP.,
Third-Party Defendants.

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Third-Party
Index No. 595683/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 145, 185, 186, 201

were read on this motion to/for **SUMMARY JUDGMENT**[1]

This action stems from an accident on November 16, 2018, where plaintiff slipped on water/snow while delivering plywood to the fifth floor of a construction project located at 525 West 26th Street, New York, NY. At the time of the accident, plaintiff was employed by third-party defendant ENVIRONMENTALLY CONSTRUCTION CORP ("ECC"). Plaintiff moves, pursuant to CPLR 3212, for an order granting him summary judgment on his Labor Law § 241(6) claim as against defendants/third-party plaintiffs 513 WEST 26th REALTY, LLC ("513 West") and INTEGRITY CONTRACTING, INC. ("Integrity") (collectively, "513/Integrity"). Additionally, he seeks summary judgment on his Labor Law § 200 claim against Integrity, as well as, dismissal of defendants' affirmative defenses sounding in comparative negligence.

In support of its motion, plaintiff argues that it is entitled to summary judgment on its Labor Law § 241(6) claim because defendants failed to comply with the standard of conduct proscribed in 12 NYCRR 23-1.7(d) requiring the removal of any "ice, snow, water, grease and any other substance which may cause slippery footing." Plaintiff maintains that, since it is undisputed that water permeated the entire floor where plaintiff worked, causing him to slip and

[1] This motion is decided together with Mot. Seq. Nos. 001; 003; and 004.

fall, defendant 513 West, the owner of the premises, and Integrity, the general contractor, are liable under this provision of the Labor Law and the industrial code. Additionally, plaintiff contends that Integrity is also liable under Labor Law § 200 because despite having notice of the wet floor, it failed to remediate the hazardous condition. Addressing defendants' defenses, plaintiff insists that defendants have failed to present any evidence of contributory negligence and, as such, that the affirmative defense of comparative negligence should be dismissed.

In support of his contentions, plaintiff refers to, among other things, the testimony of Manuel Fernandez ("Fernandez"), on behalf of Integrity (NYSCEF Doc. No. 89); Cecil Paul ("Paul"), on behalf of Integrity (NYSCEF Doc. No. 90); Davendra Deolal ("Deolal"), on behalf of third-party defendant ECC (NYSCEF Doc. No. 91); as well as, the deposition testimony of George Duffy ("Duffy"), on behalf of third-party defendant SC CONTRACTING MANAGEMENT CORP ("SC") (NYSCEF Doc. No. 92).

Specifically, plaintiff contends that Paul, the foreman of Integrity, testified at his deposition that he inspected the floors on the date prior to the commencement of work at 7:00 A.M. and confirmed that the floors were wet. Plaintiff further argues that both Paul and Fernandez acknowledge that working in said conditions posed a significant risk and that it was Integrity's responsibility to ensure that any dangerous condition on the premises was immediately remedied. Notwithstanding these wet conditions, Integrity permitted workers to work on the fifth floor, which was exposed to the elements. Although there is testimony that a tarp and/or temporary ceiling was in place to prevent the precipitation from coming onto the fifth floor and accumulating, plaintiff represents that said safeguards proved inadequate insofar as Cecil's testimony confirms that the floor was wet before the accident (NYSCEF Doc. No. 85).

In opposition, defendants argue that plaintiffs' motion should be denied because defendants neither created the claimed condition on which Alvarez slipped and fell, nor did they have prior actual or constructive notice of any such condition, especially since, plaintiff's very own testimony and evidence establish that his accident occurred during a rain event/storm in progress, for which no liability against Integrity can lie either under common-law negligence or Labor Law § 200. They further contend that New York Courts have applied the "storm in progress" argument in the context of Labor Law § 200 claims. According to defendants, plaintiff's own submissions establish that the subject accident, which plaintiff testified occurred between 8:00 and 8:15 A.M., was due to ongoing precipitation that occurred between 12:51 A.M. and 9:49 A.M. on November 16, 2018, supporting defendant's position that the accident is subject to the "storm in progress" doctrine. Addressing the testimony of Fernandez, defendants argue that the roof area was equipped with various tarps to prevent tenants below from getting wet and that, although the presence of the tarps would have prevented structural work, their presence would not have prevented the moving of materials. Defendants also rely on the testimony of Deolal that the rooftop area was not slippery, and therefore, that the rain would not have stopped the work ECC supervised. Furthermore, they assert that Industrial Code 12 NYCRR § 23-1.7(d) does not apply to open spaces like the rooftop work area where plaintiff fell.

In reply, plaintiff contends that, contrary to defendants' position, open rooftops with such obvious slippery conditions, as is present here, are entitled to the protections of 12 NYCRR 23-1.7(d). Although entitlement to summary judgment under Labor Law § 241(6) renders the Labor

Law § 200 claim moot, plaintiffs nevertheless maintain that defendants were also negligent in deploying inadequate tarps to protect against the risk of slipping and falling while delivering plywood. The "storm in progress" defense, argue plaintiffs, ignores defendants' initial obligation to ensure adequate protection for workers delivering plywood during these conditions. Furthermore, because Deolal's characterization of the floor was based on his initial inspection of the floor, plaintiffs argue that Deolal's assertion that the floor was not slippery during an initial inspection of the floor does not raise an issue of fact sufficient to defeat plaintiffs' motion (NYSCEF Doc. No. 201).

Pursuant to Labor Law § 241(6):

> "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."

"Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 488 [1st Dept 2018], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "To state a claim, the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code" (*Licata v AB Green Gansevoort*, LLC, 158 AD3d at 488; see 12 NYCRR 23 *et seq*; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 502; *see also Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]).

As relevant to the arguments raised here, 12 NYCRR 23-1.7(d) provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Here, plaintiff testified that he slipped on the wet floor while delivering materials on the fifth floor of the construction site (NYSCEF Doc. No. 87 at 71). The testimony of Manuel Fernandez, superintendent of construction for Integrity, and Cecil Paul, foreman for Integrity, confirms that it had rained on the morning of plaintiff's accident and that the subject floor was wet at the time of plaintiff's fall (NYSCEF Doc. Nos. 89 at 29-30; 90 at 54, 62, 145). Plaintiff, therefore, has demonstrated that there was an accumulation of water on the fifth floor in violation of Industrial Code § 23-1.7(d). Moreover, defendants have failed to raise an issue of fact sufficient to defeat the motion. Specifically, this court rejects defendants' contention that 12 NYCRR 23-1.7(d) does not apply to the instant facts given that the working area was partially uncovered. As held by the Appellate Division, First Department, "the fact that the area where plaintiff slipped was outdoors does not prevent it from coming within the ambit of 23-1.7 (d)."

(*Potenzo v City of New York*, 189 AD3d 705, 707 [1st Dept 2020].) Furthermore, arguments with respect to the storm in progress doctrine, while relevant to an inquiry for common-law negligence, have no bearing on a claim under "12 NYCRR 23-1.7 (d) because '[t]hat subdivision includes no exception for storms in progress'" (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 502 [1st Dept 2011] [internal quotation marks and citation omitted].) Defendant also maintains that the surface area was not slippery, based on the testimony of Deolal who averred that the floor was not slippery based on his initial assessment of the floor. However, Deolal's initial assessment of the floors before the job commenced, fails to raise an issue of fact as to the condition of the floor at the time of plaintiff's injuries.

Turning next to the Labor Law § 200 and common-law negligence claims, "Section 200 of the Labor Law, which imposes a general duty to protect the health and safety of workers, is a codification of the common-law duty imposed upon property owners to provide a safe place to work" (*Sheehan v Gong*, 2 AD3d 166, 169-170 [1st Dept 2003], citing *Jurgens v Whiteface Resort*, 293 AD2d 924 [2002]). "Under Labor Law § 200, which codifies an owner's or general contractor's common-law duties of care, there are 'two broad categories' of personal injury claims: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075, 1081 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012].)

This court finds that plaintiff has also established his *prima facie* entitlement to summary judgment on his Labor Law § 200 claim. Cecil's deposition testimony establishes that Integrity had actual notice that the subject floor was wet on the morning of November 16, 2018, insofar as he inspected the premises prior to plaintiff's accident. Furthermore, both Paul and Fernandez testified as to the risk of working in the rain and confirmed that it was Integrity's responsibility to ensure that the floors were kept in a reasonably safe condition. And, although the record establishes that some overhead protections were installed, the precipitation nevertheless seeped through the openings, wetting the floors. However, this court nevertheless finds that defendants have raised an issue of fact as to the application of the storm in progress doctrine. "The 'storm in progress' defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways" (*Powell v. MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345 [1st Dept 2002] [citation omitted]). "Not until 'the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation,' may an owner or occupant be held liable for injuries caused by accumulated ice or snow." (*Marizan v City of New York*, 2016 NY Slip Op 30030(U), **6 [Sup Ct, NY County 2016], quoting *Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345-346 [1st Dept 2002]). There is proof in the record that it snowed on the day before the accident and, relying on the certified meteorological records submitted by plaintiff, defendants argue that there was ongoing precipitation between 12:51 A.M. through 9:49 A.M., which would cover the time of the subject accident. Plaintiff has failed to establish that, as a matter of law, the placement of the overhead protection prevents defendants from availing themselves of said defense. Given the foregoing,

that branch of the motion seeking summary judgment on the Labor Law § 200 and negligence claims is denied. All other arguments have been considered and are either without merit or need not be addressed given the findings above.

ORDERED that plaintiff's motion, pursuant to CPLR 3212, is granted against defendants 513 WEST 26th REALTY, LLC and INTEGRITY CONTRACTING, INC. solely as to the Labor Law § 241(6), and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as, the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of this court.

April 10, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[X]	**GRANTED**	[ ]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**