Caminito v Douglaston Dev., LLC
2015 NY Slip Op 31744(U)
April 23, 2015
Supreme Court, New York County
Docket Number: 105387/11
Judge: Debra A. James
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.

[* 1]

BA 4/28/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59

Index Number : 105387/2011
CAMINITO, VICTOR
vs
DOUGLASTON DEVELOPMENT
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 ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

granted in accordance with attached

Memorandum Decision and Order.

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

FILED
APR 29 2015
NEW YORK
COUNTY CLERK'S OFFICE

NYS SUPREME COURT - CIVIL
GENERAL CLERK'S OFFICE
APR 28 2015
RECEIVED

Dated: APR 23 2015

[signature], J.S.C.
DEBRA A. JAMES

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

--x

VICTOR CAMINITO and CARMELA CAMINITO,

Plaintiffs, Index No.: 105387/11

-against-

DOUGLASTON DEVELOPMENT, LLC, LEVINE BUILDERS, SOR-MAL PLASTERING & CONSTRUCTION CORP., EDGE 11211 LLC, WILLIAMSBURG EDGE HOLDING LLC and WILLIAMSBURG EDGE LLC,

Defendants.

--x

FILED
APR 29 2015
NEW YORK
COUNTY CLERK'S OFFICE

Debra A. James, J.:

This is an action to recover damages for personal injuries sustained by a marble and stone setter when he tripped and fell on a metal stud while exiting a storage room off a lobby in a building under construction located at 22 North 6th Street, Brooklyn, New York (the Premises) on February 1, 2010.

Defendants Edge 11211 LLC, Williamsburg Edge Holding LLC and Williamsburg Edge LLC (collectively, the Williamsburg defendants), Douglaston Development, LLC (Douglaston), Levine Builders (Levine) and Sor-Mal Plastering & Construction Corp. (Sor-Mal) (all together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Victor Caminito (plaintiff) and Carmela Caminito's complaint against them.

BACKGROUND

On the day of the accident, the Williamsburg defendants owned the Premises where the accident occurred. Defendant

Douglaston was the developer of a project underway at the Premises for the construction of a 30-story condominium (the Project). Douglaston hired defendant Levine to serve as the Project's construction manager. Thereafter, Levine hired nonparty Port Morris Tile & Marble Corp. (Port Morris), plaintiff's employer, to furnish and install the tile work, kitchen counter-tops and exterior granite stonework for the Project. Defendant Sor-Mal served as the Project's carpentry subcontractor.

At his deposition, plaintiff testified that on the day of the accident, he was employed by Port Morris as a marble and stone setter. He described his specific duties on the day of the accident, which included laying stone in the lobby's floor and walls. At approximately 12:30 p.m., Paul Signorelli, a superintendent hired by Levine, and who plaintiff described as in charge of "running the building," instructed plaintiff to clear all of his employer's materials and equipment out of the small room (the Room), where they were being stored, because work needed to be conducted on the Room. The Room, which measured 10 feet by 15 feet, had only one means of ingress and egress.

Plaintiff testified that many of the trades at the Project also used the Room to store their equipment and materials, and that when he entered the Room, he noticed that their material was "scattered" about the Room. In addition, to his right, he

observed "a couple of metal studs on the floor, which [he] pushed to the side". He described the studs as two by fours of different lengths. He explained that the studs were of different lengths, because they were scraps. He noted that the studs "weren't neatly stacked". Plaintiff maintained that his own work did not involve the use of studs, and that he did not know who owned the studs.

Plaintiff further testified that the materials that he intended to retrieve and remove were stored against the wall to his left, on the opposite side of the room from the studs. After plaintiff pushed aside the studs, he retrieved a wheelbarrow from the doorway area. He rolled the wheelbarrow forward into the room, turned left and guided it toward the wall. Plaintiff then testified, in pertinent part, as follows:

> I loaded up my [wheelbarrow]. I started going backwards . . . there's only one entrance and exit out of the room, so I was backing up with the material, I looked back, I saw the studs were there, I took another step back and got caught up and fell on the studs.

Plaintiff explained that once his foot got caught, he had difficulty maintaining his balance due to the heavy weight of the wheelbarrow.

When asked if anyone ever directed his work at the Project, or told him what to do on a daily basis, plaintiff replied, "No one told me what to do. I was the foreman, but if there was a favor that [the Levine superintendent needed], I would help him

out ***. If there was a certain spot he needed done first". However, it was rare for the Levine superintendent to ask plaintiff to do him a favor.

Anthony Croce, Levine's Project Manager, testified that developer Douglaston hired Levine to serve as construction manager on the Project, which entailed the new construction of a 30-story condominium. He explained that Levine's field staff coordinated the work between each of the Project's trade contractors. Levine also made sure that the work of the trades was completed in conformance with the blueprints and specifications in a timely fashion. Port Morris was hired to furnish and install all of the tile work at the Premises. Croce testified that the equipment and material storage areas were coordinated between Levine's superintendent, Paul Signorelli, and the individual trades.

Paul Signorelli testified that, as Levine's superintendent, he coordinated the trades, maintained site logistics and served as the overall manager of the Project. He testified that a significant number of trades were working at the Premises on the day of the accident, and that one of the three rooms located off the lobby, a day room, was being used to store equipment and materials. He explained that, as per his policy, "[i]f a trade occupied a room for storing material, they were required to maintain the room and when they [completed their work], they were

required to remove their materials from the room".

Notably, Signorelli testified, "[T]ypically we do not put material in a room that's being worked on [or that we plan on working on] because when we store material, it's for security reasons and to protect it". Signorelli also maintained that Port Morris was an independent contractor, and that Levine did not supervise its work on the Project.

DISCUSSION

"'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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). 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]).

Defendants move for dismissal of the Labor Law § 240 (1)

claim against them. As plaintiffs do not oppose that part of defendants' motion which seeks to dismiss the Labor Law § 240 (1) claim, defendants are entitled to dismissal of the same.

Defendants move for dismissal of plaintiffs' Labor Law § 241 (6) claim against them. Labor Law § 241 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, [and] 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]).

As owners of the premises where the accident occurred, the Williamsburg defendants and Douglaston may be liable for plaintiff's injuries under Labor Law § 241 (6). However, it must be determined whether defendant Levine, as construction manager, and defendant Sor-Mal, as carpentry subcontractor, may also be liable under the statute as agents of the owner. While

a construction manager of a work site is generally not

> responsible for injuries under Labor Law §§ 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury

(Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). In addition, "[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (Russin v Louis N. Picciano & Son, 54 NY2d at 318).

Here, plaintiff's injury was brought about as a result of the sloppy storage of the studs at the site. That said, no evidence has been put forth whatsoever to establish that either Levine or Sol-Mar were responsible in any way for keeping the Room or the studs in order. Thus, as they are not proper Labor Law defendants, Levine and Sol-Mar are entitled to dismissal of the Labor Law § 241 (6) claim against them.

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 plaintiffs list multiple violations of the Industrial Code in their bill of particulars, with the exception of Industrial Code sections 23-1.7 (e) (2) and 23-2.1 (a) (1), plaintiffs do not address these Industrial Code violations in their opposition papers, and, thus, they are deemed abandoned (*see* Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; Musillo v Marist Coll., 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing the parts of plaintiffs' Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (e) (2)

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see* Rodriguez v DRLD Dev., Corp., 109 AD3d 409, 410 [1st Dept 2013]).

Industrial Code 12 NYCRR 23-1.7 (e) (2) provides, in pertinent part:

(e) Tripping and other hazards

* * *

> (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 . .

> . insofar as may be consistent with the work being performed.

In opposition to defendants' motion, plaintiffs argue that section 23-1.7 (e) (2) applies to the facts of this case, because plaintiff was injured when he tripped on scattered material that was not integral to the work (*see* Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201, 202 [1st Dept 2008] [section 23-1.7 (e) (2) was properly sustained against the defendant, "because the debris was not an integral part of the work being performed by the plaintiff at the time of the accident"]; Singh v Young Manor, *Inc.*, 23 AD3d 249, 249 [1st Dept 2005]).[1] In addition, plaintiffs argue that the Room was a "working area" for the purposes of the rule, because, at the time of the accident, plaintiff was "working," in that he was removing his employer's materials, equipment and tools from the Room.

However, as defendants argue, section 23-1.7 (e) (2) does not apply to this case, because at the time of the accident, the Room was being used solely as a storage room, and storage rooms have been held not to fall within the purview of this provision (see Conway v Beth Israel Med. Ctr., 262 AD2d 345, 346 [2d Dept 1999] [section 23-1.7 (e) (2) was not applicable to the facts of

---

[1]The court notes that defendants do not argue that because the stud that plaintiff tripped on was integral to the work that plaintiff was performing at the time of the accident section 23-1.7 (e) (2) is inapplicable to this case.

the case, because the "storeroom [where the accident occurred] was not a 'working area'"]; Dacchille v Metropolitan Life Ins. Co., 262 AD2d 149, 149 [1st Dept 1999] [section 23-1.7 (e) (2) was inapplicable where the plaintiff was injured while loading a heavy reel of cable wire onto a dolly, because the wire mesh storage area from which he retrieved the reel was not a "working area"]).

Thus, defendants are entitled to dismissal of that part of plaintiffs' Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (2).

Industrial Code 12 NYCRR 23-2.1 (a) (1)

Initially, section 23-2.1 (a) (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see* Rodriguez v DRLD Dev., Corp., 109 AD3d at 410; Dacchille v Metropolitan Life Ins. Co., 262 AD2d at 149).

Industrial Code 12 NYCRR 23-2.1 (a) states:

> (a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Here, section 23-2.1 (a) (1) does not apply to the facts of this case, because the Room, which was small in size and which had only one means of ingress and egress, was not a "passageway, walkway, stairway or other thoroughfare," as the rule requires

(see Burkoski v Structure Tone, Inc., 40 AD3d 378, 382 [1st Dept 2007] [section 23-2.1 (a) (1) inapplicable where the room where the accident occurred measured only 18 feet by 20 feet, and thus, it was not a passageway]; Militello v 45 W. 36th St. Realty Corp., 15 AD3d 158, 159-160 [1st Dept 2005] [where plaintiff injured his hand when he tripped on a pipe protruding from the base of an uninstalled radiator situated in the middle of the room where he was installing drywall, section 23-2.1 (a) (1) was inapplicable, because said room was not a passageway]; Dacchille v Metropolitan Life Ins. Co., 262 AD2d at 149]).

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-2.1 (a) (1).

Defendants also move for dismissal of the 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' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 316-317). 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]).

It is well settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 311 [1st

Dept 2007]; Burkoski v Structure Tone, Inc., 40 AD3d at 381 [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; Smith v 499 Fashion Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]; Natale v City of New York, 33 AD3d 772, 773 [2d Dept 2006]).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (see 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 the 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]).

Here, plaintiff was injured when he tripped on one of the studs which was scattered about the floor of the Room. As such, the instant factual scenario clearly shows that the accident occurred, not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through

negligent acts of the subcontractor occurring as a detail of the work'" (Lombardi v Stout, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]; see also Ortega v Puccia, 57 AD3d at 62).

As explained in Cappabianca v Skanska USA Bldg. Inc. (99 AD3d 139, 144-145 [1st Dept 2012]), a means and methods analysis is applied when an allegedly dangerous condition on the premises directly arises from the manner and means of the work. In Cappabianca, the plaintiff's work at the job site consisted of cutting bricks with a stationary wet saw. The saw and its stand stood on a wooden pallet which sat on a concrete floor (id. at 142). When in use, a wet saw sprays water on bricks in order to cool and lubricate them, also reducing dust and flying particles (*id.*). According to the plaintiff's testimony, when the saw that he was using malfunctioned, it sprayed water onto the floor, making it slippery (*id.* at 142-143). Thereafter, after cutting a brick and turning to place it on an adjacent pallet, the pallet upon which the plaintiff was standing "shifted on the slippery floor as he turned, causing him to lose his footing" and fall (*id.* at 143).

Notably, the Cappabianca Court held that "all of the contributing causes of the accident directly arose from the manner and means in which [the plaintiff] was performing his

work" (*id.* at 144). Thus, "[s]ince the City defendants and Skanska did not control the work that caused the accident, the section 200 and related negligence claims were properly dismissed" (*id.*). The Cappabianca Court reasoned:

> "Since defendants could not control the activity that continuously produced the water, namely, the operation of the wet saw, they lacked any ability to correct the unsafe condition and thus were not liable under section 200 or for negligence [citation omitted]"

(*id.* at 146).

Citing Cappabianca, in Dalanna v City of New York (308 AD2d 400, 400 [1st Dept 2003]), the First Department affirmed the dismissal of a Labor Law § 200 claim which was brought by a plumber who was injured when he tripped over a bolt that protruded from a concrete slab. Prior to the day of the accident, a number of bolts had been used to temporarily anchor a tank to the slab before its permanent installation at another location. After the tank was removed, the plaintiff's employer was supposed to have cut all the bolts level with the surrounding surface. However, the plaintiff's employer neglected to cut the bolt on which the plaintiff tripped.

The Court in Dalanna determined that the protruding bolt was not a defect inherent in the property, but instead, its presence was the result of the manner in which the plaintiff's employer performed its work. Therefore, even though the owner and construction manager had constructive notice of the bolt, they

could be held liable under Labor Law § 200 only if they had exercised supervisory control over the employer's work (*id.*).

Likewise, in the instant case, the stud that caused plaintiff to trip was not the result of a defect inherent in the property; rather, it was the result of the manner in which the stud was stored (see McCormick v 257 W. Genesee, LLC, 78 AD3d 1581, 1582 [4th Dept 2010] [tripping hazard created by pin, which was stored on a wooden form and was to be inserted into a form to hold it together during a concrete pour, was created by the manner in which the plaintiff's employer performed its work, rather than an unsafe premises condition]). Therefore, in order to find defendants liable under Labor Law § 200, it must be shown that defendants exercised some supervisory control over the way that the stud was stored.

Here, there is absolutely no evidence in the record to indicate that Douglaston, the Williamsburg defendants, Levine or Sol-Mar supervised the means and methods by which subject stud was stored. In addition, although Levine's superintendent may have instructed plaintiff to remove his employer's materials from the Room, there is no evidence in the record to indicate that Levine supervised or directed plaintiff's work. In fact, Signorelli specifically testified that Levine did not supervise plaintiff's work, and plaintiff testified that "no one told [him] what to do". Thus, defendants are entitled to dismissal of the

common-law negligence and Labor Law § 200 claims against them.

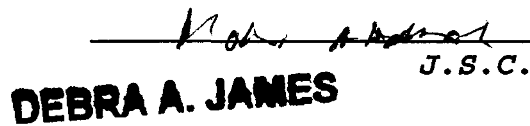
ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Douglaston Development, LLC, Levine Builders, Sor-Mal Plastering & Construction Corp., Edge 11211 LLC, Williamsburg Edge Holding LLC and Williamsburg Edge LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: April 23, 2015

ENTER:



J.S.C.

DEBRA A. JAMES

FILED
APR 29 2015
NEW YORK
COUNTY CLERK'S OFFICE

[* 19]