McGinley v Structure Tone, Inc.
2017 NY Slip Op 30751(U)
April 6, 2017
Supreme Court, New York County
Docket Number: 157693/12
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JOHN McGINLEY,

Index No.: 157693/12

Plaintiff,

-against-

STRUCTURE TONE, INC., SILVERSTEIN PROPERTIES, INC. and WILMER CUTLER PICKERING HALE AND DORR, LLP.,

Defendants.

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Schecter, J.:

This is an action to recover damages for personal injuries sustained by a carpenter on May 14, 2012, when, while working on the 45th floor of 7 World Trade Center, 250 Greenwich Street, New York, New York (the Site), the wheel of the scaffold that he was moving struck a steel beam, causing the beam to swing around and knock him off of his feet.

Defendants Structure Tone, Inc. (Structure), Silverstein Properties, Inc. (Silverstein) and Wilmer Cutler Pickering Hale and Dorr, LLP (Wilmer) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any and all cross claims and counterclaims against them.

BACKGROUND

On the day of the accident, defendant Silverstein owned the Site where the accident occurred, and defendant Wilmer occupied the space. Defendant Structure served as construction manager/general contractor for a project underway at the Site, which entailed the build-out of the 45th floor

executive dining room (the Project). Plaintiff John McGinley was employed as a carpenter by nonparty Eurotech Construction Company (Eurotech), the company hired to perform general carpentry tasks and install ceiling systems for the Project.

Plaintiff's Testimony

Plaintiff testified that he was employed by Eurotech as a carpenter on the day of the accident. Plaintiff explained that Eurotech was hired to perform "general carpentry" and to "[i]nstall ceiling systems, wall systems, [and] door systems" for the Project (plaintiff's tr at 51). Plaintiff's duties included "[f]raming, drywall, [and] acoustical ceiling applications" (*id.* at 15). While on the job, he reported to Al Hickman, his supervisor and the carpenter foreman for Eurotech. Plaintiff maintained that Structure served as the general contractor on the Project, and that Structure laborers were in charge of "clean[ing] up" (*id.* at 60).

Plaintiff testified that he was involved in ceiling installation work for an executive dining room (the Room) during the two or three days leading up to the accident and that he was never specifically told what he had to do, because he "knew [his] project" (*id.* at 72). Plaintiff further testified that, in addition to Eurotech and employees of Structure, "[e]lectricians and HVAC and tapers" were also present at the Site (*id.* at 52).

Plaintiff described the Site as being "[p]artially framed, partially sheetrocked, material storage everywhere [in] sporadic locations" (*id.* at 56). In addition, construction material, which consisted of "metal studs, electrical pipe, conduit, . . . [s]teel beams, gang boxes, ladders, compound buckets,[and] black iron, . . . [p]lywood, [s]heetrock, HVAC duct work and scaffolding" littered the Site (*id.* at 65-66). The Room also contained "[m]aterial storage . . . equipment . . . [a]nd . . . assorted trade equipment" (*id.* at 62).

When plaintiff was asked if the Site was "just one open space or . . . divided up," plaintiff responded, "divided up and framed" (*id.*). Plaintiff further described the Room, which had "two to four entrances," as "[a]pproximately 50 x 50 divided in two" and "half" finished (*id.* at 58, 62). When asked whether the Room was enclosed, plaintiff testified, "it was wide open . . . [and] it was enclosed" (*id.* at 62).

Plaintiff testified that his ceiling systems installation work in the Room required him to use a scaffold on the day of the accident. Plaintiff "[brought] the scaffold to that room on that day" and set it up "[r]ight next to [a dividing] wall" located in the "center" of the Room (*id.* at 71, 80). Plaintiff testified that the six-foot-tall scaffold, which belonged to Eurotech, was made of metal and plywood. Plaintiff noted that he had received scaffold "[s]afe use"

training, wherein he was told to lock the scaffold's wheels when working on it, and then to unlock them when moving it (*id.* at 69).

Plaintiff testified that his job duties required him to work along the entire length of the left side of the dividing wall. He set up the scaffold on a pallet, which was surrounded by "[g]ang boxes, electrical pipes, steel beams, pallets, materials, compound, stacks of ladders, heaps of metal studs, plywood standing against walls, sheetrock piled against walls [and] debris everywhere" (*id.* at 82-83). He described the "debris" as "sparse" and "sporadic" in the way that it covered "60 percent" of the floor (*id.* at 83). Plaintiff did not know where the debris came from, noting that it "chang[ed] everyday" (*id.* at 84). Plaintiff asserted that Structure was in charge of clearing the debris at the Site. In fact, he had even spoken to Structure's laborers regarding the unsafe debris "conditions" (*id.* at 60).

Just before the accident, and after moving the scaffold "to various locations over the gang boxes, over the steel beams," plaintiff positioned the scaffold in his work area and "[o]n top of the skid [pallet] with the steel beams on it" (*id.* at 94). Plaintiff maintained that Eurotech owned the pallet and the steel beams. Plaintiff complained to his foreman about the presence of the pallet and steel beams in his work area, and his foreman then told him that he would ask

Structure to have them removed, because they posed a tripping hazard. However, plaintiff did not wait until the pallet and steel beams were removed to begin his work, because "[he] was told to get the job done" (*id.* at 104).

Plaintiff explained that his accident occurred as he was attempting to roll the scaffold backwards to a new location. At this time, plaintiff was positioned at the long end of the scaffold, and all four wheels of the scaffold were unlocked. As plaintiff pulled the scaffold with both hands, while, at the same time, trying to avoid the drywall debris "next to his foot," one of the steel beams "got caught in the wheels of the scaffold" (*id.* at 111-112). This caused the steel beam to "[swing] perpendicular (90 degrees) to the skid and . . . trap[] [his] feet as [he] was moving" (*id.* at 112). When the beam struck the top of plaintiff's boots, plaintiff fell backwards, along with the scaffold, injuring his left arm, knee and hip.

Testimony of Alan Hickman (Eurotech's Carpenter Foreman)

Alan Hickman testified that he was Eurotech's carpenter foreman on the day of the accident. His duties included setting up the work area, assigning jobs, ordering material and "basically run[ning] the job" (Hickman tr at 7). He explained that Structure was the general contractor for the Project. At the time of the accident, pursuant to a contract with Structure, Eurotech was performing drywall and ceiling

work at the Site. On the day of the accident, electricians and plumbers were also present. Laborers, which were hired by Structure, were charged with "[c]leaning up behind the trades" (*id.* at 19). These laborers worked at the Site "all day long" to keep the work areas free of "[d]ebris" (*id.*). Hickman noted that, in the event that he ever observed debris at the Site, he would contact Structure to correct the situation.

Hickman further testified that, at the time of the accident, plaintiff was installing a ceiling grid in an area where a pallet and various materials were located. Hickman did not know who owned the pallet. However, he could state that the steel beams were owned by Eurotech. Hickman explained that the beams "were being used in the kitchen area of the cafeteria as waterproofing stop up against convectors" (*id.* at 36). Hickman described the cafeteria, "where the waterproofing took place," as being located in "the next room over" (*id.*). When asked how many steel beams were installed, plaintiff replied, "we installed, I believe, eight of them" (*id.*).

When Hickman was asked to explain what he considered the difference between "debris and material that [is] used in an ongoing construction project," Hickman stated that "scraps of Sheetrock [and] coffee cups" constitute "debris," but not a metal beam (*id.* at 63).

Testimony of Kieran Mulvey (Structure's Superintendent)

Kieran Mulvey testified that he was Structure's superintendent on the day of the accident. He explained that Structure served as the "construction manager/general contractor" on the Project, which entailed an office build-out for a law firm (Mulvey tr at 15). Structure hired Eurotech to provide "[t]he drywall and the ceilings" for the Project (*id.* at 27).

Mulvey described the Site as being "pretty wide open" (*id.* at 23). The Site contained a cafeteria, kitchen and conference rooms. He noted that Structure conducted safety meetings with the various subcontractors, wherein job progress and certain safety issues were discussed. To that effect, the trades were notified "to clean up after themselves, to not get on broken ladders or to police their own material, to notify Structure if there's any unsafe conditions" (*id.* at 36). In addition, Structure had laborers on the job who were in charge of "[g]eneral cleanup, sweeping of the floors, taking out trash, cleaning" (*id.* at 39).

Statement of Kevin Simmons (Eurotech's Shop Steward)

In his witness statement, dated October 3, 2012, Kevin Simmons stated that he was working as a shop steward for Eurotech on the day of the accident. Simmons, who did not witness the accident, described the accident area as "not cleaned up, and had debris of wood and steel creating a

dangerous condition" (plaintiff's opposition, exhibit A, Simmon's witness statement). He maintained that, prior to the time of the accident, Structure was told numerous times to have the area cleared of said debris.

ANALYSIS

"'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 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 241(6)

Defendants move for dismissal of the Labor Law § 241(6) claim against them. Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Labor Law § 241(6), however, is not self-executing. In order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code as opposed to a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Plaintiff does not address Industrial Code section 23-1.7(d) in his opposition to defendants' motion; thus, reliance on this section is deemed abandoned and defendants are

entitled to summary judgment dismissing that part of the Labor Law § 241(6) claim (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]).*

Plaintiff's reliance on Industrial Code section 23-1.7(e)(1) is misplaced because the accident occurred in an open area and not a passageway (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dept 2007]; *O'Sullivan*, 28 AD3d at 225-226; *Appelbaum*, 6 AD3d at 310; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003] [slab where the plaintiff fell "was not [a] 'passageway' covered by 12 NYCRR 23-1.7(e)(1)," but rather, a "common, open area between job site and street"]).

Here, plaintiff and Mulvey described the Site as a wide open space that was divided up into rooms. In addition, plaintiff specifically described the Room as "wide open" (plaintiff's tr at 62).

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*While the parties debate whether defendants also violated Industrial Code sections 23-2.1(a) and (b), which deal with the storage of materials, and section 23-5.18 (h), which requires that scaffolds only be "moved . . . on level floors or equivalent surfaces free from obstructions," a review of the record reveals that, while violations of these sections were alleged in Joseph C. Cannizzo, P.E.'s expert affidavit, which was proffered by plaintiff, plaintiff never specifically pled those alleged violations in any complaint or bill of particulars. Plaintiff's pleadings only allege that defendants "violated 12 NYCRR 23-1.7(d)&(e)(1)&(2) and all subsections thereunder" (defendants' notice of motion, exhibit C, pleadings). In any event, as there is no evidence that the subject steel bar was being "stored" at the accident location at time of the accident, sections 23-2.1(a) and (b) do not apply.

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.7(e)(1).

The alleged violation of Industrial Code section 23-1.7(e)(2) (12 NYCRR 1.7[e][2]), in contrast, presents a question of fact as to liability. Sections 23-1.7(e)(2) provides:

> "(e) Tripping and other hazards.
>
> (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."

The provision is sufficiently specific to sustain a claim under Labor Law § 241(6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Plaintiff's accident occurred in a working area. In addition, while the steel beam that the wheels of the scaffold got caught on may not constitute an "accumulation of . . . debris," it can be considered "scattered tools and materials" (*Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 160 [1st Dept 2005] [question of fact existed as to whether the radiator that the plaintiff tripped over was a "scattered material[]" for the purposes of section 23-1.7(e)(2)]).

Defendants argue that they are entitled to dismissal of the claim based on section 23-1.7(e)(2) because the steel beam was integral to the work being performed at the time of the accident. In support of this argument, defendants put forth Hickman's testimony, wherein he stated that the steel beams were being installed in the kitchen area of the cafeteria as part of a waterproofing system (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607 [1st Dept 2015] [alleged section 23-1.7(e)(2) violation dismissed, where the plaintiff tripped over a screw, which was an integral part of the raised tile floor system being installed]; *O'Sullivan*, 7 NY3d at 806 [electrical pipe or conduit that plaintiff tripped over was an integral part of the construction]; *Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 466 [1st Dept 2013] [section 23-1.7(e)(2) did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work being performed in the room]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, an integral part of the work being performed]).

The evidence in the record, however, indicates that the steel beam that caused the accident was not an integral part of the work, but rather, a scattered tool and/or material. Hickman testified that the kitchen, where the steel beams were

installed, was located in an entirely different room from where the steel beam was located at the time of the accident. In addition, defendants failed to offer any evidence to establish that the subject waterproofing work was still ongoing at the time of the accident. The steel beam, moreover, was present among piles of debris and other disgarded construction material.

Thus, defendants are not entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.7(e)(2).

Common-Law Negligence and Labor Law § 200

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

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."

There are two distinct standards applicable to Labor Law § 200 cases depending on whether the accident resulted from a dangerous condition or whether it was a consequence of the means and methods used by a contractor to do its work (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [general contractor's supervision and control over plaintiff's work was immaterial because the injury arose from the condition of the workplace created by or known to contractor rather than the method of the work]).

In cases where the defect or dangerous condition arose from a contractor's methods, to find liability under Labor Law § 200 it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no § 200 liability where plaintiff's injury was caused by lifting

a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [common-law negligence and § 200 claims dismissed where the deposition testimony established that, while defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the accident occurred when, while plaintiff was rolling the scaffold backwards, the scaffold's wheel got caught on a steel beam, which should have been cleared from the accident area. Therefore, the accident was caused due to the means and methods of plaintiff's work and the clean-up work at the Site.

Initially, as no evidence has been put forth to establish that defendants Silverstein and Wilmer had any authority to supervise and control the injury-producing work, these defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

Although Structure did not supervise or direct plaintiff's work, a question of fact exists as to whether Structure was the entity responsible for clearing the subject steel beam from the Site. Thus, Structure is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

Finally, contrary to defendants' contention, liability under Labor Law § 200 is not negated by the fact that the steel beam may have been "open and obvious" because defendants' "duty to maintain [the] premises in a reasonably safe condition . . . goes to the issue of the injured plaintiff's comparative negligence" (*Acevedo v Camac*, 293 AD2d 430, 431 [2d Dept 2002]; *Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]; *Tulovic v Chase Manhattan Bank*, 309 AD2d 923, 924 [2d Dept 2003]).

The court has considered the parties' remaining contentions and finds them to be without merit. In addition, as defendants have not offered any argument in support of their request for dismissal of any and all cross claims and/or counterclaims against them, said request is denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted in part and plaintiff's claims are dismissed except for (A) the Labor Law § 241(6) cause of action predicated on violation of Industrial Code 23-1.7(e)(2) and (B) the common-law and Labor Law § 200 claims against Structure, which claims shall proceed.

This constitutes the decision and order of the court.

Dated: April 6, 2017

HON. JENNIFER G. SCHECTER