

Joyce v 673 First Ave. Assoc.
2017 NY Slip Op 32241(U)
October 20, 2017
Supreme Court, New York County
Docket Number: 155599/2013
Judge: Kelly A. O'Neill Levy
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

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KEVIN JOYCE, HANCEL JOYCE,
Plaintiffs,

INDEX NO. 155599/2013

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

673 FIRST AVENUE ASSOCIATES, BARR & BARR, INC., THE
CENTER FOR MUSCULOSKELETAL CARE

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 57-83, 85-91
were read on this application to/for Summary judgment

In this Labor Law action, Defendants 673 First Ave. Associates, L.P. s/h/a 673 First Ave Associates Barr & Barr, Inc. and The Center for Musculoskeletal Care move for summary judgement dismissing Plaintiff's claims. The Plaintiff opposes this motion.

BACKGROUND

Plaintiff Kevin Joyce alleges he was injured on February 20, 2012 during the course of his employment by non-party Pyramid Flooring. At the time, he was working at 333 East 38th Street in Manhattan where his work involved sanding floors with a buffing machine and heat welding linoleum floors ("The Project"). He worked on the floors of small examining rooms along with a walk-in closet. Plaintiff alleges that his injury is the result of Defendants not

providing proper breathing/respiratory equipment and a safe work environment in violation of the common law and New York labor law section 200 and 241(6).

The Defendants argue that Plaintiff's alleged injury was caused by the means and methods of his work which the Defendants did not supervise or control. They further contend that even if the alleged injury arose from a dangerous condition, the Defendants did not have notice of such a condition and as such this action must be dismissed. Finally, Defendants argue that that Plaintiff's Labor Law 241(6) claim must be dismissed because Plaintiff has not alleged a proper predicate violation of the industrial code.

Plaintiff's Testimony

Plaintiff was employed by Pyramid, whose work consisted of installing carpeting, linoleum, and baseboard; heat welding seams of linoleum floors; sanding self-leveling concrete floors; and sweeping and scraping floors. Plaintiff's work included preparing for and installing carpet, linoleum, and baseboard which included sanding floors. He alleges respiratory injuries that were caused by the fumes in the areas in the building where he worked which were generated from the heat welding of linoleum floors, sanding and scraping the cement floors, and poor or inadequate ventilation in his work area. Pyramid did not provide him with any type of respirator mask, although it did provide paper dust masks for the employees who were working with self-leveling concrete.

Testimony of Joseph Krug

Joseph Krug was Barr's project executive for the Project and the senior vice president of Barr. Barr provided disposable filter masks during the Project. He was present two or three times per week. He testified that Barr was the general contractor on the Project and had full stop-work authority if they observed an unsafe condition or work being performed in an unsafe manner.

Barr did not provide respirators to workers. He did not recall if respirators or ventilation were discussed at the coordination meetings that took place on the project site.

Testimony of Daniel DeGaray

Daniel DeGaray was employed by Pyramid as a dispatcher at the Project site and was at the site approximately every one to two weeks. He testified that it is recommended that a respirator be used during the screening or welding processes and that he had himself used a respirator during these processes when he was an installer. He also testified that OSHA safety courses recommend that a respirator be used during these processes.

DISCUSSION

“[T]he ‘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.’” *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep’t 2010), quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the moving party meets this requirement, “the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial.” *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep’t 2012), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep’t 1997). The court’s function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Labor Law § 200 and Common-law Negligence Claims

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. 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’ [citation omitted].” *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep’t 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

1. 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 section 200 cases, depending whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep’t 2007).

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor’s method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (199) (no Labor Law § 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 moved); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep’t 2008).

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 A.D.3d 305, 311 (1st Dep’t 2007); *Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 381 (1st Dep’t 2007) (no Labor Law § 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 A.D.3d 523, 524-525 (2d Dep’t 2007); *Natale v. City of New York*, 33 A.D.3d 772, 773 (2d Dep’t 2006).

When the injury arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed. *See Murphy v. Columbia Univ.*, 4 A.D.3d 200, 202 (1st Dep’t 2004) (to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over the plaintiff’s work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work).

Defendants contend that they did not control the “means and methods” of plaintiff Kevin Joyce’s work nor did they have notice of a “dangerous condition” that allegedly caused plaintiff’s injuries and thus are entitled to summary judgment as to Plaintiffs’ Labor Law § 200 claim. Defendants also contend that Plaintiffs have not alleged a proper predicate violation of the New York Industrial Code to support a claim under Labor Law § 241 (6). They also assert that because they are entitled to summary judgment of Plaintiffs’ direct claims, Hancel Joyce’s derivative claims must be dismissed.

