

**Murphy v One Bryant Park, LLC**

2010 NY Slip Op 33914(U)

July 9, 2010

Sup Ct, New York County

Docket Number: 102945/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
NEIL MURPHY,

Plaintiff,

Index No.: 102945/08  
DECISION/ORDER

-against-

ONE BRYANT PARK, LLC, DURST  
DEVELOPMENT, LLC and TISHMAN  
CONSTRUCTION CORP.,

Motion Seq. No.: 003

Defendants.  
-----X

HON. DORIS LING-COHAN, J.S.C.:

**FILED**  
7 JUL 15 2008  
CLERK OF THE COURT  
COUNTY OF NEW YORK  
NEW YORK

In this personal injury/negligence action, defendants move for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, this motion is denied.

BACKGROUND

On December 17, 2007, plaintiff Neil Murphy (Murphy), an employee of non-party Schindler Elevator Co. (Schindler), suffered injuries to his right knee and hip when he tripped and fell while walking over a metal plate that had been set up as a ramp leading into a work site in a building (the building) located at One Bryant Park in the County, City and State of New York. *See* Notice of Motion, Ashnault Affidavit, ¶ 6. Defendant One Bryant Park, LLC (Bryant) is the owner of the building. *Id.*, ¶ 7. Defendant Tishman Construction Corp. (Tishman) was the construction manager for the work being performed at the premises. *Id.* Defendant Durst Development, LLC (Durst) is purported to have no ownership interest in the building, and no involvement with the work that was being performed there. *Id.*

The exact site of Murphy’s injury was at the entrance to an area called “Anita’s Way”. At

his deposition on May 11, 2009, Murphy stated that everyone entering the building's work site had to walk over the metal diamond plate ramp in Anita's Way because there was a cinderblock wall being built on either side of it which closed off the remainder of the entrance. *See* Notice of Motion, Exhibit D, at 27-29, 39-41, 48-49. Murphy also stated that the plate was not secured to the curb, and that it would go up and down like a seesaw when anyone walked over it or rolled construction material over it. *Id.* at 38-42, 44. Murphy described how he had stepped on the plate with his left foot, how one lip of the plate had then gone down, and how he had caught his right foot on the other lip of the plate which rose up, thus causing him to fall. *Id.* at 41-42. Murphy stated that, at the time of his accident, he had been walking toward an elevator that he was helping to install close to the Anita's Way entrance, but that that entrance was then being used by all of the tradesmen at the work site, and not exclusively by the elevator installers. *Id.* at 27-29, 40-41. Murphy admitted, however, that he only took instruction regarding his job assignments from his supervisors at Schindler, and not from employees of Bryant, Tishman or Durst. *Id.* at 18, 21-25. Murphy also stated that he believed that the ramp that he tripped on had been placed in Anita's Way "by a bricklayer." *Id.* at 40-41.

At his deposition on October 1, 2009, Tishman's general superintendent, Dean Essen (Essen), stated that Tishman employed him and several other superintendents to inspect the subcontractors' work at the work site, and to inspect the work site itself for unsafe conditions. *Id.*; Exhibit E, at 8. Essen also stated that Tishman had contracted with non-party Carpentry Component Assembly (CCA) to install the metal diamond plate ramps at the work site, and that, pursuant to that contract, the plates were to be screwed down and secured to the floor areas where they sat. *Id.* at 13, 24. Essen further stated that Tishman had the authority to call CCA and order

that an unsecured plate be secured if a Tishman superintendent noticed that one was loose during a work site walk through. *Id.* at 9. However, Essen also stated that “any trade had the ability to make their own ramp [and] to load their material into any space.” *Id.* at 22-23. Essen additionally stated that Tishman had contracted with non-party Total Safety (Total) as the site safety manager at the building, and that, pursuant to that contract, Total had the responsibility to either secure or remove an unsecured diamond plate that an employee might notice. *Id.* at 25. Essen finally stated that Total was responsible for notifying Tishman, in writing, of all safety issues at the work site, as well as for specifically inspecting all metal diamond plate ramps to ensure that they were secured. *Id.* at 11-12, 26-27, 30-31.

Murphy commenced this action on March 25, 2008 by filing a complaint that sets forth one cause of action for negligence. *Id.*; Exhibit A. Defendants filed a verified answer with affirmative defenses on April 14, 2008. *Id.*; Exhibit B. In his bill of particulars, Murphy identified the following statutory and code provisions as bases for his negligence claim: Labor Law §§ 200, 240 and 241 (6); Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-1.21, 23-1.22, 23-1.23, 23-1.29, 23-1.30, 23-2, 23-5, 23-6, 23-7, 23-8; and OSHA Article 1926. *Id.*; Exhibit C. Defendants now seek summary judgment to dismiss the complaint (motion sequence number 003).

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the

burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). Here, for the following reasons, triable issues of fact exist which would make it inappropriate to grant defendants' motion for summary judgment.

As was previously mentioned, Murphy's sole cause of action herein is a claim of negligence. Pursuant to New York law, "the traditional common-law elements of negligence" are "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). As was also previously mentioned, Murphy alleges three statutory bases for the "duty" component of his claim. The first of these is Labor Law § 200, which, as the Court of Appeals noted in *Lombardi v Stout* (80 NY2d 290, 294 [1992]), "is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work." Under this statute, it is well settled that a landowner will be liable for negligence in connection with injuries at a work site only if the owner exercised supervision and control over the work performed at the site, or had actual or constructive notice of the purportedly dangerous condition. *See e.g. Vital v City of New York*, 43 AD3d 309, 310 (1<sup>st</sup> Dept 2007). Here, defendants contest two of the foregoing criteria.

Defendants first assert that they did not direct or control the manner in which Murphy

performed his work. *See* Defendants' Memorandum of Law, at 4-6. They specifically refer to Murphy's deposition testimony in which he stated that he reported only to his supervisors at Schindler, and that he received no instructions from anyone at Bryant, Tishman or Durst. *Id.*; Notice of Motion, Exhibit D, at 18, 21-25. Murphy responds that Tishman did, in fact, exercise supervision and control over the work site because it "played a significant role in designating the locations" where the diamond plate ramps were placed by CCA, and also "oversaw the inspection of the ramps" via its control of Total. *See* Weir Affirmation in Opposition, ¶¶ 25, 26. Murphy cites the decision of the Appellate Division, First Department, in *Perrino v Energy Nuclear Indian Point 3, LLC* (48 AD3d 229 [1<sup>st</sup> Dept 2008]) for the proposition that these two factors indicate the presence of a triable issue regarding defendants' liability under Labor Law § 200. Defendants reply that *Perrino* is distinguishable on the facts. *See* Ashnault Reply Affirmation, ¶¶ 3-5. Defendants specifically note that, in *Perrino*, the Appellate Division found that:

The record ... was replete with evidence ... that defendants played a significant role in designating the locations where plaintiff could lay down equipment ..., oversaw the cordoning off of dangerous areas with yellow caution tape, and employed coordinators to regularly walk the job site to inspect for safety issues and to take corrective measures.

48 AD3d at 230. Defendants then argue that here, by contrast, Essen testified that "any trade" could lay down a ramp, and that Murphy testified that he believed that the ramp in question had been laid down by "a bricklayer," rather than by any of defendants' employees. *See* Ashnault Reply Affirmation, ¶ 8. Defendants also reiterate that Murphy testified that he never took any job instruction from any of defendants' employees, which, presumably, would include safety inspectors. *Id.*, ¶ 10. Essen's undisputed testimony makes it clear that CCA was merely another

subcontractor at the work site (with the non-exclusive responsibility for securing floor ramps there), and that Total was a typical safety inspection company.

Against this background, Murphy's characterizations that: 1) defendants' hiring of CCA is evidence that defendants enjoyed "a significant role" in designating the placement of the diamond plate ramps at the work site, 2) and that defendants' hiring of Total indicates that defendants also "oversaw the inspection of the ramps," are rejected. Thus, Murphy may not rely on the criteria set forth in the *Perrino* holding to argue that defendants exercised "supervision and control" over Murphy in the performance of his job. There is no significant evidence that defendants did so. Therefore, the court rejects Murphy's "supervision and control" argument.

Defendants also argue that there is no evidence that they had either actual or constructive notice of the existence of the unsecured ramp where Murphy was injured.<sup>1</sup> *See* Defendants' Memorandum of Law, at 8-12. With respect to actual notice, defendants point to the lack of any documented complaints about the ramp in question, and to Murphy's own deposition testimony that he had never walked over, or noticed, the subject ramp before his accident, despite his having been in that part of the job site on many prior occasions. Murphy does not contest this point, and therefore the court deems it conceded. With respect to constructive notice, to constitute such notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). Defendants cite the rule that neither a general awareness of the presence of a dangerous condition, nor a plaintiff's

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<sup>1</sup> Defendants raise the additional argument that there is no evidence that they created the condition that led to Murphy's injury. *See* Defendants' Memorandum of Law, at 7-8. Since Murphy does not respond to this point; thus, the court deems it conceded.

observation of such in the general area of his injury is legally sufficient to charge a defendant with constructive notice. *See e.g. DeJesus v New York City Hous. Auth.*, 53 AD3d 410 (1<sup>st</sup> Dept 2008). They then restate the evidence offered in support of their actual notice argument. *See* Defendants' Memorandum of Law, at 10-12. In response, Murphy merely argues that "[CCA]'s direct relationship with Tishman with respect to the inspection of ... the ramps ... demonstrates notice because [CCA] was acting as an agent for Tishman." *See* Weir Affirmation in Opposition, ¶ 27. However, it is clear that this assertion of an "agency relationship," without more, cannot justify a determination of actual notice because it does no more than allege that the principal (i.e., Tishman) was generally aware of the purported observations of its agent (i.e., CCA). As previously discussed, such an allegation is insufficient, as a matter of law. Thus, the court rejects both of Murphy's notice arguments. Accordingly, because there are no triable issues with respect to either "supervision and control" or "notice," Labor Law § 200 cannot afford a legally viable basis for Murphy's negligence claim.

The second statutory ground that Murphy alleges as a base for his claim is Labor Law § 240, which applies to scaffolding and other devices for use of employees. This statute is universally recognized to apply only to "elevation-related accident[s]." *See e.g. Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 71 AD3d 538, 2010 NY Slip Op. 02412 (1<sup>st</sup> Dept 2010), quoting *Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 491 (1995). Here, defendants argue that "it is uncontested that [Murphy's] accident did not result from an elevation-related hazard." *See* Defendants' Memorandum of Law, at 16. Indeed, Murphy does not contest this point in his opposition papers. Accordingly, Labor Law § 240 cannot afford a legally sufficient basis for Murphy's negligence claim either.

The final statutory ground that Murphy alleges as a base for his claim is Labor Law § 241 (6). In *Misicki v Caradonna* (12 NY3d 511, 515 [2009]), the Court of Appeals recently observed that:

This provision requires owners and contractors 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. The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241 (6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles [internal citations and quotation marks omitted].

Here, as previously mentioned, Murphy cited Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-1.21, 23-1.22, 23-1.23, 23-1.29, 23-1.30, 23-2, 23-5, 23-6, 23-7, 23-8, and OSHA Article 1926 in his bill of particulars. Defendants initially argued that none of those Code provisions was sufficiently specific to support liability under Labor Law § 241 (6). *See* Defendants' Memorandum of Law, at 16-29. In his opposition papers, Murphy apparently conceded the non-viability of 12 of those Code provisions, because he only raised arguments in support of two of them, specifically, Industrial Code §§ 23-1.7 (e) (1) and (2), and 23-1.22 (b) (1), (2) and (3). *See* Weir Affirmation in Opposition, ¶¶ 33-59. The court will examine each in turn.

Industrial Code §§ 23-1.7 (e) (1) and (2) provide as 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.

The Appellate Division, First Department, has determined that both of these Industrial Code provisions are sufficiently specific to support a negligence claim brought pursuant to Labor Law § 241 (6). *See e.g. Picchione v Sweet Const. Corp.*, 60 AD3d 510 (1<sup>st</sup> Dept 2009) (Industrial Code § 23-1.7 [e] [1] is sufficiently specific to impose liability under Labor Law § 241 [6].); *Singh v Young Manor, Inc.*, 23 AD3d 249 (1<sup>st</sup> Dept 2005) (Industrial Code § 23-1.7 [e] [2] is sufficiently specific to support plaintiff's Labor Law § 241 [6] claim). Nonetheless, defendants argue that Industrial Code § 23-1.7 (e) (1) is inapplicable because the portion of Anita's Way where Murphy was injured cannot be considered a "passageway" within the statute's definition of that term. *See* Defendants' Memorandum of Law, at 19-20. The court disagrees as plaintiff has raised a factual issue as to whether the area where he was injured can be considered to be a "passageway", as defined in Industrial Code § 23-1.7 (e) (1). In *Smith v Hines GS Properties, Inc.* (29 AD3d 433, 433 [1<sup>st</sup> Dept 2006]), the Appellate Division, First Department, drew the distinction that:

The open area between the building under construction and the materials storage trailers was not a "passageway" or walkway covered by Industrial Code (12 NYCRR) § 23-1.7 (e) (1). Nevertheless, the tradesmen at the site routinely traversed this physically defined area as their only access to equipment and materials, making it arguably an integral part of the work site. A question of fact is thus presented as to whether the spot where plaintiff's fall occurred was a "working area" within the meaning of 12 NYCRR 23-1.7 (e) (2) [internal citations omitted].

Here, by contrast, Murphy stated that the portion of "Anita's Way" where he was injured was a ramp leading through a partially constructed wall into a covered corridor that ran from West 43<sup>rd</sup> Street to West 42<sup>nd</sup> Street. *See* Notice of Motion, Exhibit D, at 27-30. In the court's view, a

factfinder can conclude that such constitutes a “passageway”, as describe in Industrial Code § 23-1.7 (e) (1). Thus, the combination of Labor Law § 241 (6) and Industrial Code § 23-1.7 (e) (1) may form a legally sufficient basis for Murphy’s negligence claim.

Defendants also argue that Industrial Code § 23-1.7 (e) (2), which applies to “working areas,” is an insufficient basis for Murphy’s claim because it only covers injuries resulting from “accumulations of dirt and debris, scattered tools and materials and sharp projections,” and Murphy did not allege that his injury resulted from any of these. *See* Defendants’ Memorandum of Law, at 20-21. Defendants’ statement of the law is correct. *See e.g. Dalanna v City of New York*, 308 AD2d 400 (1<sup>st</sup> Dept 2003). Defendants’ claims regarding the cause of Murphy’s injury also appear to be correct. *See* Notice of Motion, Exhibit D, at 38-42. Therefore, Murphy may not rely on Industrial Code § 23-1.7 (e) (2) as a basis for his negligence claim pursuant to Labor Law § 241 (6).

As previously mentioned, Murphy also alleges Industrial Code §§ 23-1.22 (b) as a basis for his Labor Law § 246 (6) negligence claim. The relevant portions of that code provision state as follows:

(1) All runways and ramps shall be substantially constructed and securely braced and supported. Runways and ramps constructed for use by motor trucks or heavier vehicles shall be not less than 12 feet wide for single lane traffic or 24 feet wide for two lane traffic. Such runways and ramps shall be provided with timber curbs not less than 10 inches by 10 inches, full size timber, placed parallel to, and secured to the sides of such runways and ramps. The flooring of such runways and ramps shall be positively secured against movement and constructed of planking at least three inches thick full size or metal of equivalent strength.

(2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking

is used it shall be laid close, butt jointed and securely nailed.

(3) Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used on such runways and ramps, it shall be laid close, butt jointed and securely nailed. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps. Bracing for such runways and ramps shall be installed at a maximum of four foot intervals.

Defendants argue that subparagraph 1 is inapplicable because it governs ramps that are intended to be used by trucks, and Murphy has offered no proof that the ramp on which he was injured was installed for use by trucks. *See* Defendants' Memorandum of Law, at 22. This appears to be correct. Therefore, the court agrees that this Industrial Code provision cannot support Murphy's claim.

However, with respect to the remaining two subparagraphs, defendants argue that there is no indication that the ramp was being used by "persons only," or by "any of the remaining types of equipment enumerated in" the Code provision. This is incorrect. Murphy properly notes that the subject ramp, which may have been placed by a bricklayer, could be used both by "persons" walking, and by persons using "wheelbarrows, power buggies, hand carts or hand trucks." *See* Weir Affirmation in Opposition, ¶¶ 48-53. The court notes that, in either case, the Code provisions require that the ramp be adequately supported and secured, and that Murphy testified that the ramp in question here was not. *See* Notice of Motion, Exhibit D, at 38-42. Therefore, the combination of Labor Law § 241 (6) and Industrial Code §§ 23-1.22 (b) (2) and/or (3) may form a legally sufficient basis for Murphy's negligence claim. Accordingly, because there are

open and triable issues of fact with respect to such claim, defendants' motion seeking summary judgment for dismissal is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants One Bryant Park, LLC, Durst Development, LLC and Tishman Construction Corporation of New York i/s/h/a Tishman Construction Corp. is denied; 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: New York, New York

July 9, 2010

ENTER:



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\murphyvonebryantetal.lane.wpd

**FILED**  
**JUL 15 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**