

Barbaro v Zwicker Elec. Co., Inc.

2013 NY Slip Op 33121(U)

November 4, 2013

Supreme Court, New York County

Docket Number: 104982/11

Judge: Joan M. Kenney

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
MONICA BARBARO,

Plaintiff,

-against-

ZWICKER ELECTRIC CO., INC.,

Defendants.

-----X
KENNEY, JOAN M., J.

DECISION AND ORDER
Index Number: 104982/11
Motion Seq. No.: 001

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers

Notice of Motion, Affirmation, Exhibits, and Memo of Law
Opposition Affirmation, and Exhibits
Reply Affirmation, and Exhibits

FILED

NOV 12 2013

**NEW YORK
COUNTY CLERKS OFFICE**

Numbered
1-10
11-15
16

In this labor law action, defendant, Zwicker Electric Co., moves for an Order, pursuant to CPLR 3212, dismissing the complaint.

Factual Background

On June 3, 2009, plaintiff Monica Barbaro, a laborer for non-party Holt Construction Corporation (Holt), tripped and fell over a safety cone covering an electric pipe at the "Peets Coffee and Tea" (the coffee shop) construction site (the project) located in the main shopping area of Terminal 4 at JFK Airport, Queens, New York (the accident). Holt, the project's general contractor, hired defendant, Zwicker, to install electrical piping to be used for wiring connections for communication machines and refrigerators at the coffee shop.

Plaintiff worked for Holt as a journeyman laborer and shop steward, and was responsible for cleaning up after the trades, bringing in deliveries, and removing debris. Plaintiff also had the authority to stop unsafe work practices at the project. She reported solely to her supervisor,

Richard Tavares (Mr. Tavares), of Holt.

Carlos Krind (Mr. Krind), a Zwicker electrician, was the sole employee of Zwicker performing electric work for the majority of time at the site. Krind installed two electrical pipes in two locations within the work space, which was approximately twenty (20) feet wide by sixty (60) feet long, in order to provide eventual electrical power connections for refrigerators and communication machines for the operation of the coffee shop. Krind's responsibilities involved opening up the trench, taking the appropriate measurements, bending electrical pipes as necessary, and installing the electrical pipes into the ground.

In both areas, the pipes were installed under the concrete-slab with one end of the pipe protruding from the slab vertically at a ninety (90) degree angle. Holt Construction was then responsible for filling the trench and placing the cement back around the embedded electrical pipes after they were installed. The electrical pipe in the front of the work space (where the accident occurred) extended approximately six to eight inches vertically; the pipes in the rear space extended vertically approximately one foot. (Krind EBT, at 72-85).

After the electrical pipe was installed, Holt employees agreed to place a safety cone, supplied by Holt, on top of the exposed portion of the pipe in the front of the open work space by Holt laborers. (Barbaro EBT, at 56). The cone was one foot square at the base, narrow on top, orange-colored, and extended one and a half feet above the ground. Plaintiff testified that the pipe was a tripping hazard, which is why it was covered with a cone, so that nobody would fall. (Id. at 52). The pipe was covered by the cone for approximately two weeks before the alleged accident. (Id. at 57).

On the day of the accident, plaintiff was assigned to remove debris on the floor and also

“moved material around for the tile guys.” (Id. at 42). Just before the alleged fall, plaintiff had been instructed by her supervisor, Mr. Tavares, to retrieve a pallet of tiles from the loading dock. Plaintiff then turned to her left towards the door and took a step when her left foot caught on a safety cone covering a pipe. The cone did not move or shift when plaintiff’s foot came into contact with the cone. (Id. at 59). Plaintiff’s left foot did not come into contact with any fluids, liquids, tools, materials, equipment, or debris, and her boot was not punctured in any manner. (Id. at 59).

Arguments

Defendant asserts that plaintiff cannot sustain a cause of action for common law negligence or Labor Law §200 because Zwicker did not cause the alleged condition that caused the accident, nor had any notice (constructive or actual) of any dangerous or hazardous conditions that allegedly caused the accident, and did not supervise or control the specific work which gave rise to plaintiff’s injury. Moreover, Zwicker contends that because plaintiff has not sufficiently pled any industrial code violations to support a Labor Law §241(6) violation, that claim must also be dismissed as against defendant.

Plaintiff maintains that the within motion for summary judgment must be denied because: (1) there are numerous factual disputes that must be resolved at trial; and (2) defendant violated Industrial Code Regulations 12 NYCRR 23-1.7(e)(1) and 12 NYCRR 23-1.7(e)(2).

Discussion

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the

material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

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]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]).

Labor Law §200 and Common-Law Negligence

It is well settled that Labor Law §200 is a codification of an owner’s and general contractor’s duty to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law §200 (1) provides that:

“All places to which this chapter applies shall be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.”

Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising

from the means or methods in which the work is performed (*see generally Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). Where the plaintiff's injury is caused by a dangerous or defective premises condition, the owner or general contractor may be held liable only if it created or had actual or constructive notice of the dangerous condition (*Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]; *Augustyn v City of New York*, 95 AD3d 683, 685 [1st Dept 2012]). General awareness that a dangerous condition may be present is insufficient to hold an owner or general contractor liable (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Here, plaintiff argues that there was a dangerous condition, the electrical pipe, which was created by Zwicker, an electrician hired by the contractor. However, it remains undisputed that Zwicker, who is neither the owner, nor general contractor, specifically followed Holt's instructions as to the timing and manner of the installation of the electrical pipe. Zwicker installed and placed the pipe to be used for wiring connections for eventual communication machines and refrigerators. After it was installed, the electrical pipe was not something that could be removed or cleaned up, as it was embedded in the concrete.

Furthermore, because it could not be removed, Holt placed a safety cone over the pipe. Prior to her accident, plaintiff was aware of the protruding pipe, and even had discussion with other Holy employees, to place such a cone over the pipe. Plaintiff testified that defendant had installed the electrical pipe approximately two to three weeks prior to her incident. She also testified that the safety cone was placed over the electrical pipe by Holt Construction employees approximately two weeks prior to the accident as a safety measure. (Barbaro EBT, at 53). As such, it is undisputed that Zwicker did not create the dangerous or defective condition that caused

plaintiff's accident as it is undisputed that plaintiff tipped and fell over the cone her own employer (rather than defendant) had placed there. Accordingly, that portion of defendant's motion seeking to dismiss plaintiff's common-law negligence and Labor Law §200 causes of action asserted as against them is granted.

Labor Law §241 (6)

Labor Law §241 (6) requires that all contractors, owners, and their agents comply with the following requirement:

“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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

Labor Law §241 (6) imposes a “*nondelegable* duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’” to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under Labor Law §241(6), the plaintiff must “specifically plead and prove the violation of an applicable Industrial Code regulation,” which proximately caused the accident (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012] [internal quotation marks and citation omitted]). A “plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)” (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

Plaintiff's verified bill of particulars alleges the following violations of the Industrial

Code: §12 NYCRR 23-1.5; §12 NYCRR 23-1.7(e)(1) and (e)(2) (Verified Bill of Particulars, ¶

3). In opposition to defendants' motion, plaintiff only relies upon §12 NYCRR 23-1.7 (e) (1) and (2), and therefore, the Court will only address these two alleged Industrial Code violations.

Plaintiff's claim that defendant violated Industrial Code §12 NYCRR 23-1.5 is dismissed for plaintiff's failure to address this code here.

§12 NYCRR 23-1.7 (e)

Section 23-1.7 (e) (Tripping and other hazards) provides as follows:

“(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”

(12 NYCRR 23-1.7 [e]).

Sections 23-1.7 (e) (1) and 23-1.7 (e) (2) have been held to be sufficiently specific to serve as a predicate for a Labor Law §241 (6) claim (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]; *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]).

In *Canning v Barneys N.Y.* (289 AD2d 32, 33 [1st Dept 2001]), the plaintiff was injured while carrying a bundle of electrical conduit when his foot became ensnared in the remnants of a coil of tie wire. The First Department held that the plaintiff was injured in a “working area,” rather than in a “passageway,” because at the time of the accident, the concrete had already been poured, and the site of his fall was in constant use as a work site for loading and unloading

construction materials and debris (*id.* at 34).

In *Dalanna v City of New York* (308 AD2d 400 [1st Dept 2003]), a plumber tripped over a protruding bolt while carrying a pipe across an outdoor 50-foot-long concrete slab. In that case, the First Department held that neither section 23-1.7 (e) (1) nor 23-1.7 (e) (2) applied –

“[t]he slab, although regularly traversed to bring pipes to the tanks, remained a common, open area between the job site and the street, and thus was not [a] ‘passageway’ covered by 12 NYCRR 23-1.7 (e) (1), and at best was a ‘working area’ covered by 12 NYCRR 23-1.7 (e) (2). However, the bolt, which was embedded in the ground, was not ‘dirt,’ ‘debris,’ ‘scattered tools and materials’ or a ‘sharp projection[,]’ as required by the latter provision”

(*id.* at 401 [citations omitted]).

Although this regulation is sufficiently specific, section 23-1.7(e)(1) does not apply to these facts because plaintiff did not fall in a “passageway.” Plaintiff testified that she fell in the front open work space of the construction site and this was a “working are” rather than a “passageway” as that term is defined by the above-referenced industrial code sections..

Section 23-1.7(e)(2) of the Industrial Code is also inapplicable to the facts of the present case. Here, plaintiff testified that she tripped over the safety cone that was covering the electrical pipe at the construction site. The safety cone was purposefully placed over the pipe to protect it and therefore was intentionally placed at the construction site and could no be construed to be a misplaced material over which one might trip. (*See Thomas v. Goldman Sach Headquarters, LLC* 109 A.D.3d 421, 422, 970 N.Y.S.2d 224, 226 (2013); *Johnson v. 923 Fifth Ave. Condo.*, 102 A.D.3d 592, 593, 959 N.Y.S.2d 146, 147 (2013); *Rajkumar v. Budd Contracting Corp.*, 77 A.D.3d 595, 596, 909 N.Y.2d 453, 454 (2010)). As such, the safety could not be “accumulations of dirt and debris and scattered tools and materials and sharp projections.” Even assuming,

arguendo, that plaintiff tripped over the electrical pipe, rather than the safety cone, the electrical pipe would also have been an integral part of the work being performed, rather than debris, scattered tools and materials, or a sharp projection, which may have created a dangerous tripping hazard for the construction workers. *See Dalanna*, 308 AD2d at 401; *O'Sullivan v. IDI Const. Co., Inc.*, 7 N.Y.3d 80, 806, 855 N.E.2d 1159 (2006); *Verel v. Ferguson Elec. Const. Co., Inc.*, 41 A.D.3d 1154, 1157, 838 N.Y.S.2d 280, 284 (2007). Plaintiff has, therefore, failed to present any triable issues of fact warranting denial of the within application to dismiss.

Accordingly, it is hereby

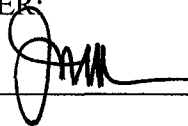
ORDERED, that defendant's motion, pursuant to CPLR 3212, is granted in its entirety, and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Zwicker Electric Co., Inc., and against plaintiff Monica Barbaro, dismissing the complaint.

Dated: November 4, 2013

FILED
NOV 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Joan M. Kenney, J.S.C.