

**Keener v Cinalta Constr. Corp.**

2014 NY Slip Op 32069(U)

July 30, 2014

Supreme Court, Suffolk County

Docket Number: 10-27284

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 10-22-13 (#002)  
MOTION DATE 5-13-14 (#003)  
ADJ. DATE 5-13-14  
Mot. Seq. # 002 - MG  
# 003 - MotD; CASEDISP

-----X  
KEVIN KEENER and EILEEN KEENER,  
Plaintiffs,

- against -

CINALTA CONSTRUCTION CORP.,  
Defendant.  
-----X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; and this cross motion to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 16; Answering Affidavits and supporting papers 17 - 18; 19 - 21; Replying Affidavits and supporting papers 22 - 23; 24 - 25; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant Cinalta Construction Corp. for summary judgment dismissing the complaint against it is granted; and it is

**ORDERED** that the cross motion by plaintiff Kevin Keener for, inter alia, leave to submit a supplemental affirmation in opposition to the motion is granted to the extent indicated herein, and is otherwise denied.

Plaintiff Kevin Keener commenced this action to recover damages for personal injuries he allegedly sustained on October 30, 2009, while working on the installation of a center median on the roadway located between 94th Street and 95th Street in Manhattan, New York. The installation of the center median was a part of a project by the Metropolitan Transit Authority ("MTA") to rehabilitate the 96th Street subway express train station. The general contractor for the project was defendant Cinalta Construction Corp. ("Cinalta"), which hired plaintiff's employer, Triumph Construction Corp., as a subcontractor to perform,

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among other things, the demolition and renovation of the center median. At the time of the accident, plaintiff was attempting to complete the installation of a wooden whaler used to shore the concrete retaining wall of the median. Plaintiff allegedly injured himself when he attempted to step down into a trench that had been excavated in preparation for the work and stumbled on a chunk of asphalt that had crumbled from the edge of the roadway. As a result, plaintiff's foot became lodged between the whaler and the chunk of asphalt, and he injured his right knee when he twisted his body to regain his balance. By way of his bill of particulars, plaintiff alleges causes of action against defendant based on common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff's wife, Eileen Keener, for damages related to loss of services and the payment of medical expenses.

Cinalta now moves for summary judgment dismissing the complaint on the grounds the accident did not occur as a result of an elevated hazard, that it neither created nor had notice of the alleged dangerous condition, and that it did not have any control or supervision of plaintiff's work at the time of the accident. Cinalta further asserts that plaintiff's claim under Labor Law § 241(6) must be dismissed, as the sections of the New York Industrial Code cited by him are inapplicable under the circumstances of this case. Although plaintiff concedes that his complaint fails to state a viable claim under Labor § 240 (1), plaintiff opposes the branch of Cinalta's motion seeking dismissal of his claims under Labor Law §§ 200 and 241(6). Specifically, plaintiff argues that triable issues exist as to whether the embankment of the trench on which he was standing at the time of the accident should be considered an elevated work area and/or passage way, whether the asphalt debris on which he slipped constituted a slippery foreign substance, and, if so, whether Cinalta had actual or constructive notice of the dangerous condition, since it existed for a sufficient length of time for its site safety engineer to discover and remedy it.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]).

Initially, the Court notes that the unopposed branch of Cinalta's motion seeking dismissal of plaintiff's claims under Labor Law §240(1) is granted, as plaintiff concedes that his complaint, which alleges that he slipped down a trench and injured himself, fails to set forth a viable claim under that section of the statute (*see Finkle v A.J. Eckert Co.*, 11 AD3d 794, 783 NYS2d 110 [3d Dept 2004]; *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 [4th Dept 1998]; *Williams v White Haven Mem. Park*, 227 AD2d 923, 643 NYS2d 787 [4th Dept 1996]).

As to the branch of Cinalta's motion seeking dismissal of plaintiff's claims under Labor Law § 241 (6), that section of the statute "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, plaintiff's bill of particulars asserts violation of various provisions of the New York Industrial Code, including 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.30, 12 NYCRR 23-2.1 and Article 1926 of OSHA. It is well established that violations of OSHA standards do not provide a basis for liability under Labor Law §241(6) (see *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, *supra*; *McSweeney v Rochester Gas & Elec. Corp.*, 216 AD2d 878, 629 NYS2d 356 [4th Dept 1995]). Similarly, 12 NYCRR 23-1.5, which merely states a general standard of care, is insufficient to support a claim under that section of the statute (see *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 920 NYS2d 545 [4th Dept 2011]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]; *Wilson v Niagara Univ.*, 43 AD3d 1292, 842 NYS2d 819 [4th Dept 2007]). 12 NYCRR 23-1.30 which pertains to illumination of work areas, also is unavailing, since no claim of deficient lighting has been made and the record does not support any such inference (see *Kochman v City of New York*, 110 AD3d 477, 973 NYS2d 114 [1st Dept 2013]; *Tucker v Tishman Constr. Corp. of N. Y.*, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; *Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 821 NYS2d 178 [1st Dept 2006]). Plaintiff's claim predicated on 12 NYCRR 23-2.1 (b) fails as a matter of law, as it has been consistently held that this provision lacks the specificity required to support a cause of action under Labor Law § 241(6) (see *Longo v Long Is. R.R.*, 116 AD3d 676, 983 NYS2d 579 [2d Dept 2014]; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 866 NYS2d 227 [2d Dept 2008]). The claims made under 12 NYCRR 23-2.1(a)(1) and (2) must likewise fail, as no allegations have been made that plaintiff tripped over any stored construction equipment or material (see *Thompson v BFP 300 Madison II, LLC*, 95 AD3d 543, 943 NYS2d 515 [1st Dept 2012]; *Zamajty's v Cholewa*, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]).

Plaintiff's allegation of violations of 12 NYCRR 23-1.7 is also deficient. 12 NYCRR 23-1.7 (a) through (c) are inapplicable, as these provisions relate to overhead, falling and drowning hazards. Further, any claims made under 12 NYCRR 23-1.7 (f), (g) and (h) are similarly devoid of merit, since they regulate work areas that are oxygen deficient or contaminated, the storage of corrosive substances, and the use of vertical passages as a means of entering or exiting work areas above or below ground level. 12 NYCRR 23-1.7 (d) is not applicable, as the asphalt on which plaintiff slipped and his leg became lodged, naturally resulted from the work being performed and was not the type of "foreign substance" contemplated by the regulation (see *Kowalik v Lipschutz*, 81 AD3d 782, 917 NYS2d 251 [2d Dept 2011]; *Lech v Castle Vil. Owners Corp.*, 79 AD3d 819, 913 NYS2d 713 [2d Dept 2010]; *Cooper v Sonwil Distrib. Ctr., Inc.*, 15

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AD3d 878, 789 NYS2d 583 [4th Dept 2005]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 769 NYS2d 559 [2d Dept 2003]). Plaintiff's reliance on 12 NYCRR 23-1.7 (e) (1) and (2) is likewise misplaced, since he testified that he did not trip, and it is undisputed that his accident was not caused by any sharp projection protruding from the bottom of the trench (*see e.g. Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 959 NYS2d 146 [1st Dept 2013]).

Cinalta also met its prima facie burden on the branch of its motion seeking dismissal of plaintiff's claims under the common law and section 200 of the Labor Law. "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*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]). "To establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time before the accident to permit defendants' employees to discover and remedy it. The general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's injury" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *see Welles v New York City Housing Authority*, 284 AD2d 327, 725 NYS2d 385 [2d Dept 2001]). This "notice must be of the specific condition and of its specific location" (*Canning v Barneys N.Y.*, 289 AD2d 32, 33, 734 NYS2d 116 [1st Dept 2001]; *see also Mitchell v New York Univ.*, 12 AD3d 200, 201, 784 NYS2d 104 [1st Dept 2004] ["The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken"])

Here, Cinalta submitted evidence demonstrating that it neither created the alleged defective condition, nor had actual or constructive notice of its existence (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Gray v City of New York*, 87 AD3d 679, 928 NYS2d 759 [2d Dept 2011]; *Applegate v Long Is. Power Auth.*, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]; *compare Dowd v City of New York*, 40 AD3d 908, 837 NYS2d 668 [2d Dept 2007]). Significantly, it is undisputed that plaintiff's employer was solely responsible for the excavation and removal of debris from the trench in which plaintiff slipped and injured himself. Plaintiff's testimony also indicates that he slipped when the asphalt at the edge of trench unexpectedly crumbled, and that the chunk of asphalt on which his foot became lodged was not visible from the surface of the roadway, since it was already laying inside the trench. Plaintiff further testified that he could not tell how long the chunk of asphalt had remained in the trench prior to his accident, and that he never made any formal complaints despite his general dissatisfaction at the failure of laborers hired by his own employer to fully remove such debris.

In opposition, plaintiff failed to raise any triable issues warranting denial of the motion (*see Alvarez v Prospect Hosp., supra*; *Zuckerman v New York, supra*). It is noted that by failing to oppose the branch of Cinalta's motion seeking dismissal of his Labor Law §241(6) claims pursuant to alleged violations of 12

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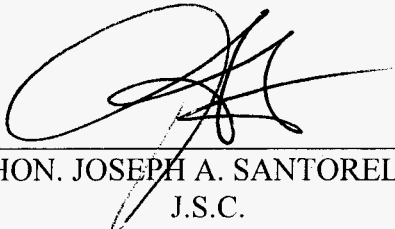
NYCRR 23-1.5, 12 NYCRR 23-1.30, 12 NYCRR 23-2.1 and Article 1926 of the OSHA regulations in his opposition papers, those claims have been deemed abandoned (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, *supra*; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Plaintiff also failed to raise a triable issue as to the applicability of 12 NYCRR 23-1.7 (d), as the asphalt on which he slipped and his foot became lodged was not one of the slippery substances enumerated in the regulation and could not be deemed a “foreign substance,” since it naturally resulted from the work of plaintiff and his co-workers (*see Kowalik v Lipschutz*, *supra*; *Lech v Castle Vil. Owners Corp.*, *supra*; compare *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 959 NYS2d 491 [1st Dept 2013]). Furthermore, plaintiff’s conclusory assertions that the alleged defect was visible and apparent for a sufficient time to permit Cinalta’s worksite safety engineer to discover and remedy it is belied by his own deposition testimony that the asphalt was laying inside the trench and he could not tell how long it remained there prior to his accident (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v New York*, *supra*).

As to the cross motion by plaintiff for, inter alia, leave to submit a supplemental affidavit in opposition to the motion, while it is true that such submissions generally should not be considered by the court (*see McMullin v Walker*, 68 AD3d 943, 944, 892 NYS2d 128 [2d Dept 2009]; *Boockvor v Fischer*, 56 AD3d 405, 406, 866 NYS2d 767 [2d Dept 2008]), they may be considered, where, as here, the original movant is given the opportunity to respond and does so (*see Hanscom v Goldman*, 109 AD3d 964, 972 NYS2d 76 [2d Dept 2013]; *Sally v Keyspan Energy Corp.*, 106 AD3d 894, 896, 966 NYS2d 133 [2d Dept 2013]). Here, a review of the affidavit submitted by plaintiff reveals that it merely reiterates assertions already contained in the transcripts of his deposition testimony, and fails, therefore, to raise any triable issue warranting denial of Cinalta’s motion. Furthermore, the branch of plaintiff’s cross motion to amend his pleadings to assert a violation of Industrial Code 12 NYCRR 23-4.2 (g) is denied, since the proposed amendment is palpably insufficient and devoid of merit (*see CPLR 3025(b)*; *Longo v Long Island Railroad*, 116 AD3d 676, 983 NYS2d 579 [2d Dept 2014]; *Lucido v Mancuso*, 49 AD3d 220, 238, 851 NYS2d 238 [2d Dept 2008]). 12 NYCRR 23-4.2 (g), which mandates sheeting and shoring standards for trenches or excavations five feet or more in depth, is inapplicable under the circumstances of this case, as plaintiff’s own testimony indicates that the trench in which he injured himself measured less than three feet in depth (*see Natale v City of New York*, 33 AD3d 772, 822 NYS2d 771 [2d Dept 2006]; *Garcia v Silver Oak United States*, 298 AD2d 555, 748 NYS2d 674 [2d Dept 2002]; *Magnuson v Syosset Cmty. Hosp.*, 283 AD2d 404, 725 NYS2d 55 [2d Dept 2001]).

Accordingly, the motion by defendant Cinalta Construction Corp. for summary judgment dismissing plaintiff’s complaint against it is granted.

Dated: \_\_\_\_\_

**JUL 30 2014**

  
 HON. JOSEPH A. SANTORELLI  
 J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION