Chiarello v Turner Constr. Co.
2016 NY Slip Op 31595(U)
August 22, 2016
Supreme Court, New York County
Docket Number: 151252/2013
Judge: Eileen A. Rakower
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

JOHN CHIARELLO,

Plaintiff,

Index No. 151252/2013

DECISION and ORDER

- against -

TURNER CONSTRUCTION COMPANY and MSG HOLDINGS, L.P.,

Mot. Seq. 003

Defendants.

---X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff John Chiarello brings this action against Turner Construction Company ("Turner") and MSG Holdings, L.P. ("MSG" and collectively, "defendants") alleging that he sustained injuries when he tripped and fell at the Madison Square Garden Project (the "Project") while he was employed by Falcon Steel Company ("Falcon"), a contractor hired to perform ironwork at the Project.

Defendants now move for an order, pursuant to CPLR § 3212, granting Defendants Turner and MSG summary judgment on plaintiff's causes of action for negligence and violations under Labor Law §§ 240, 241(6), and 200.

In support, defendants submit the attorney affirmation of Evi Kallfa, Esq., and the following exhibits annexed thereto: (a) Verified Complaint; (b) Verified Answer; (c) Plaintiff's Verified Bill of Particulars; (d) transcript of Chiarello's examination before trial, dated October 23, 2013; (e) transcript of non-party deposition of Brian O'Shaughnessy, a safety consultant on the Project, dated October 16, 2015; and (f) statement of O'Shaughnessy, dated May 1, 2013.

Plaintiff submits no opposition.

Defendants argue that they are entitled to summary judgment with respect to plaintiff's Labor Law § 240 claim because the alleged incident does not involve a gravity related risk or hazard. Defendants further argue that they are entitled to

[* 2]

summary judgment with respect to plaintiff's common law negligence and Labor Law § 200 claims because defendants did not direct, control or supervise plaintiff's work. Finally, defendants argue that they are entitled to summary judgment with respect to plaintiff's Labor Law § 241(6) claim because plaintiff did not allege a sufficiently specific and applicable section of the Industrial Code that was violated.

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 A.D.3d 184, 185–86 (1st Dept. 2006). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum New York*, 49 N.Y.2d 557, 562 (1980). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Section 240(1) of the Labor Law (commonly referred to as the "scaffold law") requires owners and general contractors to provide safety devices to protect workers from elevation-related hazards. *Stankey v. Tishman Const. Corp. of New York*, 131 A.D.3d 430, 430 (1st Dept. 2015); *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993). It is well established that the duty imposed by Labor Law § 240(1) is non-delegable and that an owner or contractor who breaches such duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work. *See, e.g.*, *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132 (1978).

Section 240(1) protects workers from special hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 514 (1991). The statute's "extraordinary protections . . . extend only to a narrow class of special hazards, and do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity." *Dilluvio v. City of New York*, 264 A.D.2d 115, 117 (1st Dept. 2000), *aff'd*, 95 N.Y.2d 928 (2000) (internal citations and quotations removed; emphasis in original) (affirming dismissal where there was no "exceptionally dangerous condition" or "significant risk" posed by an elevation differential of three feet between the ground and the tailgate of the pickup upon which plaintiff was seated). As the Court of Appeals has instructed: "[T]he single decisive question 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 N.Y.3d 599, 603 (2009).

Here, plaintiff alleges that he "tripped and fell" while working at the Project on August 2, 2012. In his deposition, plaintiff describes the incident as follows:

> "[W]hen I turned around, I stepped forward with my left foot, and then obviously your right foot goes next and as soon as my right foot went, I slid on a bunch of like concrete debris and I slipped with my right foot then my left foot. I was trying to get my balance, but I was still stuck in the rebar and I kind of like twisted my body and that's when I felt the pain instantly."

It is undisputed that the incident allegedly causing plaintiff injuries occurred at ground level. Because plaintiff's alleged injuries did not occur as the result of an "elevation-related or gravity-related risk," defendants are entitled to judgment as a matter of law with respect to plaintiff's Labor Law § 240 claim. *See Reyes v. Magnetic Const., Inc.*, 83 A.D.3d 512, 513, (1st Dept. 2011) (where the accident occurred at the same level of plaintiff's work site, plaintiff's trip and fall was the result of "the usual and ordinary dangers at a construction site"); *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339, 960 N.E.2d 948, 950 (2011) ("[C]ourts must take into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240(1).").

Turning to plaintiff's Labor Law § 200 and negligence claims, section 200 of the Labor Law is the codification of the common law duty imposed upon landowners and general contractors to provide construction site workers with a safe place to work.[1] *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993). "[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross*, 81 N.Y.2d at 505 (internal citations removed). The rule reflects the basic common-law principal that an owner or general contractor should not be held responsible for the negligent acts of others

---

[1] Labor Law § 200(1) provides: "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."

over whom the owner or general contractor had no direction or control. *Id.*; *see also Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352 (1998) ("[A]n implicit precondition to this duty is that the party to be charged with that obligation "have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition."). "[T]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200." *Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 48–49 (1st Dept. 2012) (internal citations omitted); *see also Brown v. New York City Econ. Dev. Corp.*, 234 A.D.2d 33, 33 (1st Dept. 1996) (owner's mere retention of contractual inspection privileges or general right to supervise was insufficient to impose liability).

Here, defendants have made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that defendants did not have the authority to supervise or control the manner and methods of the work. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 807 (1981) (absent "authority to control the activity producing the injury," defendants could not be liable to plaintiff under Labor Law § 200 for failure to provide a safe place to work). Plaintiff acknowledged in his deposition that he took his working directions from a foreman employed by Falcon, and did not take any direction from MSG or Turner. *See* Transcript at 115–16 ("Q. Did you take any direction from anyone other than your foreman with respect to the work that you were doing at this project? A. No."). Nor is there evidence that defendants had "actual notice of the allegedly unsafe condition." *Dennis v. City of New York*, 304 A.D.2d 611, 612, 758 N.Y.S.2d 661 (2d Dept. 2003); *McCoy v. Metro. Transp. Auth.*, 38 A.D.3d 308, 311 (1st Dept. 2007) ("Liability does not attach merely because an owner may have been aware that work was being performed in an unsafe manner.").

Moreover, summary judgment is appropriate where the ambit of the alleged duty does not reach the plaintiff. *See Bombero v. NAB Const. Corp.*, 10 A.D.3d 170, 171, 780 N.Y.S.2d 333 (1st Dept. 2004) (common-law duty imposed upon an owner or general contractor under Labor Law § 200 "does not extend to hazards which are 'part of or inherent in' the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience"). Here, there is no evidence to support the contention that the location of the trip and fall contained any hazardous conditions causing plaintiff's alleged injuries. There was nothing defective or improper about scarified concrete and exposed rebar, which were necessary

worksite conditions to perform the work; furthermore, the condition of the floor was open and obvious. *See Bombero*, 10 A.D.3d at 172 (where plaintiff lost his footing while walking across rebar, defendant owed no duty to plaintiff since the alleged hazard was clearly "part of or inherent in" plaintiff's job and "readily observable"); *see also Marin v. San Martin Rest., Inc.*, 287 A.D.2d 441, 442 (2d Dept. 2001) ("When a worker 'confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources . . . to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself.'"). Failing to oppose, plaintiff does not raise any triable issues of fact with respect to his section 200 and negligence claims.

Turning to plaintiff's remaining claim, section 241(6) of the Labor Law imposes a duty of reasonable care upon owners, contractors and their agents, requiring them "to provide reasonable and adequate protection and safety" to those employed in "all areas where construction, excavation, or demolition is being conducted." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 348 (1998). Because the statute empowers the Commissioner of the Department of Labor to "make rules to carry into effect the provisions of this subdivision," liability under the statute requires proof that a particular, non-general rule promulgated by the commissioner (those rules found in the Industrial Code) has been violated. *Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 49 (1st Dept. 2012). The duty to comply with the Commissioner's regulations is nondelegable; thus, plaintiff need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 502 (1993).

Here, plaintiff alleges violations of sections 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.30, 23-2.1, and 23-2.2 of the Industrial Code. As section 23-1.5 sets only general safety standards, it is not sufficiently specific to support a Labor Law § 241(6) cause of action. *See Meslin v. New York Post*, 30 A.D.3d 309, 310 (1st Dept. 2006) (finding that the alleged violation of section 23-1.5, a regulation that sets only general safety standards, would not constitute a basis for a claim under Labor Law § 241(6)). Section 23-1.7 concerns "protections from general hazards" and none of its subsections are applicable to the facts in this case. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(a)–(h). Section 23-1.7(e) ("tripping and other hazards") is inapplicable because plaintiff was not injured while in a "passageway" and plaintiff cannot show that debris from the scarification process was inconsistent with the work being performed at the time. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(e)(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."). Furthermore, plaintiff testified that the accident would not have occurred had he not contacted the rebar, and the rebar was an integral part of the work being performed at the time of the incident. *See O'Sullivan v. IDI Const. Co.*, 7 N.Y.3d 805, 806 (2006) (affirming that plaintiff's Labor Law § 241(6) cause of action based on section 23-1.7(e)(1) and (2) failed "because the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction").

Furthermore, section 23-1.8 ("personal protective equipment") is inapplicable because plaintiff testified that he had gloves, a hardhat, and glasses, and believed he had all of the necessary protective equipment. Section 23-1.15 ("safety railing") is inapplicable as plaintiff's alleged accident occurred at ground level. Section 23-1.30 ("illumination") is inapplicable because plaintiff testified that there were at least two lights at the top of the ceiling. Section 23-2.1(a) ("storage of material or equipment" is inapplicable because there was no storage of material or equipment involved. Section 23-2.1(b) ("disposal of debris") does not sufficiently set forth "a specific standard of conduct . . . for its violation to qualify as a predicate for a Labor Law § 241(6) cause of action." *Quinlan v. City of New York*, 293 A.D.2d 262, 263 (1st Dept. 2002); *Mendoza v. Marche Libre Associates*, 256 A.D.2d 133 (1st Dept. 1998). Finally, section 23-2.2 ("concrete work") is inapplicable because the alleged accident is not related to forms, shores or reshores. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 23-2.2 ("Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape."). Because plaintiff fails to allege a violation of the Industrial Code that is applicable or sufficiently specific, defendants are entitled to summary judgment as to plaintiff's section 241(6) claim.

Where, as here, the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. *See generally Access Capital v. DeCicco*, 302 A.D.2d 48, 53–54 (1st Dept. 2002).

Wherefore, it is hereby

ORDERED that defendants' motion for summary judgment against plaintiff John Chiarello is granted without opposition; and it is further

ORDERED that the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

[* 7]

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 22, 2016

AUG 2 2 2016

EILEEN A. RAKOWER, J.S.C.