

Macchio v Tishman Constr. Corp. of Manhattan

2008 NY Slip Op 33082(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 100730/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 100730/2006
MACCHIO, JOSEPH
vs.
TISHMAN CONSTRUCTION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
NOV 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: NOV 13 2008

HON. JUDITH J. GISCHE 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 10**

-----X
Joseph Macchio,

Plaintiff,

-against-

Tishman Construction Corporation of
Manhattan, Tishman Construction
Corporation of New York, Tishman Realty &
Construction Co., Inc., Tishman Westside
Construction, LLC and XL Specialty
Insurance Company,

Defendants.
-----X

DECISION/ ORDER
Index No.: 100730/06
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Tishman and XL n/m (3212) W/IDH affirm, exhs	1
Pltff's opp w/HSS affirm, JM affid, exhs	2
Tishman and XL reply w/IDH affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Joseph Macchio ("plaintiff") to recover money damages for personal injuries he claims to have sustained as a result of alleged violations of sections 241 (6) and 200 of the Labor Law. Now before the court is a motion brought by the defendants for summary judgment pursuant to CPLR § 3212. Issue has been joined, discovery is complete and the note of issue was filed April 2, 2008. Since this motion is timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

Arguments

Plaintiff, an electrical foreman, claims that he was injured on March 25, 2003 while working on a construction project at an MTA bus garage located in the Bronx ("the accident"). The garage is owned by The New York City Transit Authority. The construction manager at the time of the accident was defendant Tishman, pursuant to a construction management agreement made March 11, 2002 between Tishman¹ and non-party CGU. The electrical subcontractor was non-party Petrocelli Electric ("Petrocelli"), plaintiff's employer.

Plaintiff was deposed by the defendants. He testified at his deposition ("EBT") that he was in the process of instructing his workers (electricians) where to install some light fixtures into the ceiling of the bus garage, specifically the fueling area. The fueling area was (according to plaintiff) 50 feet wide by 100 feet long and divided into three lanes. At the time of his accident plaintiff was in the center lane of this fueling area. Plaintiff estimates that this particular lane was about 10-15 feet wide and the length of the garage.

According to plaintiff, he was walking though the fueling area looking up at the ceiling and at his workers who were standing atop a man or scissor lift, which they were using to access the ceiling. As he was walking plaintiff stepped on an object on the garage floor.

¹There was originally a different "prime contractor" on this project ("Lipco"). Lipco fell behind on its obligations under its contract with the New York City Transit Authority and Lipco agreed to let its performance surety ("CGU") complete its obligations under the contract. Non-party CGU and defendant XL Specialty Insurance ("XL") are, for purposes of this motion, one and the same. XL and Tishman are jointly represented in this case and on this motion. Hereinafter, reference to "defendants" means Tishman and XL, unless otherwise noted.

Plaintiff has described the object as "conduit," but also as "pipe" or "a piece of pipe." At his deposition, he described the object as being "threaded galvanized conduit" approximately 3/4 inch in diameter. Plaintiff also provided his sworn affidavit in opposition to defendants' motion. In that affidavit he states that he slipped on "a small cut-down piece of pipe, which had been used and discarded by workers from some other trade(s) that had been working in the fueling area of the bus garage." According to plaintiff it was difficult to set up the scissor lift because of all the debris in the fueling area. Plaintiff states further that he had noticed debris on the garage floor prior to the date of his accident and that he had complained of these conditions to his boss ("Mucci"). Following the incident, an accident report was prepared. It includes a statement by plaintiff that he had "slipped on small piece of pipe on floor."

Mucci provides his sworn affidavit in support of plaintiff's opposition to defendants' motion. Although Mucci was present on the day of the accident and he went to see what happened after plaintiff fell, he did not witness the fall itself. Mucci states that when he responded to the scene, he observed "a lot of debris on the floor in the area where [plaintiff] was, including discarded pieces of pipe." Mucci prepared an accident report that day stating there was "debris on the floor." Mucci states in his sworn affidavit that none of the "debris" or pipe was from materials the electrical crew was using for the light installation project.

Plaintiff claims that these conditions were violations of the Industrial Code Regulations. He relies upon the following sections in his Bill of Particulars: 12 NYCRR § 23-1.7 (e) (1) ["protections from general hazards; tripping and other hazards - passageways"], 12 NYCRR § 23-1.7 (e) (2) ["protections from general hazards; tripping

and other hazards - working areas"], 12 NYCRR § 23-2.1 (a) ["construction operations; maintenance and housekeeping; storage of material or equipment"], and 12 NYCRR § 23-2.1 (b) ["construction operations; maintenance and housekeeping; disposal of debris"].

Plaintiff also claims that Tishman was negligent by failing to maintain a safe construction site. He contends Tishman was the construction manager and it maintained a daily presence at the site. Plaintiff argues that Tishman not only had the power to correct any unsafe condition, its employees had constructive, if not actual notice, of a dangerous condition.

Plaintiff deposed John McKeon, Tishman's project manager. McKeon testified at his EBT that Tishman maintained a trailer on site and that he was personally present at the project every day. According to McKeon, he and other Tishman employees conducted daily walkthroughs of the project. Although McKeon testified he only did one walkthrough each day, he made a point of observing the conditions at the site including whether the contractors were cleaning up their areas. McKeon testified that he did his walkthroughs at different times each day, but when he did it in the morning he checked to see if the "litter from the day before was gone." McKeon EBT p. 36 lines 9-19. There were also other Tishman employees on site each day who did walkthroughs, including an electrical superintendent who observed the installation of the electrical work, validating that it was being done in accordance to the contract and specifications.

Defendants argue that they are entitled to summary judgment dismissing the complaint because plaintiff cannot support his Labor Law §§ 241 (6) or 200 claims. First, defendants argue that the plaintiff relies upon inapplicable Industrial Code

Regulations. They contend that the fuel area of the garage is not a "passageway" within the meaning of 12 NYCRR 23-1.7 (e) (1), but an open floor area that was 50 feet by 100 feet. Alvia v. Teman Electrical Contracting, Inc., 287 AD2d 421, 423 (2nd Dept 2001). According to defendants, 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-2.1 and 12 NYCRR § 23-2.1 (b) are also inapplicable because the conduit on the floor was not "debris" within the meaning of these regulations, nor were the conduits stored materials, but an integral part of the work being performed by the electrical crew. Alvia v. Teman Electrical Contracting, Inc., *supra* at 423.

Defendants argue that each contractor at the site was required to put all their debris into one specific area so that Tishman workers could then remove it and put it into dumpsters. Defendants rely upon the testimony of McKeon who stated that although the work being done produced "debris," in the sense there were boxes and wires on the ground, there were no "discarded" pipes laying around and therefore "it is not necessarily debris." McKeon EBT p. 46.

Defendants deny they had or exercised any control over the injury producing work that plaintiff was engaged in at the time of his accident. They also deny they either created or had notice of the dangerous condition alleged. Defendants argue that all the subcontractors on site were required to pile up their debris in one place so that Tishman workers could then remove it and place it into dumpsters. Thus, defendants contend that no debris was left unremoved, and any objects on the ground were not "debris" but actively being used in the work being performed by plaintiff and his crew.

Standard applied to motions for summary judgment

Since defendants seek summary judgment in their favor they have the initial

burden of setting forth evidentiary facts to prove their prima facie case such that they would be entitled to judgment in their favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the opposing party (here plaintiff) who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

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 construction workers. Comes v. New York State Electric & Gas Co., 82 NY2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993). The elements of a *prima facie* cause of action under Labor Law §241 (6) are that the: 1) plaintiff was engaged in an enumerated activity, 2) defendant is an owner, contractor or agent, and 3) defendant violated the Industrial Codes of the State of New York. In order to state a claim under Labor Law § 241(6), a plaintiff must identify a specific and applicable Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*. The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents

a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

In relevant part 12 NYCRR 23-1.7 (e) protects against tripping and other hazards in construction and other sites follows:

"(e) Tripping and other hazards.

(1) Passageways. 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."

Although defendants contend 12 NYCRR 23-1.7(e)(1) is inapplicable to the facts of this case because the object plaintiff stepped on - whether conduit or pipe - was an integral part of the light installation project that plaintiff's crew was working on at the time of his accident, there is no evidence of how long this particular object was on the ground. O'Sullivan v. IDI Const. Co., Inc., 7 N.Y.3d 805 (2006). Plaintiff raises issues of fact about how long this object had lain on the ground. He contends it was debris, and did not come from the project he was working on. He also uses the terms "conduit" and "pipe" interchangeably. Defendants' efforts to equate "conduit" with meaning and being synonymous with, "electrical conduit" are unsuccessful. Plaintiff did not testify, nor is there any proof that, he slipped on *electrical* conduit. It is for the jury to decide whether whatever plaintiff stepped and slipped on was "debris" within the meaning of this regulation, or an integral part of a project plaintiff was working on when he was

injured.

Arguments that plaintiff has changed his testimony by now stating he slipped on "pipe" when he had earlier claimed it was "conduit" are contradicted by the evidence developed thus far, and in any event it makes no difference because the exact object does not appear to have been identified, tested, etc. Thus, whether it was "pipe" or "conduit," there is no proof that the object was electrical conduit that, for example, Petrocelli dropped that morning while plaintiff's crew was doing its work. McKeon's testimony, that whenever he did a morning walkthrough he checked to see whether litter or debris from the previous day had been cleared does not resolve this factual dispute. Similarly, Mucci's characterization of the conduit or pipe as "debris" is nothing more than his opinion or conclusion.

Industrial Code Regulation 12 NYCRR 23-1.7, however, only applies to "passageways." Although not defined in the regulations, court have interpreted passageway to exclude large, open spaces, like floors. O'Sullivan v. IDI Const. Co., Inc., supra; Alvia v. Teman Elec. Contracting, Inc., 287 A.D.2d 421 (2nd Dept 2001); Boss v. Integral Const. Corp., 249 A.D.2d 214 (1st Dept. 1998). The fuel area may have been divided into lanes, but this delineation or demarcation does not make it a "passageway" within the meaning of the Industrial Code. Vieira v. Tishman Const. Corp., 255 A.D.2d 235 (1st Dept 1998). Therefore, defendants' motion to dismiss plaintiff's Labor Law § 241 (6) claim based on 12 NYCRR 23-1.7 (e) (1) is granted. However, the fuel area is a "working area," within the meaning of the Industrial Code and defendants' motion for summary judgment based upon the inapplicability of 12 NYCRR 23-1.7 (e) (2) is denied. This regulation is specific enough and applicable to

the happening of this accident so as to withstand defendants' motion.

Defendants have also established that section 23-2.1 (a) does not apply as the conduit or pipe was not being "stored" in the fuel area, and plaintiff raises no issue of fact that it was. Therefore, defendants are also entitled to dismissal of plaintiff's Labor Law § 241 (6) claim based on this regulation having been violated. 12 NYCRR 23-2.1 (b) is an insufficient predicate for a Labor Law § 241 (6) claim. Mendoza v. Marche Libre Associates, 256 A.D.2d 133 (1st Dept 1998).

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343 (1998). Where such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993). Thus, a prima facie case requires that plaintiff prove the defendant exercised supervisory and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st Dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 *aff'd* 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra*; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st Dept. 1998).

Defendants have established that they did not supervise, instruct or direct plaintiff on to do the activity that brought about his injuries. Plaintiff was the foreman

and he was the person giving instructions. No one was supervising him. Plaintiff has not raised any issue of fact for trial that defendants instructed him on what to do or supervised his work. Russin v. Picciano & Son, 54 NY2d 311 (1981); Comes v. New York State Gas Corp., 82 NY2d 876 (1993); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 (1st dept 2006). Even assuming defendants may have retained some contractual inspection privileges, and even been able to stop any dangerous work they observed, a general right to supervise the work is insufficient to impose liability on them under Labor Law § 200 claim (common law negligence). Reilly v. Newireen Associates, 303 A.D.2d 214 (1st Dept 2003); Brown v. New York City Economic Dev. Corp., 234 A.D.2d 33 (1st dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

However, plaintiff has raised an issue of fact whether defendants had notice of or created a dangerous condition. Defendants have established that the contractors were obligated or instructed to make piles of their debris so that Tishman employees could then remove it to dumpsters. There is, however, no proof how long the object that plaintiff stepped on was on the garage floor and there is the overarching dispute about whether the object was "debris" - as plaintiff contends - or part of the work that plaintiff and his crew were engaged in. This is for the jury to decide, therefore defendants' motion for summary judgment dismissing the Labor Law § 200 (common law negligence) claim must be, and hereby is, denied.

Conclusion

Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted only to the extent that this claim is predicated upon regulations that are either inapplicable or not specific; otherwise defendants' motion is denied.

Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 (common law negligence) claim is granted only to the extent it is based upon arguments that defendants controlled, supervised or directed the injury producing work; it is otherwise denied because there are issues of fact whether defendants had notice of or created a dangerous condition.

Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Trial Support Office so it may be scheduled.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
November 13, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK