

Cambriai v New York Univ.

2007 NY Slip Op 33343(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0101882/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 101882/2006
CAMBRAI, VINCENT
vs
NEW YORK UNIVERSITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 101882/06
MOTION DATE 10/01/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants New York University and James A. Jennings Co., Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the Complaint of plaintiff Vincent Cambrai is **granted on consent of plaintiff**, as to Labor Law §240(1); and it is further

ORDERED that the motion of defendants New York University and James A. Jennings Co., Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the Complaint of plaintiff Vincent Cambrai, as to all remaining causes of action, is **denied**; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

HON. CAROL EDMEAD

Dated: 10/15/07

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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

VINCENT CAMBRAI,

Plaintiff,

-against-

NEW YORK UNIVERSITY and
JAMES A. JENNINGS CO., INC.,

Defendants.

EDMEAD, J.S.C.

Index No. 101882/06

DECISION/ORDER

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Defendants New York University ("NYU") and James A. Jennings Co., Inc. ("Jennings") (collectively "defendants") move for an order pursuant to CPLR 3212, granting summary judgment dismissing the Complaint of plaintiff Vincent Cambrai ("plaintiff").

Plaintiff alleges that he was injured in an accident that occurred on September 20, 2005 at approximately 11:00 a.m. while working in the basement hallway of the Parasitology Building owned by defendant NYU at 341 East 25th Street, New York, New York (the "accident site"). Defendant Jennings was the general contractor retained by NYU to handle the renovation project at the accident site. Non-party King Electrical Services ("King") was retained by Jennings, and plaintiff was a union worker employed by King.

Plaintiff's Deposition Testimony

The morning of his accident, plaintiff was assigned to the lighting systems on the fifth floor. King had a shanty in the basement where plaintiff would report to work each day. He had to pass through the hallway where the accident occurred each day (Pl.'s dep. p. 19). Plaintiff was in the basement to get wire kept on spools. He had two of them in his hand when the

accident occurred (Id. p. 21). The passageway is pretty dimly lit. They had taken the ceiling apart. There was debris all over. Plaintiff does not know if it was a piece of wire or something that just caught him by the ankle and pulled him off of his feet (Id. p. 22). There was no temporary lighting in the passageway. The existing lighting had been "pushed back into the ceiling grid a little bit more," to accommodate the work being done on the ceiling (Id. p. 23). Plaintiff observed the debris on the floor, including piles of plaster, wire and garbage, everything from newspapers to soda cans, when he walked down the hall before his accident. The debris was strewn everywhere. The debris condition existed for more than one day before his accident. The debris was always there. They'd clean up a little bit and the pile might get moved. Once in a blue moon laborers would clean up the debris. Complaints about the debris were ongoing. Trying to get the debris cleaned up was an ongoing battle and it never got cleaned. Plaintiff, too, complained to his foreman. Plaintiff observed his foreman complaining to Ryan Jennings, the supervisor for Jennings, about the debris. About three days before the accident plaintiff complained to his foreman. Plaintiff complained about the debris about once, twice a week (Id. pp. 23-27). There were 3-5 wire carts in the hallway lining up and down one side, belonging to NYU. The carts had medical stuff in them. The carts were always there.

After plaintiff's accident, about 10 to 15 minutes later, plaintiff's supervisor came down.(Id. pp. 29-33). After his accident plaintiff believes he heard Ryan Jennings say: "let's get this place cleaned up...so that the EMS guys can get in here with a cart and get [plaintiff] out." (Id. p. 35).

Deposition Testimony of Ryan Jennings

His responsibility was to coordinate the subcontractors, implement the schedule, oversee,

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if there were any questions, answer the questions, to make sure the job was running. He did not instruct the subcontractors as to how to do their work (Jennings dep. pp. 11-12). He was in contact with King's supervisor on site, James Mercurio, daily (Id. p. 13). After Mercurio told him about plaintiff's accident, he went to the basement. The lighting in the basement was sufficient. Temporary lighting was also strung. The lighting was in plastic cages (Id. pp. 15-16).

The basement area was cleaned every day by Jennings' laborers, particularly Patsy Iolascon (Id. pp. 17-18). When Jennings went to the basement after plaintiff's accident, he did not see any debris (Id. p. 19). He instructed Patsy to dismantle a temporary partition so the EMS could get through. No one made any complaints to him about the cleanliness or lighting in the basement (Id. p. 20).

The basement area had metal cage carts about six feet tall with wheels belonging to NYU (Id. p. 26).

Defendants' Contentions

As to plaintiff's Labor Law §200 and common law negligence claims, plaintiff has not presented any evidence that defendants caused or created the alleged condition that caused plaintiff's accident, or that they had notice of the condition which plaintiff claims caused his accident. Further, plaintiff has presented no evidence that defendants exercised any supervision and/or control of the work performed by plaintiff. On the contrary, plaintiff testified that all of his instructions came from his foreman James Mercurio and that the only entity that directed and controlled the manner in which plaintiff performed his work was his employer, King.

Plaintiff's Labor Law §240(1) claim should be dismissed because plaintiff's alleged accident did not result either from a fall from a height or after being struck by an object that was

being hoisted which object was at a level higher than the plaintiff. In short, plaintiff's alleged accident is not associated with elevated risks while performing certain work on a structure or building. Plaintiff testified in deposition that he was walking down a hallway and tripped on dirt and/or garbage that was located on the same level as he was walking. There was no gravity-related risk involved in this accident.

Plaintiff's Labor Law §241(6) claim, asserting violation of Industrial Code §23-1.7(e) related to tripping hazards and §23-2.1 requiring that all building materials shall be stored in a safe and orderly manner, should be dismissed because as is clear from the photographs taken by Mr. Jennings, there was no debris on the floor as confirmed by Mr. Jennings in his deposition testimony. These photographs clearly demonstrate the lack of any garbage, debris or other materials on the floor in the hallway where the plaintiff's accident occurred. Further, plaintiff could not state what, if anything, caused him to fall, as in fact there was no such garbage or debris on the floor of the hallway when the plaintiff's accident occurred. This is again confirmed through the accident report which does not list anything as being the cause of the plaintiff's tripping and falling and certainly no mention of any debris, wire or garbage on the floor.

With respect to Industrial Code §23-1.30, there is no evidence in this case that the lighting in the area where the plaintiff's accident occurred was improper or inadequate.

Plaintiff's Opposition

Plaintiff consents to the dismissal of plaintiff's cause of action under Labor Law §240(1).

As per plaintiff's Response to Combined Demands dated June 13, 2006, defendants were made aware of the fact that James F. Mercurio was a witness to the condition in the basement passageway.

According to Mr. Mercurio's sworn statement:

"The basement is dimly lit & is poorly maintained on a regular basis. The basement is used for storage of medical supplies. There are many carts with glass bottles & equipment. The corridors that are used to walk through are very narrow.....In addition to the carts & supplies, there was garbage & debris on the floor. This included coffee cups, bottles, boxes, cans, bags & construction debris which includes wire, cement, ladders.

Further, Mr. Mercurio adds that the defendants had actual notice of these conditions:

Ryan Jennings was on the site often. He was in the basement often & saw the dangerous & sloppy conditions of the basement. I recall that I had told Patsy, the laborer for the GC, to clean up the basement because it was so messy, cluttered & dangerous. He would clean it up on occasion, but the debris would build up - re-creating the dangerous condition in the basement. He should have cleaned up on a daily basis, or at least every other day. However, he cleaned up only twice a month if that. I told Patsy to clean up because that was his job with the GC.

Mr. Mercurio was the first individual to come to the plaintiff's assistance after his fall, and in his sworn statement, he describes the conditions he observed at the time:

I was aware that [plaintiff] went to the basement for material. He didn't come back immediately & was gone about 15 minutes when I went to look for him. I went into the basement & observed that the basement was very messy & covered with debris as it was obvious that Patsy had not cleaned it up in quite a while. I came down a flight of steps & saw Vincent lying on the floor, half way down the corridor. The corridors are only about 2 feet wide because of the carts. Vincent was lying on his side in pain & said that he fell & couldn't get up. He said he tripped over something on the floor & couldn't break his fall by grabbing onto any carts that had glass & bottles & some of them have wheels. I noticed that the area immediately in front of Vincent was covered with debris. I saw wire, boxes, cups, bags & fully understood why he had fallen. The area was very cluttered.

Given plaintiff's testimony, the sworn statement of Mr. Mercurio, and Industrial Code §23-1.7(e) which mandates that passageways and working areas be kept free of accumulations of debris, there are clear issues of fact as to the defendants' liability under the common law and Labor Law §§ 200 and 241(6). Accordingly, those branches of the defendants' motion which

seek to dismiss these causes of action must be denied.

With respect to Labor Law §200 and common law negligence, first when there is a question of a defective condition, supervision and control by the owner or general contractor is not required. And, the defendants have not met their burden to demonstrate that they did not have actual or constructive notice of the debris and sufficient time to remedy it. Quite to the contrary, based upon the plaintiff's testimony and the sworn statement of Mr. Mercurio, who specifically claims that the debris was in the basement passageway for many months and that Ryan Jennings was there often and saw the dangerous and sloppy conditions for himself, there is ample evidence from which a jury could conclude that the defendants either created the unsafe condition or had actual or constructive notice of it.

Defendants' Reply

As to the artificial lighting, both plaintiff and Mr. Jennings acknowledge that artificial illumination was present at the time of the plaintiff's accident. Plaintiff's conclusory allegation that the area was dark is not sufficient to establish a violation of 23-1.30, as it does not suffice to demonstrate that there was less than 5 foot-candles of lighting present. Indeed, it has been repeatedly held that where plaintiff offers no evidence that the lighting failed to meet this specific standard, a claim based upon that section must be dismissed.

As to the remaining sections of the Industrial Code, both deal with maintaining clear passageways. Herein, plaintiff claims that he allegedly tripped over some wire; however, neither the plaintiff himself nor Mr. Mercurio ever established with any particularity that plaintiff in fact tripped over a piece of wire. It is merely plaintiff's speculation that a piece of wire caused him to trip as in fact he has no idea what caused his alleged fall, nor does Mr. Mercurio as is made clear

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from his statement. Indeed, Mr. Mercurio said that he was advised by the plaintiff "he said he tripped over something on the floor," clearly indicating that he has no idea what caused his accident to occur. Further, Mr. Mercurio's sworn statement is replete with speculation and conclusions and should be disregarded in its entirety.

What should be clear based on the photographs is that the corridor in which the plaintiff allegedly met with this accident was free from debris and brightly lit.

Analysis

Labor Law 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross*, 81 N.Y.2d at 501-502). In order to recover a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross*, 81 N.Y.2d at 501-502; *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 N.Y.2d at 502-504). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long*, 55 N.Y.2d at 160).

In terms of the obligations statutorily imposed by Labor Law § 241(6), it has been recognized that the statute is "a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor

Commissioner's rule-making authority * * * " (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 503, 601 N.Y.S.2d 49, 618 N.E.2d 82). In *Ross*, the Court of Appeals, in adherence with prior determinations, held that a plaintiff may not rely solely upon the "broad, nonspecific regulatory standard * * * " contained in section 241(6) (*id.* at 504, 601 N.Y.S.2d 49, 618 N.E.2d 82), but instead, must rely upon the violation of a specific administrative rule, i.e., a corresponding Industrial Code violation which mandates compliance with "concrete specifications," and not one which merely establishes "general safety standards" (*id.* at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82).

Herein, plaintiff relies on three sections of the Industrial Code.

Industrial Code §23-1.7(e)

This section provides as follows:

(e) Tripping and other hazards. (1) *Passageway*. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) *Working areas*. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Industrial Code § 23-2.1, relating to "Maintenance and housekeeping," provides in pertinent part:

(a) Storage of material or equipment.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Industrial Code §23-1.30 addresses illumination and states as follows:

Illumination sufficient for safe working conditions shall be provided where ever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot-candles in any area where persons are required to work nor less than 5 foot-candles in any passageway, stairway, landing or similar area where persons are required to pass.

In the instant case, there is sufficient evidence to raise an issue of fact as to defendants' liability under Industrial Codes §§23-1.7(e) and 23-2.1. And, defendants' photographs taken by Mr. Jennings, are not persuasive to alter this conclusion. Accordingly, those branches of the defendants' motion which seek to dismiss these causes of action are denied.

With respect to Industrial Code §23-1.30, plaintiff testified that there was no temporary lighting in the basement; he does not recall there being temporary lighting in the hallway; there was a plaster ceiling with all the chunks taken out and whatever they had there for lights had been pushed back into the ceiling grid a little bit more and that was about it (dep. p. 23). And, the alleged poor lighting was confirmed by Mercurio. This amounts to more than vague testimony that the lighting was "poor" and the basement where he fell was "dark" which would be "insufficient to create an inference that the amount of lighting fell below the specific statutory standard" (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 349, 819 N.Y.S.2d 732 [2006]). Jennings testified that temporary lighting was in place. The dueling depositions concerning lighting raise an issue of fact.

The deposition testimony of plaintiff and the sworn statement of Mercurio are sufficient to create an inference that the amount of lighting fell below the specific statutory standard' ” (*Carty v Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 733, 821 N.Y.S.2d 178 [2006], quoting *Cahill*

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v *Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 349, 819 N.Y.S.2d 732 [2006]).

Labor Law §200 and common law negligence

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site (*Nevins v. Essex Owners Corp.*, 276 A.D.2d 315, 714 N.Y.S.2d 38 [1st Dept 2000]; citing *Blessinger v The Estee Lauder Co.*, 271 A.D.2d 343, 707 N.Y.S.2d 78), but “[a]n implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’ ” (*Blessinger, supra*, quoting *Russin v Picciano & Son*, 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805).

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Russin v Picciano & Son*, 54 N.Y.2d 311, 317 [1981]; see *Rizzuto v Wenger Contr. Co.*, 91 N.Y.2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 A.D.2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 A.D.3d 470, 810 N.Y.S.2d 493; [2006]; *Gatto v Turano*, 6 A.D.3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 A.D.3d 548 [2003]; *Duncan v Perry*, 307 A.D.2d 249 [2003]; *Giambalvo v Chemical Bank*, 260 A.D.2d 432 [1999]; *Cuertas v Kourkoumelis*, 265 A.D.2d 293[1999]; *Sprague v Peckham Materials Corp.*, 240 A.D.2d 392 [1997]).

Section 200 is a codification of the common-law duty of an employer to provide a safe work place (see *Employers Mut. Lab. Ins. Co. of Wis. v Di Cesar & Monaco Concrete Constr.*

Corp., 9 AD2d 379, 383). Liability does not attach under section 200 absent actual or constructive notice of the condition complained of (*see Miller v Perilla*, 71 AD2d 389, 391, app DSM 49 NY2d 1044, mot for lv to app DSM 51 NY2d 767; *Zoellick v Thompkins Sq. Holding Co.*, 10 AD2d 492, 496).

Here, there is no evidence that defendants supervised or controlled the work performed by plaintiff. However, the evidence presented establishes an issue of fact as to whether the defendants - at least to some degree - created the dangerous condition, as well as whether the defendants had actual and/or constructive notice of the dangerous condition.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants New York University and James A. Jennings Co., Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the Complaint of plaintiff Vincent Cambrai is **granted on consent of plaintiff**, as to Labor Law §240(1); and it is further

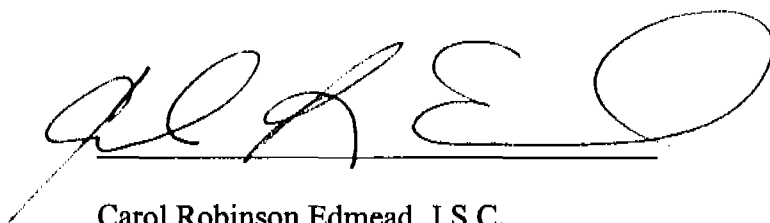
ORDERED that the motion of defendants New York University and James A. Jennings Co., Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the Complaint of plaintiff Vincent Cambrai, as to all remaining causes of action, is **denied**; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

HON. CAROL EDMED

Dated: October 15, 2007



Carol Robinson Edmead, J.S.C.

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