Depaz v 20 EEA Partners LLC
2018 NY Slip Op 32177(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 156444/15
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12
Justice

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MARVIN DEPAZ,

Plaintiff,

- v -

20 EEA PARTNERS LLC, *et al.*,

Defendants.

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INDEX NO. 156444/15

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against them. Plaintiff opposes and cross-moves for an order granting him partial summary judgment on his claim pursuant to Labor Law § 241(6). Defendants oppose the cross motion.

I. PERTINENT BACKGROUND

On May 19, 2015, at 20 East End Avenue in Manhattan, plaintiff was injured when, while carrying a 16-foot long plywood form, he tripped on a one-inch piece of rebar that had been installed on a wooden plywood deck on which he was walking. The deck was to become the third floor and was part of the construction project where plaintiff worked as a carpenter. There was yet no fourth floor nor had any walls been constructed on the third floor. Plaintiff had walked over the rebar 10 times on the date of his accident without incident. (NYSCEF 28).

Plaintiff intended to walk 100 feet from where he picked up the form to where he was going to use it, but only made it 50 feet before he tripped. He took the "path that [he] needed to take to go wherever [he] was going, to the other side of the building." (NYSCEF 28). A photograph of the accident location depicts a completely open work area with no walls or ceiling. (NYSCEF 42).

Defendant 20 EEA Partners LLC owned the premises; defendant Bravo Builders, LLC operated as the construction manager for the project at issue. Bravo hired plaintiff's employer, Structure Tech, to perform concrete superstructure work, including all "formwork, rebar and concrete for floors 1 through the upper bulkhead." (NYSCEF 31, 32). Plaintiff's foreman directed his work daily. (NYSCEF 28).

In his amended bill of particulars, plaintiff withdrew his Labor Law § 240(1) claim. (NYSCEF 39).

II. LABOR LAW § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given the non-delegable duty imposed on an owner and general contractor, a plaintiff need not establish that a defendant and general contractor had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013]

[plaintiff need not show that defendants exercised supervision and control over work or worksite]).

Plaintiff relies on 12 NYCRR § 23-1.7(e)(1) as the basis for his Labor Law § 241(6) claim. He is deemed to have waived reliance on any other regulations. Pursuant to that rule, as it relates to tripping and other hazards, all passageways must be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

The parties dispute whether the area where plaintiff tripped constitutes a "passageway." Having described the path as an incipient floor with a plywood deck on it in an open and unbounded construction area, plaintiff fails to establish that he was injured while in a passageway, rather than an open work area which does not constitute a passageway within the meaning of this industrial code provision. (*See Steiger v LPCiminelli, Inc.*, 104 AD3d 1246 [4th Dept 2013] [passageway is defined walkway or pathway used to traverse between discrete areas, rather than open area]; *see also Solano v Skanska USA Civil Northeast, Inc.*, 148 AD3d 619 [1st Dept 2017] [as accident occurred in open area, it did not occur in passageway]; *DePaul v N.Y. Brush, LLC*, 120 AD3d 1046 [1st Dept 2014] [where plaintiff fell after wooden plank broke while he walked on it, accident occurred in open working area and not passageway "notwithstanding evidence that workers traversed the plank to get from the street to the job site"]; *McKee v Great Atlantic & Pacific Tea Co.*, 73 AD3d 872 [2d Dept 2010] [open, ground-level worksite did not constitute passageway]; *Canning v Barney's New York*, 289 AD2d 32 [1st Dept 2001] [location of accident was work area, not passageway, where it was used as work site and even though plaintiff had to pass through it in order to reach his work area]).

Canning is directly on point. There, while working at a site on the main floor of a building under construction, plaintiff had obtained a conduit from a storage shed located outside

of the site's entrance, and had walked some 20 feet into the building when he tripped over material on the concrete floor and fell. The Court held that the area was an open working area rather than a passageway as: (1) the surface on which he fell was a floor contained within the structure; (2) the area was in constant use as a work site; (3) the plaintiff was required to pass through the area to reach his work area; and (4) the path from the storage shed to his work area was essentially a straight line. (289 AD2d at 34).

Defendants thus establish that plaintiff's Labor Law § 241(6) claim fails absent an applicable predicate violation, and plaintiff fails to raise a triable issue in opposition.

III. LABOR LAW § 200 AND NEGLIGENCE

Pursuant to Labor Law § 200, an owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

While plaintiff argues that the protruding rebar constitutes a dangerous condition on the premises, it was part of the third-floor construction and thus essentially implicates the means and manner in which he or others constructed the floor, and was not a defect inherent in the worksite. (*See Cappabianca*, 99 AD3d at 144 [liability for dangerous condition on premises generally pertains to "a defect inherent in the property," not to manner in which work performed]; *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1st Dept 2018] [no evidence that Labor Law § 200 claim arose from alleged defect or dangerous condition on premises; "(w)here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises."]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [where

protruding bolt on which plaintiff tripped had been installed to hold down tank and employer failed to cut it down to be level with surrounding surface, protrusion was created by manner in which plaintiff's employer performed work]).

Plaintiff's allegation that defendants actually exercised supervision and/or control over his work through Bravo's actions in conducting safety meetings and having the authority to stop unsafe work is insufficient. (*See Villanueva*, 162 AD3d at 404 [defendant did not exercise control over manner and means of work by having authority to stop work for safety reasons]; *Galvez v Columbus 95th St. LLC*, 161 AD3d 530 [1st Dept 2018] [no evidence that contractor supervised, directed, or controlled plaintiff's work and fact that it had authority to stop unsafe work practices insufficient to show requisite degree of control]).

Moreover, it is undisputed that only plaintiff's foreman supervised and controlled his work. (*See Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014] [defendant did not control work that caused plaintiff's accident as plaintiff testified that he worked solely under supervision of his employer-subcontractor's foreman and did not receive direction from anyone else]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [plaintiff worked under direction of his own employer's foreman and was not supervised by anyone else]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007] [plaintiff testified that defendant did not tell plaintiff's employer or its employees how to perform its work and defendant testified that it did not supervise subcontractors' work and did not tell them what to do]; *see also Castellon v Reinsberg*, 82 AD3d 635 [1st Dept 2011] [as it was undisputed that defendant did not tell plaintiff how to do his work, plaintiff's Labor Law § 200 claim should have been dismissed]).

To the extent that the rebar constitutes a dangerous condition, when a dangerous condition is readily observable and inherent in the work, a claim pursuant to Labor Law § 200 may not be maintained. (*See Gasper v Ford Motor Co.*, 13 NY2d 104 [1963]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]). Here, the rebar was an integral part of the construction work at issue as plaintiff's role and that of the other employees was to construct the floor and surrounding structure using rebars and other materials. (*See e.g., Bombero v NAB Constr. Corp.*, 10 AD3d 170 [1st Dept 2004] [plaintiff's claim based on accident that occurred when he walked across rebar barred as his duties included work with rebar and hazard was readily observable]; *Brown v 44th St. Dev., LLC*, 48 Misc 3d 234 [Sup Ct, New York County 2015], *affd on other grounds* 137 AD3d 703 [1st Dept 2016] [dismissing plaintiff's Labor Law § 200 claim as plaintiff's construction of basement involved rebar on which he fell after he walked on it]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order granting them summary judgment is granted to the extent of dismissing plaintiff's claims against them, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that plaintiff's cross motion for partial summary judgment on liability is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

9/4/2018
DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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