

Taveras v Turner Constr. Co.

2012 NY Slip Op 33252(U)

December 18, 2012

Sup Ct, Nassau County

Docket Number: 1730/11

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ELVIN TAVERAS,

Plaintiff,

ORIGINAL RETURN DATE: 10/02/12
SUBMISSION DATE: 10/16/12
Index No. 1730/11

-against-

TURNER CONSTRUCTION COMPANY, LINCOLN
CENTER FOR THE PERFORMING ARTS, INC. and
LINCOLN CENTER DEVELOPMENT PROJECT, INC.,

MOTION SEQUENCE #002

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply.....	3
Memorandum of Law.....	4

Defendants move for summary judgment dismissing the complaint against them. Plaintiff opposes the motion.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

This action was brought by plaintiff to recover damages sustained as a result of an accident that occurred at a construction site at Lincoln Center for the Performing Arts, Inc. ("Lincoln Center") on or about April 1, 2010, when plaintiff allegedly lost his balance stepping off a ladder and tripped on an empty protection boot*. Plaintiff alleges violations of Labor Law §§ 200, 240(1) and 241(6), as well as negligence.

Defendants submit that Turner Construction Company ("Turner") was the construction manager, Lincoln Center was the owner of the premises and Lincoln Center Development Project, Inc. (the "Project") was the owner's representative.

According to plaintiff's deposition testimony, at the time of the accident he was the foreman for two crews at the job site (Movant's Ex. C, p. 19). His accident occurred on the ground floor, which he described as "extremely messy, dirty . . . just a lot of material. Between the garbage and the materials, overwhelming" (Id., p. 28). "There were styrofoam boards, pieces of it. There was fiberglass insulation. There was a lot of wood" (Id., p. 29). Based upon a meeting plaintiff had with laborers employed by Turner, it was plaintiff's understanding that it was Turner's responsibility to remove the debris (Id., p. 31). Plaintiff claims that he noticed this condition ever since he came to the job and that he complained at least once a day to an employee of Turner in charge of overseeing the subcontractors (Id., p. 32).

On the day of the accident, plaintiff was using a ladder to do welding. He placed a screwdriver and a hammer in slots on top of the ladder (Id., p. 40). At that time the area was free and clear of debris (Id., p. 41). After the lunch break, plaintiff went to the second floor to take some field measurements and then went to Turner's office (Id., p. 42). Towards the end of the day, he went back to get his tools (Id., p. 45). Plaintiff went up the ladder, retrieved his tools and started walking down the ladder (Id., p. 46). He had his right foot on the ground, and when he placed his left foot on the ground, he lost his balance (Id.). After his fall, plaintiff looked down and saw a yellow post holder on the floor next to the debris (Id., p. 48). Plaintiff testified that his foot came in contact with the yellow post before he lost his balance (Id., p. 49).

Plaintiff's testimony reveals that he believes that the post was there from the time he first got to the job. "There was a wood post inserted inside of it with a wood barricade . . . protecting the hole" (Id.). Plaintiff stated that they removed the wood barricade around the boot, "but they didn't remove the boot. If the boot had been removed, I wouldn't have tripped on it" (Id., p. 66). Plaintiff acknowledged that he did not lose his footing on the ladder but lost his balance when he hit the yellow post boot on the floor (Id., p. 68).

*"The 'protection boot' was affixed to the floor as part of a guard railing setup that was supposed to be in place around a hole in the floor. At the time of the accident, the railing portion of the setup had been removed and the 'protection boot' was left in place" (Reply Aff. ¶6).

In order to prevail on a Labor Law § 240(1) claim, “a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident’ (citation omitted). ‘The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do “not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (citation omitted). ‘Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists’ (citation omitted)” (*Chang v. Homewell Owner’s Corp.*, 38 AD3d 625, 626-627 [2d Dept. 2007]).

Here, as in *Chang*, defendants met their prima facie burden regarding plaintiff’s Labor Law § 240 (1) claim by “demonstrating that the fall resulted from a ‘separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance’ (citations omitted)” (*Id.* at 627). Moreover, based upon plaintiff’s own testimony, he fell because he lost his balance (citations omitted)” (*see, Chin-Sue v. City of New York*, 83 AD3d 643, 644 [2d Dept. 2011]). In opposition, plaintiff failed to raise a triable issue of fact.

In order to prevail on a Labor Law § 241(6) claim, “a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (citations omitted)” (*Chang v. Homewell Owner’s Corp.*, 38 AD3d at 627). Plaintiff alleges, in his bill of particulars, violations of Rule 23 of the Industrial Code, including but not limited to 12 NYCRR 23-1.7-1.21 and 23.2.1. Defendants contend that plaintiff is not entitled to such statutory recovery. These contentions are not refuted by plaintiff, with the exception of Industrial Code §23-1.7(e)(2), which plaintiff maintains was violated by defendants.

That section provides: “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. Plaintiff submits his affidavit wherein he avers that the accumulation of debris and garbage hid the “boot” from his sight. However, he stated at his deposition that “[a]fter his fall, plaintiff looked down and saw a yellow post holder on the floor next to the debris (Movant’s Ex. C, p. 48).

Defendants argue that plaintiff’s “debris hid boot” contention, asserted for the first time in opposition, is without probative value. “Generally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded (citations omitted)” (*Lupinsky v. Windham Const. Corp.*, 293 AD2d 317, 318 [1st Dept. 2002]). Accordingly, defendants have met their prima facie burden regarding plaintiff’s Labor Law §241(6) claim, and in opposition, plaintiff has failed to raise a triable issue of fact.

With regard to Labor Law § 200 and common-law negligence, “Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work’ (citations omitted)” (*Allan v. DHL Express (USA), Inc.*, 99 AD3d 828, 831 [2d Dept. 2012]). The Appellate Division, Second Department, has addressed the distinction

between two categories triggering the application of Labor Law § 200(1), namely: injuries sustained as a result of a dangerous or defective condition of the premises or injuries sustained as a result of the use of dangerous or defective equipment (*Reyes v. Arco*, 83 AD3d 47 [2d Dept. 2011]). Here, the injuries were not sustained as a result of the use of dangerous or defective equipment. The standard in determining liability for the first category is whether “the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time (citations omitted) (*Id.* at 51).

Defendants maintain that they lacked notice that the safety railing had been removed from the “protection boot.” In support of the motion, defendants submit the affidavits of David Rollyson, a project supervisor employed by Turner, and Ron Austin, the Executive Director of the Project. Mr. Rollyson avers that he walks the entire job site every morning, as well as two additional job-site walk throughs, looking for and remediating safety issues and that if he had observed that the safety railing had been removed, he would have immediately replaced it (§§5, 6). Mr. Austin avers that neither the Project nor Lincoln Center on or prior to the date of plaintiff’s accident dismantled or removed any of the barricades, posts or fencing (§7).

Defendants submit that they have established that they had no notice of the purportedly dangerous or defective condition as they conducted frequent inspections with no indication of a dangerous condition. In opposition plaintiff submits the transcript of the deposition testimony of Mr. Rollyson. While looking at a photograph of the subject area, Mr. Rollyson testified that an “OSHA boot holds up a railing, a railing that would have been here . . . [w]ell, if they had put this ladder here, that railing would have been removed. You put it up around areas you’re not supposed to work in” (Pl’s Ex B, pp. 22, 23). When asked if he knew when the boards were taken out of the boot, Mr. Rollyson responded no and that he did not know who took them out (*Id.*, p. 24).

Mr. Rollyson testified that if he saw something that was unsafe, he would stop the work; he would have put the railing back up like he did everyday; “someone pulled it down and shouldn’t have been working in that area” (*Id.*, p.45). Mr. Rollyson stated: “I do remember putting that up periodically. But I walk my job before everybody comes in every morning, I make sure we’re in good shape” (*Id.*, p. 46).

Defendants met their prima facie burden of entitlement to summary judgment on the Labor Law § 200 and common-law negligence claims as the record is devoid of any evidence suggesting that defendants had actual or constructive notice of the allegedly dangerous condition (*Chang v. Homewell Owner’s Corp.*, 38 AD3d at 627). Plaintiff failed to raise a triable issue of fact.

Based upon all of the foregoing, defendants’ motion to dismiss is granted, and the complaint is dismissed.

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This decision constitutes the order and judgment of the court under Index No. 1730/11, Motion Sequence #002.

Dated: December 18, 2012

HON THOMAS P. PHELAN
THOMAS P. PHELAN, J.S.C.

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