

Ramirez v 76th and Broadway Owner, LLC
2014 NY Slip Op 31272(U)
May 15, 2014
Sup Ct, New York County
Docket Number: 108974/11
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANCELMO RAMIREZ,

INDEX NO. 108974/11

Plaintiff,

- against-

MOTION SEQ. NO. 001

76TH AND BROADWAY OWNER, LLC, STAHL
MIDTOWN OWNERS, LLC and CAULDWELL-WINDGATE
COMPANY, LLC,

Defendants.

The following papers were read on this motion by defendants for summary judgment dismissing the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
MAY 19 2014

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

This is an action to recover damages for personal injuries sustained by Ancelmo Ramirez (plaintiff), a stone worker, when he slipped and fell on ice while working on a construction site on the roof of a new 18-story residential condominium building (the building) located at 2148 Broadway, New York, New York (the project) on December 30, 2010. Now before the Court is a motion by defendants 76th and Broadway Owner, LLC (Broadway), Stahl Midtown Owners, LLC (Stahl) and Cauldwell-Wingate Company, LLC (Cauldwell) (collectively, defendants), pursuant to CPLR 3212, for summary judgment dismissing the complaint as asserted against them.

BACKGROUND

On the day of plaintiff's accident, Broadway owned the building where the accident took place. Broadway hired Cauldwell to serve as construction manager for the project. In turn, Cauldwell hired nonparty Port Morris Tile & Marble Corporation (Port Morris), plaintiff's

employer, to serve as the subcontractor for the stonework on the project. Plaintiff was injured when he slipped and fell on ice while working from the exposed roof of the building, allegedly injuring his right shoulder and arm. At the time of the accident, plaintiff, a foreman for Port Morris, was installing stonework on the exterior of the building. Plaintiff explained that, in order to perform the stone installation work on the building, it was necessary to work from the roof. On the day of the accident, the roof was still unpaved, as the stone work had to be completed before the roof could be finished. However, on the day of the accident, the roof's waterproof membrane (the roof membrane) had been installed.

Plaintiff testified that the accident took place on a Thursday. Plaintiff did not report to work on Monday or Tuesday of that week, because his transportation had been shut down due to a winter weather event resulting in the accumulation of approximately three feet of snow. When he returned to work on Wednesday, plaintiff maintains that he observed a coating of thin ice on the roof, although he did not notify anyone other than his coworker about the condition. In fact, plaintiff testified that while at work on the roof on the day before the accident, both plaintiff and his coworker, "Dominique," slipped and fell on the ice that was present on the roof (Defendants' notice of motion, exhibit H, plaintiff tr at 69).

Before starting work on the day of the accident, plaintiff and Dominique again noticed and discussed the icy condition of the roof (Defendants' notice of motion, exhibit H, plaintiff tr at 74). Plaintiff testified that Dominique phoned "Matt" from Cauldwell to bring the condition to his attention (*id.*). Thereafter, plaintiff and Dominique retrieved some plywood boards from the second floor "to try to prevent [themselves] from slipping on [the ice]" (*id.* at 73]). Plaintiff did not take steps to break up or remove the ice, because it was "not [their] job to do that . . . [w]e just report it, and it's supposed to be taken care of" (*id.* at 151).

However, irrespective of the ice, and even if it were a sunny day, the men had planned to put down plywood before beginning their work, because it was part of the "process" (*id.* at

77). To that effect, Matt instructed the men to use plywood boards to cover the roof membrane in order to protect it while the stone installation work was being performed (*id.* at 76).

Importantly, plaintiff testified that they "just had to cover directly under where they were working" (*id.* at 81). Plaintiff was never told to cover any other areas.

Plaintiff further testified that after he walked about 200 feet from the work area toward the gang box to retrieve some tools, and as he was returning to the work area, he slipped on ice and fell. Plaintiff explained that "you could walk off the plywood there, and that's what I did" (*id.*). After he fell, plaintiff noticed a very thin sheet of black ice on top of the roof membrane in the area where he fell. Specifically, when plaintiff was asked at his deposition to describe this area, plaintiff testified, "Ice. I walked off the plywood onto ice. Well, it was - it wasn't all iced up. There were parts that were ice and some that weren't because the sun melted some of it" (*id.* at 116).

Thomas Flood (Flood) testified that, at the time of the accident, he was employed by Cauldwell as an assistant superintendent. He testified that the roof of the building was exposed to the elements of nature. On the day of the accident, with the exception of the installation of the roof membrane, the roof was unfinished. The roof membrane was placed over the roof in order to prevent water from infiltrating the building. He explained that semi-smooth protection boards were installed on top of the roof membrane at the time of installation to protect it. Notably, Flood testified that the protection boards were not placed over the entire roof area, but rather, they were only placed in the areas where work was being performed.

Flood maintains that he heard about plaintiff's accident from the safety manager on the project. Flood testified that he did not recall observing any snow or ice on the roof between December 26, 2010 and December 30, 2010, the day of the accident, although he did remember that it was "a harsh winter" (Defendants' notice of motion, exhibit E, Flood tr at 33). In addition, Flood did not recall receiving any complaints from the safety manager or anyone

else regarding the presence of ice on the roof where the Port Morris employees were working.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

Initially, it should be noted that, plaintiff concedes in his opposition that Stahl had no connection to the building or the project, and has agreed to withdraw his claims as against this defendant. Thus, defendants are entitled to dismissal of the complaint as against Stahl. In addition, plaintiff also withdraws his Labor Law § 240(1) claim as against all defendants. Thus, defendants are entitled to dismissal of the Labor Law § 240(1) cause of action against them.

Plaintiff's Labor Law § 241(6)

Labor Law § 241(6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. . . .”

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars,

with the exception of Industrial Code section 23-1.7(d), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (see *Genovese v Gambino*, 309 AD2d at 833; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241(6) claim predicated on those provisions.

Industrial Code 12 NYCRR 23-1.7(d) provides:

"(d) 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."

Industrial Code 12 NYCRR 23-1.7(d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241(6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]). Further, Industrial Code section 23-1.7(d) applies to the facts of this case. Initially, the accident occurred as plaintiff was using a "floor" within the meaning of section 23-1.7(d). In addition, plaintiff's testimony that he was injured as a result of slipping on ice, a foreign substance, raises at least a triable issue of fact as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard" (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501 [1st Dept 2011], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998] [evidence that the plaintiff slipped on snow and ice raised an issue of fact as to whether someone on the construction project failed to prevent or remediate the hazardous condition within a reasonable time]; *Temes v Columbus Ctr. LLC*, 48 AD3d 281, 281 [1st Dept 2008]).

Defendants have failed to establish that an adequate and properly placed safety device was present in the area of the accident to prevent plaintiff from slipping on ice in the first place.

While plywood boards may have covered the roof membrane in the immediate work areas, as plaintiff testified, they “just had to cover directly over where they were working,” and “you could walk off the plywood” (Defendants’ notice of motion, exhibit H, plaintiff’s tr at 81). Flood also testified that the plywood covering was only placed in the immediate work areas and not placed over the entire roof. Thus, defendants are not entitled to dismissal of that portion of the plaintiff’s Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7(d).

Plaintiff’s Common-Law Negligence and Labor Law § 200 Claims

Defendants also move to dismiss plaintiff’s common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [citation omitted]; see also *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200(1) states, in pertinent part, as follows:

1. All places to which this chapter applies shall be so 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.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (see *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

“Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had

actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]).

As plaintiff was injured as a result of slipping on the ice that was present on the roof, the factual scenario in this case shows that the accident did not arise from the means and methods of the work, but rather, plaintiff's injuries arose from an unsafe condition (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009]). As such, it must be demonstrated that defendants created or had actual or constructive notice of the unsafe condition, *i.e.*, the ice (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]).

However, it should be noted that, in accidents involving hazardous ice conditions, such as the accident at bar, "notice of a condition which caused the ice to form [is] sufficient" (*Roca v Gerardi*, 243 AD2d 616, 617 [2d Dept 1997] ["[t]he jury's conclusion that the ice came from the pile of snow next to the plaintiff's entrance was inferrable from the testimony and photographic evidence"]; *Gomez v National Ctr. for Disability Servs.*, 306 AD2d 103, 104 [1st Dept 2003] [where the defendant was given written notice of "inadequate drainage and dangerous water pooling conditions on its roof," an issue of fact existed as to whether the defendant had constructive notice of the icy condition that caused plaintiff to slip and fall]; *Sweeney-Kamouh v City of New York*, 180 AD2d 487, 488 [1st Dept 1992] [where the plaintiff was injured when her feet got tangled in the sash cord of a window blind, it was not necessary for her to show that the

defendant had actual notice of the sash cord lying on the floor. Instead, she only had to establish that the defendant had a “general awareness that the cord could therefore fall onto the floor and create a hazard”)).

Here, while the record does not suggest that defendants created the hazardous condition that caused the accident, a question of fact does exist as to whether they had actual or constructive notice of the presence of ice on the roof and/or the winter weather conditions that created the ice. For example, plaintiff testified that just the day before the accident, his coworker, Dominique, notified Cauldwell about the presence of ice on the roof. In addition, Flood testified that he knew it to be a “harsh winter,” and that the roof of the building was exposed to the elements (Defendants’ notice of motion, exhibit E, Flood tr at 33). In fact, according to weather reports, just four days before the accident, approximately ten inches of snow fell on New York City.

In any event, in light of the aforementioned evidence of hazardous winter weather events which occurred around the time of the accident, defendants’ “duty . . . to provide a safe place to work encompass[ed] the duty to make reasonable inspections to detect unsafe conditions” (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d at 555, quoting *DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 73 [4th Dept 1983]). Where a reasonable inspection would disclose a defect or dangerous condition, constructive notice of that condition will be imputed if the owner fails to make such inspection (*see Harris v Village of E. Hills*, 41 NY2d 446, 449 [1977]; *Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2d Dept 2003]). In this case, at least a question of fact exists as to whether, upon a reasonable inspection, defendants would have readily seen the ice patches present on the roof that caused plaintiff to slip and fall, such that constructive notice should be imputed to them. Thus, defendants are not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

Finally, it should be noted that, in his opposition, plaintiff requests that the court search the record and grant him summary judgment in his favor as to liability under the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7(d). However, this Court will not consider plaintiff's request in the absence of a proper cross-motion seeking this relief (*Khaolaead v Leisure Video*, 18 AD3d 820, 821 [2d Dept 2005]).

CONCLUSION

For the foregoing reasons, it is hereby

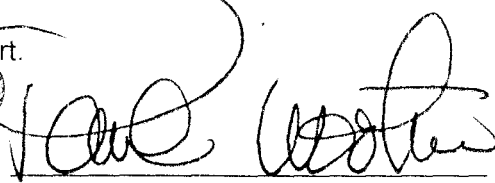
ORDERED that the portion of the motion of defendants 76th and Broadway Owner, LLC (Broadway), Stahl Midtown Owners, LLC (Stahl) and Cauldwell-Wingate Company, LLC's (Cauldwell) (together, defendants) to dismiss the complaint herein as against Stahl is granted and the complaint is dismissed in its entirety as against said defendant Stahl, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant, however the remainder of the motion is denied; and it is further,

ORDERED that the action is severed and continued against the remaining defendants; and it is further,

ORDERED that the portion of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 240(1) claim, as well as the Labor Law § 241(6) claim, with the exception of that part of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7(d), is granted, and these claims are severed and dismissed as against defendants, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

FILED



Dated: 5-15-14

MAY 19 2014

Paul Wooten J.S.C.

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