Valle v Port Auth. of N.Y. & N.J.
2016 NY Slip Op 30535(U)
March 30, 2016
Supreme Court, Queens County
Docket Number: 7877/2013
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

RICHARD VALLE, et ano.,
Plaintiff(s),

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,
Defendant(s).

Index No. 7877 2013

Motion Date March 14, 2016

Motion Cal No. 144

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendants The Port Authority of New York and New Jersey (Port Authority), T. Moriarty & Son, Inc. (T. Moriarty), and Unicorn Construction Enterprises, Inc. (Unicorn) (collectively defendants), for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the amended complaint against them or, in the alternative, for an order, pursuant to CPLR 3211 (a) (7), dismissing same.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-7
Reply.....	8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Richard Valle, an electrician, and his wife, suing derivatively, commenced this action to recover damages for personal injuries alleged to have been sustained by him on October 18, 2012, on a construction site located at LaGuardia International Airport by the Delta Terminal Guard Post #2, and more particularly between Pump House No. 4 and the

FAA, during the course of his employment with Hellman Electric Corp. (Hellman Electric). According to plaintiff's verified bill of particulars dated September 20, 2013, while plaintiff was "laying pipe, conduit and/or sewer line in a several foot deep trench at the construction site thereat, his foot became trapped in mud within the trench that went up to his knee and he became injured." Port Authority owned the site; T. Moriarty was the general contractor; Unicorn was a subcontractor hired to excavate the trench; Hellman Electric was a subcontractor retained to install conduit for underground duct banks which were to provide future power for an outdated pumping station. The within action ensued whereby plaintiff alleges violations of, *inter alia*, Labor Law §§ 200, 240, 241, 241-a, and common-law negligence.

I. The Depositions

A. Plaintiff

Plaintiff testified that he was employed by Hellman Electric on the date of the accident. He reported to his foreman, Thomas Lattanzio, who was working on the job with him at the time. He generally wore a hard hat and construction boots with steel tips. On the date of the accident, however, he was also wearing a raincoat and galoshes over his work boots – the latter of which went half-way up his calves – since the weather was cloudy and there was misty rain in the morning. The misty rain stopped approximately an hour before the accident. Plaintiff indicated that he had also worn the galoshes prior to that day because the trench in which he was working was "mucky." He wore them to keep him from getting wet from the water that would, at times, accumulate in the trench, a condition that would require him to use a pump to remove the water. On the morning of the accident, there was about a foot of water in the trench. The water was either pumped out or had dissipated since, by the time he started working therein, the water was gone. As he was working, the trench was accumulating water but not enough to warrant the use of the pump. Prior thereto, though, he was having issues with the mud since it was going over his boots as he was walking. He mentioned the problem to Mr. Lattanzio on the day of the accident (there may have been the general contractor or the Port Authority guard in the vicinity) to see if there was something that could be placed on the ground, but he is not sure if anyone heard him since he was "just speaking out loud . . . half people listen, half people don't."

Specifically, immediately prior to the accident, plaintiff was working by the pump station at the bottom of the trench, approximately five to six feet below grade. He was standing in place and hammering at a conduit pipe approximately 20 feet in length when his foot became stuck in the mud. In describing the accident, he indicated that his foot "sunk all the way in to my knee and then I tried to get myself out. . . . I was actually almost sitting down on the ground 'cause my leg was in the ground. . . . One was up on top and the other

one was in – in the dirt. Like, I was squatting, I guess, or, uh I don't know how you say it. Like – I had like a – bending down on my, uh, right foot was on the knee, the other leg was in the ground." When he tried to pull his leg out, he heard a pop and sustained injury to his Achilles tendon. When describing the depth of mud in that area, plaintiff opined the following: "I just might have hit a fluke and I – 'cause the step or two before I took that step, that went – my foot went in, was solid. Then I took one step and right in, like – like it just sucked my leg right in, like it was – and that's when I end up – almost like sitting." He described the mud/muck as "quick sand."

B. Daniel Chmielewski

Mr. Chmielewski is an assistant resident engineer with the Port Authority, responsible for field inspectors, the administration of contracts, resolving change orders, and payments. He stated that he spoke with plaintiff and Mr. Lattanzio when they first came on site to get a general idea of what their plans were for the day, whether they needed assistance with electrical shutdowns in order to perform their work, and anything else that would assist him in the preparation of his own daily reports. He described the pumping station as a huge pit that collects storm water and drainage from nearby areas. When the pit gets full, the pumps turn on and divert the water into nearby Flushing Bay; without the system, LaGuardia Airport would flood. He stated that, occasionally, water comes from underground from the Bay. Further, whenever a trench is dug, ground water may come up depending on the location of the trench; in such a case the trench would be approximately four to five feet. He indicated that the deepest point of the subject trench was approximately four feet, six inches. With respect to the specific area where plaintiff's accident occurred, he has seen groundwater but would not be able to distinguish if it was trapped groundwater or if it was related to the tides.

When asked whether it was safe for plaintiff to be performing the work he was at the time of the accident, Mr. Chmielewski indicated that it was, based on other workers performing during that time and based on the inspection by the contractors' competent safety person who looked at the trench.

As far as competent safety people, Mr. Chmielewski explained that Unicorn, the subcontractor who performed the trench excavation, hired a safety firm to inspect the trench; however, he is not aware when the last inspection was performed prior to the accident. He also indicated that the Port Authority's field inspector advised him that the trench appeared safe and that there were no issues with the excavation, but he was not able to indicate precisely when that inspection was performed.

Mr. Chmielewski explained that no precautions were taken to ensure that there was neither moist soil nor mud at the bottom of the trench, since same were common occurrences

for trench excavations. Neither would he see a reason to measure the depth of moist soil since it is "[j]ust never done, I can't understand why." To that end, he indicated that it was common practice to work in moist soil; so long as there is not a full depth of standing water in the trench, it is safe to work. He was not able to answer as to what precautions would be taken if it were determined that there was a foot of moist soil on the trench floor since – as indicated above – the depth of moist soil was never measured. While he described the manner in which an excavator would construct the trench and, specifically, how to flatten the bottom, he did not personally witness that process being done to the particular area where plaintiff was working prior to having his accident.

C. Alfred Santos

Mr. Santos was the project superintendent for T. Moriarty, and he was responsible for managing the project. During the course of this project, he was on site daily. Despite the fact that Flushing Bay was approximately 100 feet from the job site, he was not concerned about water intrusion since the trench was less then six to eight feet deep; the subject trench was only three-and-a-half feet deep. It was his job as well as the job of the electrical foreman to inspect the trench to ensure it was safe; however, there was no one specifically assigned to inspect the trench on a daily basis. Prior to excavation, no subsurface investigation was performed since this project did not call for a deep excavation; the soil is not disturbed unless the excavation goes below three to four feet at which point the trench must be tamped down in order to compact the soil. When digging a trench that is as shallow as the one involved, there is nothing done to prepare it to make it safe for workers. When asked whether it would be acceptable for there to have been mud in the trench and, specifically, enough to "pull somebody's boot off," Mr. Santos testified that "[t]he only thing I can say to that was [plaintiff] wasn't the only one in that trench." The only thing that was ever done to protect workers from a mud condition in the trench is that workers are given rubber boots. Notwithstanding, Mr. Santos was not made aware of any mud complaints.

D. Jose Pereira

Mr. Pereira was the foreman at Unicorn, the subcontractor responsible for the trench excavation and back fill. The subject trench was 300 feet long and ranged from 30 to 48 inches deep. He explained the procedure by which the trench was constructed: a small excavator would scoop out the dirt and the bottom of the bucket on the machine was used to make the bottom of the trench "nice and level." The trench would then be ready for use.

On the date of the accident, he noticed that there was mud in the trench, but he does not know how much. He does not know if it is safe for workers to install conduit in the trench with two to three inches of mud on the floor. He stated that it was Hellman Electric's

responsibility to advise him if there was something wrong with the trench and, if so, he would remedy the particular condition complained of. Aside from that, Unicorn was not responsible for maintenance of the trench nor measurement of mud at the bottom thereof. Mr. Pereira never encountered any problems with mud in the trench.

E. Thomas Lattanzio

Mr. Lattanzio was the foreman at Hellman Electric and plaintiff's supervisor. He testified that the trench in which they were working was approximately three feet in height. He never made any complaints about the condition of the trench. He noticed that plaintiff was having difficulty walking in the trench since the ground was uneven. Though it was not raining, he recalls that the trench floor was muddy, which is why plaintiff was wearing rubber boots. He explained that the presence of mud is a common occurrence in a trench and there is "nothing you can do about it" – *i.e.*, it is incidental to working in a trench – due to ground water seeping up and since trenches are traps for rain. At the time of the accident, he considered the trench to be in a reasonably safe condition.

Mr. Lattanzio also stated that neither the Port Authority, nor T. Mortiary, nor Unicorn took any steps to prevent the formation of mud in the trench. He indicated that he would not work in one-foot deep mud; in order to remedy such a situation, a contractor could dig it out or pour sand, soil, or stone on the bottom of the trench. He estimated that there was about an inch of mud around the area where plaintiff was working.

F. John McCarthy

Mr. McCarthy is the president of ProSafety Services, LLC, which provided safety consulting services for Unicorn. According to two audit reports, ProSafety performed an inspection of the trench on September 25, 2012, and October 5, 2015, and found that there were no issues nor were there reports of excessive mud conditions; he conceded, though that trench conditions may change drastically from one day to the next on a construction site. That being said, he indicated that it was not his company's role to inspect the trenches prior to work being performed. It was, however, his company's concern to ensure safe footing, and explained that a number of different remedial actions could be taken depending on the issue with which one is presented. Further, certain muddy conditions may be unacceptable, but it depends on particular work operations that are happening on a particular day. Sink holes are also a concern, which are typically tested for prior to excavation whereby a company would be hired to take soil samples in a process called boring holes which can detect the condition of the soil.

II. Discussion

A. Labor Law § 241-a

That branch of the motion for an order granting defendants summary judgment dismissing plaintiff's Labor Law § 241-a claim is granted without opposition, as this accident did not occur in or at an elevator shaftway, hatchway, or stairwell.

B. Labor Law § 240 (1)

This section provides:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes absolute liability in situations where a worker is "exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite" (*Rocovich v Consolidated Edison Co.*, 167 AD2d 524 [1990], *affd.* 78 NY2d 509 [1991]). However, not every gravity-related injury falls under the special protections afforded under section 240 (1) (*see Gasques v State*, 59 AD3d 666 [2009]). "[T]he single decisive question [in determining whether Labor Law § 240 (1) is applicable] is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]).

Here, defendants have met their *prima facie* burden of establishing their entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) claim. That plaintiff's foot became stuck in the mud is not the type of hazard which requires protection under this statute (*see Zastenchik v Knollwood Country Club*, 101 AD3d 861 [2012]; *Pirrotta v EklecCo*, 292 AD2d 362 [2002]). In opposition, plaintiff has not presented any legal authority to suggest that, since his left leg sunk a considerable distance into the mud, that same qualifies as a "falling worker" case. As such, defendants are entitled to dismissal of this claim.

C. Labor Law § 241 (6)

This section provides,:

> "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 statute, enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a non-delegable duty upon owners and contractors to comply with specific safety regulations set forth in the New York State Industrial Code regulations (12 NYCRR § 23 *et seq*; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Thus, a plaintiff supports a Labor Law § 241(6) cause of action by demonstrating that his or her injuries were proximately caused by a violation of an Industrial Code rule applicable to the circumstances of the accident and setting forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*id.* at 502; *Cabrera v Revere Condominium*, 91 AD3d 695 [2012]).

Initially, to the extent plaintiff relies on violations of various sections of the Occupational Safety & Health Administration (OSHA) to support his section 241 (6) claim, it is well-settled that alleged violations of those regulations cannot form a predicate for liability under Labor Law § 241 (6) (*see Shaw v RPA Assoc., LLC*, 75 AD3d 634 [2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2005]).

Turning to the alleged violations themselves, plaintiff has cited to the following regulations as predicates for his Labor Law § 241 (6) claim: 12 NYCRR 23-1.7, 1.8, 2.2 (c) (1), 3.3 (c), 3.4, 4.1, 4.1 (a), and "42" (ostensibly 4.2).

Defendants have established that none of the hazards in section 23-1.7 – e.g. overhead, falling, drowning, slipping, or tripping – apply to this accident. Plaintiff testified that his foot became stuck in the mud; plaintiff's re-characterization in opposition to the motion that he "slipped downwards" does not render the regulation applicable. In any event, the bottom of a trench is not a "floor, passageway, walkway, scaffold, platform or other elevated working surface" as contemplated by this section of the Industrial Code (*see Stampone v Consol. Edison, Inc.*, 2012 NY Slip Op 30196 [U], citing *Miranda v City of New York*, 281 AD2d 403 [2001]; *Scarupa v Lockport Energy Assoc., L.P.*, 245 AD2d 1038 [1997]).

Defendants have also established that 12 NYCRR 23-1.8, governing personal protective equipment, is inapplicable to the facts of this case. Plaintiff indeed testified that he was wearing construction boots, galoshes, and a raincoat, and at no point did he indicate that it was a failure of one of these protective apparel that caused his accident. In opposition, plaintiff does not indicate how his failure to be given "safety boots" proximately caused this injury.

Defendants have also, without opposition, demonstrated the inapplicability of sections 23-2.2 (c) (1) (beams, floors, and roofs), 3.3 (c) (inspections during hand demolition operations), 3.4 (mechanical methods of demolition), and 4.1 (general requirements for excavation operations).

Finally, defendants have established that 12 NYCRR 4.2 is inapplicable to this case. Though the sides of the trench were not provided with sheeting, shoring, side, or bank protection, this accident is not alleged to have occurred due to a cave-in. In opposition, plaintiff has not demonstrated that the failure to comply with this section of the Industrial Code was a proximate cause of the accident.

D. Labor Law § 200

It is well-settled that the owner, operator, and possessor of property has the duty to maintain the premises in a reasonably safe condition in light of all the circumstances, including the likelihood of injury to those on the property, the seriousness of the injury, and the burden of avoiding the risk (*see Peralta v Henriquez*, 100 NY2d 139 [2003], citing *Basso v Miller*, 40 NY2d 233 [1976]; *Ruggiero v City School Dist. of New Rochelle*, 109 AD3d 894 [2013]). In addition, Labor Law § 200 codifies the common-law duty of owners, employers, and contractors to provide employees with a safe place to work (*see Paladino v Society of N.Y. Hosp.*, 307 AD2d 343 [2003]; *Brasch v Yonkers Constr. Co.*, 306 AD2d 508 [2003]). Liability under Labor Law § 200 falls into two categories: the first involves the case where the injury results from an alleged defective or dangerous condition of the premises where the work is performed (*see Chowdhury v Rodriguez*, 57 AD3d 121 [2008]), and the second is where the injuries arise from the means and methods of the work (*see Ortega v Puccia*, 57 AD3d 54 [2008]).

Where, as here, plaintiff's claim is based upon an alleged unsafe or dangerous condition of the premises, contrary to defendants' contentions, supervisory authority is not an element of a Labor Law § 200 cause of action (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1998]; *Baumann v Town of Islip*, 120 AD3d 603 [2014]). Under these circumstances, liability based upon common law negligence and Labor Law § 200 can be imposed on the defendants if they created or had actual or constructive notice of the alleged

condition and a reasonable opportunity to correct it (*see Carrillo v Circle Manor Apts.*, 131 AD3d 662 [2015]; *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47 [2011]; *Scott v Redl*, 43 AD3d 1031 [2007]).

The accident at issue here was allegedly due to an unsafe condition at the premises, to wit: the existence of mud in a trench. Defendants collectively argue the following in support of their motion: (1) they did not create the muddy condition; (2) they did not have actual notice thereof as they received no complaints; and (3) they did not have constructive notice thereof, being that plaintiff testified that the condition was a "fluke."

Defendants have failed to meet their *prima facie* burden on plaintiff's Labor Law § 200 and common-law negligence claims. Initially, it is noted that defendants fail to discern the different roles each of them played as they relate to the subject work site in relation to their discussion pursuant to Labor Law § 200 and common-law negligence. For example, defendants merely state in a conclusory manner that "[t]he act of Plaintiff working inside a trench that became muddy from rain or naturally present groundwater is not a condition that was created by the Defendants." However, there is no specific reference to Unicorn's role in excavating the trench. Mr. Pereira explained that the excavator bucket was used merely to smooth out the trench. Mr. Santos testified that, after reaching a depth of three to four feet, the trench must be tamped down in order to compact the soil, which soil would, in such a circumstance, be disturbed. That, coupled with plaintiff's testimony that he was working in a trench which was at least five feet deep renders defendants unable to meet their *prima facie* burden of establishing that Unicorn, in physically constructing the subject trench, did not do so in a negligent manner.

Further, even assuming defendants never actually received any complaints regarding the muddy condition which is alleged to have caused plaintiff's accident,[1] defendants have failed to meet their burden of establishing the absence of constructive notice. The only witness who was definitively able to testify regarding the last inspection prior to plaintiff's accident indicated that said inspection was performed on October 5, 2012, 13 days prior thereto. That same witness admitted that site conditions can change drastically from day to day. Thus, the fact that there were no issues with the trench on October 5, 2012 has no

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1. It could be said that there is an issue of fact presented in that regard; however, the testimony was not entirely clear on that point. Specifically, plaintiff testified that he complained about the mud to his foreman. In addition to his foreman being there, he stated "[a]nd I think it was somebody behind, but I don't know who it was. I don't know if it was the [Port Authority] guard behind me or the GC behind me." None of them responded to him, however, as he explained "I was just speaking out loud. Like, I do that a lot. I just – I blurt things out and half people listen, half people don't."

bearing on its condition on the date of the accident (*see e.g. Reyes*, 83 AD3d at 49). It would further appear that there was no meaningful inspection performed to protect against the hazard at issue here. Mr. Santos testified that there was no one specifically assigned to inspect the trench on a daily basis. Mr. Chmielewski testified that the depth of moist soil was never measured, so it would be impossible for him to answer whether it could be possible that plaintiff was made to work in a foot of mud (a condition that, at least, Mr. Lattanzio indicated was dangerous). Indeed, he indicated that there were never any precautions taken to remove a mud condition. This appeared to be the response from most of the defense witnesses (*see e.g. McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2012]). This is despite the fact that there was testimony that such a condition could be remedied.[2]

Further, the court is not persuaded that plaintiff's characterization of the subject condition as a "fluke" automatically absolves defendants of the duty to keep the premises reasonably safe. There is no indication as to what plaintiff meant when he used that word to describe the "quick sand" with which he was confronted; however, it is noted that Merriam-Webster defines the term as "a stroke of luck" (Merriam-Webster Online Dictionary, fluke [http://www.merriam-webster.com/dictionary/fluke]) [Note: online free version]. The court finds that a reasonable jury could determine either that the condition was a "fluke" to the extent that no reasonable precautions could have corrected it or that the condition was a "fluke" to the extent that plaintiff personally did not expect that his next step would have sent his foot under the mud and up to his knee. Thus, there is a question of fact as to whether the condition could have been discovered upon a reasonable inspection of the trench (*see Di Giacomo v Metropolitan Life Ins. Co.*, 291 AD2d 429 [2002]).

Finally, it is noted that, to the extent defendants argue that mud is a common occurrence with respect to trench work, that opinion does not establish, *prima facie*, that the particular mud condition with which plaintiff was faced was common; in any event, that the condition is common (or that plaintiff was the only worker who was injured as a result thereof) does not negate the possibility that said condition is dangerous and does not negate the duty to maintain a safe work environment (*see generally Korostynskyy v 416 Kings Hwy., LLC*, 136 AD3d 758 [2016]; *Zastenchik*, 101 AD3d at 863).

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2. Mr. Lattanzio testified, noted *supra*, that excess mud could be dug out or sand or soil could be poured on top of it. Mr. McCarthy also testified, noted *supra*, as to the practice of boring holes, but that process was not done here. There is certainly an issue of fact presented on the motion, based on the conflicting testimony as to the depth of the trench, whether the soil should have been tested prior to excavation.

III. Conclusion

Accordingly, defendants' motion is granted only to the extent that plaintiffs' Labor Law §§ 240, 241-a, and 241 claims are dismissed. The motion is otherwise denied.

Dated: March 30, 2016

J.S.C.