Baker v Stone & Webster, Inc.
2010 NY Slip Op 32901(U)
October 13, 2010
Supreme Court, Queens County
Docket Number: 22308/2008
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

GERARD BAKER and CARMEN BAKER, Plaintiff,	Index Number 22308 2008
- against -	Motion Date July 27, 2010
STONE & WEBSTER, INC. STONE & WEBSTER CONSTRUCTION COMPANY, INC., STONE & WEBSTER A SHAW GROUP COMPANY, ASTORIA ENERGY LLC and NORTH AMERICAN ENERGY SERVICES COMPANY, Defendants.	Motion Cal. Number 2
	Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by defendants for summary judgment in their favor dismissing plaintiff's claims pursuant to Labor Law §§ 200 and 241 (6).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-7
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-13

Upon the foregoing papers it is ordered that the motion and the cross motion are decided as follows:

Plaintiffs in this negligence/labor law action seek damages for personal injuries sustained by Gerard Baker (herein "plaintiff"), on January 25, 2006, when he slipped and fell on black ice at premises owned by Astoria Energy, LLC, (Astoria Energy), while in the course of his employment with American Electrical Testing (American). The action by Carmen Baker is derivative. The injury occurred at a power plant owned by Astoria Energy. Stone & Webster (S&W) was the general contractor. It is noted that since the acquisition of S&W by the Shaw Group, Inc. in or around 2000, S&W's name has undergone various permutations, including, e.g. Stone & Webster A Shaw Company, Shaw & Stone Webster, Stone & Webster Construction Company, Inc., etc. For purposes of this motion, all Stone & Webster companies will be referred to as S&W.

Defendants move to dismiss plaintiffs' claim pursuant to Labor Law § 200 and common law negligence on the grounds that they did not supervise, direct or control the work being performed by the injured plaintiff nor have plaintiffs established a prima facie case of negligence as to defendants. Defendants also move to dismiss plaintiffs' claim pursuant to Labor Law § 241(6), on the ground that the Industrial Codes section cited by plaintiffs do not apply to the facts at hand. Plaintiffs oppose the motion and cross move for summary judgment in their favor on their Labor Law §§ 200 and 241(6) claims.

Facts

On January 25, 2006, plaintiff Gerard Baker (herein "plaintiff") was a journeyman electrician working for American on the site of the Astoria Energy power plant. Usually plaintiff's tasks involved testing electrical equipment at the plant. On January 25, 2006, plaintiff arrived at noon and was scheduled to work until midnight. He entered the building several times that day, from different entrances.

At around 10:00 p.m., plaintiff and his partner, James Bernard, were in the American Electrical Testing trailer getting some equipment. They were on the way to check the wiring on a generator main circuit breaker in the main building. Plaintiff and his partner planned to access the main building via the "Zamboni entrance", a "roll-up gate" that led to the main building. They did not need anyone to let them into the building because they knew the entrance would be open. This entrance was used daily by contractors as well as by the S&W site safety manager. When he left the trailer, plaintiff was wearing his electrical work boots and carrying a "medium to heavy" workbox. Plaintiff was also carrying a Megger, i.e. "An electrical measuring device that measures the integrity of the insulation on the wire." To arrive at the main building from the

American Electrical Testing trailer, plaintiff and his partner had to walk less than one hundred yards. The path to the building was dark. To reach the building, plaintiff walked onto the dirt road leading from his trailer, reached and cross the "ballast path", walked across another area of dirt and finally onto the asphalt. The asphalt would lead him directly to the Zamboni entrance.

When plaintiff and his partner stepped onto the asphalt path, they were within 10 feet of the Zamboni entrance. The area where they were walking had no lights other than a floodlight mounted about 15-20 feet high on the wall of the building, around the corner from the entrance they were approaching. The light provided about three or four feet of illumination to the north, the direction it was facing, however, plaintiff and his partner were coming from the west. After stepping onto the path, plaintiff slipped on a patch or "area" of ice and fell to the ground.

S&W had various sub-contracts in place with, for example, a company in charge of "civil" work - - work involving earth or concrete, or that took place underground. S&W had oversight of each contractor and their work site safety personnel. S&W maintained an office on the site and had a site safety manager and a site safety supervisor present. In the spring of 2006, North American Energy Services took control of the Astoria Energy plant for operation and management.

<u>Labor Law § 200</u>

Defendants argue that plaintiff's common law negligence and Labor Law § 200 claims should be dismissed because defendants had no supervisory control over the contractor's workers, including plaintiff. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Kajo v E.W. Howell Co., Inc.,* 52 AD3d 659, 661 [2008]). "Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. It is well settled that an implicit precondition to th[e] duty [to maintain a safe construction site] is that the party to be charged with that obligation have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition. General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work,* i.e ., how the injury-producing work was performed [internal quotation marks and citations omitted]." (*Hughes v Tishman Construction Corp.,* 40 AD3d 305, 306 [2007]; see also *Narducci v Manhasset Bay Associates,* 96 NY2d 259, 263 [2001]; *Masullo v 1199 Housing Corp.,* 63 AD3d 430 [2009].

However, "[w]here [as here] a plaintiff's injuries stem from a dangerous condition on the premises, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice [internal quotation marks and citation omitted]" (*Aguilera v Pistilli Construction & Development Corp.,* 63 AD3d 763, 764 [2009]. This is true regardless of whether the defendant supervised the plaintiff's work (*Konopczynski v ADF Construction Corp.,* 60 AD3d 1313 [2009]).

In order to prevail on its motion for summary judgment, defendant was required to establish that it "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" (*Candelario v Watervliet Hous. Auth.*, 46 AD3d 1073, 1074 [2007]; *see Cantwell v Rondout Sav. Bank*, 55 AD3d 1031, 1031-1032 [2008]; *Amidon v Yankee Trails, Inc.*, 17 AD3d 835, 836 [2005]). A demonstration of " '[c]onstructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit [the] defendant[ ] to discover it and take corrective action' " (*Cantwell v Rondout Savings Bank*, 55 AD3d at 1032, quoting *Boyko v Limowski*, 223 AD2d 962, 964 [1996]; *see Martin v RP Assoc.*, 37 AD3d 1017, 1017 [2007]). Here, defendants failed to establish, prima facie, that they did not have actual or constructive notice of the allegedly hazardous condition which caused the injured plaintiff's accident (*see DeLiso v State of New York,* 69 AD3d 786 [2010]). The injured plaintiff testified that he had notified the defendants of the presence of ice on the ground in the area approximately two (2) days before the accident. Defendants did not dispute this. Therefore, the motion to dismiss plaintiffs' claim pursuant to Labor Law § 200, is denied. The cross motion for summary judgment in plaintiffs' favor on their claims pursuant to Labor Law § 200, is granted.

<u>Labor Law § 241(6)</u>

A plaintiff asserting a Labor Law § 241(6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code (*see Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494 [1993]; *Samuel v A.T.P. Dev. Corp*., 276 AD2d 685 [2000]), and that such violation was a proximate cause of his or her injuries (*see Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396 [2005]; *Plass v Solotoff,* 5 AD3d 365, 367 [2004]). Here plaintiffs Labor Law § 241(6) claim is predicated on sections 23-1.5, 23-1.7(d) and (e), 23-2.1 and 23-1.30.

Preliminarily, the branch of the motion which seeks to dismiss plaintiffs' Labor

Law section 241(6) claim predicated upon section 23-1.7(e), is granted as unopposed and otherwise on the merits (*see Reiner v Dormitory Authority of the State of New York*, 266 AD2d 443 [1999]). Also, sections 23-1.5 and 23-2.1 of the Industrial Code lack the specificity required to support a cause of action under Labor Law § 241(6) (*see Salinas v Barney Skanska Constr. Co.,* 2 AD3d 619 [2003]; *Fowler v CCS Queens Corp.,* 279 AD2d 505 [2001]; *Lynch v Abax, Inc.,* 268 AD2d 366 [2000]; *see generally Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]). Therefore, the branches of the motion which seek summary judgment dismissing the Labor Law § 241(6) claim based on these provisions are granted.

Section 23-1.7[d], prohibits employees from using a "floor, passageway, walkway . . . which is in a slippery condition" and contains the command that "[i]ce, snow, water, grease and *any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing*" (emphasis added). In violation of this provision, defendants allowed ice to accumulate in "large areas", and these areas were present in the dirt portion of the path plaintiff typically used from the office trailer to the building and, according to plaintiff, they were present on the asphalt path.

Defendants contend that plaintiff's accident did not occur on a "passageway" since the accident happened on a pathway used to enter the building, located out in the open. The court finds here that the "pathway" to plaintiff's work site constituted a passageway that plaintiff was required to use in order to access his equipment (see *Beltrone v City of New York*, 299 AD2d 306, 308 [2002]; *Whalen v City of New York*, 270 AD2d 340, 342 [2000]; *see also Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [2008]; *Linkowski v City of New York*, 33 AD3d 971, 974 [2006]; *cf. Cafarella v Harrison Radiator Div. of Gen. Motors*, 237 AD2d 936, 937 [1997]). Notably, responsibility under Labor Law § 241(6) extends not only to the area where the work was actually being conducted, but to the entire construction site, including passageways and platforms, in order to insure the safety of workers going to and from the points of actual work (*see Kane v Coundorous*, 293 AD2d 309 [2002]; *Rossi v Mount Vernon Hosp.*, 265 AD2d 542 [1999]; *Sergio v Benjolo N.V.*, 168 AD2d 235 [1990]; *Brogan v International Bus. Machs. Corp.*, 157 AD2d 76 [1990]). Accordingly, the branch of the motion which is to dismiss plaintiffs' § 241(6) claim predicated on section 23-1.7[d], is denied. The cross motion for summary judgment in plaintiffs' favor based upon a violation of section 23-1.7[d], is granted.

NYCRR 23-1.30 requires that "illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations." Defendants claim that plaintiffs' allegations

under this provision are "vague" and "unsubstantiated". The injured plaintiff testified that there were no lampposts on the sides of the path where he fell, and that none of the lights on top of the trailers in the vicinity were directed at the area in front of the entrance where plaintiff fell. Plaintiff also testified that the floodlight attached to the building was on a wall around the corner from where plaintiff fell, and provided only 3 to 4 feet of illumination in the direction plaintiff was coming from. Plaintiff fell approximately ten feet from the entrance, and there was no illumination at the area where he fell. While plaintiff testified as to the poor lighting in the area, he did not testify that this was a contributing cause to his fall. Therefore, the cross motion for summary judgment in plaintiffs' favor based upon a violation of section 23-1.30, is denied as there is no evidence in the record that the lack of illumination was a proximate cause of plaintiff's fall. Relatedly, the motion for summary judgment dismissing plaintiffs' claim under section 23-1.30, is denied as there are issues of fact as to whether the absence of proper illumination was a proximate cause of plaintiff's fall.

Conclusion

The motion to dismiss plaintiffs' claim pursuant to Labor Law § 200, is denied. The cross motion for summary judgment in plaintiffs' favor based upon a violation of Labor Law § 200 is granted.

The branches of the motion which seek to dismiss plaintiffs' § 241(6) claim predicated upon sections 23-1.5 and 2.1 are granted. The branches of the motion which seek to dismiss plaintiffs' § 241(6) claim predicated upon sections 23-1.7(d) and 23-1.30 are denied. The cross motion for summary judgment in plaintiffs' favor based upon defendants' violation of section 23-1.7 (d), is granted. The cross motion for summary judgment in plaintiffs' favor based upon defendants' violation of section 23-1.30, is denied.

Dated: October 13, 2010

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Howard G. Lane, J.S.C.