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

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57

Index Number : 102693/2007

WONG, STANLEY

VS

WEST CHAMBERS STREET

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 102693/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

Memo Of Law M1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED

APR 09 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4-5-10

MARCY S. FRIEDMAN, J.S.C.

J.S.C.

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

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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STANLEY WONG and CORNA VALENTINE-WONG,

Index No.:102693/07

*Plaintiffs*,

- against -

DECISION/ORDER

WEST CHAMBERS STREET ASSOCIATES, PLAZA CONSTRUCTION CORP.,

*Defendants.*

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In this Labor Law action, plaintiff Stanley Wong sues for injuries he sustained when he tripped on a tarp at a construction site on November 27, 2006. Defendants West Chambers Street Associates ("West Chambers") and Plaza Construction Corp. ("Plaza") move for summary judgment dismissing the complaint.[1]

West Chambers is the owner of the property where the accident occurred and Plaza was the construction manager of the project. Plaintiff was employed by non-party Diamond Installations as a union glazer. Plaintiff testified that the accident occurred as follows: On the morning of the accident, plaintiff was assigned to clean up broken glass in the courtyard of the premises. (P.'s Dep., 46.) In order to perform the work, plaintiff needed to move a scaffold

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[1]Plaintiff withdrew his Labor Law § 240(1) cause of action pursuant to the parties' stipulation dated June 11, 2009. Plaintiff also withdrew his Labor Law § 241(6) claims based on Industrial Code Sections 23-1.5, 23-1.7(d), 23-1.7(e)(1), 23-1.30, and 23-2.1 (12 NYCRR), and their Labor Law § 200 cause of action only against West Chambers. (See Aff. of David Mayer in Opp., ¶ 2.)

through the courtyard, but there was not a clear path available because of debris in the area. (Id. at 53.) According to plaintiff, he went to see the site safety manager, Joseph Amore, to notify him of the condition and about 35 minutes later went back to the courtyard with his coworker Geoff Lacorte. After doing some work on the scaffold, plaintiff and his coworker began to move the scaffold, though the debris had not yet been cleared. (Id. at 65-66, 69-70.) As plaintiff was walking backwards through the courtyard while carrying the scaffold, he stepped on a blue tarp, which had been covering drum lids, and slipped. As a result, he fell to the ground (id. at 77, 86-87), injuring his back.

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 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.)

Labor Law § 241(6) Claim

Labor Law § 241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
> 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.

It is well settled that this statute requires owners and contractors and their agents "'to

provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law § 241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

Plaintiff's remaining Labor Law § 241(6) claim is that defendants violated Industrial Code Section 23-1.7(e)(2), which requires floors and areas where persons work or pass to be kept free from dirt and debris accumulation, scattered tools, and materials. In seeking dismissal of plaintiff's claim, defendants do not dispute that plaintiff slipped on a tarp and that there were lids underneath it. Rather, they argue that the tarp cannot be classified as debris, tools, or materials because it was being used to cover a portion of the project where work was being performed. Defendants further contend that Section 23-1.7(e)(2) does not apply to open areas such as the courtyard.

Defendants fail to eliminate triable issues of fact as to whether the material on which plaintiff slipped was debris within the meaning of Section 23-1.7(e)(2). Defendants do not submit any evidence or testimony by someone with knowledge of the condition of the courtyard at the time of the accident that shows that the tarp or lids were "integral to the work being performed, or constituted mere 'debris.'" (See Quinn v Whitehall Props., II, LLC, 69 AD3d 599, 600 [2d Dept 2010].) The conclusory affidavit of Plaza's project superintendent Larry Burns does not demonstrate the absence of triable issues of fact. Mr. Burns claims, without any

evidentiary support, that the Department of Buildings ("DOB") performed an inspection of the project site on the date of the accident and did not issue any violations. (Burns' Aff., ¶ 7 [Defs.' Motion, Ex. H].) However, he testified at his deposition that he did not recall whether he was even at the construction site that day. (Burns' Dep. at 26.) He also does not state whether the DOB inspected the courtyard at or before the time that plaintiff claims the dangerous condition existed.

In opposition, plaintiff raises a triable issue of fact. In particular, plaintiff testified that there was dirt and debris all over the courtyard (P.'s Dep. at 53, 64), which included "[c]oncrete, 2 by 4, metal, rocks, blue tarps around" (id. at 64-65); that he slipped on lids covered by a blue tarp (id. at 86); and that this debris is what caused his accident. In his Accident Report, plaintiff also attributed his fall to debris. (Mayer Aff. in Opp., Ex. 3.)

Defendants also do not demonstrate that the courtyard was the type of open area not covered under Section 23-1.7(e)(2). Specifically, defendants do not submit any authority that the courtyard was not a work area in light of the testimony that plaintiff's accident occurred while he was performing his job of removing broken glass from the courtyard, that the courtyard was surrounded by walls, that one would have to go through an entrance to enter it, and that the courtyard itself was being constructed as part of the project. (P.'s Dep. at 44-46, 50-51, Burns' Dep. at 13.) Contrary to defendants' contention, this is a case in which the accident occurred in a "working area" within the purview of Section 23-1.7(e)(2). (Compare Muscarella v Herbert Const. Co., Inc., 265 AD2d 264 [1st Dept 1999] with Maza v University Ave. Dev. Corp., 13 AD3d 65 [1st Dept 2004].) Accordingly, the branch of defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim based on Section 23-1.7(e)(2) will be denied.

Labor Law 200 and Common Law Negligence Claims

Plaza also moves to dismiss plaintiff's common law negligence and Labor Law § 200 claims. Labor Law § 200 is a codification of 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. and Gas Corp., 82 NY2d 876 [1993].) Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed. (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]. See also Vital v City of New York, 43 AD3d 309 [1st Dept 2007]; Kinirons v Teachers Ins. and Annuity Assn. of Am., 34 AD3d 237 [1st Dept 2006].)

When the accident arises from a dangerous condition on the property, 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, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed. (See Murphy v Columbia Univ., 4 AD3d 200, 202 [1st Dept 2004]; Lally v JGN Constr. Corp., 295 AD2d 148, 149 [1st Dept 2002], lv denied 99 NY2d 504; see DeBlase v Herbert Const. Co. Inc., 5 AD3d 624 [2d Dept 2004].)

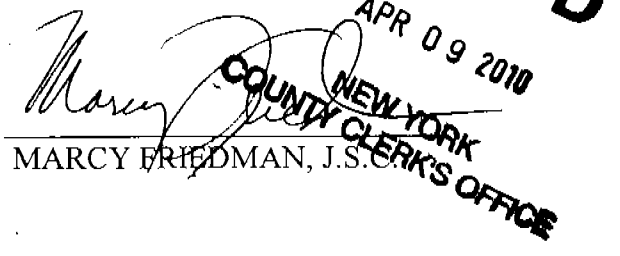
Here, defendants fail to eliminate triable issues of fact as to whether Plaza had actual or constructive notice of the unsafe condition. In support of their motion, defendants cite the testimony of Joseph Amore that plaintiff never complained to him about the debris in the courtyard prior to the accident. (Amore Dep. at 19.) However, plaintiff testified, in contrast, that he did notify Mr. Amore of the condition before his accident because he was the safety manager, and that he told him the debris needed to be cleared in order for him to move the scaffold. (P.'s

Dep. at 41, 65-66.) Plaza also does not show that it lacked constructive notice of the condition. Indeed, Plaza acknowledges that it was the entity responsible for removal of all debris at the site. (See Aff. of Mark Cipolla in Reply, ¶ 7.) Defendants further contend that Plaza did not have notice of the condition because, as Mr. Amore testified, he was not employed by Plaza but rather by Total Safety Consulting. However, Mr. Amore also testified, and Plaza does not dispute, that he "was working for Plaza construction at the 200 Chambers Street" and that he was a representative of Plaza for purposes of carrying out their site safety program. (Amore Dep. at 12, 30-31.) He also testified that he and the Plaza superintendents held the site safety meetings together. (Id. at 45.) Triable issues of fact therefore exist as to whether Plaza had notice of the dangerous condition alleged by plaintiff. Accordingly, plaintiff's Labor Law § 200 cause of action against Plaza should not be dismissed.

It is hereby ORDERED that the motion of defendants West Chambers Street Associates and Plaza Construction Corp. for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) claims is granted to the following extent: The § 200 claim is dismissed without opposition against defendant West Chambers Street Associates, and the § 241(6) claim is dismissed without opposition except to the extent that it is based on Industrial Code § 23-1.79(e)(2).

This constitutes the decision and order of the court.

Dated: New York, New York
April 5, 2010




MARCY FRIEDMAN, J.S.C.