Grosskopf v Beechwood Org.
2016 NY Slip Op 30420(U)
March 9, 2016
Supreme Court, Suffolk County
Docket Number: 10-5240
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 10-5240
CAL. No. 14-01655OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-17-14 (#003)
MOTION DATE 3-30-15 (#004)
ADJ. DATE 6-1-15
Mot. Seq. #003 - MotD
#004 - XMG
CDISP: Y

---X

MICHAEL GROSSKOPF,

Plaintiff,

- against -

BEECHWOOD ORGANIZATION, BEECHWOOD MEADOWBROOK BUILDING CORP., BEECHWOOD MEADOWBROOK d/b/a BEECHWOOD ORGANIZATION,

Defendants.

---X

BEECHWOOD ORGANIZATION, BEECHWOOD MEADOWBROOK BUILDING CORP., BEECHWOOD MEADOWBROOK d/b/a BEECHWOOD ORGANIZATION,

Third-Party Plaintiffs,

- against -

STERLING CABINETS NORTHEAST, INC,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment/amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 30; Answering Affidavits and supporting papers 31 - 32; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Beachwood Organization, Beechwood Meadowbrook Building Corp., and Beechwood Meadowbrook for summary judgment dismissing the complaint against them is granted; and it is

ORDERED that the motion by plaintiff for, inter alia, leave to amend the complaint, nunc pro tunc, to add Mile Development Corp, Meadowbrook Pointe Development Corp., and Michael Dubb as defendants to the action is denied.

Plaintiff Michael Grosskopf commenced this action to recover damages for personal injuries he allegedly sustained on February 8, 2007, when he slipped and fell while working at the construction site of a new housing development known as Meadowbrook Pointe, located in Westbury, New York. The accident allegedly occurred when plaintiff, who was monitoring the delivery of kitchen cabinets, stepped out of a delivery truck and slipped on an icy patch that had formed on a snow covered area of grass near the driveway of one of the housing units. At the time of the accident, plaintiff was employed by third-party defendant Sterling Cabinets Northeast, Inc. ("Sterling"), a subcontractor hired to supply and install cabinetry. The project allegedly was owned and developed by a number of entities, including defendants/third-party plaintiffs Beachwood Organization, Beechwood Meadowbrook Building Corp., and Beechwood Meadowbrook d/b/a Beachwood Organization. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The Beechwood defendants joined issue denying plaintiff's claim and asserting affirmative defenses. Shortly thereafter, they brought a third-party action against Sterling. However, the third-party action was discontinued pursuant to a stipulation entered by the parties on July 30, 2012. The note of issue for the underlying action was filed on October 2, 2014.

The Beechwood defendants now move for summary judgment dismissing the complaint against them on the grounds they cannot be held liable under either the Labor Law or common law negligence, since they were not owners, agents, or contractors at the time of the alleged accident, and owed plaintiff no duty of care with respect to the snow and ice on the grassy lawn, since the condition was both open and obvious and not inherently dangerous. They further assert that plaintiff's claims under Labor Law §§240 and 241(6) must be dismissed, as the accident was not caused by any elevation differential and plaintiff failed to allege the violation of any applicable sections of the New York Industrial Code. Plaintiff opposes the motion on the basis defendants failed to submit evidence establishing that they were not the owners or general contractors of the housing development at the time of the accident, and that they did not have constructive notice of the condition that caused him to fall. Additionally, plaintiff argues that triable issues exist as to whether the conditions of his work distracted him, and if so, whether his mere comparative negligence is insufficient to excuse defendants' duty to maintain their premises in a safe condition. Plaintiff further contends that triable issues exists as to whether defendants violated 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) and 12 NYCRR 23-2.1.

By way of a separate motion, incorrectly labeled a cross motion, plaintiff moves for an order permitting him leave to amend the complaint, nunc pro tunc, to add Mile Development Corp, Meadowbrook Pointe Development Corp., and Michael Dubb as defendants to the action. Plaintiff asserts that the amendment naming these entities and their owner as defendants to the action should be permitted despite expiration of the statute of limitations applicable to the underlying claim, because they

share a unity of interest with the Beechwood defendants, and should have known, but for an excusable mistake concerning the identity of the proper parties, that the action would have been brought against them as well. Plaintiff submits evidence, including copies of Sterling Cabinet's subcontract and reports from the New York Department of State Division of Corporation's website, which indicate that Beechwood Organization and Meadowbrook Pointe Development Corp were general contractors for the construction project, and that Michael Dubb was the owner and president of those entities. The Beechwood defendants submitted no opposition to plaintiff's motion.

Initially, the court grants the unopposed branch of defendants' motion for dismissal of plaintiff's Labor Law §240 (1) claim, as it is undisputed that the subject accident, which occurred at ground level, is not among the type of perils Labor Law § 240 (1) was designed to prevent, plaintiff's claim under that section of the statute is inactionable (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Favreau v Barnett & Barnett, LLC***, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]; *see also* ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]).

As to the branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law §241 (6) claim, 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]).

Sections 23-1.7(d) and (e) of the Industrial Code, which pertain to slipping and tripping hazards on job sites, provide in relevant part as follows:

> (d) Slipping Hazards: Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated work surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (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 and from sharp projections insofar as may be consistent with the work being performed.

Here, defendants established, prima facie, that the sections of the Industrial Code they allegedly violated either failed to set forth a specific safety command or were inapplicable under the facts of this case. Significantly, section 23-1.7(d) of the Industrial Code does not apply to common areas such as the sidewalk where plaintiff slipped and fell (*see* ***Passantino v Made Realty Corp.***, 121 AD3d 957, 996 NYS2d 53 [2d Dept 2014]; ***Constantino v Kreisler Borg Florman Gen. Constr. Co.***, 272 AD2d 361, 707 NYS2d 487 [2d Dept 2000]). Moreover, section 23-1.7(e) of the Industrial Code is inapplicable where, as here, the adduced evidence indicates that plaintiff did not fall as a result of an accumulation of dirt or debris. Rather, plaintiff testified that he fell as a result of slipping on snow and ice, which was not a tripping hazard (*see* ***Stier v One Bryant Park LLC***, 113 AD3d 551, 979 NYS2d 65 [1st Dept 2014]; ***Purcell v Metlife, Inc.***, 108 AD3d 431, 969 NYS2d 43 [1st Dept 2013]). Even assuming, arguendo, that plaintiff's alleged trip over the nearby curb could be regarded as secondary proximate cause of his accident, 12 NYCRR 23-1.7 (e) (1) does not apply, since the grassy area of the sidewalk where he slipped could not be considered a passage way (*see* ***Carrera v Westchester Triangle Hous. Dev. Fund Corp.***, 116 AD3d 585, 984 NYS2d 339 [1st Dept 2014]; ***Johnson v 923 Fifth Ave. Condominium***, 102 AD3d 592, 959 NYS2d 146 [1st Dept 2013]).

12 NYCRR 23-1.7 (e) (2) also is inapplicable, since the raised curb on which plaintiff allegedly tripped was not comprised of an accumulation of dirt, debris, scattered tools, materials, or a sharp projection as required by the regulation (*see* ***Costa v State of New York***, 123 AD3d 648, 997 NYS2d 690 [2d Dept 2014]; ***Purcell v Metlife, Inc.***, *supra*; ***Johnson v 923 Fifth Ave. Condominium***, *supra*). Additionally, 12 NYCRR 23-1.5 (a), which merely sets forth a general standard of care for employers, cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (*see* ***Ulrich v Motor Parkway Props., LLC.***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Pereira v Quogue Field Club of Quogue, Long Is.***, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). Plaintiff failed to raise any triable issues in response which warrants denial. Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted.

As to the branch of defendants' motion for summary judgment dismissing plaintiff's claims under the common law and section 200 of the statute, Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). To establish a prima facie case of negligence under the common law, a plaintiff must demonstrate the existence of duty owed by the defendant to the plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*see* ***Solomon v City of New York***, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]). While a property owner has a duty to maintain the property in a reasonably safe manner (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]), the owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see* ***Atehortua v Lewin***, 90 AD3d 794, 935 NYS2d 102 [2d Dept 2011]; ***Capozzi v Huhne***, 14 AD3d 474, 788 NYS2d 152 [2d Dept 2005]). Although the question of whether a condition is hidden or open and obvious is generally for the

finder of fact to determine, the court may determine that a risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion (*see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]).

Although defendants failed to prove they did not own the subject premises on the date of plaintiff's accident, they established, prima facie, that the snow and ice on the grassy area of the sidewalk where plaintiff slipped, and the minor height differential between such grassy area and the nearby curb, was open and obvious and not inherently dangerous (*see* ***Verdejo v New York City Housing Authority***, 105 AD3d 450, 963 NYS2d 78 [1st Dept 2013]; ***Gomez v David Minkin Residence Hous. Dev. Fund Co., Inc.***, 85 AD3d 1112, 927 NYS2d 117 [2d Dept 2011]; ***Capasso v Village of Goshen***, 84 AD3d 998, 922 NYS2d 567 [2d Dept 2011]; ***McGuire v 3901 Independence Owners, Inc.***, 74 AD3d 434, 902 NYS2d 69 [1st Dept 2010]; ***Seelig v Burger King Corp.***, 66 AD3d 986, 888 NYS2d 123 [2d Dept 2009]; ***DiGeorgio v Morotta***, 47 AD3d 752, 850 NYS2d 556 [2d Dept 2008]; ***Wesolowski v Wesolowski***, 306 AD2d 402, 760 NYS2d 886 [2d Dept 2003]; ***Garcia v New York City Hous. Auth.***, 234 AD2d 102, 650 NYS2d 715 [1st Dept 1996]). Significantly, plaintiff testified that he slipped on the grassy area adjacent to the driveway, that the snow he slipped on appeared to be leftover snow that had not melted, and that he regarded his accident as a "freak fall." Plaintiff did not raise a triable issue in opposition, as he failed to demonstrate that the snow and ice on the grassy area where he fell was inherently dangerous, or that defendants engaged in any conduct that either distracted him or rendered the otherwise open and obvious condition a trap (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *cf* ***Stoppeli v Yacenda***, 78 AD3d 815, 911 NYS2d 119 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint against them is granted.

In light of the above determination dismissing all of the claims asserted in the complaint, the motion by plaintiff for leave to amend the pleadings to add new defendants to such complaint is patently lacking in merit, and is denied (*see generally* ***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; *see also* ***Razey v Wacht***, 281 AD2d 941, 722 NYS2d 447 [4th Dept 2001]; ***Ellis v Whippo***, 262 AD2d 1055, 692 NYS2d 279 [4th Dept 1999]).

Dated: 3/9/16

THOMAS F. WHELAN, J.S.C.