Krzyzanowski v City of New York
2019 NY Slip Op 31027(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 157165/2016
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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MAREK KRZYZANOWSKI,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE COMPTROLLER OF THE CITY OF NEW YORK, ROCKMORE CONTRACTING CORP., STV CONSTRUCTION INC.

Defendants.

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INDEX NO. 157165/2016

MOTION DATE 11/21/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this Labor Law action, defendants, the City of New York, the Comptroller of the City of New York, Rockmore Contracting Corp., and STV Construction Inc., now move pursuant to CPLR 3212 for summary dismissal of the complaint of plaintiff, Marek Krzyzanowski. Plaintiff opposes defendants' motion and cross-moves for summary judgment of its claims under Labor Law §241(6), premised on Industrial Code § 23-1.7(e). Defendants oppose plaintiff's cross-motion.

At the time of the accident giving rise to the instant action, the property located at 10 Reade Street, also known as 2 Lafayette Street, in the county, city and state of New York (premises), was being renovated into a preschool. The premises was owned by the City of New York. The City hired STV Construction, Inc. (STV), which in turn hired non-party Earth Construction to perform work at the premises. Plaintiff was employed as a painter by Earth Construction and performed work at the premises.

Plaintiff claims that as he was walking behind a co-worker through a hallway located within the premises, his co-worker stepped on an unsecured Masonite board, causing the board to rise and catch plaintiff's right foot, causing him to fall (NYSCEF # 38, 30:17-32:8). Plaintiff alleges claims under Labor Law §§ 200/common law negligence and 241(6), for violation of Industrial Code §23-1.7. Plaintiff's opposition withdraws his claims under Labor Law § 240(1) and Labor Law § 241(6), under Industrial Code §§ 23-1.5(a-b), (c1-2); 23-1.22; 23-1.30; 23-1.32; and 23-1.33.

Discussion

"Summary judgment must be granted if the proponent makes 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v. Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, " 'regardless of the sufficiency of the opposing papers' " (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law Section 200/Common Law Negligence

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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Defendants contend that plaintiff's Labor Law § 200 claim should be dismissed since it was plaintiff's employer, Earth Construction, and not defendants that had the authority to control plaintiff's work.

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.* [emphasis in original).

In contrast, where the defect arises from a dangerous condition on the work site, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc, IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

At the outset, the court finds that defendants did not have supervisory authority over plaintiff's work. Plaintiff testified that only his employer, Earth Construction, supervised the way in which his work was performed (NYSCEF # 38, 17:2-8; # 39, 14:12-18; 26:24-27:6).

Next, defendants establish that they did not have constructive or actual notice of the alleged dangerous condition. A defendant is charged with constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it (*Gordon v. Am. Museum of Nat. History*, 67 NY2d 836 [1986]). Here, plaintiff testified that the dangerous condition occurred when his co-worker stepped on the Masonite causing it to rise and catch his foot. Further, there is no evidence in the record demonstrating that defendants were aware that the dangerous condition prior to plaintiff's accident. Peter O'Hanlon, defendants' witness and site manager, testified that he conducted safety inspections once or twice per week, and that it was "possible" that he saw boards like the one plaintiff tripped on, but he was unsure whether he saw the subject board (NYSCEF # 40, 44:14-45:2).

Accordingly, plaintiff's claims under Labor Law § 200/common law negligence are dismissed.

Labor Law Section 241(6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec.* Co., 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

Defenants argue that Industrial Code § 23-1.7(e) is inapplicable since the Masonite that plaintiff alleges caused his accident was integeral to the work being performed. Industrial Code § 23-1.7(e) states as follows:

Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(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.

Here, plaintiff demonstrates his entitlement to summary judgment of his claim under Industrial Code § 23-1.7(e)(1) by testifying that he was walking through a through a passageway within the premises when his co-worker stepped on unsecured Masonite, causing the board to rise and catch plaintiff's right foot, which caused plaintiff to fall.

In opposition, defendants fail to raise an issue of fact. Defendants cite to cases such as *Stier v One Bryant Park LLC* (113 AD3d 551 [1st Dept 2014]) for the proposition that a defendant may not be liable under Industrial Code § 23-1.7(e)(1) where the alleged hazard is an integral part of the work being performed (NYSCEF doc no 16, ¶13). However, those cases do not support defendants' position since they only address summary dismissal under Industrial Code § 23-1.7(e)(2). In any event, the argument that the alleged hazard constitutes an integral part of the work performed is inapplicable to 12 NYCRR § 23-1.7(e)(1) (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607-608 [1st Dept 2015]).

Accordingly, plaintiff is entitled to judgment as to liability of its claim pursuant to Labor Law § 241(6), under Industrial Code § 23-1.7(e)(1).

Next, defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim under Industrial Code § 23-1.7(e)(2) is denied. Plaintiff testified that the Masonite was covering the concrete floors (NYSCEF # 38, 30:4-8), and that the boards were "possibly" placed on the floor to protect the newly laid cement (NYSCEF # 39, 31:11-20). O'Hanlon, the site manager, also testified that Masonite was used to protect the floors (NYSCEF # 40, 5-11; 44:7-21). However, there is no evidence demonstrating that the Masonite board was integral to the work as a painter plaintiff was performing at the time of his accident (*see Tighe v Hennegan Const. Co.*, 48 AD3d 201, 202 [1st Dept 2008]).

Finally, defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim under Industrial Code § 23-2.1, is granted. Section 23-2.1 of the Industrial Code governs the storage of material or equipment and the disposal of debris. As

addressed by the testimony above, the testimony demonstrates that Masonite was used at the premises to cover the floors. Plaintiff, in response, has failed to rebut defendants' showing.

Conclusion

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 to dismiss the complaint is granted to the extent that plaintiff's claims pursuant to Labor Law §§ 200, 240(1), and 241(6), premised on Industrial Code §§ 23-1.5(a-b), (c1-2); 23-1.7(e)(2); 23-1.22; 23-1.30; 23-1.32; 23-1.33; and 23-2.1, are dismissed; it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3212 for summary judgment of his claim under Labor Law § 241(6) premised on Industrial Code § 23-1.7(e)(1) is granted; it is further

ORDERED and ADJUDGED that the Clerk of the court shall enter judgment as written; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, along with notice entry, on all parties within fifteen (15) days of entry.

This constitutes the Decision and Order of the court.

4/8/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE