

Rivera v City of New York

2010 NY Slip Op 31860(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 111315/07

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

7-8-10

Rivera

INDEX NO.

111315/07

MOTION DATE

2-11-10

MOTION SEQ. NO.

001

MOTION CAL. NO.

Plaintiffs,

- v -

CITY OF NEW YORK
Defendants.

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed Memorandum Decision and order.

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

FILED
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 30, 2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

Index No.: 111315/07

-----X
GABRIEL RIVERA,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

-----X
JOAN A. MADDEN, J.

FILED
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover damages for the injuries allegedly sustained by plaintiff Gabriel Rivera ("Rivera") as the result of a workplace accident, defendant City of New York ("the City") moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion.

Background

This action arises out of an accident that occurred at the center lower roadway of the Manhattan Bridge at the Manhattan Tower in New York City. Non-party Koch Skanska ("Koch") was hired by the City to renovate the lower roadway of the Manhattan Bridge. Rivera is a member of a union called the Iron Workers Local 40 and was hired by Koch as a journeyman ironworker to remove the steel and concrete bed and steel girders underneath the roadway.

Rivera testified at his deposition that he was injured on December 4, 2006, at approximately 11:30 am, when his left foot slipped on debris consisting of concrete dust while he was in the process of removing steel girders. He fell onto the roadway and his left hand got caught between the steel roller and the roadway, allegedly causing severe injury to his left middle and index fingers.

According to Rivera, immediately prior to the accident, he and other workers were lowering a girder onto steel rollers. He testified that this is not the typical process for removing

steel girders in the road deck. Rather, he stated, the process usually involves using a hydraulic crane on wheels to remove road sections. Before Rivera's accident, however, the crew discovered that the crane couldn't fit under the Manhattan tower. Thus, the crew installed an overhead pulley system in order to remove the sections of roadway and the steel girder. The pulley system involved an overheard chain, which each worker in the crew took turns manually pulling. Following the seamless removal of the roadway section, the pulley system was attached to the girder in order to lift it out and land it onto steel rollers. The crane was to be used to suspend the girder and place it onto the tractor-trailer, so that the truck could pull it clear of the Manhattan tower.

Rivera testified in his deposition that the steel girder was approximately four feet tall and thirty feet wide, and he noted in his 50-H testimony that it weighed approximately four and a half tons. He also testified in his deposition that the steel rollers were about eighteen inches long, two inches in diameter and twenty five pounds. In the 50-H hearing, however, Rivera testified to different dimensions, asserting that the rollers were approximately two and a half feet long. According to Rivera, Sean McDermott ("McDermott"), Koch's general foreman, gave the direction to Rivera's foreman, James Mench ("Mench"), to have the crew remove the girder with the pulley system to suspend it and bring it over to the truck. When the girder landed on the steel rollers, Rivera was preparing the east end of it to be attached to the tractor-trailer by burning a hole on the end of the beam and attaching a small wire rope to it. As the tractor-trailer pulled the girder towards the east, Rivera went to grab the roller from the west end of the girder and bring it back to the front. Rivera testified that he was attempting to place the roller underneath the girder, and while doing so his left leg gave out, slipping from underneath him,

and that when he slipped his hand got caught underneath the roller and the girder rolled right over it.

Rivera further testified that the dust he slipped on resulted from the drilling of holes into the concrete floor of the road sections and the saw cutting of the roadway. He testified that he did not observe the dust on this specific day until he was on the ground after he slipped, but that he had noticed the presence of concrete dust about a week before. Additionally, he testified that he had verbally complained to Mench a month prior to the accident about oil, debris, and concrete dust on the roadway. He stated that he believed Mench said he "would take care of it." Rivera did not know whether anything happened as a result of his complaint to his foreman.

Rivera testified that Koch provided all of the work equipment that he used on the site, including the pulley system and the rollers. Further, he received all of his safety equipment, except for his leather work gloves, from Koch. The equipment Koch provided included a safety harness, glasses, hardhat, and a vest. Rivera also testified that he was instructed solely by Koch and never had any contact with representatives of the City. Koch held weekly safety meetings on Wednesdays which were run by Mench.

McDermott testified that the crane was in fact able to pick up the girder in the area of the Manhattan tower, but that it was unable to swing the girder left or right because of the height of the tower. Thus, the crew manually aligned the girder once it was suspended. According to his deposition, McDermott said he observed the crew having some physical difficulty in moving the girder towards the east, so he suggested to Mench that they land it on the rollers and pull it out from between the towers. He further stated that he observed Rivera "down in a crouching position placing a roller, trying to square up a roller . . . He put his hand like this to square it up and his glove got caught." (see Exhibit "I", to the City's Motion for Summary Judgment, p. 57,

In. 4-8) McDermott testified that at the time he was standing about two feet from the girder, on the same side as Rivera. He also testified that while the trailer was pulling the girder on the rollers, Rivera's roller came out of alignment and he watched him try to straighten it out, although no one instructed him to do so. According to McDermott, in general, the procedure to keep rollers from coming out of alignment is to hit them with an eight pound hammer, but that Rivera did not do so and that he had his hand in the wrong place.

McDermott testified that the work of cutting the concrete generated dust, but that he never observed this dust in the areas where the ironworkers were working on the lower roadway on the Manhattan Bridge. He said that all the locations were vacuumed of this dust, but he could not recall whether there was any concrete dust in the exact location where the accident occurred.

The submissions do not include any deposition testimony or affidavits from the representatives of the City.

In this action, Rivera asserts claims under Labor Law §§ 241(6), 200, and 240(1).

The City now moves for summary judgment to dismiss all of the claims against it. At oral argument, however, Rivera conceded that Labor Law the § 240(1) claim is insufficient.

With respect to the Labor Law § 241(6) claim, the City argues that the sections of the State Industrial Code on which Rivera relies are either insufficient to support a claim, inapplicable to the facts of the case, or that their violation was not the proximate cause of Rivera's accident. Specifically, the City argues that Industrial Code § 23-1.7(d) is inapplicable as a matter of law since it applies to certain types of work areas and in particular, "a floor, passageway, scaffold or other elevated working area," and not an open area such as the lower roadway deck of the Manhattan Bridge. The City next argues that it is well settled that both subsections (1) and (2) of Rule 23-1.7(e) are directed at incidents that occur as the result of a

tripping as opposed to a slipping hazard, and here, it is uncontroverted that the accident resulted from Rivera slipping on debris. In the alternative, the City argues that it is nevertheless entitled to summary judgment since the concrete dust upon which Rivera slipped was a byproduct of the removal of roadway decking, an integral part of the work being performed on the bridge.

As for Labor Law § 200 claim, the City argues that it cannot be held liable as the evidence establishes that the City did not supervise, direct or control the activity causing Rivera's accident, and did not have notice of any allegedly unsafe condition or work practice.

Rivera opposes the motion, arguing that he has a viable cause of action under Labor Law §241(6) since the record shows that his accident was caused by the violation of State Industrial Code §§ 23-1.7(d) and 23-1.7(e)¹. Specifically, he argues that the concrete dust he allegedly slipped on constitutes a "foreign substance which may cause slippery footing" under the regulation, and thus his work area was not kept clear of accumulation of concrete dust and debris. Rivera further argues that the concrete dust was not a part of the work his crew was performing, as they were ironworkers involved in structural work, and did not work with concrete.

Rivera also argues that there are triable issues of fact as to whether the City violated its duty to provide Rivera with a safe place to work as mandated under Labor Law § 200, by failing to ensure that the job site was free of tripping and slipping hazards. While Rivera acknowledges that the City did not supervise the worksite, he asserts that it is nonetheless potentially liable under Labor Law § 200 since the accident that resulted in his injuries was not attributable to the means and methods of the work performed, but rather to a dangerous condition on the bridge

¹Although Rivera cites Industrial Code sections 23-1.30 and 23.8.1(f) in his Bill of Particulars, he does not argue in opposition to the City's motion that these sections provide a basis for liability under Labor Law § 241(6)

resulting in an unsafe workplace. He argues that the question of whether the City had actual or constructive notice of the dangerous condition raises a triable issue of fact.

Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...” Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 325 (1986).

Labor Law § 241(6)

Labor Law § 241(6) provides that “[a]ll 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.” The section requires owners and contractors at a construction site 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-Electric Co., 81 NY2d 494 (1993).

The duty under Labor Law § 241(6) is nondelegable. Thus, “to the extent that a plaintiff has asserted a viable claim under Labor law § 241(6), he need not show that defendants exercised supervision or control over the worksite in order to establish a right to recovery.” Id. At the same time, however, “[o]nly a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under that

statutory section.” Heller v. 83rd St. Investors Ltd. P’ship, 228 AD2d 371, 372 (1st Dept), ly denied 88 NY2d 815 (1996); see also Messina v. City of New York, 300 AD2d 121 (1st Dept 2002). In addition, general provisions of the State Industrial Code (12 NYCRR), which do not mandate compliance with concrete specifications, are insufficient to support claims under Labor Law § 241(6). Id. Furthermore, a violation of a section of the State Industrial Code is only “some evidence of negligence.” Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 351 (1998).

Thus, this court must examine each section of the State Industrial Code that Rivera alleges was violated in order to determine whether it may serve as a basis for Labor Law § 241(6) liability.

Rivera alleges that the defendants violated State Industrial Code Rules 23-1.7(d) and 23-1.7(e). The rules are as follows:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, 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,

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from other obstructions or conditions which 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.

Sections 23-1.7(d), 23-1.7(e)(1), and 23-1.7(e)(2) have been held to be sufficiently specific to provide a basis for liability under Labor Law §241(6) Rizzuto, 91 NY2d at 350-51; Corbi v. Ave. Woodward Corp., 260 AD2d 255 (1st Dept 1999).

The City asserts that section § 23-1.7(d) is inapplicable to the facts of this case as it only governs cases involving passageways, walkways, scaffold, platforms, or other elevated working spaces. However, § 23-1.7(d) also provides for protection from slippery conditions on various

surfaces, including a “floor” and “elevated working surface” like the lower roadway deck of the Manhattan Bridge where Rivera was working. In his testimony, Rivera asserts that he slipped on concrete dust on the roadway which caused him to fall and injure his hand. While McDermott testified that there was no presence of concrete dust at the site and Rivera did not slip at all, such testimony raises an issue of fact for the jury. In addition, contrary to the City’s argument, it cannot be said as a matter of law that the dust at issue was “an integral part of the work being performed at the accident site.” McDonagh v. Victoria’s Secret, Inc., 9 AD3d 395, 396-397 (1st Dept 2004). Accordingly, there are triable issues of fact as to whether Industrial Code § 23-1.7(d) provides a basis for liability.

As noted above, while § 23-1.7(d) applies to open spaces, § 23-1.7(e)(1) only concerns accidents that occur in passageways. Therefore, since it is undisputed that Rivera’s accident occurred in an open area, § 23-1.7(e)(1) is not applicable to the facts of this case.

In regards to § 23-1.7(e)(2), Rivera’s testimony provides that he slipped on “concrete dust,” not that he tripped over anything at the worksite. However, § 23-1.7(e)(2), which applies to “tripping and other hazards” has been held to be applicable when, as here, a plaintiff slips at the worksite. Lopez v. The City of New York Transit Authority, 21 AD3d 259 (1st Dept 2005).

Accordingly, summary judgment is only granted dismissing that part of Rivera’s Labor Law § 241(6) claim that is based on a violation of State Industrial Code § 23-1.7(e)(1), 23-1.30 and 23.8.1(f), but the claim is viable to the extent it is based on an alleged violation of § 23-1.7(d) and § 23-1.7(e)(2).

Labor Law § 200

The common law duty to maintain a safe workplace is codified in Labor Law § 200. See Gaspar v. Ford Motor Co., 13 NY2d 104 (1963). Liability under Labor Law § 200 will be

imposed if the owner or contractor exercised supervisory control over the construction site or had actual or constructive notice of the unsafe condition. See Rizzuto, 91 NY2d at 343, 351 (1998). Here, Rivera's testimony indicates that he never observed representatives of the City supervising the jobsite. He testified that he received all of his direction from the foreman of his employer, Koch, and he was unaware of whether his instructions came down from the City to Koch. Therefore, there is no evidence to suggest that the City exercised supervisory control over the worksite.

Although the City did not exercise supervisory control over the worksite sufficient to give rise to potential liability under Labor Law § 200, such supervision is not necessary when the defendant has actual or constructive notice of the condition causing the injuries, which does not arise out of the means and methods of the contractor. See e.g., Higgins v. 1790 Broadway Assoc., 261 AD2d 223 (1st Dept 1999). Here, however, Rivera's injury did in fact arise out of the contractor's methods employed for performance of the work, and not from a defect in the premises. See Dellanna v. City of New York, 208 AD2d 400 (protruding bolt was not a defect in the premises itself, but rather created by the manner in which the worker's employer performed his work.) Moreover, even if it could be argued that Rivera's injuries was the result of a condition or defect at the worksite, there is no evidence in the record from which it could be inferred that the City has actual or constructive notice of any such condition or defect.

Conclusion

In view of the above, it is

ORDERED that the City's motion for summary judgment dismissing Rivera's Labor Law § 241(6) claim is granted to the extent of dismissing that part of Rivera's Labor Law § 241(6) claim that is based on a violation of State Industrial Code § 23-1.7(e)(1), 23-1.30 and

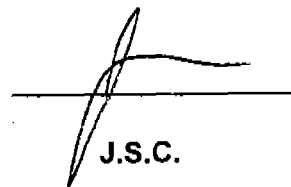
23.8.1(f), but the claim is viable to the extent it is based on an alleged violation of § 23-1.7(d) and § 23-1.7(e)(2) and it is further

ORDERED that the City's motion for summary judgment is granted dismissing Rivera's Labor Law § 200 claim; and it is further

ORDERED that the City's motion for summary judgment is granted dismissing Rivera's Labor Law § 240(1) claim; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351 at 60 Centre Street on August 12, 2010 at 2:45 pm.

DATED: June 20 2010


J.S.C.

FILED
JUL 08 2010
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