Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Jacqueline Knell, as Administratrix of the Estate of James Knell, and Jacqueline Knell, individually,

Plaintiffs,

- against -

The City of New York,

Defendants.

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Index Number: 5350/11

Motion Date: 2/4/13

Motion Cal. Number: 56

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this motion by plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law §241[6].

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition	5-6
Reply	7-8

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

Motion by plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law §241(6) predicated upon violation of §§ 23-1.7(d), 23-1.8(c)(2) and 23-1.13(b)(3) and (4) of the Industrial Code is granted solely insofar as liability pursuant to §241(6) is predicated upon a violation of §23-1.13(b)(4) of the Industrial Code. In all other respects, the motion is denied.

Plaintiff's decedent, James Knell, an employee of the New York City Metropolitan Transportation Authority (MTA) was electrocuted on April 26, 2010 when he slipped and fell on the elevated tracks of the Rockaway line in the area of Beach 90th Street in Queens County while performing track construction work and his arm contacted the electrified third rail.

The complaint alleges, inter alia, liability under Labor Law §241(6) predicated upon violation of §§ 23-1.7(d), 23-1.8(c)(2) and 23-1.13(b) of the Industrial Code (12 NYCRR).

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]).

Section 23-1.7(d) of the Industrial Code 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."

Thomas J. Burka, train service supervisor for the New York City Transit Authority, testified in his deposition that he was walking on the F4 track and Knell was walking on the F3 track next to him heading in the direction of beach 90th Street. At some point, he saw Knell in between the two running rails holding a blue bucket of track spikes. There were numerous blue buckets along the right-of-way, also known as a toe wall or catwalk. Robert DeMarco, employed by the New York City Transit Authority as maintenance supervisor for the track department, explained in his deposition that a toe wall is an extension of the via duct on which people walk – normally track workers, but in an emergency, train passengers who have to be evacuated. He was shown photographs showing buckets on what may be described as a narrow walkway on the side of the tracks. He identified this walkway as the toe wall. Burka testified that he saw Knell turn with the bucket, and that as he turned, "he was stepping also in between the two running rails and must have slipped, slipped and fell". He also observed, "As he fell towards the third rail he must have landed partly on the third rail. And for a second, not even a second, instantly he just jolted a little." Burke a also testified that it had rained torrentially, requiring them to stop working and that when work was resumed, it was still raining lightly. DeMarco testified that the track was slippery from the rain. The unrebutted testimony also was that the protective cover over the third rail had been removed for a distance of approximately 1,000 feet and the electrified third rail was exposed.

The testimony establishes that Knell fell while walking on an area of the tracks in between the running rails, and, therefore, did not fall on "a floor, passageway, walkway, scaffold, platform". Moreover, although it is undisputed that he did fall on elevated train tracks and the evidence presented was that the ballast on the tracks was slippery due to the rain, this Court is of the opinion

that this is not the type of slippery condition of an elevated working surface that is contemplated by §23-1.7(d) of the Industrial Code. That section contemplates the presence of a slippery foreign substance, including ice, snow, water and grease on a work surface which should not be present and which is amenable to being "removed, sanded or covered". It is clear that this provision of the Industrial Code does not apply to lengthy distances of railroad tracks exposed to the elements, and the Court cannot fathom the possibility of any plausible argument that the City should have dried, sanded or covered its miles of elevated train tracks that became wet from rain that was falling.

Therefore, plaintiff has not only failed to establish a prima facie entitlement to summary judgment on the issue of liability based upon a violation of §23-1.7(d) of the Industrial Code, but that section is clearly inapplicable to the facts of this case.

With respect to §23-1.8(c)(2) of the Industrial Code, §23-1.8(c) sets forth requirements for the provision of "protective apparel". Subdvision (1) requires head protection to workers required to work in an area where there is a danger of being struck by a falling object or a head-bumping danger. Subdivision (3) requires waterproof clothing to employees required to work in rain, snow or wet conditions, and subdivision (4) requires that employees using or handling corrosive substances be made to wear appropriate protective apparel and eye protection. Subdivision (2), the subdivision allegedly violated in the present matter, mandates that a worker "required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes."

In this regard, plaintiff annexes to the moving papers a copy of the Final Report issued by the TA's Board of Inquiry after conducting an investigation of Knell's fatal accident wherein it was concluded that "Knell was wearing safety shoes that exhibited significant wear. The sole of the shoes were smooth and therefore most probably offered less slip resistance then shoes with a tread" (sic)(emphasis added). This conclusion is based upon the Board's premise that a smooth sole provides a lower coefficient of friction coupled with a lowering of the coefficient of friction on the ballast stones of the track bed upon which he was walking as a result of becoming wet from the rain and drizzle that had fallen.

It is the contention of plaintiff's counsel that the City's failure to assure that Knell wore shoes that offered slip resistance constituted a prima facie violation of §23-1.8(c)(2) of the Industrial Code. However, the plain language of that

subdivision, especially within the context of subsection (c) as a whole, concerns protecting workers' feet from becoming wet and has nothing to do with providing protection against slip hazards. Therefore, §23-1.8(c)(2) of the Industrial Code is inapplicable to the present case.

Finally, as to §23-1.13 of the Industrial Code, plaintiff contends that she is entitled to summary judgment for violation of subsection (b), subdivisions (3) and (4) thereof.

Section 23-1.3(b)(3) provides, "Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such circuit exists. He shall advise his employees of the location of such lines, the hazard involved and the protective measures to be taken."

This section contemplates the existence of an electrical line or circuit of which a worker may not be aware in the area where work is being performed, and against which the worker does not know how to protect himself or herself absent special instructions. Here, the power circuit was the third rail of the subway tracks, open, obvious and known by track workers, and even lay people, as being electrified. No warning sign alerting track workers of the existence and location of such "circuit" and the protective measures they need to take need have been provided and, therefore, this section of the Industrial Code is inapplicable to the present situation.

However, plaintiff has established a prima facie entitlement to summary judgment for violation of §241(6) of the Labor Law premised upon a violation of §23-1.13(b)(4) of the Industrial Code. That section provides, in relevant portion, "Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means."

Plaintiff provided undisputed evidence that the third rail in the area of the work being performed by Knell was electrified with a current of 600 volts and that the protective wooden guard that is fixed over the rail to protect a worker from coming into contact with the electrified rail had been removed. It is also undisputed

that plaintiff fell and his arm came into contact with the exposed third rail. Therefore, plaintiff has established a prima facie entitlement to summary judgment on the issue of liability under §241(6) of the Labor Law as premised upon a violation of §23-1.13(b)(4) of the Industrial Code by showing that Knell was not provided with protection against electric shock by either turning off the power to the third rail or by making sure that the guard was in place over the third rail, and that the failure to do so was a proximate cause of Knell's fatal injury (see e.g. Harris v Arnell Constr. Corp., 47 AD 3d 768 [2nd Dept 2008]). The City, in opposition, has failed to proffer any triable issue of fact as to proximate causation or as to comparative negligence on the part of Knell.

Accordingly the motion is granted to the extent heretofore stated.

Dated: March 4, 2013

KEVIN J. KERRIGAN, J.S.C.