

Cimino v Turner Constr. Co.

2013 NY Slip Op 30022(U)

January 7, 2013

Sup Ct, NY County

Docket Number: 104647/10

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/10/2013
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

Index Number : 104647/2010
CIMINO, CHARLES
vs.
TURNER CONSTRUCTION
SEQUENCE NUMBER : ~~001~~ 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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 ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/7/13

Luy, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
CHARLES CIMINO and JOELLE CIMINO,

Plaintiffs,

Index №.: 104647/10
Motion Seq. No. 003

-against-

DECISION AND ORDER

TURNER CONSTRUCTION COMPANY, RC DOLNER,
INC., LINCOLN CENTER FOR THE PERFORMING
ARTS, INC., LINCOLN CENTER DEVELOPMENT
PROJECT, INC. and CITY OF NEW YORK,

Defendants.

-----X

LOUIS B. YORK, J.S.C.:

FILED

JAN 10 2013

NEW YORK
COUNTY CLERKS OFFICE

In a case involving an electrician who was injured in two separate accidents on a project at Lincoln Center, defendants Turner Construction Company (Turner Construction), Lincoln Center For The Performing Arts, Inc. (Lincoln Center), Lincoln Center Development Project, Inc. (the Development Project), and City of New York (the City) (collectively, the Moving Defendants), move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's fourth, fifth, and sixth causes of action, which seek recovery, respectively, under negligence, Labor Law §§ 200 and 241 (6), and a derivative claim for loss of services. Each of these causes of action relates to the second accident, which occurred on October 5, 2009.

BACKGROUND

On October 5, 2009 plaintiff Charles Cimino (Cimino or plaintiff) was working as an electrician for nonparty Fred Geller Electrical, Inc. (Geller Electrical) in a basement room at Lincoln Center. On his way back from lunch, Cimino slipped on sprinkler pipes and fell. As a result, he allegedly suffered a fractured left tibia, and aggravated an injury to his right knee. Turner Construction was the construction manager on a renovation project initiated by Lincoln Center and the Development Project.

[* 3]

On April 9, 2010, plaintiffs filed their complaint, which, in addition to the causes of action that are the subject of this motion, sought recovery for injuries related to an accident that occurred on May 26, 2008.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998)). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]). In this circumstance, "whether [it] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and

an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]). In this circumstance, “whether [it] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims ...” (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Initially, Moving Defendants argue that the pipes did not constitute a dangerous condition, and that Cimino’s accident was caused entirely by his own folly. In support, they rely on *Haynie v New York City Hous. Auth.* (95 AD3d 594 [1st Dept 2012]) and *Smith v Curtis Lbr. Co.* (183 AD2d 1018 [3d Dept 1992]), both of which involved premises liability rather than Labor Law § 200. In *Haynie*, the plaintiff, a cable technician, entered the defendant’s property to turn off a client’s cable. The Court held that “[t]he large chunks of concrete that plaintiff knowingly traversed while carrying a 28-foot, 40- to 50-pound ladder was not a dangerous condition as a matter of law” (95 AD3d at 594). In *Smith*, the plaintiff bought lumber from defendant’s lumber yard, and then slipped and fell while trying to remove planks from one woodpile by standing on an adjoining pile in the rain (183 AD2d at 1018). The Court, after first holding that the defendant did not have a duty to help the plaintiff load the wood, held that the danger of standing on loose wood is apparent, that the plaintiff’s decision to disregard this risk was folly, and that, in language that would later be quoted in *Haynie*, “[a] defendant is not required to protect a plaintiff from his own folly” (183 AD2d at 1019).

Here, Moving Defendants have failed to establish as a matter of law that Cimino’s accident was caused entirely by his own folly, and that his accident was not caused by a

dangerous condition. In both *Smith* and *Haynie*, the plaintiff knowingly stepped onto conditions that held an open slip-and-fall risk. The underlying principle in both cases is that defendants need not protect plaintiffs from their own bad choices. Here, plaintiffs raise a question of fact as to whether it was folly that caused Cimino to step on the sprinkler pipes, or if the way materials were stored on the jobsite forced plaintiff to step on the pipes when crossing the basement area. In describing his accident, Cimino testified that he saw the pipes as he approached the area where he was working, but had to step on them because other objects blocked his path:

Q: And how many paces did you take between the time you saw the pipes and the time you slipped?

A: Couple.

Q: Was there any reason that you did not avoid stepping on the pipes?

A: There was other things blocking my area. There was a lift on one side, ducts on the other side.

Q: Was there any space around the pipes to walk?

A: No. It was messy.

(Plaintiff's March 3, 2010 50-h Hearing, at 18-19).

Thus, plaintiff raises an issue of fact as to whether the pipes, along with other materials left on the floor of the jobsite, created a dangerous condition.

Even if a dangerous condition were present, the Moving Defendants argue, they did not create it, or have any notice of it. Plaintiffs concede that defendants did not create or have actual notice of the sprinkler pipes and other materials left on the floor. As to constructive notice, Moving Defendants argue that, among them, only Turner was present in the area where Cimino's accident took place, and Turner could not have had notice of the pipes because even plaintiff does not know how long the pipes had been left where he tripped on them. Moving Defendants refer to testimony from plaintiff's July 12, 2011 deposition:

- Q: Do you know who put the pipes there?
A: No.
Q: Do you know how long the pipes had been there?
A: No.

(Cimino's July 2011 Deposition, at 67).

Plaintiffs contest the issue of constructive notice only as to Turner. Thus, as defendants Lincoln Center, the Development Project, and the City had no notice of the pipes left on floor, they are not liable under Labor Law § 200 and common-law negligence. As such, the branch of the motion that seeks dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims as against these defendants is granted.

Plaintiffs establish, through the testimony Claude Wuytack (Wuytack), Turner's superintendent, that Turner was in charge of maintaining safety at the jobsite, and that it had laborers and foreman charged with housekeeping duties (Wuytack Deposition, 69-70). In order to raise a question of fact as to constructive notice as to Turner, plaintiff submits his own 50-h hearing transcript, in which he testified that he saw the subject pipes when he arrived for work at 7:00 AM, more than five hours before his accident (Plaintiff's March 3, 2010 50-h Hearing, at 20).

"Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Moving Defendants argue that plaintiffs cannot establish constructive notice, as Cimino testified that the arrangement of items on the floor changed between the morning and the time of

his accident, in that the lift was moved, and some additional materials may have been added (Plaintiff's March 3, 2010 50-h Hearing, at 21). When asked if he had ever stepped on the pipes before his accident, Cimino testified that "[i]n the morning I think I went through the same way" (Plaintiff's July 2011 Deposition, at 67). Earlier, at the same deposition, however, Cimino was unable to recall if the pipes were present in the morning:

"Q: When you arrived in the morning, did you have to step up onto these pipes to get where you were working?

A: I don't recall if they were there before"

(*id.* at 61).

Here, the alleged dangerous condition was not the pipes alone, but the way in which they, along with various materials left on the floor, made passage through the area difficult and presented a risk to workers. As the materials surrounding the sprinkler pipes were left, or rearranged, at some unknown point between the time Cimino arrived at the jobsite and the time he tripped on the sprinkler pipes, the record does not support an inference that the dangerous condition existed for a sufficient period for Turner to discover and remedy it. That is, nothing suggests that the materials were arranged in the morning in a way that routed workers over the pipes. Moreover, Cimino testified both that the pipes were in the same position in the morning as when he tripped on them, and that he could not remember if the pipes were actually there in the morning. Thus, plaintiffs fail to raise an issue of fact as to whether Turner had constructive notice of a dangerous condition. As such, plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed as against Turner.

II. Labor Law § 241 (6)

Labor Law 241 provides:

All contractors and owners and their agents ... shall comply with the following requirements:

6. All areas in which construction, excavation or demolition 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.

It is well settled that this statute requires owners and contractors and their agents “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” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists even in the absence of control or supervision of the worksite (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 348-349), “comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

In order to maintain a viable claim under Labor Law 241 (6), the plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). As to determining whether a particular provision of the Industrial Code is applicable, the Court of Appeals has noted, in *St. Louis*, that the Code “should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

Plaintiffs allege that defendants violated the following provisions of the Industrial Code: 12 NYCRR 23-1.7 (e) (1), 12 NYCRR 23-1.7 (e) (2), and 12 NYCRR 23-2.1 (a) (1).¹ Moving

¹ The complaint alleges violations to additional provisions of the Industrial Code, such as 12 NYCRR 23-1.30, 12 NYCRR 27-1 (b), and 23-2.1 (b) (1), but plaintiffs explicitly abandon their claim that defendants violated these provisions.

Defendants make specific arguments against each of these provision, as well as a more general proximate-cause argument. In the latter, Moving Defendants argue that even if they violated the provisions, the violations would not have proximately caused Cimino's accident, because Cimino's decision to step on the pipes was the sole proximate cause of his accident.

In support of its proximate-cause argument, Moving Defendants rely on *Weingarten v Windsor Owners Corp.* (5 AD3d 674 [2d Dept 2004]) and *Misirlakis v East Coast Entertainment Props.* (297 AD2d 312 [2d Dept 2002]). In *Weingarten*, the plaintiff, a handyman, was injured when he stood on a folding chair and tried to pull himself into an unoccupied freight elevator that was stuck between floors, even though there was no emergency, and he knew that the building owner had a contract with an elevator-service company (5 AD2d at 676-677). In holding that plaintiff's "unforeseeable" actions were the "sole and superseding cause of his injuries," the Court noted that "[r]epairing elevators was not one of the plaintiff's duties, no one had requested that he climb into the elevator, and he had never previously attempted to do so" (*id.* at 677). In *Misirlakis*, the plaintiff, after locking himself out of a building, injured himself when he fell into a dumpster as he tried to climb onto a second-floor fire escape. The Court held that plaintiff's complaint, which included Labor Law § 241 (6) allegations, should be dismissed as his "unnecessary and unforeseeable act of climbing onto the dumpster and ascending the fire escape was the sole and superseding proximate cause of his injuries" (*Misirlakis v East Coast Entertainment Props.*, 297 AD2d at 313).

Cimino's accident is distinguishable from those in *Weingarten* and *Misirlakis*. Here, it cannot be said as a matter of law that plaintiff was the sole proximate cause of his own injuries where he has alleged that he was obliged to step onto the subject sprinkler pipes because of the

way that materials at the jobsite were arranged. Unlike the plaintiffs in *Weingarten* and *Misirlakis*, Cimino did not go out of his way to put himself in a position of risk. As such, Moving Defendants are not entitled to dismissal of plaintiffs' Labor Law § 241 (6) claims based on its proximate-cause argument, and analysis of the individual Industrial Code provisions is required.

12 NYCRR 23-1.7 (e), entitled "Tripping and other hazards," provides

(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.

Without citing to any caselaw, Moving Defendants argue that this provision is inapplicable, as, they contend, there is no evidence of dirt, debris, or scattered material. As to 12 NYCRR 23-1.7 (e) (1), Moving Defendants argue that Cimino's accident did not take place in a passageway. In this, Moving Defendants are correct, as the record indicates that the plaintiff fell in a part of the floor "where persons work or pass," thus subsection 23-1.7 (e) (2) of the Industrial Code, rather than subsection 23-1.7 (e) (1), is in play (*see Lech v Castle Vil. Owners Corp.*, 79 AD3d 819, 820-821 [2d Dept 2010]; *Vieira v Tishman Constr. Corp.*, 255 AD2d 235, 235-236 [1st Dept 1998]).

As to the second, more apt regulation, Moving Defendants argue that instead of being scattered, the sprinkler pipes were stored in an orderly way. In support, Moving Defendants cite to a portion of Cimino's July 2011 Deposition that does not describe the relative orderliness in

which the pipes and other materials were left on the floor. Instead, Cimino testified that there were eight to ten pipes and that they were metal, and eight to 12 feet long (Cimino July 2011 Deposition, at 60). As to the arrangement of materials, Cimino is not particularly specific:

Q: And what color was it [the floor]?

A: Concrete color, gray. It was covered by other things, too, the pipes. That's why I wasn't sure how long the pipes were.

Q: What were the pipes covered with?

A: There was other material, like air ducts, on the floor. I think there was a tarp or something on the floor

(*id.* at 61).

As Moving Defendants fail to offer evidence that the subject pipes were not scattered materials under 12 NYCRR 23-1.7 (e) (2), Moving Defendants fail to make a prima facie showing of entitlement to judgment with regard to this predicate to liability under Labor Law § 241 (6).

12 NYCRR 23-2.1 (a) (1) provides that “[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.” Similar to their argument against application of 12 NYCRR 23-1.7 (e) (2), Moving Defendants argue that plaintiffs 12 NYCRR 23-2.1 (a) (1) cannot serve as a Labor Law § 241 (6) predicate because the pipes Cimino tripped on were stored in a safe and orderly manner. Again, Moving Defendants fail to submit any evidence to support this claim. As Moving Defendants fail to make a prima facie showing as to 12 NYCRR 23-2.1 (a) (1), or 12 NYCRR 23-1.7 (e) (2), the branch of their motion seeking dismissal of plaintiffs’ Labor Law § 241 (6) is denied.

As plaintiffs’ claims under Labor Law § 241 (6) remain, Moving Defendants are not

entitled to dismissal of plaintiff Joelle Cimino's derivative claims.

CONCLUSION

Accordingly, it is

ORDERED that the branch of defendants Turner Construction Company, Lincoln Center for the Performing Arts, Inc., Lincoln Center Development Project, Inc., and City of New York's motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is granted and plaintiffs' fourth cause of action is dismissed; and it is further

ORDERED that the branches of defendants' motion seeking dismissal of plaintiffs claims under Labor Law § 241 (6) and for loss of services is denied; and it is further

ORDERED that the action will continue as to the remaining causes of action.

Dated: 1/7/13

FILED

JAN 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Luy

Hon. Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**