

**Stewart v Stalco Constr., Inc.**

2013 NY Slip Op 30712(U)

March 28, 2013

Sup Ct, Suffolk County

Docket Number: 09-44293

Judge: Thomas F. Whelan

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**ORDERED** that the motion by third-party defendant Preferred Construction Inc. for, inter alia, summary judgment dismissing the third-party complaint against it is denied; and it is

**ORDERED** that the motion by defendants/third-party plaintiffs Stalco Construction Inc. and the Diocese of Rockville Center for summary judgment dismissing plaintiffs' complaint against them is granted; and it is

**ORDERED** that the motion by plaintiffs David Stewart and Lori Stewart for partial summary judgment in their favor on the issue of liability is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff David Stewart on September 17, 2008 while he was working on the construction of a new building on the premises of the Holy Sepulcher Cemetery, located in Coram, New York. Plaintiff allegedly was injured when he tripped over a pipe beneath a sheet of insulation laying on the floor of the unfinished room in which he was working. The worksite site was owned by defendant/third-party plaintiff Diocese of Rockville Center ("the Diocese"), and defendant/third-party plaintiff Stalco Construction Inc. ("Stalco") served as the general contractor for the project. At the time of the accident, plaintiff was employed by third-party defendant Preferred Construction Inc. ("Preferred"), a subcontractor hired to provide carpentry services at the worksite. Third-party defendant Ambrosio & Company, Inc. ("Ambrosio") was the plumbing subcontractor for the project. By way of their complaint, plaintiffs allege, inter alia, causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200 and 241(6). The complaint also asserts a claim by plaintiff's wife, Lori Stewart, for loss of consortium and reimbursement of medical expenses.

The Diocese and Stalco (hereinafter collectively referred to as "Stalco") joined issue on December 11, 2009, asserting a general denial and affirmative defenses to the action. Shortly thereafter, Stalco commenced the third-party action asserting claims for contribution, indemnification, and breach of contract based on the third-party defendants' alleged failure to obtain liability insurance naming Stalco as an additional insured. The third-party defendants joined issue, asserting similar cross claims against each other and counterclaims against Stalco.

Preferred now moves for summary judgment dismissing the third-party complaint on the ground plaintiff did not suffer a "grave injury" pursuant to section 11 of the Workers' Compensation Law and, therefore, the third-party claims against it for indemnity and contribution cannot be maintained. Ambrosio opposes the motion, arguing that Preferred is contractually obligated to indemnify Stalco for any and all claims, including claims by its own employees, for injuries arising out of or in connection with the performance of its work. Stalco cross-moves for summary judgment dismissing the complaint, arguing that it did not direct or control plaintiff's work, and that it neither created nor had actual or constructive notice of the alleged defective condition. Stalco further asserts that plaintiffs' claim under Labor Law § 241(6) must be dismissed, as it is premised on inapplicable sections of the New York Industrial Code. Alternatively, Stalco seeks judgment over and against the third-party defendants for contractual indemnification and failure to procure insurance.

Ambrosio partially opposes Stalco's motion, arguing any award of summary judgment on the

issues of contractual or common law indemnification at this stage of the proceeding would be premature, since triable issues remain as to the respective fault, if any, of the parties in causing plaintiff's accident. Preferred also partially opposes Stalco's motion, arguing, inter alia, that it is not contractually required to indemnify Stalco, that it procured insurance naming Stalco as an additional insured, and that Stalco should be held liable for plaintiff's injuries since it possessed the authority to control and supervise his work. Plaintiffs oppose Stalco's motion on the basis a triable issue exists as to whether Stalco had constructive notice of the presence of an accumulation of construction debris in the area where plaintiff fell. Plaintiffs further contend that their claims under Labor Law §241(6) are actionable, as the construction debris over which plaintiff tripped constituted a "foreign substance" and was not a natural result of plaintiff's work. Plaintiffs also cross-move for partial summary judgment in their favor on the issue of liability, arguing that no triable issues exist as to whether Stalco failed to provide its workers a safe place to work in violation of the Labor Law.

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if it either created the dangerous condition or had actual or constructive notice of its presence (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *Chowdhury v Rodriguez, supra*; *Kehoe v Segal*, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner cannot be had under Labor Law §200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317, 445 NYS2d 127 [1981]; *Ortega v Puccia, supra*).

Here, plaintiff's accident arose from an allegedly defective condition on the premises rather than from the manner in which the work was being performed, as it is undisputed that plaintiff tripped over construction debris consisting of a discarded piece of pipe that was laying on the floor beneath a sheet of insulation (*see Nankervis v Long Is. Univ.*, 78 AD3d 799, 800, 911 NYS2d 393 [2010]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148, 908 NYS2d 117 [2010]; *compare Schwind v Mel Lany Const. Mgt. Corp.*, 95 AD3d 1196, 945 NYS2d 151 [2d Dept 2012]; *Cody v State of New York*, 82 AD3d 925, 926, 919 NYS2d 55 [2011]). Stalco, therefore, established its prima facie entitlement to summary judgment dismissing plaintiffs' common law negligence and Labor Law §200 claims by demonstrating that it neither created nor had actual or constructive notice of the alleged dangerous condition (*see Ortega v Puccia, supra*; *Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; *Kehoe v Segal*, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). Significantly, plaintiff testified that he was the only person working in the room that morning, that he personally cleared it of debris before everyone at the worksite, including himself, ceased work during a fifteen minute coffee break, and that he was unaware of anyone returning to the room prior to the accident. As such, plaintiff's own testimony reveals that the alleged dangerous condition was not open and obvious, and that, even if had been, any finding that the condition was present for a sufficient length of time to be discovered would be based on pure speculation (*see Kobiashvilli v Hill*, 34 AD3d 747, 828 NYS2d 68 [2d Dept 2006]; *Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409, 818 NYS2d 158 [2d Dept 2006];

*DeLeon v N.Y. City Tr. Auth.*, 5 AD3d 531, 772 NYS2d 874 [2d Dept 2004]).

Stalco also established, prima facie, its entitlement to summary judgment dismissing plaintiffs' claim under Labor Law § 241(6). Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; see *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (see *Rizzuto v L.A. Wenger Contr. Co.*, supra; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (see *Forschner v Jucca Co.*, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Here, plaintiffs have alleged in their complaint violations of the following sections of the Industrial Code: 12 NYCRR §§ 23-1.7(d) (Slipping Hazards), 23-1.7 (e) (1) (Tripping Hazards in Passageways) and 23-1.7 (e) (2) (Tripping Hazards). 12 NYCRR 23-1.7 (e) (1), which requires owners and general contractors to keep all passageways free of debris which could cause tripping, is inapplicable under the circumstances of this case, as the accident occurred in an open room rather than a passageway (see *Parker v Ariel Assocs. Corp.*, 19 AD3d 670, 798 NYS2d 489 [2d Dept 2005]; *Castillo v Starrett City*, 4 AD3d 320, 322, 772 NYS2d 74 [2d Dept 2004]; *Adams v Glass Fab*, 212 AD2d 972, 973, 624 NYS2d 705 [4th Dept 1995]). 12 NYCRR 23-1.7 (d), which provides that "[e]mployers shall not suffer or permit any employee to use a floor . . . or other elevated working surface which is in a slippery condition," also is inapplicable, since neither the insulation nor the metal pipe laying on the floor beneath it constituted a slippery foreign substance (see *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 [1st Dept 2013]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 769 NYS2d 559 [2d Dept 2003]). 12 NYCRR 23-1.7 (e) (2), which requires that areas where persons work or pass be kept "free from accumulations of ... debris and from ... materials ... insofar as may be consistent with the work being performed," likewise is inapplicable. The piece of insulation and pipe on which plaintiff slipped was an integral part of the ongoing construction as it resulted directly from the work he and his co-workers were performing (see *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806, 822 NYS2d 745[2006]; *Cody v State of New York*, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; *Aragona v State of New York*, 74 AD3d 1260, 905 NYS2d 237 [2d Dept 2010]), and plaintiff testified that a supervisor advised him that he was required to clean up the debris in his work area as a condition of his employment on the project (see *Marinaccio v Arlington Cent. School Dist.*, 40 AD3d 714, 836 NYS2d 232 [2d Dept 2007]; *Cabrera v Sea Cliff Water Co.*, 6 AD3d 315, 776 NYS2d 541 [1st Dept 2004]).

In opposition, plaintiffs' conclusory assertions are insufficient to raise triable issues of fact warranting denial of the motion (see *Zuckerman v New York*, 497 NYS2d 557, 427 NYS2d 595 [1980]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Accordingly, the cross motion by defendants/third-party plaintiffs Stalco Construction Inc. and the Diocese of Rockville Center for summary judgment dismissing plaintiffs' complaint against

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them is granted.

Inasmuch as the complaint against defendants/third-party plaintiffs Stalco Construction Inc. and the Diocese of Rockville Center has been dismissed, plaintiffs' motion for summary judgment in their favor on the issue of liability is denied, as moot. Additionally, the motion by third-party defendant Preferred Construction Inc. seeking summary judgment dismissing the third-party complaint against it has been rendered academic, and is likewise denied.

Dated: 3/28/13

  
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THOMAS F. WHELAN, J.S.C.