Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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John Coyne,

Plaintiff,

- against -

The City of New York, New York City School Construction Authority, The Board of Education, Leon D. DeMattis Construction Company, Inc. And Laquilla Pinnacle Construction Co.,

Defendants.

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Index Number: 16156/03

Motion Date: 4/5/11

Motion Cal. Number: 7

Motion Seq. No.: 3

The following papers numbered 1 to 8 read on this motion by defendants, The City of New York, New York City School Construction Authority (SCA), Board of Education and Leon D. DeMattis Construction Company, Inc., for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-71
Reply.....	8

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

Motion by the City, the SCA, the Board of Education and DeMatteis for summary judgment dismissing plaintiff's complaint against them alleging causes of action pursuant to Labor Law §§240(1), 241(6) and 200, and common law negligence, is granted solely to the extent that plaintiff's causes of action pursuant to Labor Law §240(1) and pursuant to Labor Law §241(6), except insofar as premised upon violation §23-1.7(d) of the Industrial Code, are dismissed as against movants. In all other respects, the motion is denied.

Plaintiff, a journeyman ironworker employed by FMB Construction, a non-party, allegedly sustained injuries as a result of slipping and falling in a puddle on a floor of a construction site at I.S. 208 High School for Teaching Professions in Queens

County on August 9, 2002. The construction project was the erection of a new high school. DeMatteis was the general contractor and FMB was a subcontractor hired by DeMatteis to provide steelwork, including the erection of stairwells.

Plaintiff testified in his deposition that he was assigned to fire watch on the roof level of one of the three buildings that formed the school complex being constructed. His job was to watch out for any fires that may be created by the welding work being performed by his supervisor, Mr. Bumbrey, on the roof. Only the exterior shell of the building had been erected at the time of the accident; there were no interior walls. At some point he left to get Bumbrey a harness from a gang box on the second floor of the center building. After retrieving the harness, plaintiff was unable to go down the same stairwell he had gone up because ironworkers were starting to weld and torch on that stairwell. Therefore, plaintiff proceeded toward a different staircase on the second floor. He testified that he encountered a large silty puddle blocking his path. He could not go around it as there was construction debris on the sides of the puddle and an electrician working on a ladder, so he attempted to walk through the puddle, and as he stepped into it, his left foot became stuck and his right foot slid and he fell.

As to plaintiffs' claim under §240(1) of the Labor Law, that section applies only to accidents and injuries arising from elevation-related hazards (see Rocovich v. Consolidated Edison Company, 78 NY 2d 509 [1991]). Labor Law §240(1) is inapplicable to the present matter, since plaintiff's injuries neither resulted from his falling from an elevated work site to a lower level nor from an object falling upon plaintiff from an elevated position. Plaintiff merely slipped and fell on the floor of the building. Indeed, plaintiff does not oppose that branch of the motion for summary judgment dismissing his claim pursuant to §240(1) of the Labor Law.

Moving defendants are also entitled to summary judgment dismissing plaintiff's claims against them brought pursuant to §241(6) of the Labor Law, except insofar as premised upon a violation of §23-1.7(d) of the Industrial Code.

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that the owner or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]).

Plaintiff alleged in his bill of particulars a violation of §23 of the Industrial Code, "including but not limited to" §§23-1.7, 23-2.1, 23-1.30 and 23-2.2 and also violation of Article 1926 of OSHA.

Violations of OSHA standards may not form the basis for liability under §241(6) (see Lin v Holy Family Monuments, 18 AD 3d 800 [2nd Dept 2008]). Moreover, responsibility for compliance with OSHA regulations rests upon plaintiff's employer, FMB, not defendants (see 29 CFR §1910.12[a]; Abreo v URS Greiner Woodward Clyde, 2007 NY Slip Op 52662[U] [Sup Ct Queens County]).

Also, no provisions of §23 of the Industrial Code is applicable to the facts of this matter, with the exception of §23-1.7(d). Indeed, plaintiff does not oppose that branch of the motion to dismiss plaintiff's 241(6) claim, except insofar as it is predicated upon a violation of §§23-1.7(d) and (e)(2) of the Industrial Code.

Section 23-1.7(e) of the Industrial Code provides: "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 performed." This section applies only where the plaintiff tripped over something (see e.g. Madir v 21-23 Maiden Lane Realty, LLC, 9 AD 3d 450 [2nd Dept 2004]). Although plaintiff testified that the floor had construction debris on it, he did not trip over any of it. Rather, his testimony is that he slipped when he stepped in a puddle of water. Therefore, §23-1.7(e)(2) is inapplicable to the facts of this case.

However, §23-1.7(d) is sufficiently applicable to support a claim under Labor Law §241(6).

Section 23-1.7(d) of the Industrial Code (12 NYCRR) provides: "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."

Movants' counsel argues that this section is inapplicable

because the location of plaintiff's accident was an open area and, thus, was not a "floor, passageway, walkway, scaffold, platform or other elevated working surface" contemplated by the statute (citing Enriquez v B&D Development, Inc., 63 AD 3d 780 [2nd Dept 2009]; Barnes v. DeFoe/Halmer, 271 AD 2d 387 [2nd Dept 2000]; Jennings v Lefcon Partnership, 250 AD 2d 388 [1st Dept 1998]). His contention that the area in question was "open" because the walls were not yet up is without merit. Regardless of whether the walls around the floor were completed or merely the frame thereof was in place, plaintiff slipped on a finished floor within the confines in the interior of the subject building. In any event, "the alleged injury occurred in an area in which construction, excavation, or demolition work was being performed" (McCraw v United Parcel Service, 263 AD 2d 499 [2nd Dept 1999]). The cases cited by movants' counsel, supra, are entirely inapposite to the facts of the instant matter.

Movants have also failed to meet their prima facie burden of establishing an entitlement to summary judgment dismissing plaintiff's causes of action under §200 of the Labor Law and common law negligence.

Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]).

Where the unsafe condition of the work site was caused by the methods used by the contractor in performing the work, it must be established that the owner or contractor had supervisory control over the performance of the work in order to be liable under §200 (see Griffin v. NYC Transit Auth., 16 AD 3d 202 [1st Dept 2005]; Rippolo v. Mitsubishi Motor Sales of America Inc, 278 AD 2d 149 [1st Dept 2000]). Here, there is no issue as to whether plaintiff's injuries were the result of the methods used to perform his work. Plaintiff's injuries allegedly were the result of a puddle on the floor of the building, a condition of the premises itself. Therefore, the question of supervisory control is irrelevant to the facts of this case.

However, where the condition was not caused by the contractor's unsafe work practices, liability may only be imposed upon the owner or contractor under either §200 or common law if the owner or contractor created the dangerous condition or, where the unsafe condition of the premises was not created by the contractor, if it is shown that the owner or contractor had actual or constructive notice of the condition (see Bradley v. Morgan Stanley & Co, 21 AD 3d 866 [2nd Dept 2005]).

Movants have failed to proffer evidence so as to eliminate any questions of fact as to whether the slippery puddle was created by them or whether they had actual or constructive notice of that condition. It was their burden, as the proponents of summary judgment, to proffer affirmative evidence eliminating all issues of fact in this regard. Merely arguing that plaintiff has failed to produce evidence establishing that movants created or had actual or constructive notice of the condition and merely arguing that plaintiff did not testify in his deposition that movants created the condition or had notice of it and that he is unable to establish that they had constructive notice of it does not satisfy this burden.

Counsel for movants also argues that plaintiff's Labor Law §200 claim must be dismissed because the puddle was an open and obvious condition that plaintiff observed and, therefore, movants had no duty to warn of its existence, citing, inter alia, Rose v. A. Servidone, Inc., 268 AD 2d 516 [2nd Dept 2000]). However, only an open and obvious condition that is not, as a matter of law, inherently dangerous negates the duty to warn (see Errett v Great Neck Park Dist., 40 AD 3d 1029 [2nd Dept 2007]; Cupo v Karfunkel, 1 AD 3d 48 [2nd Dept 2003]; see also Dinallo v DAL Elec., 43 AD 3d 981 {2nd Dept 2007]; Bernth v King Kullen Grocery Co., Inc., 36 AD 3d 844 [2nd Dept 2007]). An open and obvious condition alone is not a defense to a cause of action under §200 of the Labor Law (see Barbiero v Agramunt, 45 AD 3d 514 [2nd Dept 2007]). In Rose v A. Servidone (supra), although it was held that there was no liability under §200 or common law because the allegedly dangerous condition was open and obvious, it was clear in that case that the condition was not inherently dangerous. The plaintiff in that case was a worker for a utility company performing his duties a a pole setter. He was injured when he stepped off his truck onto unlevel ground strewn with dirt, pebbles, blacktop and concrete in a open-area construction site. The state of the ground upon which he stepped, being open and obvious, not containing any trap or nuisance and not otherwise posing any unusual risk, was not inherently dangerous.

In our case, although the puddle into which plaintiff stepped was open and obvious, plaintiff's testimony indicates that the condition which allegedly caused his injury was not the water, but the cement or other unidentified material at the bottom of the puddle which caused his left foot to become stuck and his right foot to slip. Since the record on this motion raises an issue of fact as to whether the condition that caused plaintiff's slip and fall was in the nature of a concealed trap or nuisance, the Court may not conclude as a matter of law, at this juncture, that the condition did not pose an unreasonable risk of injury and was not inherently dangerous.

Accordingly, the motion is granted to the extent that plaintiff's causes of action pursuant to §240(1) of the Labor Law and §241(6) of the Labor Law, except insofar as premised upon a violation of §23-1.7(d) of the Industrial Code, are dismissed as against movants. In all other respects, the motion is denied.

Dated: April 15, 2011

KEVIN J. KERRIGAN, J.S.C.