

Keen v Majestic Realty Assoc., LLC

2014 NY Slip Op 32394(U)

September 9, 2014

Sup Ct, New York County

Docket Number: 153809/12

Judge: Joan M. Kenney

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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
Patrick Keen,

Plaintiffs,

-against-

Majestic Realty Associates, LLC,
Challenger Properties, LLC and New York
SMSA Limited Partnership d/b/a Verizon Wireless,

Defendants.

-----X
Majestic Realty Associates, LLC,
Challenger Properties, LLC,

Third-Party Plaintiffs,

-against-

New York SMSA Limited Partnership
d/b/a Verizon Wireless,

Third-Party Defendant.

-----X
New York SMSA Limited Partnership
d/b/a Verizon Wireless,

Second Third-Party Plaintiff,

-against-

Red Wing Electric, LLC,

Second Third-Party Defendant.

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

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

Papers
Notice of Motion, Affirmation, Exhibits, and Memo of Law

DECISION AND ORDER
Index Number: 153809/12
Motion Seq. No.: 004

Index Number: 590222/13

Numbered
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In this personal injury action, defendants/third-party plaintiffs, Majestic Realty Associates LLC (Majestic), and Challenger Properties, LLC (Challenger) (collectively movants), move for an Order, pursuant to CPLR 3212, dismissing the complaint in its entirety. In the alternative, defendants/third-party plaintiffs move for an Order, pursuant to CPLR §3212, granting them judgment on its contractual indemnification claim against defendant/third-party defendant, New York SMSA Limited Partnership d/b/a Verizon Wireless (Verizon).

Factual Background

On November 7, 2009, while working on the roof of the building located at 226 East 54th Street, New York, NY (the premises), plaintiff Patrick Keen (Keen), allegedly fell on one of the steps leading to and from a steel platform housing Verizon's cellular equipment (the accident) and sustained injuries. Plaintiff was employed by Red Wing Electric, LLC (Red Wing) as a cell phone tower technician. Red Wing was hired by Verizon. Majestic is the present owner of the premises. Verizon leased the roof of the building for its equipment.

On the evening of the accident, plaintiff was on the roof upgrading Verizon's equipment, which included removing and installing antennas, combiners, jumpers, and coaxial cables. The equipment was installed on a steel platform, which was accessible by a steel staircase consisting of five steps. As he was descending the stairs, plaintiff fell on the first step. Plaintiff testified that the step was missing certain screws that went into clamps that held the treads together.

Plaintiff's supervisor, Mike McCormick, would notify plaintiff where he would be

working and what particular tasks were to be performed on a particular day. Tony Oross was plaintiff's foreman on the date of the accident, and instructed plaintiff and other members of the technician crew which antennas to move, replaces, or install. No one other than McCormick and Oross supervised or directed plaintiff's work.

The subject building is managed by Empire Management. Ramin Shalom, on behalf of Empire Management, testified that Verizon was responsible for the maintenance of the subject platform, equipment, and stairs. He further testified that while he occasionally conducted general inspections of the roof, he did not inspect Verizon's equipment or the steps. He never walked on the stairs or platform. Mr. Shalom also testified that the building's superintendent never walked on the steps.

Verizon's principal engineer/construction manager, Michael Quaglietta, testified that Verizon does indeed own the subject platform and stairs, and that Verizon was responsible for the maintenance, inspection, and repair of the platform and stairs. He further testified that Verizon's cell technicians would inspect the subject platform and stairs every month or two. He further testified that the building had nothing to do with the platform or stairs, and that Red Wing contracted with Verizon and not the building to perform the work at issue.

Arguments

Moving defendants/third-party plaintiffs claim that they cannot be held liable under Labor Law §240(1), 241(6), and 200 because: plaintiff was not engaged in the typed of work that is protected by the labor law; plaintiffs failed to allege specific violations of the Industrial Code; and movants did not control or supervise plaintiff's work, nor did they have actual or constructive notice of the alleged defect. Movants also contend that Verizon must indemnify

them in accordance with the parties' lease agreement.

Plaintiff argues that he is entitled to summary judgment on its Labor Law §240(1) and 246(1) claims, and that moving defendants' motion should be denied in its entirety because there exist triable issues of fact.

Verizon contends that it is not contractually obligated to indemnify moving defendants/third-party plaintiffs because Majestic never signed the pertinent lease and Challenger's relationship to the property is unclear because it was no longer the owner at the time of the accident.

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 §240(1)

Labor Law §240(1) provides that:

“[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish 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 aim of the statute is to protect workers by imposing liability for the failure to supply required safety devices at construction sites upon those best situated to mandate and implement their use (see *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d, 513, 520). While the statute is to be liberally construed so as to accomplish this purpose, injuries from hazards other than those falling within the context are not compensable thereunder, even if proximately caused by the lack of required safety devices (see *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509; *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 319; *Quigley v. Thatcher*, 207 N.Y. 66, 68). The Court of Appeals has construed Labor Law §240(1) as applying to “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). However, “the protections of Labor Law §240(1) do not apply to every worker who falls and is injured at a construction site... Among other prerequisites, a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device.”

A permanent staircase, which is not designed as a safety device to afford protection from an elevation-related risk, is outside the coverage of Labor Law §240(1). *See Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285, 2008 WL 2344634 (1st Dept 2008); *Griffin v. New York City Transit Authority*, 16 A.D.3d 202 (1st Dept 2005); *Norton v. Park Plaza Owners Corp.*, 263 A.D.2d 531, 694 N.Y.S.2d 411 (1999). In the present case, the stairway in question is a permanently installed structure that served a passageway from the roof to the platform that housed Verizon's equipment. The staircase is a normal appurtenance to the building and not designed as a safety device to protect plaintiff from an elevation-related risk. (*See id.* at 532). While plaintiff argues that he is a covered person performing a covered activity under the labor law, this argument does not apply since a permanent staircase is outside the protection afforded by Labor Law §240(1).

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]).

Although a plaintiff asserting a Labor Law §241(6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim. (*Walker v. Metro-N. Commuter R.R.*, 11 A.D.3d 339, 341, 783 N.Y.S.2d 362 [1st Dept 2004]). A court may consider an allegation of a specific statutory violation raised for the first time in opposition to a motion for summary judgment where the allegation raises no new theories of liability and causes no prejudice to defendants (*see Kelleir v. Supreme Indus. Park*, 293 A.D.2d 513, 514, 740 N.Y.S. 2d 398 [2d Dept 2002]). Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position. (*Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365, 841 N.Y.S.2d 277 [1st Dept 2007]).

Although plaintiff alleges violations of Industrial Code Section 23-1.7(d) and 23-1.7(e) for the first time in its opposition to defendants’ motion for summary judgment, this Court will consider both.

Section 23-1.7(d), relating to slippery conditions, is inapplicable to the facts of this case. This section requires that “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.” This provision has been held to be sufficiently specific to support a Labor Law §241(6) claim, and staircases have been held to be passageways within the meaning of the Industrial Code. *See Conklin v. Triborough Bridge and Tunnel Authority*, 49 A.D.3d 320 [1st Dept. 2008]. However, the section also states that “ice, snow, water, grease, and any foreign substance which may cause slippery footing shall be removed, sanded, or covered to provide safe footing.” Plaintiff testified that the step on the stairway was loose, causing him to lose his footing and trip. Because none of the aforementioned foreign substances are claimed to be the cause of plaintiff’s accident, the section is not applicable to this action. (*See Lewis v. Lower East Side Tenement Museum*, 40 A.D.3d 438 [1st Dept.]).

Section 23-1.7(e), relating to tripping hazards in passageways or work areas caused by the accumulation of dirt, debris, or obstructions, is also inapplicable to the facts of this case. Plaintiff does not allege that he tripped on an accumulation of dirt or debris, scattered tools, or sharp projections, thus subsection (e)(1) is not applicable. (*See Cappabianca v. Skanska USA Bldg., Inc.*, 99 A.D.3d 139, 147, 950 N.Y.S.2d 35 [2012]; *Alvia v. Teman Elec. Contr., Inc.*, 287 A.D.2d 421, 423 [2d Dept 2001]). Subsection (e)(2) is also not applicable because staircases are not “working areas” with the meaning of the regulation. (*See Chuqui v. Church of St. Margaret Mary*, 39 A.D.3d 397 [1st Dept 2007]).

Labor Law §200 and Common Law Negligence

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."

"Labor Law §200 codifies the common-law duty to maintain a safe work site"

(*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046 [2d Dept 2012]). There are two distinct standards applicable to Labor Law §200 cases, depending on the kind of situation involved: whether the injuries resulted from a dangerous condition, or from the means and methods by which the work was done (*see e.g. Raffa v City of New York*, 100 AD3d 558, 955 N.Y.S.2d 9 [2012]).

"Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident [interior quotation marks and citations omitted]" (*Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1195 [2d Dept 2012]). "To provide 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 a defendant's employees to discover and remedy it" (*Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 686 [2d Dept 2011]; *see also White v Village of Port Chester*, 92 AD3d 872, 876 [2d Dept 2012] [owner liable if "had actual or constructive notice of (dangerous or defective condition), and failed to remedy the condition within a reasonable amount of time"]). In addition, "constructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

In this case, plaintiff is alleging a violation of Labor Law §200 based upon the existence of a dangerous condition. There is no evidence in the record that movants had actual notice of the loose step. The deposition testimony of Ramin Shalom, the building manager, demonstrates that while he had access to the roof and occasionally conducted general inspections of the roof, he never inspected or walked on the stairs, and thus had no actual notice of the defect. Defendants have also established that they did not have constructive notice of the defect because they did not inspect Verizon's staircase and platform. Plaintiffs argue that as landowners, defendants had a duty to inspect and maintain the premises in a reasonably safe condition. However, a landlord is not generally liable for negligence with respect to the condition of the property after its transfer of possession and control to a tenant, unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provisions (*Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326, 642 N.Y.S.2d 897 [1996], *lv. denied* 88 N.Y.2d 814, 651 N.Y.S.2d 16, 673 N.E.2d 1243 [1996]; *see McDonald v. Riverbay Corp.*, 308 A.D.2d 345, 764 N.Y.S.2d 185 [2003]; *Quinones v. 27 Third City King Rest.*, 198 A.D.2d 23, 603 N.Y.S.2d 130 [1993]). Here, the lease agreement between building owner and Verizon imposes no obligation on the owner to make repairs or maintain the demised area in question. The lease states that the lessee (Verizon) shall maintain the property in a reasonable condition, and further emphasizes this obligation by stating that the lessor (Majestic/Challenger) shall maintain the property, *excluding* the premises, in good condition. Under these circumstances, the building owner cannot be liable for Verizon's failure to maintain the demised premises in a reasonable condition.

Indemnification

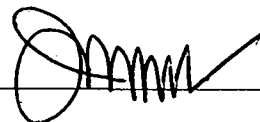
That part of defendants/third-party plaintiffs' motion seeking summary judgment on its contractual indemnification claims against defendant/third-party defendant Verizon is denied as moot. This Court is granting movants Majestic and Challengers' motion for summary judgment and the matter is dismissed against them. Accordingly, it is

ORDERED, that defendants Majestic Realty Associates, LLC, and Challenger Properties, LLC's motion to dismiss, pursuant to CPLR 3212, is granted, and the alternative relief sought for contractual indemnification is denied, as moot; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendants Majestic Realty Associates, LLC, and Challenger Properties, LLC, and against plaintiff, dismissing this action as against these movants.

Dated: September 9, 2014

ENTER:

A handwritten signature in black ink, appearing to read 'JMK', is written over a horizontal line.

Joan M. Kenney, J.S.C.