Goffredo v Skanska USA, Inc.
2016 NY Slip Op 32100(U)
October 6, 2016
Supreme Court, Queens County
Docket Number: 29559/08
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

DOMENICK GOFFREDO and ELAINE GOFFREDO,

Plaintiffs,

-against-

SKANSKA USA, INC., and SKANSKA USA BUILDING, INC.,

Defendants.

Index No: 29559/08

Motion Date: 6/15/16

Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by defendants for an extension of time to move for summary judgment and, upon granting the extension, for summary judgment dismissing the complaint

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 5
Memorandum of Law in Support.....	6
Answering Affidavits-Exhibits.....	7 - 8
Memorandum of Law.....	9 - 10
Replying Affidavits.....	11 - 12

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

The branch of the motion for an extension of time to move for summary judgment is granted.

This is an action to recover for injuries plaintiff sustained on March 16, 2006 when he allegedly slipped and fell on oil on the floor of the "tank and pump room" at the St. George Ferry Terminal on Staten Island (Ferry Terminal) in the course of his employment with P.A.C. Plumbing. (P.A.C.). The New York City Economic Development Corporation (EDC), the general contractor on the Ferry Terminal Modernization Project, hired P.A.C. as the plumbing contractor for the project.

Plaintiff, and his wife suing derivatively, commenced this action against Skanska USA Building, Inc. and Skanska USA Building, Inc.(collectively Skanska)[1] the entities retained by the EDC, pursuant to a contract, as the construction manager for the project alleging causes of action based upon common law negligence and violations of Labor Law(LL) § 240(1), § 241(6), § 200.

The defendants now move for summary judgment dismissing all causes of action asserted in the complaint. In support of their motion defendants submitted the deposition testimony of the plaintiff taken at a 50-H hearing on July 24, 2006, and his deposition testimony taken in the context of this action, the deposition testimonies of Skanka's Construction Superintendent Patrick Harrison, and Project Manager Stephen Tilden and Tilden's affidavit as well EDC's separate contracts with Skanska and P.A.C.

Plaintiff testified that he was at the construction site to inspect and repair a three way valve of a fuel storage tank which was not functioning properly after installation. He testified that he had to use a ladder to reach the valve which was on the top of the tank and that after he descended the ladder, and while walking out of the building he took 4-5 steps and slipped on what he believes is "waste oil". After he fell he saw that there was oil on his hands and clothes. He further testified that he saw oil on the pathway where he walked before he fell and saw "spill pads" piled in a corner and laid out singly about 12-13 feet from where he fell.

Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners or contractors and their agents for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure (see Bough v New York City Sch. Constr. Auth., 140 AD3d 1104 [2016] quoting Jock v Fine, 80 NY2d 965, 967-968 [1992]).

The branch of the defendant's motion to dismiss the plaintiff's cause of action based upon violation of Labor Law § 240(1) granted.

It is undisputed that his accident was not gravity-related.

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[1]Skanska USA Building, Inc. and Skanska USA Building, Inc. are, for all intents and purposes, the same entity (see ¶1 Tilden Affidavit)

Plaintiff's description of his accident amply demonstrates that any alleged injury he may have sustained was not result of a fall from an elevation or as the result of being struck by a falling object that was required to be secured.

The branch of the defendants' motion to dismiss the plaintiff's Labor Law § 241(6) cause of action based upon alleged violation of Industrial Codes 12 NYCRR 23-1.2(a); 1.5(a) and 1.7(e)(1)(2) is granted and denied as to his Labor Law § 241(6) claim based upon the alleged violation of 23 NYCRR 1.7(d).

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents regardless of whether they exercised supervision or control over the work site to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (Ross v Curtis Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]; Rizzuto v L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]). To prevail on a Labor Law § 241(6) claim, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (see Ross v Curtis-Palmer Hydro-Elec. Co., supra at 503-505). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (see Rizzuto v L.A. Wenger Contr. Co., supra at 349).

Skankas' claim that plaintiff has failed to allege a violation of a of any applicable Industrial Code violation is without merit.

In his Verified Bill of Particulars, plaintiff alleges violations of Industrial Code Regulations 12 NYCRR 23-1.2(a); 1.5(a); 1.7(d); and 1.7(e)(1)(2). The plaintiff's Labor Law § 241(6) claim based on the alleged violation of §§ 23-1.2(a) and 23-1.5 are only a finding of fact and a general provision of the Industrial Code respectively, thus, insufficient to support a claim under Labor Law § 241(6) (see Gordineer v Cty. of Orange, 205 AD2d 584[1994]). Industrial Code § 23-1.7(e)(1)(2) are not applicable to the facts of this case because that section concerns tripping hazards from debris on the ground. However, in opposition, plaintiff relies only upon the violation of 12 NYCRR 23-1.7(d) entitled Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Slipping hazards and has abandoned the remainder. Regulation § 23-1.7(d) contains "specific, positive commands" and is inapplicable to the facts of this case and sufficient to support the plaintiff's LL §

241(6) claim (see Rizzuto v L.A. Wenger Contr. Co., supra at 350-351 [1998]). Skanska has failed to establish, prima facie, that it did not violate this Industrial Code.

The branch of the defendants' motion to dismiss the plaintiff's Labor Law §200 and common law negligence claim is also denied.

Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (see Rizzuto v L.A. Wenger Contr. Co., supra at 352; Doto v Astoria Energy II, LLC, 129 AD3d 660, 663-64 [2015]). A construction manager or project manager that has supervisory control and authority over the work and the construction site may be vicariously liable as an agent of the property owner or general contractor for injuries sustained at the construction site (see Walls v Turner Const. Co., 4 NY3d 861 [2005]; Nienajadlo v Infomart New York, LLC.,19 AD3d 384, 385 [2005]; Brennan v 42nd St. Development Project, Inc., 10 AD3d 302 [2004]). Where, as here, the plaintiff's injuries arise out of an alleged dangerous condition of the premises, a contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition (see Keating v Nanuet Bd. of Educ., 40 AD3d 706, 708 [2007]; Kerins v Vassar Coll., 15 AD3d 623, 625 [2005]; Piazza v Frank L. Ciminelli Constr. Co., Inc., 2 AD3d 1345, 1349 [2003]).

Skanska has failed to establish as a matter of law that it did not have control and authority over the work and the construction site and that it did not have constructive notice of the condition which caused plaintiff's accident. Although the defendants' contract with EDC provided that defendants are not responsible for the means, methods, techniques and procedures employed by individual contractors, the deposition testimony of Harris and Tilden raise issues of fact as to the supervisory control and authority of defendants. In this regard it is noted that as in Walls v Turner Const. Co., supra at 864, defendants were the "eyes, ears, and voice" of EDC, that it was Skansa, not EDC, that maintained a daily presence at the site, that it had the contractual duty of coordinating all aspects of a construction project, and that Skanska had the authority to control activities at the work site and to stop any unsafe work practices. Although technically EDC was designated as the general contractor, based on Tilden's assertions in his affidavit the only responsibility which was apparently not delegated by EDC toSkanska was the authority to hire and fire contractors. In addition, the affidavit of Tilden stating that Skanska used the

laborers hired by EDC to clean the job site for general and daily cleaning also raises issues of fact as to Skanska's control and the extent of such control over the construction site and whether it had responsibility to maintain the construction site.

With respect to the issue of notice, to meet their burden on the issue of lack of constructive notice, Skanska must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall (see Campbell v New York City Tr. Auth., 109 AD3d 455, 456 [2013] ; Reyes v Arco Wentworth Management Corp., 83 AD3d 47, 52-53 [2011]). Evidence of general inspection practices, without evidence as to when the area at issue was inspected relative to the plaintiff's fall, is insufficient to establish the lack of constructive notice (see Fernandez v Festival Fun Parks, LLC, 122 AD3d 794, 795 [2014) thus, Tilden's affidavit stating that he would walk through the tank room approximately once a week is insufficient to demonstrate, as a matter of law, lack of constructive notice.

Dated: October 6, 2016
D# 54

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J.S.C.