

<b>Velez v City of New York</b>
2015 NY Slip Op 32527(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 402672/2012
Judge: Donna M. Mills
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 58**

GREGORY VELEZ,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY  
SCHOOL CONSTRUCTION AUTHORITY and  
NYC DEPARTMENT OF EDUCATION,

Defendants.

INDEX NO. 402672/2012  
Motion Sequence 001  
**DECISION & ORDER**

**FILED**

FEB 04 2015

NEW YORK  
COUNTY CLERKS OFFICE

**DONNA MILLS, J.:**

In this personal injury action, defendants City of New York (the City), New York City School Construction Authority (SCA) and New York City Department of Education (DOE), sued here as NYC Department of Education, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

**Factual Background**

On December 19, 2011, plaintiff Gregory Velez (Velez), a laborer employed by Structural Concrete & Masonry (SCM), was allegedly injured at a job site at 645 Main Street, Roosevelt Island, New York County. The location was a property owned, managed and/or operated by defendants.

Velez commenced an action in Queens County, on May 14, 2012, asserting a claim of negligence, and violations of Labor Law §§ 200, 240 and 241 (6). Motion, exhibit B. The action was transferred to New York County on or about December 18, 2012.

**Testimony**

Velez testified at a statutory 50-h hearing on May 4, 2012, and at an examination before trial (EBT) on June 6, 2013, respectively, Motion, exhibit D (Velez I tr) and exhibit E (Velez II tr).

Velez said that he started working for SCM in November 2011, and the project on Roosevelt Island was his first job with them. Velez I tr at 8-9. He normally worked five days a week, on an evening shift, 3:00 P.M. to 12:30 A.M. *Id.* at 9-10. Two SCM foremen directed his work. *Id.* at 10-11. He stated that he was one of three or four SCM laborers at the site. Velez II tr at 26. He said that SCM provided him with the supplies and materials used in his work. Velez I tr at 11.

Velez testified that he never spoke to any of defendants' employees at the project site. *Id.* at 17. On the day of the accident, one of his foremen instructed him to help erect a scaffold on a higher roof by bringing planks up from the lower roof. *Id.* at 18-19. He estimated that the planks were seven feet by two feet, two to three inches thick. Velez II tr at 56-57. He said that he had received training for erecting scaffolds. Velez I tr at 19.

The accident occurred on the lower roof, at about 7 P.M., while Velez was alone. *Id.* at 21. He had worked on the lower roof for several weeks (Velez I tr at 22), but never in the section at the rear where the planks were stacked (Velez II tr at 81). He recalled that it was a cold, cloudy night, with very little moonlight in the area where he was working, but with enough light to see the planks that he came to move. Velez I tr at 21-22, 36. Three tall lamps, near one end of the lower roof, illuminated the scene. *Id.* at 57. He said that he brought planks from the lower roof to the upper roof a few times before the accident. *Id.* at 25. The two areas were separated by a short staircase having eight steps. Velez II tr at 52. He took the planks from a stack four or five feet high. Velez I tr at 38. He stated that he took the same path on each trip. *Id.* at 39.

At the 50-h hearing, Velez stated that he was carrying two planks when the accident occurred. Velez I tr at 28. At his EBT, he said that he was carrying one plank on his right shoulder. Velez II tr at 76. He said that he walked “about four to five feet [before he tripped]. Maybe a little more.” *Id.* at 79. At the 50-h hearing, Velez recalled that he took about 10 steps before he tripped over a drain cap, in an area where he had not been before. Velez I tr at 29-30. He described that drain cap as “[a] cap that sticks out from the roof just to allow the water to go down so it doesn’t accumulate on the roof.” *Id.* at 30. He said that the drain cap was made of steel. *Id.* at 31.

His testimony was inconsistent about seeing that particular drain cap before he allegedly tripped over it, or any others on this roof. At his 50-h hearing, he said that he never saw any drain caps at this job site. *Id.* at 31-32. However, at his EBT, Velez said that he had seen three or four similar drain caps on the lower roof and the upper roof. Velez II tr at 71. He then stated that “they were screwed on or welded on,” and in place when he first arrived to work at the site. *Id.* at 72-73. Later, he said that he saw drain caps on the upper roof only, not on the lower roof, where the incident occurred. *Id.* at 75-76.

He estimated that the drain cap was about three and a half to four inches high, but he could not recall its length. Velez I tr at 33. He said that he identified it as a drain cap after he fell. *Id.* He used his cell phone to shine a light on the drain cap, because the ground area, unlike the general surroundings, “was pitch black.” *Id.* at 54. He saw no water, snow, leaves, debris or construction tools in the immediate vicinity. Velez II tr at 182. He said that the drain cap was black. *Id.* at 70. He never complained to anyone about the lighting on the roofs. *Id.* at 36. His cell phone was unable to take photographs, and, days later, when he separately asked each shop steward to take photographs of the drain cap, they refused, for fear of reprisals, Velez claimed.

Velez I at 55, 68-70. When he asked one of the shop stewards on the telephone if he could come to the job site to take photographs, he was refused. Velez II tr at 174.

Velez testified that two shop stewards asked him to continue working after the accident, but he was unable to endure the pain. Velez I tr at 41-42. One of the shop stewards then called an ambulance and Velez was taken to a hospital. *Id.* at 47-48. His left knee was x-rayed, he was given a prescription for pain medication and he was discharged. *Id.* at 49-50. When he returned two weeks later for a followup, he said that knee surgery was recommended to him. *Id.* at 51. He visited his own orthopedist subsequently, who performed surgery on Velez's left knee sometime in 2012, after the 50-h hearing. Velez II tr 110-111. Velez said that he was still not working about 18 months after the accident. *Id.* at 17. He stated that he "can't stand up for too long, can't go up and down them narrow stairways . . . [and that he] wouldn't be able the [sic] lift heavy equipment or walk with it, not for long distance anyway." *Id.* at 121.

Jean Clerie (Clerie), SCA's project officer, testified that he had a trailer at 645 Main Street, Roosevelt Island, which he visited two days a week. Motion, exhibit F (Clerie tr) at 7, 25-26. He explained that the renovations at the job site were conducted at night, because the school there was open during the day. *Id.* at 8. He said that the typical setup for night work was to "have very bright lights." *Id.* at 9. He claimed that, in addition to the regular lighting, "you have high-intensity lighting that they concentrate [on] one area where they [were] working mostly." *Id.* at 14. He knew that there were roof drains on the building. *Id.* at 12. He did not request photographs of the scene after the accident. *Id.* at 14-15.

In addition to the testimony summarized above, defendants submit affidavits from Clerie; Jeffrey Atkinson (Atkinson), a custodial engineer employed by DOE; and Stanley Brzezinski (Brzezinski), a project supervisor with National Environmental Safety Company (NESCO); and a

signed, unsworn statement by William McIntyre (McIntyre), a senior project manager with SCM.<sup>1</sup> McIntyre's statement will not be considered by the court, because it is unsworn.

Clerie states that "SCA did not provide any instructions or directions to any contractors involved in the renovation project," did not provide any tools, materials or equipment to any of the contractors, had no employees at the site doing physical work, and was not responsible for any maintenance or housekeeping in the area being renovated. Clerie aff, ¶¶ 7-10. He explains that drain covers "are always raised above the drain" in order to serve their purpose. *Id.*, ¶ 11. He adds that he never received any complaints about the drain covers or the lighting on the roof at any time prior to the accident. *Id.*, ¶¶ 12-13.

Atkinson worked at the school undergoing renovation at the time of the accident. His duties included keeping the site clean, inside and outside, and making needed repairs. Atkinson aff, ¶ 1. He did not witness the accident. He claims that the custodial staff had no involvement with the renovation project, supplied no tools or materials, provided no direction or supervision to those working on the project, and erected no scaffolds or lights for the project. *Id.*, ¶¶ 5-10. He states that the school building had exterior lights that turned on automatically at sundown. *Id.*, ¶ 10. He asserts that he knew of no complaints about these lights in December 2011, and that the lights were not repaired or replaced at the time. *Id.*

Atkinson describes the drain covers as "bolted to the roofs . . . raised from the roofs to prevent dirt and debris from blocking the drains . . . [and he] never observed [them] . . . to be loose or out-of-place or in need of repair or replacement in December 2011." *Id.*, ¶ 12.

Brzezinski claims that he was at the job site every day throughout the duration of the

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<sup>1</sup> All of the affidavits are annexed to the affidavit in support of Jennifer R. Freedman, defendants' counsel. McIntyre's hand-written statement is attached as exhibit H to the motion.

project. Brzezinski aff, ¶ 1. NESCO, his employer, was the general contractor for the project, and hired SCM for all the masonry work. He did not witness the accident, but he says that he spoke to Velez afterwards.

His affidavit echoes Atkinson's regarding the character and condition of the drain covers and the lighting on the roofs. He, too, states that he never received any complaints about the drain covers, and that he never heard of any other incidents involving the drain covers. *Id.*, ¶¶ 7-9.

### **Legal Standards for Summary Judgment**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1<sup>st</sup> Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

### **Discussion**

Although Velez's complaint seeks relief under Labor Law § 240, his bill of particulars omits the charge that defendants violated Labor Law § 240, the so-called "scaffold law," and

there is no evidence of an elevation-related risk as a cause of the accident. *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 (1991) (Labor Law § 240 is meant to provide “protection against risks due in some way to relative differences in elevation”). Velez does not mention this claim in the instant motion, and it, therefore, is dismissed.

Defendants argue that plaintiff’s Labor Law § 200 and common-law negligence claims should be dismissed, because they lacked supervisory control over plaintiff, and they lacked notice of a hazardous condition. Additionally, defendants contend that the Labor Law § 241 (6) claim should be dismissed, because they did not violate the cited regulations.

#### Labor Law § 200 and Common-Law Negligence Claims

Labor Law § 200, New York’s codification of common-law negligence, states a general duty to protect the health and safety of employees at their workplace.

“To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff’s work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition.”

*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591 (1st Dept 2009) (internal citation omitted). This ultimately identifies two different approaches to assigning liability to a property owner or general contractor: (1) when the accident was the result of the means and methods used to do the work, under the supervision of the defendant, or (2) when the accident was a result of a dangerous condition, created by or noticed by the defendant. See *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796 (2d Dept 2007).

Velez concedes that defendants did not supervise his work. Falkoff affirmation at 4 (pages unnumbered). He argues, instead, that his accident resulted from a dangerous condition. *Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004) (“It was not necessary to prove

[defendants'] supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of plaintiff's work"). There is no dispute that the drain cap was not part of the renovation project and that it was in place when the work started. Defendants affirm that "the drain covers had been installed before December 19, 2011 as they were part of the original construction of the school building." Freedman affirmation, ¶ 47. It is agreed that the drain cover sat a couple of inches above the level of the roof. No one asserts that the drain cover was itself defective. Instead, Velez maintains that there are issues of material fact concerning the hazardous condition posed by the drain cover, that is, its positioning and how it sat on the roof, which prevent the granting of summary judgment to defendants dismissing his statutory and common-law negligence claims.

Defendants state that "there is absolutely no evidence from which defendants' constructive notice of any dangerous or defective condition associated with the drain covers on the lower roof can be fairly inferred." *Id.*, ¶ 49. "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). Indeed, there is no allegation or evidence of any prior complaints or incidents involving drain covers at the site.

Combined with Velez's testimony that the vicinity of the drain cover was "pitch black," there is a material issue of fact whether defendants met their responsibilities in providing a safe work site. Defendants incorrectly contend that Velez first used the term "pitch black" in opposition to the instant motion "to avoid the consequences of his earlier testimony." Freedman affirmation, ¶ 56. Actually, Velez described the area where he tripped as pitch black at his 50-h hearing, on May 4, 2012, the first time that he was questioned about the accident under oath, and

more than two years before the date of his opposition affidavit, June 6, 2014. Under these circumstances, defendants' motion for summary judgment dismissing the complaint's statutory and common-law negligence claims must be denied.

#### Labor Law § 241 (6) Claim

Labor Law § 241 (6) imposes liability on property owners, general contractors and their agents without regard to their involvement in the day-to-day operations of a project involving construction, demolition or excavation. "Section 241 (6) places a nondelegable duty upon owners and contractors 'to provide reasonable and adequate protection and safety' for workers." *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 (1st Dept 2012). The work must adhere to the New York State Industrial Code, 12 NYCRR Part 23 (Industrial Code). However, holding an owner or general contractor liable for work site injuries, pursuant to Labor Law § 241 (6), requires a specific, applicable violation of the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993) ("we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 [6] and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards").

Plaintiff's complaint and bill of particulars allege violations of Industrial Code §§ 23-1.5, 23-1.7 (e) (1) and (2), and 23-1.30. Industrial Code section 23-1.5 announces itself as dealing with the "[g]eneral responsibility of employers," and is far from enunciating specific job site requirements. It cannot be the basis for a Labor Law § 241 (6) claim. *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 312 (2d Dept 1997) ("12 NYCRR 23-1.5 is a regulation that relates to general safety standards and, accordingly, will not provide a basis for a claim under Labor Law § 241 [6]").

Section 23-1.7 (e) (1), entitled “Tripping and other hazards,” requires that “[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. . . .” The lower roof was a large open area. It does not correspond to a passageway, and, therefore, Industrial Code section 23-1.7 (e) (1) is inapplicable. Similarly, section 23.1.7 (e) (2) requires that “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 and from sharp projections insofar as may be consistent with the work being performed.” The drain cap was a permanent fixture of the roof. It cannot be considered dirt, debris, a scattered tool or material, and, while it stood above the surface of the roof, it was not a sharp projection which could cut or puncture any person, as described in the regulation’s preceding paragraph.

Industrial Code section 23-1.30 requires that “[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations . . . .” Velez testified that, while the lower roof generally was sufficiently illuminated for him to locate and select planks to be moved to a higher location, the immediate area of the drain cover was “pitch black.” Defendants, besides incorrectly claiming that Velez introduced this language at a late date, argue that his distinction between light and dark “defies common sense.” Freedman reply affirmation, ¶ 11. They review the testimony from several sources about the lighting on the lower roof, although there is no allegation that the entire scene was in darkness. They contend that Velez’s acknowledgment of sufficient lighting to find the stack of planks, remove a couple and start walking across the lower roof contradicts his characterization of the area surrounding the drain cover as pitch black. This matter is obviously an issue of material fact and must be resolved as such, not as a matter of law.

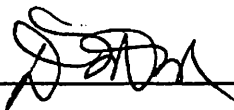
In sum, defendants' motion to dismiss the complaint's Labor Law § 241 (6) claim is granted in part and denied in part.

Accordingly, it is

ORDERED that the motion of defendants City of New York, New York City School Construction Authority and New York City Department of Education, sued here as NYC Department of Education, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted with respect to the claim of violation of Labor Law § 240, and to that part of the cause of action regarding violation of Labor Law § 241 (6) that is based on Industrial Code §§ 23-1.5, 23.1.7 (e) (1) and (2), but is denied as to the part of the Labor Law § 241 (6) claim that is based on Industrial Code § 23-1.30.

DATED: February 3, 2015

ENTER:



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J.S.C.

**DONNA M. MILLS, J.S.C.**

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