

Gwyn v Georgetown 19th St. Dev., LLC
2009 NY Slip Op 30867(U)
April 13, 2009
Supreme Court, New York County
Docket Number: 108898/06
Judge: Doris Ling-Cohan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART **36**

Justice

Index Number : 108898/2006

GWYN, JAMES

VS.

GEORGETOWN 19TH STREET

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

In this 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/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED

APR 15 2009

COUNTY CLERK'S OFFICE

NEW YORK

JUSTICE DORIS LING-COHAN

Dated: 4/13/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 36

JAMES GWYN,

Plaintiff,

Index No.: 108898/06

- against -

DECISION/ORDER

GEORGETOWN 19TH STREET DEVELOPMENT LLC
GEORGETOWN 19TH STREET PHASE I, LLC,
HTRF VENTURES LLC, and TURNER
CONSTRUCTION COMPANY,

Defendants.

Motion Seq. No.: 002

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

LING-COHAN, DORIS, J.:

In this Labor Law action, plaintiff James Gwyn sues to recover for injuries allegedly sustained on November 1, 2005, when he slipped and fell while working at the site of the construction of the InterActive Corp Building (the building) located on West 18th Street in Manhattan. The complaint asserts causes of action under Labor Law §§ 200, 241(6), and 240(1), as well as common law negligence. Defendants Georgetown 19th Street Development LLC, Georgetown 19th Street Phase I, LLC, HTRF Ventures LLC, the owners of the premises (collectively, defendant owners), and defendant Turner Construction Company (Turner), the general contractor for the construction project, now move for summary judgment dismissing the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court

* 3]

as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562.

The essential facts surrounding plaintiff's accident are largely undisputed. On November 1, 2005, plaintiff was employed as a laborer by Sorbara Construction Corp. (Sorbara), a subcontractor responsible for the installation of the concrete superstructure of the building. Plaintiff testified that his work as a laborer generally involved "a lot of moving and carrying ... sheetrock, four-by-fours, two-by-fours" to the carpenters doing the framing (see P's Dep., Ex. I to Sparling Aff. in Support, at 73-74). On the morning of his accident, plaintiff was working on the second level of the building, carrying sheetrock and wood to his boss (*id.* at 77-80, 82-83), until he was told to go to the basement to move scaffold "stoppers" from one side of the basement to the other side and put them in piles where the carpenters were working (*id.* at 84-85, 90-91), and "to make sure we clean up everything downstairs" (*id.* at 83). Scaffold stoppers, also known as shoes, are steel

devices placed on the bottom of a scaffold to secure it (*id.* at 86; see Dep. of Eric Alogna, Ex B to Sparling Reply Aff., at 105-107). Plaintiff described the stoppers that he was carrying as metal squares weighing about 10-15 pounds each (P's Dep at 86), and explained that he used buckets to carry the stoppers, so that he could carry more (*id.* at 86-87). According to plaintiff, he placed about six stoppers in each bucket (*id.*), and made four or five trips, before he was injured (*id.* at 88-89). On his last trip, he stepped over a wooden crossbeam on the basement floor, about three feet high (*id.* at 93- 96), and stepped on debris described as a few black and white rubber pipes (*id.* at 96, 206), which rolled and slid (*id.* at 104), causing him to slip and fall (*id.* at 96-97). Plaintiff testified that he had seen similar pipes before the day of his accident (*id.* at 99-100), and saw them on the basement floor on the day of his accident (*id.* at 102), but did not see the pipes he slipped on until he was stepping over the beam, and then could not stop or avoid them (*id.* at 102-103). Plaintiff stated that the pipes were "more than likely" used by the plumbers (*id.* at 96), who "throw them there" (*id.* at 105). According to plaintiff, although he did not know who was supposed to remove the pipes on the floor, it was not his job (*id.* at 105); his job was only to remove the scaffold stoppers (*id.* at 105-106).

When plaintiff fell, a fellow worker in the area came to

help him stand up (*id.* at 98-99, 106). After he got out of the basement, he told his boss what happened (*id.* at 106-107), and was taken by an ambulance to a hospital (*id.* at 115).

Labor Law § 200 and Common Law Negligence

Defendants seek dismissal of the Labor Law § 200 and common law negligence claims on the grounds that they did not supervise or control plaintiff's work, and that the condition causing plaintiff to trip was open and obvious.

Labor Law § 200 codifies the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. See *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). "An implicit precondition to this duty...is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981); see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998). Neither a general right to supervise, nor retention of contractual inspection privileges, amount to the control necessary to impose liability under Labor Law §200 or a common law negligence claim (*Brown v New York City Economic Dev. Corp.*, 234 AD2d 33, 33 [1st Dept 1996]); there must be "proof indicating that defendant exercised actual supervision or control over the work in the course of which plaintiff was injured." *Gonzalez v United Parcel Serv.*,

249 AD2d 210, 210 (1st Dept 1998); see *Buckley v Columbia Grammar & Prep.*, 44 AD3d 263, 272-73 (1st Dept 2007); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003). Thus, an owner or general contractor will not be liable under § 200 where the evidence demonstrates that the plaintiff's employer, and not the owner or general contractor, specifically controlled the means or methods of the plaintiff's work. See *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226, *affd* 7 NY3d 805 (2006); *Reilly v Newireen Assocs.*, 303 AD2d 214, 219 (1st Dept 2003).

In this case, there is no evidence that defendants directed or controlled the means or methods of the work being performed by plaintiff. Plaintiff testified that he received his orders from his "boss," the person he reported to the first day at the construction site and every day thereafter (P's Dep. at 78-80). On the day of his accident, plaintiff testified, he was doing "basic labor work," carrying sheetrock and wood to his boss on the second floor, and then was directed by the same man to go to the basement to move "stoppers" (*id.* at 81-86).

Although plaintiff could not recall the name of his boss or for whom he worked (*id.* at 60, 78), his co-worker Eric Alogna, who worked with plaintiff in the basement on the day of plaintiff's accident, testified that he and plaintiff received their orders from two Sorbara foremen, Nole and Chicky (Alogna Dep. at 19-20, 25). Turner's Project Superintendent, William

[*7]

Bastidas (Bastidas), who testified that he was responsible for monitoring the progress of the construction work, and that he was on the site every day (Dep. of William Bastidas, Ex. J to Sparling Aff. in Support, at 5, 7-8), also submitted an affidavit that Turner was the construction manager and hired subcontractors to do the actual construction; that Turner employees do not supervise or direct the work of the subcontractors; that Turner did not supervise or direct Sorbara laborers; and that only Sorbara foremen supervised, controlled, and directed the work of Sorbara laborers (Bastidas Aff. in Reply, at 1, 2). Moreover, plaintiff testified that, during the time that he was in the basement, the only other people working there were two co-workers and some carpenters (P's Dep. at 107). In view of this evidence, plaintiff's inability to recall the name of his boss or for whom he worked does not raise a triable issue of fact as to actual control or supervision of plaintiff's work.

To the extent that plaintiff contends that Turner's contractual agreement to supervise the construction project and the presence of a site safety manager on the jobsite raise triable issues of fact as to supervision and control, plaintiff's argument is unavailing. Neither defendants' general contractual duty to protect workers, nor Turner's presence at the worksite, is sufficient to establish the necessary control or supervision for the imposition of liability under § 200 or the common law. See

Hughes v Tishman Constr. Corp., 40 AD3d 305 (1st Dept 2007); *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, *supra*; *Singh v Black Diamonds LLC*, 24 AD3d 138 (1st Dept 2005); *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 (1st Dept 2005). Evidence that a project superintendent "coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition, as is claimed here, is insufficient to raise a triable issue whether [defendants] exercised the requisite degree of supervision and control over the work" to sustain the Labor Law § 200 and common-law negligence claims. *Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 (1st Dept 2008).

Further, while there is some authority that the presence of a site safety manager with authority to stop work creates a triable issue of fact (see *Brennan v 42nd St. Dev. Project, Inc.*, 10 AD3d 302 [1st Dept 2004]; *Freitas v New York City Tr. Auth.*, 249 AD2d 184, 186 [1st Dept 1999]), the weight of recent authority is clearly to the contrary. See *O'Sullivan*, 7 NY3d at 806 (no triable issue where safety manager did not control plaintiff's work); *Hughes*, 40 AD3d at 309 (same, noting inconsistencies in case law); *Singh v Black Diamonds LLC*, 24 AD3d 138, *supra*. Here, Bastidas testified that Turner hired a site safety manager, who reviewed safety on the job and held regular

[*9],
safety meetings (Bastidas Dep. at 10-11), and reported to Bastidas daily (*id.* at 11). Bastidas also testified that, at the safety meetings, general "housekeeping" matters, including clean-up of debris, were addressed, along with matters of safety generally (*id.* at 41-42). As there is no evidence that the site safety manager had any control over plaintiff's work, the presence of the site safety manager is insufficient to raise a triable issue as to defendants' supervision and control. See *O'Sullivan*, 7 NY3d at 806; *Hughes*, 40 AD3d at 309.

With respect to the issue of whether defendants had actual or constructive notice of the injury-causing condition, even assuming that notice of a defective condition is enough, by itself, to make an owner or general contractor liable under Labor Law § 200 (*see Lally v JGN Constr. Corp.*, 295 AD2d 148, 149 [1st Dept 2002]; *but see Buckley*, 44 AD3d at 273; *see also Comes*, 82 NY2d at 878), plaintiff also fails to raise a triable issue of fact in response to defendants' prima facie showing that they had no notice of the specific defect that allegedly caused plaintiff's accident.

Here, there is no evidence that defendants had actual notice. Plaintiff's testimony that he told his boss that the basement conditions were dangerous is insufficient to raise a triable issue of fact as to whether any of the defendants had actual knowledge of the alleged defective condition.

Further, to demonstrate actual or constructive notice, "[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 Univ.*, 12 AD3d 200, 201 (1st Dept 2004); see *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 351 (1st Dept 2006). Evidence that Bastidas was generally aware that clean-up in the basement needed improvement (Bastidas Dep. at 31-34, 35-36); that discussion of debris clean-up was a regular part of safety meetings (*id.* at 42); and that Bastidas had general discussions with Sorbara's management about housekeeping (*id.* at 36, 45), is insufficient to raise a triable issue as to constructive notice of the specific defect (the black and white pipes), which plaintiff claims caused him to slip and fall (P's Dep. at 96-97). See *Geonie*, 50 AD3d at 445; *Mitchell*, 12 AD3d at 201. Therefore, defendants have established their entitlement to summary judgment dismissing the common law negligence and Labor Law § 200 claims.

In view of the above decision that defendants did not supervise or control plaintiff's work, or have actual or constructive knowledge of the alleged defective condition, the court does not reach the issue of whether the alleged injury-causing condition was open and obvious. The court notes, however, that the issue of whether a hazard is open and obvious is generally fact-specific and thus usually a question for the

jury. See *Tagle v Jakob*, 97 NY2d 165 (2001). A court may make that determination only when clear and undisputed evidence establishes as a matter of law that the risk was open and obvious. *Id.* Moreover, this Department has repeatedly held that liability under § 200 is not negated "by the 'open and obvious' nature of any danger; rather [this factor goes] to plaintiff's comparative negligence." *Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 65 (1st Dept 2004); see *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 (1st Dept 2004); see also *Smith v McClier Corp.*, 22 AD3d 369, 371 (1st Dept 2005); cf. *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 (1st Dept 2008) (readily observable hazard does not absolve defendant of liability when hazard is not inherent in work); accord *Van Salisbury v Elliott-Lewis*, 55 AD3d 725 (2d Dept 2008).

Labor Law § 241 (6)

In contrast to Labor Law § 200, Labor Law § 241 (6), by its very terms, imposes a nondelegable duty upon owners and contractors to provide "reasonable and adequate protection and safety" to construction workers. See *Rizzuto*, 91 NY2d at 348-349; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 (1993). Under this section, a plaintiff need not show that defendant exercised supervision or control over the worksite in order to recover. See *Rizzuto*, 91 NY2d at 348-349; *Ross*, 81 NY2d at 502. In order to maintain a viable claim under Labor Law §

[* 12]

241 (6), however, the plaintiff must allege a violation of a provision of the Industrial Code (12 NYCRR) that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." *Id.* at 505.

In his Verified Bill of Particulars (Ex. C to Sparling Aff. in Support, ¶ 20), plaintiff alleges violations of Industrial Code §§ 23-1.7 (d); 23-1.7 (e) (1), (2); 23-1.33 (a) (1), (2), (3); 23-2.1 (a); and 23-2.1 (b). Defendants contend that none of these regulations is applicable. Plaintiff does not oppose the portion of the motion that addresses §§ 23-1.33 (a) (1), (2), & (3), which pertain to non-workers passing by a construction site. That branch of the motion accordingly will be granted without opposition.

With respect to plaintiff's claim based on § 23-1.7 (d), defendants fail to establish their entitlement to summary judgment. Although defendants acknowledge that § 23-1.7 (d) is sufficiently specific to support a Labor Law § 241 (6) claim (see *Rizzuto*, 91 NY2d at 351), defendants argue that plaintiff's claim based on that section cannot be sustained because plaintiff was not injured on an elevated working surface and the piping on which plaintiff tripped is not a slippery condition.

Industrial Code provision 12 NYCRR 23-1.7 (d) provides:

(d) Slipping hazards. 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.

Contrary to defendants' argument, however, this section does not require that the floor where plaintiff was working be elevated. See *Rizzuto*, 91 NY2d at 350-351 (section covered slippery condition on floor of bus depot terminal); *Cottone v Dormitory Auth. of State of NY*, 225 AD2d 1032 (4th Dept 1996). Nor is it clear that, as a matter of law, the debris identified by plaintiff as the cause of his fall cannot support a claim under § 23-1.7 (d). See *Lopez v City of New York Tr. Auth.*, 21 AD3d 259 (1st Dept 2005) (construction debris can support 23-1.7 [d] claim); but see *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 (2nd Dept 2003) ("demolition debris," not otherwise described, is not a foreign substance under § 23-1.7 [d]). Rather, whether the debris containing pipes is covered under § 23-1.7 (d) is a question for the jury. See *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 732 (2d Dept 2007) (triable issue whether debris containing pieces of glass was foreign substance under § 23-1.7 [d]). The cases on which defendants rely, which only generally hold that construction debris is not a slippery condition, therefore are not determinative. See e.g. *Bond v York Hunter Constr., Inc.*, 270 AD2d 112, 113 (1st Dept), *affd* 95 NY2d 883

(2000) (vehicle track on which plaintiff slipped was not a floor, passageway, scaffold, etc., under § 23-1.7 [d]; issue of debris as dangerous condition improperly raised on appeal, but court noted it was inherent result of work); *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107 (1st Dept 2002) (plaintiff injured sliding down roof; accumulation of dirt and debris, not otherwise identified, was not a slippery condition).

To the extent that defendants also argue that § 23-1.7 (d) does not apply where the slipping hazard is an integral part of the work being done (see *Stafford v Viacom, Inc.*, 32 AD3d 388 [2d Dept 2006]), there is also a triable issue of fact as to whether the debris, described by plaintiff as rubber pipes used by plumbers, was an inherent part of the work that he was doing at the time of his accident.

Defendants contend that, pursuant to its contract with Turner, Sorbara was responsible for cleaning all debris in the basement, and that because plaintiff was engaged in debris removal at the time of his accident, any debris on the basement floor was an inherent part of his work. However, plaintiff testified that at the time of his accident he was told to remove the scaffold stoppers, and was directed to do only that work (P's Dep. at 105-106). He also testified that he did not know who was supposed to remove the pipes at issue, but it was not his job (*id.* at 105). Further, although Turner's Project Superintendent

testified that Sorbara was responsible for debris removal, he also indicated that other trades, such as the electrical workers, were responsible for removing their own debris (Bastidas Dep. at 37).

As to plaintiff's claim based on Industrial Code § 23-1.7 (e), that section provides:

(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.

There is no dispute that plaintiff was in a work area when he tripped on pipe debris, although evidence shows that it was not a passageway as that term is used under § 23-1.7 (e) (1). See *Dalanna v City of New York*, 308 AD2d 400, *supra*; *Canning v Barneys New York*, 289 AD2d 32 (1st Dept 2001). While it has been held that § 23-1.7 (e) (2) does not apply when the injury-causing object was an integral part of the work being performed by plaintiff (see *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2d Dept 2001]), as noted above, conflicting testimony as to the scope of plaintiff's work on the day of his accident raises a triable issue of fact as to whether the object on which plaintiff

tripped was an integral part of the task he was performing. Compare *Cabrera v Sea Cliff Water Co.*, 6 AD3d 315 (1st Dept 2004) (no liability where plaintiff was sweeping up dust he had just created); *Castillo v Starrett City, Inc.*, 4 AD3d 320 (2d Dept 2004) (piece of insulation where plaintiff was installing insulation was integral part of work he was performing); *Harvey v Morse Diesel Intl., Inc.*, 299 AD2d 451 (2d Dept 2002) (cable in area where plaintiff electrician was installing cable was integral part of work she was performing); *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, *supra* (piece of plywood where plaintiff was stacking plywood was material used in actual task he was performing).

Plaintiff's claim, to the extent that it is based on Industrial Code § 23-2.1, should be dismissed. Section 23-2.1 (a), which provides that "building materials shall be stored in a safe and orderly manner" and that "material piles shall be stable ... and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare," is not applicable. The pipe debris on which plaintiff tripped was not building material being "stored," and was not a "material pile" but rather a few pieces of pipe and, as noted above, the basement area where plaintiff fell was not a "passageway, walkway, stairway or other thoroughfare," but was an open working area. See *Castillo*, 4 AD3d at 321-322. See also *Buckley*, 44 AD3d at 272.

Plaintiff also has no claim under § 23-2.1 (b). While there is a split of authority between the First and Second Departments and the Fourth Department on the issue of whether this section is sufficiently specific to support a Labor Law § 241 (6) claim, it is well settled in the First Department, as well as in the Second Department, that § 23-2.1 (b) "lack[s] the specificity required to qualify as a predicate for section 241 (6) liability." *Lynch v Abax, Inc.*, 268 AD2d 366, 367 (1st Dept 2000). See *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 (2d Dept 2008); *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452 (2d Dept 2004); *Quinlan v City of New York*, 293 AD2d 262, 263 (1st Dept 2002); *Canning*, 289 AD2d at 33-34; *Mendoza v Marche Libre Assocs.*, 256 AD2d 133, 133 (1st Dept 1998). As there is clear controlling law in this Department, plaintiff's reliance on a Fourth Department case, *Scally v Regional Indus. Partnership* (9 AD3d 865 [4th Dept 2004]), is misplaced.

Labor Law § 240 (1)

Plaintiff offers no opposition to the branch of defendants' motion which seeks dismissal of the Labor Law § 240 (1) claim. In any event, plaintiff, as he acknowledged (P's Dep. at 162-163), was not subject to an elevation-related hazard, and therefore § 240 (1) is not applicable.

Accordingly, it is

ORDERED that defendants' motion is granted to the extent of

dismissing the common-law negligence, Labor Law § 200, and Labor Law § 240 (1) claims, and dismissing the Labor Law § 241 (6) claim to the extent that it is based on a violation of Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1), 23-1.33 (a) (1), (2), (3); 23-2.1 (a); and 23-2.1 (b); and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated:

4/13/09

JUSTICE DORIS LING-COHAN
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\gwyn v georgetown.wpd

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK