Cooke v CRP/Extell Parcel I. LP
2012 NY Slip Op 30492(U)
February 23, 2012
Supreme Court, New York County
Docket Number: 105675/10
Judge: Joan M. Kenney
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SCANNED ON 3/2/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY, J.S.C.
Justice

PART 8

Index Number : 105675/2010
COOKE, TREVOR
vs.
CRP/EXTELL PARCEL I, L.P.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 105675/10
MOTION DATE 10/27/11
MOTION SEQ. NO. 002

otion to/for summary judgment

No(s). 1-10
X motion No(s). 11, 12
Reply + opp to X motion No(s). 13

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
MAR 01 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: February 23, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: .... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .... MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

---X

TREVOR COOKE,

Plaintiff,

-against-

CRP/EXTELL PARCEL I. LP and
BOVIS LEND LEASE LMB, INC.,

Defendants.

---X

DECISION & ORDER
Index No.: 105675/10
Motion Seq. 002

FILED
MAR 01 2012
NEW YORK
COUNTY CLERK'S OFFICE

JOAN M. KENNEY, J.:

In this labor law matter, defendants seek an Order, pursuant to CPLR 3212, dismissing the complaint.

Plaintiff cross-moves for an Order, pursuant to CPLR 3212, for partial summary judgment on plaintiff's Labor Law §241(6) and §200 causes of action against defendants.

FACTUAL BACKGROUND

Briefly, defendant, CRP/Extell Parcel 1, L.P. (CRP), was the owner of a premises known as 80 Riverside Boulevard in the County of New York, City and State of New York (the premises) and Bovis Lend Lease LMB, Inc. (BOVIS), supervised, directed and/ or controlled certain construction work at the premises as the construction manager. On or about the May 2, 2007, plaintiff Trevor Cooke, was lawfully on the construction site at the premises when he was caused to be injured.

It is asserted in the complaint that defendants failed to comply with Sections 240 of the Labor Law of the State of New York and/or Title 12 NYCRR. 23 of the State of New York and violated and/or otherwise failed to comply with Sections 241(6) of the Labor Law of the State of New York and/or Title 12 NYCRR 23 of the State of New York, including, but not limited to, Sections 23-1.5; 23-1.7; 23-1.7(e)(1),2 3-1.7(e)(2) and 23-2.1.

Specifically, on May 2, 2007, plaintiff was an employee of non-party Pinnacle Industries. As

part of his duties, plaintiff carried a stair rack up a platform when his "feet slipped out from under" him as a rebar he was standing on "just went" (Trevor Cooke's May 10, 2011 deposition transcript, page 35, lines 7-16) (the accident). Plaintiff explained at the deposition that the accident occurred because this piece of rebar was loose and caused him to slip and be injured. There is no dispute that the pieces of rebar had been installed by other Pinnacle Industries employees (see Cooke deposition transcript, page 36, lines 24-25, page 37, lines 1-3).

ARGUMENTS

Defendants argue that their application for summary judgment dismissing the complaint must be granted because: (1) there are no triable issues of fact; and (2) the causes of action claiming a violation of Labor Law §200, 240(1) and 241(6), and violation of Industrial Code sections 23-1.5, 23-1.7(e)(1), 23-1.7(e)(2) and 23-2.1, have no merit.

Plaintiff opposes defendants motion on grounds that it is undisputed that defendants violated Labor Law §241(6), Industrial Code Sections 23-1.7.(e)(1) and 23-1.7(e)(2) and Labor Law §200, and therefore, plaintiff is entitled to partial summary judgment on said claims.

Defendants contend that the cross motion application interposed by plaintiff, must be denied, because: (1) it is untimely; (2) plaintiff's affirmation in support of his cross motion contradicts his own testimony and fabricates scenarios with respect to its Labor Law § 241(6) claims; and (3) plaintiff failed to raise factual issues regarding defendants argument for dismissal of plaintiff's common law negligence claims and Labor Law § 200 causes of action.

DISCUSSION

The rule governing summary judgment is well established: "The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

The burden of production as well as the burden of persuasion always rests with the proponent of the motion (*Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]). Consequently, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact. Once that burden is satisfied, the opponent of the motion must produce sufficient evidence, in admissible form, establishing the existence of a triable issue of fact. Therefore, "if the [evidence] on the issue is evenly balanced, judgment must be rendered against the party bearing the burden of proof" (*300 East 34th Street Co. v Habeeb*, 248 AD2d at 50, [1st Dept 1997]).

It is noted that this Court is considering plaintiff's cross motion application as the purported untimeliness of the motion did not prejudice defendants. Moreover, defendants waived their right to object to the timeliness of the cross motion, having agreed, on numerous occasions, to adjourn the final submission of the within motions.

At the onset, it is noted that plaintiff's claims that defendant violated Labor Law § 240 and Industrial Code §§ 23-1.5 and 23-2.1, are dismissed. Plaintiff failed to set forth any arguments in opposition to this relief sought by defendants.

Labor Law § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, that: "All areas in which construction ... 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 duty imposed on owners and contractors by this

section is nondelegable and it exists even in the absence of control or supervision of the work-site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]). In order to support a claim under Labor Law § 241(6) , plaintiffs must allege a violation of an Industrial Code regulation which "mandate[s] compliance with concrete specifications and [does] not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009] [internal citation omitted]). Violation of the regulation must also be the proximate cause of the plaintiff's injury (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]). Moreover, contributory and comparative negligence are valid defenses to claims brought under this section, unlike claims brought pursuant to Labor Law § 240 (1) (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). Also unlike Labor Law § 240 (1), where absolute liability follows a breach, a breach of a regulation is merely some evidence of negligence in the Labor Law § 241 (6) context (id.).

In this case, plaintiff argues that defendants violated Industrial Code §§ 23-1.7(e)(1) and 23-1.7(e)(2).

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

This particular section of the Industrial Code provides, in relevant part:

"(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."

These sections have been found to be specific enough to form the basis for a Labor Law §241 (6) claim (see *Picchione v Sweet Construction Corp.*, 60 AD3d 510 [1st Dept 2009]). However, the section does not apply here because plaintiff did not trip, but rather slipped as the rebar "just went" from under his feet. Plaintiff explicitly stated that "a piece of rebar" was loose and caused him to fall (Cooke Deposition pg.35, lines 7-10). While plaintiff's body may have fallen in the same way as if he had tripped, the court cannot use that possibility as a basis for applying this section, as a matter of law, to a factual situation that it does not cover and was not testified to by plaintiff at his deposition. The provision is inapplicable for the additional reason that the rebar "which just went" was not dirt or debris or an obstruction. It was an integral part of the work that plaintiff was engaged in (e.g. building a staircase) on the day of the accident (see also e.g. *Smith v New York City Housing Authority*, 71 AD3d 985, 987 [2d Dept 2010] [materials "were integral to the work being performed"]; *Vital v City of New York*, 43 AD3d at 311; *Castillo v Starrett City*, 4 AD3d 320, 322 [2d Dept 2004] [object "was an integral part of the work he was performing"]). In fact, plaintiff testified at his deposition that he was the Lead Stringer for Pinnacle Industries, a contractor in the business trade of superstructure concrete. His job as a lead stringer was to put up the wood and plywood that would serve as the forms for the concrete (Cooke Deposition, pg. 18, lines 8-12) and the rebar was specifically needed to reinforce the concrete prior to installing the wood/plywood parts (see Cooke Deposition, pg. 36, lines 12-15).

In the papers in opposition, for the first time in the nearly two years this case has been pending, plaintiff claims that he "stepped onto debris and rebar that was loosed and unsecured" (see

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Cooke affidavit dated October 7, 2011). The mere mention of a trigger word (i.e. "debris") is not enough to invoke a purported violation of the pertinent Industrial Code sections. Plaintiff's attempt to create a factual scenario that was never testified to at the deposition, or asserted to in the complaint, falls short of credible evidence to demonstrate that he tripped on debris. At most, this statement is an unsubstantiated self-serving statement.

Thus, the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) claim that is based on this section 23-1.7(e)(1) of the Industrial Code, must be granted.

Labor Law § 200

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents (see, *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993)).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work (see, e.g. *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints,* 41 AD3d 796 (2d Dept 2007)).

In this case, plaintiff is alleging a violation of Labor Law § 200 based upon the existence of a dangerous condition. When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident, or evidence that the owner created that unsafe condition (*Murphy v Columbia University*, 4 AD3d 200 (1st Dept 2004).

Plaintiff contends that the undisputed inspection of the construction site by defendants, is enough to demonstrate actual/constructive knowledge by defendant of the "hazardous condition" that caused plaintiff's fall. Plaintiff further adds that defendants conducted daily debris removal, and thus had actual knowledge that debris was left behind by electricians on the date, and in the area, of the accident.

The claims that debris was left behind and caused the accident, is again raised for the first time here, and lacks evidentiary support. The additional assertion that electricians on the site were the ones that left the debris behind that caused plaintiff's fall, is equally unsubstantiated as it is being asserted by plaintiff's attorney having no personal knowledge of the facts (see also, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; and *Gaeta v. New York News*, 62 NY2d 340 (1984).

Both the construction manager's vice president, Charles L'Heureux, and the vice-president of the owner of the premises, Joseph Montano, affirm that neither had directed/instructed/supervised Pinnacle's installation of rebars at the job site; nor did they provide any tools/material to Pinnacle workers to perform said duties. It was also asserted by defendants that each trade was responsible for overseeing their own safety at the job site (L'Heureux deposition, pg. 11, lines 7-24). Plaintiff did not dispute these factual assertions. Plaintiff claims, rather, that the parties' agreement set forth defendant(s)' responsibilities which included overseeing all construction means, methods, techniques, sequences and procedures and as such, had control/supervised plaintiff's work. The "mere retention of contractual inspection privileges or a general right to supervise [however] does not amount to control sufficient to impose liability ... in the absence of proof of ... actual control." *Brown v New York City Economic Development Corp.*, 234 AD2d 33, 33 (1st Dept 1996).

In the case at bar, no evidence has been submitted to indicate that defendant(s), as the general

contractor and/or owner, exercised any supervision or control over plaintiff's work. Plaintiff's conclusory statement that defendants had significant and close involvement with the work being performed is insufficient to defeat this portion of defendants' motion (*Gilbert Frank Corp. v Federal Insurance Company*, 70 NY2d 966 (1988); *Gusinsky v Genger*, 74 AD3d 539 (1st Dept 2010). In fact, plaintiff himself testified at his deposition that the Pinnacle workers were the ones who installed the rebar (Cooke deposition, pg. 36, lines 24-25; pg. 37, lines 1-5) . Moreover, based on this statement, defendants did not create the purportedly dangerous condition (i.e. having a "loose" rebar). It is undisputed that the rebar remained embedded in the concrete and served as the base of the staircase. It is not something that could be removed or "cleaned" up, as it was part of the concrete. Additionally, plaintiff testified that immediately before his fall, he observed the rebar (which he did not know was loose at the time) and claimed that it looked "okay" so that anyone else doing an visual inspection would not have observed anything unusual or dangerous at the time (see Cooke deposition, pg. 37, lines 6 - 15). As such, that portion of defendants' motion seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action asserted as against them, is granted.

Accordingly, it is

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants against plaintiff, dismissing the complaint; and it is further

ORDERED that plaintiff's cross motion is denied, as moot and on the merits.

Date: 2/23/12

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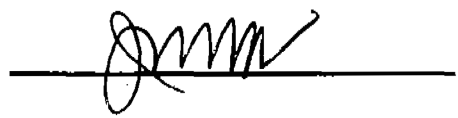

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