

Vinciguerra v Turner Constr. Co.

2019 NY Slip Op 30814(U)

April 1, 2019

Supreme Court, New York County

Docket Number: 159591/2014

Judge: Kelly A. O'Neill Levy

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**KELLY O'NEILL LEVY
JSC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X

JACK VINCIGUERRA,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY,
TURNER/STV (IN JOINT VENTURE) and STV GROUP, INC.,

Defendants.

INDEX NO. 159591/2014

MOTION DATE 01/16/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

This is a Labor Law action where the plaintiff tripped and cut himself with a demolition saw.

Defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc. (collectively, hereinafter, Turner) move for an order, (1) pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint and all cross-claims against them and (2) permitting Turner to enter judgment with the Clerk and against plaintiff with statutory costs and disbursements. Plaintiff Jack Vinciguerra opposes and cross-moves for an order, pursuant to CPLR § 3212, granting summary judgment in his favor on the Labor Law § 241(6) claim. Turner opposes.

BACKGROUND

On July 29, 2014, plaintiff Jack Vinciguerra, a laborer employed by non-party J-Track, was performing construction work for the NYPD Police Academy located in College Point,

Queens (hereinafter, the premises). The New York City Department of Design and Construction retained Turner to act as the construction manager and general contractor for the project. Turner hired J-Track as a subcontractor. At the time of the accident, plaintiff was tasked with removing electrical conduit from Turner's trailers located in the parking lot, which was under construction at the time. Plaintiff was aiding in the removal of Turner's trailers so that another subcontractor, Tully, could continue its work. Plaintiff used a demolition saw (hereinafter, the saw) to cut electrical conduit (hereinafter, the pipe). The pipe bent which caused the saw to bind up and kick back. The force of the saw kicking back caused plaintiff to step back onto a piece of plywood, lose his balance, and fall. The saw cut plaintiff's left knee.

Plaintiff testified that he was employed by J-Track as a laborer [Deposition of Plaintiff (ex. G to the Daks aff.) at 46, 53]. Plaintiff stated that he did not speak or interact with Turner when he first arrived at the premises (*id.* at 54). Turner had safety workers to ensure site safety (*id.* at 54-55). J-Track provided him with a hardhat and safety glasses (*id.* at 57). Plaintiff received all his instructions from his J-Track foreman (*id.* at 62). Turner would tell the superintendent or the foreman what needed to be done and they would tell him what to do (*id.* at 63, 65-66). Turner needed to move its trailers, which were connected to pipes with cables running through (*id.* at 95). Turner instructed J-Track to cut the pipes so that the trailers could be disassembled (*id.*). Plaintiff noted that there was a lot of debris at the premises, including wood and other materials (*id.* at 97-98). Tully, a construction subcontractor, was tasked to excavate the parking lot, but it could not begin its work until Turner's trailers were removed from the area (*id.* at 98). The pipes ran power to the trailers (*id.* at 101). Plaintiff was using a hand-held, gas-powered demolition saw (the saw) to cut the pipes (*id.* at 104). The saw had a 14-inch blade (*id.*

at 105). About half of the blade was covered, while a portion was uncovered (*id.* at 113-114). As plaintiff was cutting the pipe, when the saw got halfway through, the pipe bent downwards, which caused the saw to bind up (*id.* at 151). The force of the saw kicking back caused plaintiff to step back with his left foot and trip over a piece of broken plywood on the ground (*id.*). As he fell, the saw cut his leg (*id.*). When he got up, he shut off the saw and his foreman came over to assist him (*id.*). Plaintiff was not sure where the plywood had come from but suggested that Tully had stored plywood in that area (*id.* at 153). Plaintiff was unsure as to why the pipe had bent (*id.* at 165).

Emily Harris, an assistant superintendent for Turner, testified that Turner was the construction manager and general contractor for the construction of the police academy [Deposition of Emily Harris (ex. H to the Daks aff.) at 15]. She had general supervision responsibilities, but she did not direct the trades in their work (*id.* at 53). She confirmed that Tully was working on the parking lot of the premises (*id.* at 69) and that plaintiff was working on the removal of Turner's trailers (*id.* at 151). She stated that the saw did not seem to be missing a guard or piece (*id.* at 246-247).

Plaintiff's C-3 Employee Claim for the Workers' Compensation Board confirms that he was injured while cutting cables when a saw struck his knee [C-3 Report (ex. I to the Daks aff.)]. Turner's Incident Investigation Report, prepared by Ms. Harris, also confirms that plaintiff used a demolition saw to cut away at a temporary conduit, and that the saw caught him just below his left knee [Turner Incident Investigation Report (ex. J to the Daks aff.)]. J-Track's Incident Report further confirms that plaintiff was cutting conduit when his demolition saw got jammed up and hit him in his left knee [J-Track Incident Report (ex. K to the Daks aff.)].

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). 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 factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Labor Law § 240(1) Claim

Turner moves for summary judgment and dismissal of the Labor Law § 240(1) claim. Plaintiff concedes that Labor Law § 240(1) is inapplicable to this action in his opposition to this motion.

Labor Law § 240(1), also known as the Scaffold Law (*Ryan v. Morse Diesel*, 98 A.D.2d 615, 615 [1st Dep't 1983]), provides, in relevant part:

“All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm

directly flowing from the application of the force of gravity to an object or person” *John v. Baharestani*, 281 A.D.2d 114, 118 (1st Dep’t 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.”

Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001); *Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep’t 2008); *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep’t 2007). To prevail on a Labor Law § 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep’t 2004).

Here, there is no elevation-related hazard, as plaintiff was standing outdoors on the ground level at the time of his accident. Therefore, Labor Law § 240(1) is inapplicable. Thus, the court grants the branch of Turner’s motion for summary judgment seeking dismissal of the Labor Law § 240(1) claim and dismisses same.

Labor Law § 200 and Common-Law Negligence Claims

Turner moves for summary judgment and dismissal of the Labor Law § 200 and common-law negligence 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’ [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 311, 316-317 (1981). 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 Labor Law § 200 cases, depending on 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).

Here, the accident was the result of a dangerous condition on the premises, specifically the piece of broken plywood on the ground behind plaintiff, which caused him to trip and cut his knee. There is an issue of fact as to whether there was a defect in the saw or whether proper guarding was provided to protect plaintiff against getting cut by the saw's blade. Plaintiff suggests that the saw did not have the proper guarding to protect him from his accident. Plaintiff further testified that a portion of the saw's blade was uncovered, but he implied that the blade needed to remain uncovered to cut through the pipe (Plaintiff tr. at 113-114). Ms. Harris testified that the saw did not seem to be missing a guarding (Harris tr. at 246-257). Thus, there is an issue of fact as to whether the saw's blade was properly guarded as to provide protection for plaintiff.

“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 A.D.3d 139, 144 (1st Dep't 2012).

It is unclear whether Turner had actual or constructive notice of the dangerous condition of the broken plywood on the ground. Ms. Harris testified that she did not know whether there were planks of wood in the area of the accident (Harris tr. at 279-280). But plaintiff stated that Tully had stored plywood in that area (Plaintiff tr. at 153). Therefore, there is an issue of fact as to whether Turner had notice of the dangerous condition at the premises, namely the broken plywood on the ground.

Thus, the court denies the branch of Turner's motion for summary judgment seeking to dismiss the Labor Law § 200 and common-law negligence claims.

Labor Law § 241(6) Claim

Turner moves for summary judgment and dismissal of the Labor Law § 241(6) claim. Plaintiff cross-moves for summary judgment on this 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

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 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute 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.*

Initially, while plaintiff asserts multiple alleged Industrial Code violations in their bill of particulars, with the exception of sections 23-1.5(c)(3), which deals with the condition of equipment and safeguards, 23-1.7(e)(2), which deals with tripping hazards, 23-1.12(c)(1), which deals with the guarding of power-driven saws, and 23-9.2(a), which deals with maintenance of power-operated equipment, plaintiff does not oppose their dismissal. Therefore, the unopposed Industrial Code provisions are deemed abandoned. *See Genovese v. Gambino*, 309 A.D.2d at 833 (2d Dep't 2003).

Thus, Turner is entitled to dismissal of the abandoned Industrial Code provisions. This court will consider the remaining asserted Industrial Code violations in turn.

§ 23-1.5 General responsibility of employers.

- ...
- (c) Condition of equipment and safeguards.
- (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

As a preliminary matter, Industrial Code § 23-1.5(c)(3) is sufficiently specific to maintain a Labor Law § 241(6) claim. *See Becerra v. Promenade Apts. Inc.*, 126 A.D.3d 557, 558 (1st Dep't 2015).

As explained above, there exists a question of fact as to whether plaintiff's saw was defective or not properly guarded. This question of fact also applies to this Industrial Code section, which deals with the condition of equipment and safeguards.

Thus, the court denies the branch of Turner's motion seeking summary judgment and dismissal of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.5. The court also denies plaintiff's cross-motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.5(c)(3).

§ 23-1.7 Protection from general hazards.

...

(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.

As a preliminary matter, Industrial Code § 23-1.7(e)(2) is sufficiently specific to maintain a Labor Law § 241(6) claim. *See Capuano v. Tishman Constr. Corp.*, 98 A.D.3d 848, 850 (1st Dep't 2012).

In *Capuano v. Tishman Constr. Corp.*, where the plaintiff slipped on a piece of sprinkler pipe and was injured as a result, the court affirmed the motion court's granting of partial summary judgment on the Labor Law § 241(6) claim based on a violation of Industrial Code § 23-1.7(e)(2). *Id.* Here, plaintiff's accident occurred in a working area, as he was working in the parking lot of the premises near Turner's trailers at the time of his accident. Plaintiff tripped on construction debris, namely a broken piece of plywood, which caused his saw to cut his knee. Turner failed to provide reasonable and adequate protection and safety to plaintiff in leaving the broken piece of plywood on the ground in the working area. Therefore, Industrial Code § 23-1.7(e)(2) was violated.

Thus, the court denies the branch of Turner's motion seeking summary judgment and dismissal of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7 and grants the branch of plaintiff's cross-motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(2).

§ 23-1.12 Guarding of power-driven machinery.

...

(c) Power-driven saws.

(1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

As a preliminary matter, Industrial Code § 23-1.12(c)(1) is sufficiently specific to maintain a Labor Law § 241(6) claim. *See Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 544 (1st Dep't 2011).

Turner asserts that Industrial Code § 23-1.12(c)(1) is inapplicable for portable saws. However, Industrial Code § 23-1.12(c)(1) is inclusive of portable saws, as stated in the plain language of the regulation. It appears that Turner mistakenly applied the language of Industrial Code § 23-1.12(c)(2), which specifically excludes portable saws.

In *Ortega v. Everest Realty LLC*, the court found that there was an issue of fact as to whether the defendants violated Industrial Code § 23-1.12(c)(1), as it was unclear whether the saw in that case was equipped with a guard which was compliant with the Industrial Code. *Id.* Similarly, here, it is unclear whether the saw was properly equipped with a guard above the base plate. As such, there exists a question of fact as to whether the saw was properly equipped.

Thus, the court denies the branch of Turner's motion seeking summary judgment and dismissal of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.12(c). The court also denies plaintiff's cross-motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.12(c)(1).

§ 23-9.2 General requirements.

(a) Maintenance.

All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient

inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement ...

As a preliminary matter, the Court of Appeals has found that the third sentence of Industrial Code § 23-9.2(a) is sufficiently specific to maintain a Labor Law § 241(6) claim. *See Misicki v. Caradonna*, 12 N.Y.3d 511, 521 (2009).

Plaintiff asserts that the saw lacked a guard below the base plate which would have prevented the saw from cutting plaintiff. Turner asserts that Industrial Code § 23-9 is inapplicable, as it related to power-operated heavy equipment or machinery. It is unclear whether plaintiff's saw qualifies as "heavy equipment or machinery" as stated in the Industrial Code. Also, as explained above, it is unclear whether plaintiff's saw had a structural defect or an unsafe condition, as there is a question of fact as to whether the saw was properly guarded.

Thus, the court denies the branch of Turner's motion seeking summary judgment and dismissal of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-9. The court also denies plaintiff's cross-motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-9.2(a).

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that the branch of defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc.'s motion for an order, pursuant to CPLR § 3212,

granting summary judgment in their favor on the Labor Law § 240(1) claim is granted and that claim is dismissed; and it is further

ORDERED, that the branch of defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc.'s motion for an order, pursuant to CPLR § 3212, granting summary judgment in their favor on the Labor Law § 200 and common-law negligence claims is denied; and it is further

ORDERED, that the branch of defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc.'s motion for an order, pursuant to CPLR § 3212, granting summary judgment in their favor on the Labor Law § 241(6) claim predicated on a violation of Industrial Code §§ 23-1.8(c)(1), 23-1.10, 23-1.11, 23-1.13, 23-1.30, 23-2.1, 23-2.2(a), 23-3, 23-4, and 23-5 is granted and the portion of the Labor Law § 241(6) claim predicated on a violation of these Industrial Code sections is dismissed; and it is further

ORDERED, that the branch of defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc.'s motion for an order, pursuant to CPLR § 3212, granting summary judgment in their favor on the Labor Law § 241(6) claim predicated on a violation of Industrial Code §§ 23-1.5, 23-1.7, 23-1.12(c), and 23-1.9 is denied; and it is further

ORDERED, that the branch of defendants Turner Construction Company, Turner/STV (in joint venture), and STV Group, Inc.'s motion seeking permission to enter judgment and for statutory costs and disbursements is denied; and it is further

ORDERED, that the branch of plaintiff Jack Vinciguerra's cross-motion for an order, pursuant to CPLR § 3212, granting summary judgment in his favor on the Labor Law § 241(6) claim predicated on a violation of Industrial Code §§ 23-1.5(c)(3), 23-1.12(c)(1), and 23-9.2(a) is denied; and it is further

ORDERED, that the branch of plaintiff Jack Vinciguerra's cross-motion for an order, pursuant to CPLR § 3212, granting summary judgment in his favor on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(2) is granted.

This constitutes the decision and order of the court.

4-1-19
DATE

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

KELLY O'NEILL LEVY
JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: