

Cevallos v Davidson Equities, LLC

2017 NY Slip Op 32418(U)

October 10, 2017

Supreme Court, Queens County

Docket Number: 704199/15

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
OSCAR ALEXANDER CEVALLOS,

Plaintiff,

-against-

Index No.: 704199/15
Mot. Cal Date: 6/1/17
Mot. Seq. No.: 2

DAVIDSON EQUITIES, LLC and VODONIA
CONTRACTING & SUPPLIES CORP.,

Defendants,

-----X

The following numbered papers read on this motion by defendants for summary judgment dismissing the complaint.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 34-45
Answering Affidavits - Exhibits.....	EF 46-51
Reply Affidavits.....	EF 52-54

Upon the foregoing papers it is ordered that the motion is determined as follows:
Plaintiff alleges that he was injured while working as an employee of nonparty SSC High Rise Constr. Inc. (SSC) on a construction project on property owned by defendant Davidson Equities, LLC (Davidson), when he tripped over debris on the floor as he was carrying pieces of steel rebar. SSC was a subcontractor hired by defendant Vodonia Contracting & Supplies Corp. (Vodonia), the general contractor for the project which involved the construction of two 17-story apartment towers. Plaintiff's accident occurred on the fourth floor of the West Tower where he was moving the rebar 40 to 50 feet across a temporary plywood floor so it could be used in the construction of the concrete floor. The debris on which he tripped included garbage, nails and pieces of wood.

The complaint herein asserts causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff now concedes that he does not possess a viable cause of action under Labor Law § 240(1) and consents to the dismissal of the cause of action based thereon. In addition, plaintiff does not dispute that insofar as the cause of action pursuant to Labor Law § 241(6) is premised upon regulations promulgated thereunder which are set forth in Industrial Code §§ 23-1.7(d), 23-1.8, 23-1.16, 23-1.22, 23-1.30, 23-1.32, 23-2.1, 23-2.4, 23-3.1, 23-3.2 and 23-3.3, said provisions are either inapplicable to the facts of this case or, with respect to section 23-2.1(b), not sufficiently specific to support a cause of action under Labor Law § 241(6). (See *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Longo v Long Is. R.R.*, 116 AD3d 676 [2d Dept 2014]; cf. *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013].) Accordingly, the motion is granted to the extent that defendants are awarded summary judgment dismissing the cause of action for violation of Labor Law § 240(1) and so much of the cause of action pursuant to Labor Law § 241(6) as is predicated upon violations of the above-referenced Industrial Code regulations.

In all other respects, the motion is denied. Contrary to defendants' apparent misapprehension, on a summary judgment motion it is the moving party's burden to submit evidence in admissible form sufficient to demonstrate the absence of any issues of fact and affirmatively establish the movant's right to judgment as a matter of law. (See *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Katz v Beil*, 142 AD3d 957, 964 [2d Dept 2016]; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904 [2d Dept 2013].) Defendants have not met this burden.

Where, as here, the plaintiff's accident arose from an allegedly dangerous condition at the work site rather than the manner in which the plaintiff's work was being performed, liability for common-law negligence and violation of Labor Law § 200 may be imposed upon a property owner if the owner created the condition or had actual and constructive notice of it and failed to remedy the condition within a reasonable amount of time. (See *Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]; *Nankervis v Long Is. Univ.*, 78 AD3d 799, 800 [2d Dept 2010]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 147-148 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*,

63 AD3d 763, 764 [2d Dept 2009].) A contractor may be held liable for such claims if it had control over the work site and actual or constructive notice of the dangerous condition. (See *Bessa*, 148 AD3d at 978; *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 720-721 [2d Dept 2014]; *White v Village of Port Chester*, 92 AD3d 872, 876 [2d Dept 2012].) Defendants, who have not been deposed and have not submitted an affidavit from a party with personal knowledge of the facts, have each failed to establish a prima facie entitlement to judgment as a matter of law with respect to plaintiff's Labor Law § 200 and common-law negligence causes of action. (See *Bessa*, 148 AD3d at 978; *White*, 92 AD3d at 876; *Nankervis*, 78 AD3d at 800; *Slikas*, 78 AD3d at 149; *Aguilera*, 63 AD3d at 764.) Both defendants have failed to offer proof affirmatively demonstrating their lack of actual or constructive notice, including proof as to when they last inspected the floor where the accident occurred or that the debris could not have been discovered upon reasonable inspection. (*Id.*; see also *Caiazzo*, 119 AD3d at 722.) Defendant Vodonia has also failed to offer any proof as to whether it had control over the work site. (See *Bessa*, 148 AD3d at 978; *White*, 92 AD3d at 876.) The deposition testimony of plaintiff stating that he did not complain to defendants concerning the condition and was not given instructions by defendants does not satisfy defendants' burden on these issues.

Defendants' showing against the remaining part of plaintiff's cause of action under Labor Law § 241(6) is also deficient. Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers in areas where construction work is being performed, and an owner or contractor will be held vicariously liable for injuries sustained due to another party's negligence in failing to comply with specific rules and regulations promulgated under section 241(6). (See *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; see also *St. Louis v Town of N. Eba*, 16 NY3d 411, 413 [2011].) Neither the absence of actual or constructive notice on the part of defendants nor defendants' lack of supervision or control over the work site is a defense to a claim under section 241(6). (See *St. Louis*, 16 NY3d at 413; *Rizzuto*, 91 NY2d at 350, 352; *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740 [2d Dept 2015]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 957 [2d Dept 2013].) The provisions of Industrial Code § 23-1.7(e)(1) and (2) regarding tripping hazards in

passageways and working areas which are relied upon by plaintiff are both sufficiently specific to support a cause of action under Labor Law § 241(6) and arguably applicable to the facts of this case. (*See Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 984 [2d Dept 2014]; *White v Village of Port Chester*, 92 AD3d 872, 877 [2d Dept 2012]; *see e.g. Nankervis*, 78 AD3d at 800; *Aguilera*, 63 AD3d at 765.) Defendants have failed to make a prima facie showing that these provisions are not applicable in this matter or that a violation thereof did not proximately cause plaintiff's injuries. (*See Rizzuto*, 91 NY2d at 350-351; *Zaino v Rogers*, ___ AD3d ___, 2017 NY Slip Op 06218 [2d Dept 2017]; *Nankervis*, 78 AD3d at 800; *Aguilera*, 63 AD3d at 765; *see also Lopez*, 123 AD3d at 984.)

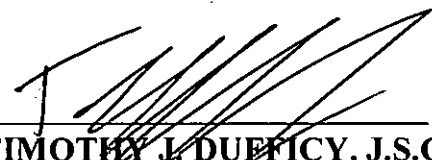
With regard to the above claims as to which defendants failed to carry their initial burden, summary judgment is precluded. (*See Slikas*, 78 AD3d at 149; *Aguilera*, 63 AD3d at 764-765.)

Accordingly, it is

ORDERED, that the motion is granted to the extent that defendants are awarded summary judgment dismissing the cause of action for violation of Labor Law § 240(1) and so much of the cause of action pursuant to Labor Law § 241(6), as is predicated upon violations of the above-referenced Industrial Code regulations; and otherwise denied. Plaintiff's Labor Law § 200 and § 241 (6) causes of action based upon violations of Industrial Code § 23-1.7 (e)(1) and § 23-1.7(e)(2) shall proceed to trial forthwith.

Dated: October 10, 2017

FILED
OCT 28 2017
COUNTY CLERK
QUEENS COUNTY


TIMOTHY J. DUFFICY, J.S.C.