Here Mr. Krug performed “walk-through” inspections of the work site, walking through two or three times per week, and he and other Barr personnel had the authority to correct any unsafe conditions that they observed taking place on the site. *See Mott v. Tromel Const. Corp.*,

79 A.D.3d 829 (2d Dep't 2010) (defendant project superintendent's testimony that he conducted regular walk-through inspections of the work site, that he was present on the site on a daily basis, and that he had the authority to stop any unsafe work that was taking place on the site established a triable issue of fact as to the general contractor's control over the work site and whether it had actual or constructive notice of a dangerous condition on the site). Additionally, Mr. Krug was aware that sanding and scraping floors and heat welding seamless vinyl created dust and generates fumes, respectively, but Barr did not provide workers on the job site with respirators. *See* 98 A.D.3d 1090 (2d Dep't 2012) (constructive notice may be imputed to a defendant where the dangerous condition is visible and apparent and existed for a sufficient period of time for defendant to have discovered and remedied the condition); 234 A.D.2d 106 (1st Dep't 1996).

Plaintiff claims that his injuries could not have been caused solely by his work but resulted from ventilation in the work site being poor and exposure to fumes from painting work taking place in the building. Mr. Krug testified that Barr did not monitor the air quality and ventilation on the work site and he did not know whether the ventilation systems in the work areas were ever inspected or whether air quality tests were ever performed. As there is a question of fact as to whether ventilation caused plaintiff's injuries, and whether defendants fulfilled their duty to monitor the air quality at the worksite, and whether they had constructive notice of the fume condition that caused plaintiff's injuries, summary judgment dismissing the Labor Law § 200 and common-law negligence claims is denied. *See Cerverizzo v. City of New York*, 116 A.D.3d 469, 471 (1st Dep't 2014).

Labor Law § 241 (6) Claim

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 to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 501-502. However, 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, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff alleges in his complaint violation of the following sections of Rule 23 of the Industrial Code: 12 NYCRR 23-1.8, 23.1.25, 23-1.26, and 23-2.8. However, with the exception of section 23-2.8, he does not address particular Industrial Code violations in his opposition papers, and the claims predicated on the other three are deemed abandoned. *See Cardenas v. One State St., LLC*, 68 A.D.3d 436, 438 (1st Dep’t 2009)(plaintiff’s reliance on Industrial Code provisions cited in his bill of particulars not addressed in the motion court or on appeal deemed abandoned). Accordingly, Defendants are entitled to summary judgment dismissing the branches of Plaintiff’s Labor Law § 241 (6) claim predicated on those abandoned provisions. The court now turns to the one section that plaintiff does address.

Industrial Code 12 NYCRR 23-2.8

Industrial Code 12 NYCRR 23-2.8 provides:

(a) Confined space definition. As used in this section, a confined space means a room, a portion of a room or an enclosure having no means of natural ventilation other than one entrance opening and which room, portion of a room or enclosure is of such dimensions that a painter is required to work inside such room, portion of a room or enclosure. Such confined space may be a tank, an elevator car, a compartment, a closet, the upper area of a high ceiling room or a similarly enclosed space.

(b) General requirements. The painting of confined spaces, including the use of coating materials, paint removers, stains, solvents and abrasives, shall be so performed as to prevent the dissemination of such harmful materials into the air where persons are located in quantities tending to injure the health of such persons.

(c) Paint spraying. Persons engaged in paint spraying operations and persons in such close proximity to such operations that they are exposed to the spray mists shall be provided with and shall use approved respirators. Operators of paint spraying equipment shall be provided with and shall use protective oil, grease or cream on the exposed parts of their bodies. Where such work is performed in tanks, vats and similar enclosed vessels, protection in addition to the required respirators shall be provided by means of mechanical exhaust ventilation.

(d) Brush work. Persons engaged in brush painting with other than water-mixed paints in confined spaces shall be provided with approved respirators. Where brush work is performed in tanks, vats and similar enclosed vessels, protection in addition to the required respirators shall be provided by means of mechanical ventilation.

(e) Coating removal. Where coating removal is being performed with any volatile solvent in a confined space, protection in addition to approved respirators shall be provided by means of mechanical ventilation.

(f) Machine sanding. An approved respirator shall be provided for, and shall be worn by, any person operating a sanding machine unless the sandpaper is wetted with oil or water or the sanding machine is provided with a dust collector.

As a preliminary matter, Industrial Code 12 NYCRR 23-2.8 contains sufficiently specific directives to sustain a cause of action under Labor Law § 241 (6). *See Kebbeh v. City of New York*, 113 A.D.3d 512, 513 (1st Dep't 2014).

Defendants argue that dismissal of the Section 23-2.8 claim is warranted because plaintiff claimed that he was exposed to fumes from painters preparing walls with primer and painting and to dust from the painters sanding. However, there is a question of fact as to whether Section 23-2.8 applies to the particular sanding and painting that was going on around him and therefore, summary judgment as to plaintiff's Labor Law § 241 (6) predicated on Industrial Code 12 NYCRR 23-2.8 is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of Defendants 673 First Ave. Associates, L.P. s/h/a 673 First Ave Associates Barr & Barr, Inc. and The Center for Musculoskeletal Care for summary judgment dismissing the complaint is granted only to the following extent:

The branches of plaintiff's Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code sections 23-1.8, 23-1.25, and 23-1.26 are dismissed.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

10-20-17
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
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