

Kuzma v Skanska USA Bldg., Inc.

2008 NY Slip Op 32439(U)

August 29, 2008

Supreme Court, Kings County

Docket Number: 0011792/2006

Judge: Bruce M. Balter

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August, 2008.

P R E S E N T:

HON. BRUCE M. BALTER,
Justice.
-----X

MAREK KUZMA,

Index No. 11792/06

Plaintiff,

- against -

SKANSKA USA BUILDING, INC.,

Defendant.
-----X

SKANSKA USA BUILDING, INC.,

Third-Party Plaintiff,

- against -

NAURBACH CONSTRUCTION CORP.,

Third-Party Defendant.
-----X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	4 _____
Reply Affidavits (Affirmations) _____	5 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers (Memoranda of Law) _____	3 _____

Upon the foregoing papers, defendant/third-party plaintiff Skanska USA Building, Inc. (Skanska), the construction manager herein, moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the claims of plaintiff Marek Kuzma (Plaintiff) who bases his claims on Labor Law §§ 200, 240(1), 241(a) and 241(6).

Factual and Procedural History

This personal injury action arises out of a workplace accident wherein plaintiff, a construction worker employed by AWL Industries (AWL), suffered injuries on August 31, 2005 during the course of a major construction project at Pier 84, located at 555 West 12th Street in Manhattan. Hudson River Park Trust (HRPT), the property owner, hired both AWL to perform heating and air conditioning work at the Pier 84 site and Skanska to oversee operations as construction manager. Skanska's manager, Brian Joseph (Joseph), in turn, served as its project superintendent at Pier 84, and Krzysztof Kowalic, an AWL foreman, was plaintiff's immediate supervisor who also directed and instructed him how to perform work at the site.

Plaintiff pertinently recounted at his deposition that he was instructed on the day of the accident by an AWL foreman to fix two leaking pipes in the "concession building," a new structure being erected on the pier. To fix the pipes, situated approximately 10 feet off the ground, plaintiff climbed a 10-foot A-frame ladder that AWL provided and proceeded to tighten the piping using two wenches that AWL also provided.

However, the ladder shifted forward during the second pipe's tightening, and

plaintiff's left arm struck an exposed metal stud used for installing sheetrock. The stud cut into plaintiff's left arm above the elbow and severed a nerve. Plaintiff, though, did not fall from the ladder after injuring his arm.

Skanska Project Superintendent Joseph related in his deposition testimony that his duties included supervising and coordinating the manpower, materials, and contractors working at the site. He testified that Skanska performed no work at Pier 84 and that HRPT hired prime contractors, such as AWL, to perform the on site heating, ventilation and air conditioning work and M.A. Angeliades (Angeliades) to perform the general construction work at the site. Superintendent Joseph states in a separate affidavit that Angeliades contracted with Naurbach Construction Corp. (Naurbach) to install sheetrock in the concession building and further notes in that affidavit and in his deposition testimony that it was Angeliades' duty to check for any sharp edges around the metal studs used to attach the sheetrock.

Labor Law § 240(1)

In support of its motion for summary judgment, Skanska argues that plaintiff's claims under Labor Law § 240(1) should be dismissed, "as the incident as alleged by plaintiff as the cause of his injuries does not fall under the protections of the statute."

In his opposition papers, plaintiff concedes that his injury was not gravity-related within the meaning of Labor Law § 240 (1) and does not oppose Skanska's motion for summary judgment as it relates solely to Labor Law § 240 (1).

Accordingly, that branch of Skanska's motion for summary judgment against plaintiff under his Labor Law § 240(1) cause of action is granted.¹

Labor Law § 241 (6)

Skanska also moves for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action.² In support of this branch of its motion, Skanska maintains that plaintiff failed to demonstrate a violation of any of the sections of the New York Industrial Code as alleged in the bill of particulars.³ In its memorandum of law in support of its motion for summary judgment, Skanska alleges that Industrial Code 12 NYCRR 23-1.7(e) addresses tripping hazards within a passageway, and because "plaintiff was standing on a ladder in an

¹ In its memorandum of law in support of summary judgment, Skanska alleges that there is no basis for plaintiff's claims under Labor Law §§ 240(2) and (3) because they pertain solely to scaffolding. In his opposition papers, plaintiff does not address these sections and, therefore, to the extent such claims are not already withdrawn, plaintiff's Labor Law §§ 240 (2) and (3) are also dismissed.

² Skanska argues that plaintiff's claims under Labor Law § 241(1) through § 241(4) are without merit because those provisions address the construction of floors, which Skanska argues has no relevance to plaintiff's claims. Also, Skanska asserts that Labor Law § 241(5) is inapplicable because it pertains to elevators, elevating machines and hod-hoisting apparatuses. In his opposition papers, plaintiff does not address these sections and, therefore, to the extent such claims are not already withdrawn, plaintiff's Labor Law § 240 (1), (2), (3), (4) and (5) claims are dismissed.

³ Skanska's memorandum of law in support of summary judgment addresses each Industrial Code violation alleged in the bill of particulars, however, plaintiff fails to oppose any provisions other than Industrial Code 12 NYCRR 23-1.7(e)(2) in his opposition papers. Accordingly, to the extent that such claims are not already withdrawn, the court dismisses plaintiff's claims on any other Industrial Code Provisions alleged in his bill of particulars as a basis of liability under Labor Law § 241(6).

open area at the time of the incident...this provision is not relevant.”

In opposition, plaintiff argues that “the presence at this worksite of the metal studs, constituting a sharp and dangerous projection in the work area where the plaintiff was working is a clear violation of Industrial Code Provision 23-1.7(e)(2).” Plaintiff also contends that Skanska's arguments are unavailing because "Section 23-1.7(e)(2) not only deals specifically with sharp projections, but also covers all areas where ‘persons work.’” Plaintiff submits an affidavit from Stanley H. Fein (Fein), a licensed engineer, who opines that, in the instant case, 12NYCRR 23-1.7(e)(2) was “violated by the failure to remove or cover sharp projections that can cut or injure someone, and by failing to keep a work area, known to the defendant to be utilized by plaintiff and his co-workers, free from sharp projections.”⁴

In reply, Skanska asserts that 12 NYCRR 23-1.7(e)(2) “does not apply when the object which caused the injury is an integral, permanent part of the construction, and thus not a violation of Labor Law § 241(6).” Skanska also contends that “the metal stud the plaintiff's arm struck was not a sharp projection as required by Industrial Code 12 NYCRR 23-1.7(e)(2).” Further, Skanska argues that the cases plaintiff cites in opposition are inapplicable to the facts of the instant case because in the cited cases “the objects which caused the plaintiffs' injuries were not integral, permanent parts of the construction.” Skanska also notes that plaintiff's own testimony demonstrates that the metal stud involved

⁴ The court notes that Fein seems to have mistakenly stated that 12 NYCRR 23-1.7(e)(2) serves as a predicate for Labor Law § 240(1) rather than Labor Law § 241(6).

in the accident had been placed on the wall in preparation for the installation of sheetrock, which Skanska argues is illustrative of the stud's permanency in the construction. Skanska also notes that that Joseph confirms the permanent nature of the metal studs in his deposition testimony by testifying that sheetrock is attached to the studs as a part of the building's construction. Finally, Skanska avers that "since the metal stud the plaintiff's arm struck was an integral, permanent part of the construction, the stud can not be considered a 'sharp object' pursuant to Industrial Code §12 NYCRR 23-1.7(e)(2)."

Labor Law § 241 (6) places a non-delegable duty upon owners and contractors to "provide reasonable and adequate protection and safety" for their workers in accordance with the rules and regulations promulgated thereunder (*see Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 878 [1993]; *also see Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 503 [1993]), and imposes absolute liability on those parties for violations of the provisions of that section where such violation proximately causes a plaintiff's injury, irrespective of the owner's lack of control or supervision over the work site (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 348-349 [1998]; *see also Allen v Cloutier Construction Corp.*, 44 NY2d 290, 300 [1978]).

In order to establish a Labor Law § 241 (6) claim, a plaintiff must demonstrate that his or her injuries were proximately caused by the violation of an Industrial Code regulation which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common-law standards of due care (*see Ross*, 81 NY2d at 503-505; *see*

also *Fair v 431 Fifth Avenue Assocs.*, 249 AD2d 262, 263 [1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 597 [1995]; *Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [1995].

12 NYCRR 23-1.7 (e)(2), subtitled “Working areas,” requires that construction site owners keep “floors, platforms and similar areas where persons work or pass” 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.” 12 NYCRR 23-1.7 (e)(2) is sufficiently specific to support a Labor Law § 241(6) claim (*see Randazzo v Consolidated Edison Company of New York*, 271 AD2d 667, 668 [2000]; *see also Adams*, 212 AD2d at 973; *Baird v Lydall, Inc., Manning Div.*, 210 AD2d 577, 578 [1994]).

However, 12 NYCRR 23-1.7 is not applicable when the injury-producing object is an integral part of the construction (*see Ryder v Mount Loretto Nursing Home, Inc.*, 290 AD2d 892 [2002] [where plaintiff, who was installing pipe hangers in a shower area, tripped over a U-shaped metal track previously attached to the concrete floor by a subcontractor; this installed partition component was an integral part of the construction and could not be characterized as a sharp projection within the purview of 12 NYCRR 23-1.7(e)(2)]; *see also Verel v Ferguson Elec. Const. Co., Inc.* 41 AD3d 1154 [2007] [where plaintiff tripped over electrical conduits installed by defendant Ferguson, 12 NYCRR 23-1.7(e)(2) did not apply because the conduits protruding from the concrete floor of the building were an integral part of the construction]; *see also O’Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [2006] [where plaintiff tripped over an electrical pipe protruding from a newly laid floor, 12 NYCRR 23-

1.7(e)(2) was not violated because the electrical pipe was permanently placed and an integral part of what was being constructed]; *see also Parker v Ariel Assoc. Corp.*, 19 AD3d 670 [2005]).

Here, both plaintiff and Joseph testified that the metal studs were of the type for attaching sheetrock, forming the framework for the interior walls of the building. The metal studs are, therefore, permanent in nature and an integral part of the construction. In light of this fact, 12 NYCRR 23-1.7(e)(2) cannot serve as a predicate for Skanska's Labor Law § 241(6) cause of action. Accordingly, that branch of Skanska's motion to dismiss plaintiff's Labor Law § 241(6) claim is granted.⁵

Labor Law § 241(a)

In support of the branch of its motion to deny plaintiff's Labor Law § 241(a) cause of action, Skanska argues that "plaintiff has failed to demonstrate a violation of the sections of Labor Law Section 241(a), which addresses the protection of workmen in or at elevator shaftways, hatchways and stairwells as alleged in plaintiff's Bill of Particulars."

Plaintiff does not oppose Skanska's contentions regarding the inapplicability of Labor Law § 241(a).

Under the circumstances, this branch of Skanska's motion for summary judgment

⁵ In reaching its decision, the court gave no weight to Fein's expert affidavit submitted by the plaintiff, as Fein's speculative and conclusory claims were insufficient to raise an issue of fact regarding Skanska's alleged violation of 12 NYCRR 23-1.7(e)(2). Fein, who never examined the subject metal stud, "failed to establish the foundation or the source of the standards underlying [his] conclusion" (*David v County of Suffolk*, 1 NY3d 525, 526 [2003]). Thus, his affidavit is without probative value.

against plaintiff under his Labor Law § 241(a) cause of action is granted.

Labor Law § 200

Skanska also moves for summary judgment dismissing plaintiff's Labor Law § 200 cause of action on the ground that it did not supervise or control the means and methods by which AWL or its workers performed their work. According to Skanska, plaintiff's testimony indicates that plaintiff "received direction for his work solely from an AWL foreman" and that Skanska "did not [provide] any tools, materials or equipment, including ladders to AWL employees to use at the project." In its memorandum of law in support of summary judgment, Skanska also asserts that it did not have notice of the defect which plaintiff alleges caused the accident.

Plaintiff opposes this branch of Skanska's motion for summary judgment on the ground that it is premature in that "defendant has not produced a copy of its agreement with the owner of the premises for its alleged construction management services." In the absence of said contract, plaintiff alleges that it is purely self-serving for Skanska to discuss the extent of its duties and responsibilities. Moreover, plaintiff contends that Joseph's testimony makes it clear that, as project manager, he was aware of the fact that the studding had been installed and that the studs were exposed, causing a potential hazard to workers. Additionally, plaintiff notes that Joseph "testified that defendant did inspections, [and] they produced daily reports, none of which were produced during discovery." Further, plaintiff asserts that the moving papers refer to Angeliades as both the general contractor and as the subcontractor

responsible for installing the metal studs, which plaintiff argues creates “questions concerning duties and responsibilities that must be answered.”

In reply, Skanska annexes the contract between HRPT and Skanska and copies of Skanska and AWL's daily reports. According to Skanska, “a review of these documents does not reveal that Skanska directed or controlled plaintiff's work.” Skanska also avers that the issue of whether Angeliades is a general contractor or a subcontractor is irrelevant to this motion, and that Joseph testified that it was Angeliades' “responsibility to check the metal studs for sharp portions” because Angeliades hired the subcontractor (Naurbach) that installed the metal studs.

Labor Law § 200 is a codification of the common law duties of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes*, 82 NY2d at 877; *Allen*, 44 NY2d at 299). Labor Law § 200 imposes liability on property owners as well as on agents of owners (*see Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [2007] [Labor Law § 200 “also applies to agents of the owner or general contractor, who are in a position to exercise supervision and control over the work, thus enabling them to avoid or correct an unsafe condition”]). Such liability under Labor Law § 200 will attach when the injury sustained resulted from an actual dangerous condition, and then only if the defendant(s) exercised supervisory control over the work performed on the premises (*see Rizzuto*, 91 NY2d at 352-353) or had notice of the dangerous condition which produced the injury (*see Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997]).

Although the parties extensively discuss the issue of supervision and control, or lack thereof, on Skanska's part, "that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work" (*Keane v Chelsea Piers, L.P.*, 16 Misc 3d 1116(A), *8 [2007]; *see also McLeod v Corp. Of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 [2007] [where negligence arose from the manner in which work was performed at a site, a general contractor must have actually exercised supervision and control over the work performed to be held liable under Labor Law § 200]). Here, however, plaintiff's injuries arose from a purported unsafe condition present at the work site. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Kerins v Vassar College*, 15 AD3d 623, 626 [2005]).

To give rise to constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see also Andrini v Navarra*, 49 AD3d 575, 575 [2008]). Further, "[t]he notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken." (*Mitchell v New York University*, 12 AD3d 200 [2004]). "[A] 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition" (*Piacquadio v Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994], *citing Gordon v American Museum of Natural History*, 67 NY2d at 838;

see also Kleinberg v City of New York, 17 Misc 3d 1116(A) [2007]).

Here, upon review of the deposition testimony of plaintiff and Joseph and the contract and daily reports submitted by Skanska in its reply papers, the court finds that there is no evidence that Skanska directly supervised or controlled plaintiff's work or provided plaintiff with direction or equipment to perform his job. In this regard, it is well-established that an owner or general contractor's "general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under common law negligence and under Labor Law § 200" (*Natale v City of New York*, 33 AD3d 772, 773 [2006] quoting *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004], lv denied 2 NY3d 702 [2004] [other internal citations omitted]; *see also Dennis v City of New York*, 304 AD2d 611, 612 [2003] ["retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200"] [internal citations omitted]).

Further, the "authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed" (*Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 713 [2007] quoting *Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 683 [2005] [internal citation omitted]). Plaintiff testified that he never took any instruction from anyone other than his supervising foreman at Pier 84.

Therefore, even if Joseph may have had overall responsibility for the safety of the work done by the prime contractors and generally supervised and coordinated the work site, such duty to supervise and enforce general safety standards is insufficient to raise a question of fact as to Skanska's negligence.

Regarding the issue of whether Skanska had notice of the allegedly dangerous condition presented by the metal stud, plaintiff's bill of particulars claims the presence of both actual and constructive notice of a defect. Skanska generally denied that it had notice of the allegedly dangerous condition of the metal studs in its motion papers. In opposition, plaintiff argues that Joseph was aware that metal studding had been installed, that the metal studs were exposed, and that AWL employees were working in close proximity to the studding, thereby imputing notice to Skanska of the alleged hazardous condition of the metal stud that injured plaintiff.

Here, Skanska has established that it did not create the dangerous condition since the metal studs were installed by another contractor (Naurbach). Skanska has also established that it did not have actual notice of the alleged dangerous condition of the metal studs since Joseph's examination before trial and affidavit indicate that Joseph never received any complaints prior to the accident about the studs having sharp edges. Moreover, Skanska has established that it cannot be charged with constructive notice since Joseph's examination before trial and affidavit indicate that Skanska did not have control over the dangerous condition involved here. Specifically, Joseph testified that Naurbach was hired by Angeliades to install the metal studs and sheetrock in the concession building and that

Angeliades (as opposed to Skanska) was the party responsible for the condition of the studs. In response to Skanska's prima facie showing, plaintiff has failed to raise any triable issues of fact as to whether Skanska had notice of the allegedly dangerous condition of the metal stud and, therefore, whether notice can be imputed to Skanska, his employer. Moreover, Skanska's general awareness that metal studs were used in the construction, and that work was performed in proximity to the studs, is insufficient to raise a triable issue of fact as to Skanska's negligence.

Accordingly, that branch of Skanska's motion to dismiss plaintiff's Labor Law § 200 and common law negligence is granted.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Bruce M. Baiter