Eugene v Benjamin Hotel
2014 NY Slip Op 31845(U)
July 10, 2014
Supreme Court, New York County
Docket Number: 111333/11
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN PART 36

Justice

Index Number : 111333/2011
EUGENE, FEDLER
vs.
BENJAMIN HOTEL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3

Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ for Summary judgment is decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 17 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/14

_____, J.S.C.
JUSTICE DORIS LING-COHAN

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: IAS PART 36

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FEDLER EUGENE,

Plaintiff,

-against-

THE BENJAMIN HOTEL and DENIHAN OWNERSHIP COMPANY, LLC, d/b/a DENIHAN HOSPITALITY GROUP, and DENIHAN HOSPITALITY GROUP c/o JOSEPH N. RIZZO,

Defendants.

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Index No.: 111333/11
DECISION/ORDER
Motion Sequence No.: 003

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury action, defendants the Benjamin Hotel and Denihan Ownership Company, LLC, d/b/a Denihan Hospitality Group move for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

On August 10, 2011, plaintiff Fedler Eugene (Eugene) was injured during the course of his employment as a professional cleaner with non-party Chutespan, Inc. (Chutespan), when he fell into a vat of hot oil and was burned. *See* notice of motion, exhibit A (complaint), ¶ 31. Eugene's injury occurred in the industrial kitchen of a building called the Benjamin Hotel (the building) located at 125 East 50th Street in the County, City and State of New York. *Id.*, ¶ 9. Defendant the Benjamin Hotel (the Benjamin) owns the building, and defendant Denihan Ownership Company, LLC, d/b/a Denihan Hospitality Group (Denihan) owns the Benjamin. *Id.*; Prezioso affirmation, ¶¶ 6-7; exhibit D. Whether the remaining named defendant Denihan Hospitality Group c/o Joseph N. Rizzo is a separate entity, or merely an alternate name for

Denihan, is unclear; however, the Benjamin and Denihan have filed an answer, and only those two parties' names appear on the instant motion.

At his July 31, 2012 deposition, Eugene stated that, on the day of his accident, he had requested and received a bucket from employees of the Benjamin, and had used it to drain the grease from the upper grease hood of a fry station stove in the building's industrial kitchen. *See* notice of motion, exhibit B, at 103-107. Eugene also stated that he did not use the same bucket to drain the oil from the deep fryer itself, because doing so was not part of his job. *Id.* at 107-108. Eugene further stated that he asked the Benjamin's employees to drain the oil out of the deep fryer, but that they refused to do so and told him to finish his own work first. *Id.* at 108, 121, 127-130. Eugene next stated that he continued his work by ascending a three-foot A-frame step ladder to remove some filters from the upper grease hood of the stove. *Id.* at 114-116. Eugene noted that he had never used a harness while performing this type of work. *Id.* at 58. Eugene stated that he stepped onto the surface of the stove itself to complete this cleaning operation. *Id.* at 118-119, 121-124. Eugene then stated that, after he had removed the filters, he remained standing on the stove top and started spraying. *Id.* at 126-127. Eugene said that, at that point, he left the kitchen for a cigarette break. *Id.* at 130-134. Eugene next stated that, when he returned, he ascended the ladder again and stood on the stove top to continue cleaning the upper grease hood. *Id.* at 134-135, 138. Eugene stated that, while he was doing this, his left foot slipped on a cookie tray that had been left on the stovetop and was covering the deep fryer portion of the stove, and that his left leg plunged into the deep fryer. *Id.* at 134-135, 141-147, 148-150, 152-158. Finally, Eugene stated that, at this point, he was badly burned because a Benjamin employee had heated the oil in the deep fryer to cook french fries while he was on his

cigarette break. *Id.* at 135-137, 139-140.

Eugene's Chutespan supervisor, field technician Leroy Bloomer (Bloomer), was deposed at which time he confirmed that, on the day of Eugene's accident, he had asked two building kitchen employees who were present at the time, to drain the grease out of the deep fryer attached to the stove that Eugene was engaged in cleaning. *See* notice of motion, exhibit E at 91-94. Bloomer stated that he checked the temperature of the grease in the deep fryer before Eugene began to work and found that it was cool. *Id.* at 95-97. Bloomer also stated that he had observed Eugene at work on top of the stove removing filters from the upper grease hood, and had also seen him leave the work site for a break. *Id.* at 97-105. Bloomer also stated that, just prior to Eugene taking his break, he had also observed a building food preparer come into the kitchen and ask if the Chutespan employees could stop cleaning while he prepared an order of french fries for a guest; and that he then observed Eugene leave, and the worker prepare the fries and cover the deep fryer with a tray. *Id.* at 106-108. Bloomer further stated that he observed Eugene return to the kitchen a short while later and climb on the stove, and also stated that he warned Eugene to be careful because the deep fryer was hot, and that Eugene responded that he would. *Id.* at 109-110. Finally, Bloomer stated that he did not observer Eugene's accident, but that he went to help him out of the deep fryer and off to the hospital afterwards. *Id.* at 110-111.

The Benjamin was first deposed on August 20, 2102, via director of engineering Desmond Orgill (Orgill), who stated that he is responsible for "maintenance of the facility," including the building's kitchen, which is used by nonparty the National Restaurant (the National). *See* notice of motion, exhibit F, at 17-21. Orgill also stated that he customarily performed walk through inspections of the kitchen one or more times a day. *Id.* at 47-48. Orgill

acknowledged that he provided Chutespan with the ladders that its employees used to clean the kitchen. *Id.* at 49-51.

The Benjamin was deposed a second time via utility worker Habib Seck (Seck), who stated that he had not emptied the oil out of the deep fryer on the day of Eugene's accident. *See* notice of motion, exhibit H, at 52-53.

The Benjamin was also deposed a third time via utility worker Sarko Ansong (Ansong), who stated that he emptied the oil out of the deep fryer after Eugene's accident. *See* notice of motion, exhibit I, at 37-38. Ansong also stated that he had seen Chutespan's workers cleaning the kitchen before Eugene's accident, but that he did not tell them that the oil in the deep fryer was hot. *Id.* at 32-34.

Finally, the National was deposed, via chef Darron Harper (Harper), who stated that he was not allowed to turn off the deep fryer, since it was required to be on all of the time except that Seck and Ansong emptied out the previous day's old oil at approximately 4:00 a.m. *See* notice of motion, exhibit K, at 40. Harper acknowledged that he had made an order of french fries at the deep fryer station that Eugene was cleaning, and also stated that Eugene had asked him for some of the fries and taken them outside to eat just before he returned to cleaning the stove and suffering his accident. *Id.* at 45-50.

Eugene initially commenced this action on September 21, 2011, but later served an amended complaint on March 19, 2013 that sets forth causes of action for: 1) common-law negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 241 (6); and 4) violation of Labor Law § 240. *See* notice of motion, exhibit O. The Benjamin and Denihan filed a joint answer with affirmative defenses to the amended complaint on May 20, 2013. *Id.*; Exhibit

P. Now before the court is the motion of the Benjamin and Denihan for summary judgment to dismiss the amended complaint (motion sequence number 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

In their motion, defendants first argue that Eugene's fourth cause of action, which alleges a violation of Labor Law § 240 (1), should be dismissed because Eugene "was not engaged in an enumerated activity covered by the protections of the statute." *See* notice of motion, Prezioso affirmation, ¶ 23. Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals holds that the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between

the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). The Court also notes that this statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 342 (2008). Finally, the Court requires a "plaintiff to show that the statute was violated and that the violation proximately caused his injury." *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 (2004).

Here, defendants specifically argue that the type of "cleaning" that Eugene was engaged in was *not* an activity that triggered the protections of Labor Law § 240 (1). *See* notice of motion, Prezioso affirmation, ¶¶ 26-42. Defendants cite the Court of Appeals decision in *Dahar v Holland Ladder & Mfg. Co.* (18 NY3d 521, 525 [2012]) for the rule that "every case we have decided involving cleaning as used in Labor Law § 240 (1) ... has involved cleaning the windows of a building," and argue that Eugene was clearly not engaged in such activity. *Id.* Eugene responds that the daily kitchen cleaning that the building's employees performed constituted "routine maintenance" that is outside the statute's protection, while he was engaged in "industrial deep cleaning," which *is* entitled to statutory protection. *See* Roth affirmation in opposition, ¶¶ 43-54. After careful consideration, this court agrees with defendants.

In *Soto v J. Crew Inc.* (21 NY3d 562, 568-9 [2013]), the Court of Appeals recently observed that:

> "Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as 'cleaning' under the statute, if the task: (1) is routine, in the sense that it is the

> type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other."

Here, the deposition testimony makes it clear that Chutespan was employed to perform periodic cleaning of the building's kitchen. Also, it does not appear that Eugene was using any specialized cleaning equipment or that he was working at a significant elevation. Finally, it is evident that the kitchen cleaning was "unrelated to any ongoing construction, renovation, painting, alteration or repair project." Thus, it is clear that, as a matter of law, Chutespan's activity constituted "routine maintenance" that is outside the ambit of Labor Law § 240 (1). Eugene has not advanced any legal support for his argument that "industrial deep cleaning" was an activity that the Legislature intended to be covered by the protection of the statute. Therefore, the court rejects Eugene's argument and dismisses plaintiff's Labor Law § 240 (1) claim. Thus, the court need not reach defendants' alternative arguments for dismissal of that claim on the grounds that: 1) Eugene's accident did not involve a "gravity-related risk," or 2) Eugene has not established proximate causation.

Defendants next argue that Eugene's Labor Law § 241 (6) claim must be dismissed because he was not injured while performing "construction, demolition or excavation" work. *See* notice of motion, Prezioso affirmation, ¶¶ 61-65. Defendants further argue, in any event, that Eugene has failed to cite any Industrial Code provisions to support his Labor Law § 241 (6)

claim. *Id.* In his opposition papers, Eugene responds to the latter argument, but ignores the former. *See* Roth affirmation in opposition, ¶¶ 54-65. Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors 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). "The legislative intent of section 241 (6) is to ensure the safety of workers at construction sites." *Morris v Pavarini Constr.*, 22 NY3d 668, 673 (2014), *citing Nagel v. D & R Realty Corp.*, 99 NY2d 98, 102 (2002) ("That the Legislature sought to protect workers from industrial accidents specifically in connection with construction, demolition or excavation work is, therefore, patent"). Here, it is clear from Eugene's silence that he concedes that he was *not* engaged in "construction, demolition or excavation work" at the time of his injury. Therefore, plaintiff is not entitled to the protection of Labor Law § 241 (6), and his claim under that statute is dismissed, as a matter of law.

Finally, defendants argue that Eugene's common-law negligence and Labor Law § 200 claims should be dismissed because they are not supported by any cognizable legal theory. *See* notice of motion Prezioso affirmation, ¶¶ 66-75. It is well settled that Labor Law § 200 is the statutory codification of the common-law duty that is imposed on owners and/or general contractors to provide construction workers with a safe work site. *See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 (1st Dept 2008), citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). Thus, the two causes of action are, for all intents and purposes, interchangeable.

Furthermore, Labor Law § 200 claims based on cleaning activity have been found to be viable; thus, the fact that Eugene was not engaged in "construction work" is of no moment with respect to this statute. *See e.g. Garrett v City of New York*, 41 Misc 3d 1221(A), 2013 NY Slip Op 51788(U) (Sup Ct, Kings County 2013); *Agli v. Turner Construction Co., Inc.*, 246 AD2d 16 (1st Dept 1998).

It is also well settled that liability may attach pursuant to Labor Law § 200 either where a worker's injury arises from a condition at the workplace that was created by or known to the owner (*see e.g. Griffin v New York City Tr. Auth.*, 16 AD3d 202 [1st Dept 2005]), or where the worker's injury was caused by a defect or dangerous condition that arose from the general contractor's methods, and the contractor supervised or controlled the manner of the injured party's work. *See e.g. Roppolo v Mitsubishi Motor Sales of Am., Inc.*, 278 AD2d 149 (1st Dept 2000). Here, Eugene responds that defendants caused the dangerous condition that gave rise to his injury, and/or had actual notice of that condition, specifically, that the Benjamin's workers both created, and were actually aware of, the greasy buildup on the stove top that he was standing on while performing his cleaning duties. *See* Roth affirmation in opposition, ¶¶ 26-42. Eugene cites the deposition testimony of Ansong and Harper to support his contention that grease had built up on the stove top over the course of it being used for a day's worth of cooking. *Id.*; notice of motion, exhibits H, I, K.

Eugene also cites the holding of the Appellate Division, First Department, in *Eisenberg v Lunch Boy* (256 AD2d 93 [1st Dept 1998]) that:

> "An issue of fact exists as to whether defendant restaurant created or had constructive notice of the alleged grease spot on its floor that caused plaintiff to fall, raised by, inter alia, the deposition testimony of plaintiff and his co-worker that the floor was greasy and slippery, and the deposition testimony of defendant's

> manager that persons making daily deliveries of cooking oils, and kitchen employees working with cooking oils, both commonly traversed the customer area of the restaurant [internal citation omitted]."

Id. at 93; *see also Frazier v MM Jimbo's, Inc.*, 2012 WL 9570510 (Trial Order) (Sup Ct NY County 2012) (when the plaintiff raises a triable issue of fact as to whether the defendants created the greasy condition that led to his fall, the burden of proof shifts to the defendants to show that they did not create or have notice of that condition).

Here, the deposition testimony that Eugene cites (including his own) would certainly permit a finding that a greasy condition existed on the stove top. The court notes that Eugene did not state that he cleaned the stove top before he ascended it to clean the upper grease hood, and all of the testimony indicates that Harper used the deep fryer attached to the stove to cook an order of french fries during the time that Eugene was engaged in cleaning. Nevertheless, in their reply papers, defendants argue that their duty of care to Eugene did not "extend to hazards which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the workers age, intelligence and experience." *See* Prezioso reply affirmation, ¶ 49. Defendants do accurately cite the law for this proposition. *See e.g. Bombero v NAB Const. Corp.*, 10 AD3d 170 (1st Dept 2004). Defendants argue that the greasy condition on the stove top was both inherent and readily observable, and that Eugene actually knew about it, both because he observed it himself and because Bloomer told him about it. *Id.*, ¶ 50. Certainly Bloomer did state that he warned Eugene about the fact that the deep fryer had been used while he was taking his cigarette break, and Harper stated that Eugene had asked for and been given french fries from the fryer before he took his break. *See* notice of motion, exhibits E, K. However, Eugene did not mention either of these claims in his

own deposition testimony, and indicated that he was unaware that the fryer had been used while he was out. *Id.*, exhibit B, 135-140. Therefore, there is a conflict in the instant deposition testimonies. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002). As such it would be inappropriate to dismiss Eugene's common-law negligence and Labor Law § 200 claims at this juncture, as a matter of law. Therefore, the court denies so much of defendants' motion as seeks this relief. Accordingly, defendants' motion is granted in part and denied in part.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants the Benjamin Hotel and Denihan Ownership Company, LLC, d/b/a Denihan Hospitality Group is granted solely to the extent that the third and fourth causes of action in the instant complaint are hereby dismissed as against said defendants, but is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

ORDERED that the balance of this action shall continue.

Dated: New York, New York
July 10, 2014

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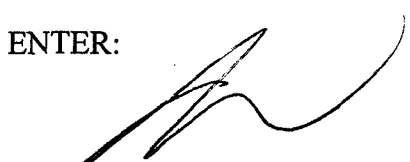

Hon. Doris Ling-Cohan, J.S.C.