Urcelay v Port Auth. of N.Y.
2016 NY Slip Op 32920(U)
June 14, 2016
Supreme Court, New York County
Docket Number: 111478/11
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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STEVE URCELAY,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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Index No. 111478/11
Motion Seq. 04

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the first and third causes of action for common law negligence and second cause of action for violations of Labor Law §§ 200 and 241(6) is granted only to the following extent: The branch of the motion seeking dismissal of the first and third causes of action and the second cause of action alleging a violation of Labor Law §200 is granted, and those claims are hereby dismissed. The branch of the motion seeking to dismiss the second cause of action for violation of Labor Law §241(6) is denied.

In this action, plaintiff claims that he was installing curtain wall (the glass facade) at One World Trade Center on December 15, 2010 when he slipped and fell on ice. Plaintiff, who was employed by Benson Industries, had been working on the site for approximately 6 months prior to the day of the accident. Defendant The Port Authority of New York and New Jersey (Port Authority) is the owner of the premises; defendant Tishman Construction Corporation (Tishman) was the construction manager for One World Trade Center.

Deposition testimony

In support of the motion, defendants submit the deposition testimony of plaintiff and three defense witnesses: Dion Rivera, Tishman's safety manager, Michael Bode, Tishman's foreman and Robert Romano, a Port Authority Occupational Health and Safety Specialist.

At his deposition (exh H), plaintiff testified that on the day of the accident he was inspecting the 23rd floor for any tools or materials that might have been left behind (T at 48). Plaintiff and his co-worker, Frank Pesce, had descended the core staircase from the 24th floor to the 23rd floor, and proceeded 20 feet from the core to an area that was not enclosed when plaintiff slipped and fell on a patch of ice that "was not huge", "just a small patch" which he did not observed prior to falling (T at 49, 51, 57, 59). Plaintiff said the ice was located 10 feet from the core and 30 feet from the exterior wall (T at 71); the patch was "maybe 2½, 3 feet wide by maybe 3 feet" and "blended in" with the floor "like black ice" (T at 60-61).

Plaintiff stated that before starting work on any given floor, he would be on that floor preparing it for the curtain wall installation, and Benson usually worked on a floor for 2-3 days at a time (T at 62-63). Plaintiff specifically said that two to three days prior to his accident he did not notice ice on the 23rd floor near the area of his fall when he was working there, replacing netting and cables (T at 64). He stated that he had no knowledge of any ice on the north side of the 23rd floor in the days before he fell; he himself did not see any ice in the area near where he fell, and no one ever told him they observed ice in the area where he fell. Plaintiff did not make any complaints to anyone about ice and no one told plaintiff that they ever made any complaints about ice in the area where he fell (T 73-77).

Plaintiff stated that Tishman, Benson and the shop stewards held regular safety meetings which Benson's shop steward and foremen attended, and that ice was discussed at those meetings (T at 80, 84-85). Plaintiff confirmed that Tishman conducted snow and ice removal and prevention activities in the building (shoveling, spreading pellets). Additionally, Benson's foreman would routinely notify Tishman of any conditions at the edges of the building near the open areas during Benson's work (T at 65-66). Tishman would put down ice melt on any ice on the floors where Benson was installing curtain walls (T at 70), and if it snowed, Tishman workers would come to the floor, shovel the snow away from the side of the building, put the snow in steel containers and spread ice melt (T at 88).

At his deposition (exh I), Rivera, a Safety Site Manager for Tishman, testified that because the project at One World Trade Center went up floor-by-floor, with the structural steel installed first, then the concrete core, and finally the exterior curtain wall, the floors were exposed to the outside elements until the curtain wall was installed (T at 35, 41). Rivera stated that the laborer foreman would inspect the floors, from the top floor moving down through each floor, on a daily basis before work began (T at 41, 42). Additionally, Rivera would do his own walk-through of the site at the start of each work day (T at 52-54). Rivera indicated that Tishman laborers, under the supervision of Mike Bode, a foreman, performed snow removal throughout the floors, and Bode performed a walk-through of each floor in the morning before the work began, in the afternoon, and at the end of the day (T at 62). Additionally, laborers assigned to each floor were at the site 24 hours a day (T at 62). Rivera stated that the laborers would address any icy conditions by spreading salt, breaking up ice with chisels and then removing the ice (T at 68, 76), and using ice melt products and wet vacuums (T at 76-79, 117). In addition to

inspecting each of the floors, different trades on the site would notify Tishman if any icy conditions were observed; when reported, this condition would be immediately addressed by the laborers (T at 81). In addition, if Rivera was notified that bad weather was coming, he would routinely so advise the trades. The December 8, 2010 Safety Meeting Agenda, which contained a notice to be aware of ice, was marked at Rivera's deposition (exh 5) (T at 84-86). Rivera said that any topic that was on an agenda would have been discussed with the trades and the laborers (T at 87, 89). Finally, Rivera's daily report for the date of the accident, December 15, 2010 does not contain any notation that Rivera or anyone else observed an ice condition on the 23rd floor prior to plaintiff's accident (exh J).

At his deposition (exh K), Michael Bode, Tishman's Labor Foreman at the site on the day of plaintiff's accident, testified that in December 2010 he attended job safety foreman meetings once a week (T at 9), and that his job duties during that time included the removal of snow and ice at the site (T at 14, 18). Specifically, Bode stated that at this work site any accumulated snow would be piled in an area on each floor where no work was taking place. Any ice would be melted with calcium chloride (T at 19-20); piled snow would be shoveled and taken down the material hoist (T at 24). Bode testified that even after the installation of the curtain wall encasing, laborers were responsible for addressing any snow and ice accumulation (T at 23). A large push broom would be used to clear any remaining liquid to prevent re-freeze (T at 25). Bode said that he was responsible for inspecting the ice and directing the manner of its removal (ice melt, scrapers, chopping gun) (T at 26); additionally, Tishman had industrial vacuums to remove any water that might freeze (T at 57). In December 2010, Bode personally inspected each floor in the morning and in the afternoon. He would meet with all laborers in the morning

to assign jobs and would receive information about any conditions from Site Safety, usually through the manager, Anthony Fedor, throughout the day (T at 32-33, 35). Additionally, Bode reviewed the payroll sheets for the two weeks prior to plaintiff's accident; they confirmed that laborers routinely salted floors, and specifically did so on the mornings of December 14, 2010 and December 15, 2010, beginning at 5:00am (T at 52-75). He noted that from December 13 to December 15, there were over 40 laborers actively engaged in snow, ice and water removal, with 34 individuals assigned on December 15, the day plaintiff fell (T at 76-78). Bode said that Tishman left ice melt on every floor in case any trade needed to use it in their work area, and that his laborers would start as early as 5:00 a.m. to address any conditions that needed to be addressed before the start of work (T at 97-99). Finally, Bode said that he had no personal knowledge of any icy conditions on the 23rd floor of One World Trade Center on December 15, 2010 prior to plaintiff's accident (T at 12 and 100).

At his deposition (exh L), Romano, a Senior Occupational Health and Safety Specialist employed by the Port Authority, testified that his responsibilities in December 2010 included the assessing the implementation of the health and safety plan (T at 9). In December 2010 Romano was at the site from 8:00 a.m. to 4:00 p.m. and regularly performed field observations (T at 15). Romano testified that Tishman held regular meetings to address health and safety issues, and because the building was open to outside elements, Romano would specifically look for ice formation, or the potential for ice formation, on the floors (T at 23-24, 28-29). In the event he saw any potential ice conditions, Romano would contact Tishman site safety to address the snow or ice (T at 29, 32-33). Romano stated that all personnel at the site were routinely reminded about ice at daily and weekly site meetings (T at 37-38). Romano confirmed that in

December 2010 his daily inspections included monitoring and reporting ice conditions (T at 39-40, 53), and that Tishman laborers removed water or slush, spread salt or sand on any ice, used industrial vacuums to remove water, and used cones, tape or barricades to prevent people from walking in certain areas that month (T at 42-46). Finally, Romano's reports did not indicate that ice was observed during his inspection of the 23rd floor at any time prior to plaintiff's accident.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 200

Section 200 of the Labor Law codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work. *Russin v Louis N. Picciano & Son,* 54 NY2d 311, 316-317 (1981). Under this section, where the injuries arise from a dangerous condition on the premises, an owner will not be liable where it did not create the condition and did not have actual or constructive notice of the dangerous condition. *Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 556 (1st Dept 2009).

In order to constitute constructive notice, "a dangerous condition 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]).

In *Temes v Columbus Centre LLC*, 48 AD3d 281, 851 NYS2d 188 (1st Dept 2008), the Appellate Division, First Department held that the trial court properly dismissed the Labor Law §200 and common law negligence claims of a plaintiff who slipped on an ice patch within a newly constructed building in the absence of any evidence that defendants had actual or constructive notice of the *particular* icy condition where the accident took place.

In the moving papers, defendants set forth a prima facie case that they did not have actual or constructive notice of the subject ice patch by submitting evidence that defendants conducted daily inspections of all floors for snow and ice conditions, including the morning of plaintiff's accident, and that, prior to the accident, neither plaintiff nor anyone else notified defendants or reported observing ice on the 23rd floor where he fell.

Plaintiff's assertion that defendants failed to meet their prima facie burden of demonstrating entitlement to judgment as a matter of law since the moving papers did not contain any affidavits of persons with knowledge of plaintiff's accident or the surrounding circumstances is without merit. Defendants submitted transcripts of the deposition testimony of plaintiff and three witnesses who were involved with inspection for snow and ice at One World Trade which are "excellent sources of proof" on a summary judgment motion. Siegel, NY Prac §281, at 480 [5th ed]. Thus, the burden shifts to plaintiff to demonstrate an issue of fact to defeat summary judgment.

Here, plaintiff does not contest that defendants did not have actual notice of the ice patch. Instead, plaintiff asserts that defendants had constructive notice of the subject hazardous condition because they were responsible (1) for the safety of the workers *in general* (emphasis supplied) citing to the defendants' witnesses' deposition testimony, and (2) for the removal of any snow or ice conditions, citing to the Tishman Construction Safety Guidelines (opp., exh 5). Plaintiff further asserts that the defendants had constructive notice because they acknowledged the existence of ice and snow on the open floors and had procedures in place for the subcontractors to advise Tishman of any conditions that the subcontractor observed. However, neither defendants' general responsibility for workers' safety nor Tishman's promulgation of safety guidelines raises an issue of fact as to whether defendants had constructive notice of this particular condition, a patch of ice on the 23rd floor.

Plaintiff's argument, that if defendants' employees performed their daily inspections properly, then the ice condition could have and should have been discovered and remedied so as to prevent the subject accident (opp., para. 32), does not raise an issue of fact regarding

constructive notice. Plaintiff's candid admission that the ice "blended in" with the floor "like black ice" (T at 60-61) indicates that the ice was neither visible or apparent, a necessary element of constructive notice. *See Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 933 NYS2d 679 (1st Dept 2011) (even if the defect existed when defendants' president viewed the condition, it was not visible or apparent).

Plaintiff's reliance on the affidavit of Frank Pesce, plaintiff's co-worker on the date of the incident (opp., exh 6) to demonstrate that defendants had constructive notice of the ice is misplaced. Pesce states that when he went to help plaintiff get up from the floor after plaintiff had fallen, he saw an area of ice. Significantly, his affidavit does not demonstrate that the dangerous condition existed for a sufficient length of time prior to the accident; Pesce saw the ice *after* plaintiff slipped, and not before. Thus Pesce's affidavit does not raise an issue of fact regarding constructive notice. And although Pesce states that he saw ice on the concrete floors at the work site in the weeks before December 15, 2010, he does not state when he saw the ice or that he saw ice in the specific area of the 23rd floor where plaintiff fell.

Finally, plaintiff submitted the affidavit of a meteorologist (opp., exh 7) who reviewed weather data for Kennedy and La Guardia Airports and Central Park for two days before plaintiff's accident, and opined that the precipitation that fell at those locations on those days "was more than a sufficient amount to create puddles on the exposed 23rd level [of One World Trade]" and the ice "was present for more than 35 hours and was therefore a long-standing condition" (Wright aff., paras. 5, 7). As defendants noted in their reply, Wright used precipitation data from locations other than One World Trade and was not present at the site on the day plaintiff fell. Therefore, his opinion that this specific ice patch was a long-standing

condition that existed on the 23rd floor is speculative and fails to raise an issue of fact as to constructive notice.

Accordingly, because plaintiff failed to raise any issue of fact as to whether defendants had constructive notice of the particular patch of ice on the 23rd floor that caused plaintiff to fall, the branch of defendants' motion for summary judgment dismissing the first and third causes of action for common law negligence and second cause of action for violation of Labor Law § 200 is granted, and those causes of action are hereby dismissed.

Labor Law § 241(6)

Labor Law § 241(6) imposes a duty on a property owner to comply with the rules and regulations promulgated by the Commissioner of Labor. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d, 501-502. To support a claim under this section of the Labor Law, plaintiff must allege a violation of an applicable Industrial Code regulation which mandates compliance with concrete specifications and does not simply declare general safety standards or reiterate common-law principles. *See Misicki v Caradonna*, 12 NY3d 511, 513 (2009).

In support of their motion, defendants assert "(p)laintiff's second claim, under Labor Law §241(6), with reliance on Industrial Code Section 1.7(d) (sic), must also be dismissed as there is no evidence that the equipment, operation or conduct at the work site was not reasonable and adequate under the circumstances presented" (aff. in supp., para. 64). This argument is not relevant to plaintiff's claim that defendants violated Industrial Code §23-1.7(d), entitled "slipping hazards", which prohibits owners and employers from allowing workers to use "a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery

condition" and requires that water and other "foreign substance[s]" which may cause slippery footing be removed or covered. Defendants have not submitted any evidence to rebut the applicability of this Industrial Code section generally, and have not challenged plaintiff's claim that he fell on ice on a floor, walkway, passageway or working surface at the work site. Accordingly, defendants have not demonstrated entitlement to dismissal of plaintiff's claimed violation of this section of the Industrial Code.

Additionally, as plaintiff pointed out in his opposition, defendants moved to dismiss the Labor Law §241(6) cause of action by addressing only Industrial Code Section 23-1.7(d). Significantly, defendants did not annex plaintiff's verified bill of particulars and did not address the four other claimed Industrial Code violations: Sections 23-1.2, 23-1.5(a), 23-1.5(c)(1) and 23-1.5(c)(3), which were set for forth in paragraph 22 of plaintiff's verified bill of particulars (opp., exh 8). Because defendants failed to address these Industrial Code sections, the burden never shifted to plaintiff to raise a triable issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 (1980). Defendants, in their reply, attempted to remedy this deficiency in the moving papers by asserting why the other Industrial Code sections cannot serve as a predicate for this claim. However, the function of reply papers is to address arguments made in opposition and not to permit movants to introduce new arguments in support of the motion. *See Dannasch v Bifulco,* 184 AD2d 415, 585 NYS2d 360 (1st Dept 1992). Accordingly, the branch of defendants' motion to dismiss the second cause of action for violation of Labor Law 241(6) is denied.

Accordingly, it is

ORDERED that the branch of defendants' motion seeking dismissal of the first and third causes of action and the second cause of action alleging a violation of Labor Law §200 is granted, and those claims are hereby dismissed.

The branch of defendants' motion to dismiss the second cause of action for violation of Labor Law §241(6) is denied.

This Constitutes the Decision and Order of the Court.

Dated: June 14, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC