SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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MARLON EASON,

Plaintiff,

-against-

GOTHAM CONSTRUCTION COMPANY LLC, EXTELL 4110 LLC, 555 TENTH AVENUE LLC, 555 TENTH AVENUE 11 LLC and JOHN DOE CORPORATION,

Defendants.

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DECISION & ORDER

Ind. No. 162096/15

Mot. Seq. 001

HON. KATHRYN E. FREED, J.S.C.

The following e-filed documents, listed by NYSCEF document number (Motion Sequence 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 41
were read on this motion for SUMMARY JUDGMENT.

This is an action to recover damages for personal injuries allegedly sustained by a union concrete laborer on April 21, 2015 when, while working at a construction site located at 555 Tenth Avenue, New York, New York (the premises), he fell backwards after the wheel of a pallet jack that he was rolling backwards stopped short because it came into contact with some construction debris.

Defendants Gotham Construction Company LLC (Gotham) and Extell 4110 LLC (Extell) (together, defendants) and 555 Tenth Avenue LLC and 555 Tenth Avenue II LLC (together, the 555 Tenth Avenue defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them.

It should be noted that on April 11, 2018, plaintiff executed a stipulation of partial discontinuance withdrawing and discontinuing the Labor Law § 240 (1) claim against defendants and the 555 Tenth Avenue defendants.

FACTUAL AND PROCEDURAL BACKGROUND

On the day of the accident, Extell owned the Premises where the accident occurred. Pursuant to a construction agreement with Extell, Gotham served as the construction manager on a project at the Premises, which entailed the construction of a new 54-story residential tower (the project). Non-party Pinnacle Industries (Pinnacle) was hired to provide the concrete superstructure work on the Project. Plaintiff was employed by Pinnacle as a concrete laborer at the time of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Pinnacle as a union concrete laborer, and that Pinnacle had been retained to provide the concrete work on the Project. He testified that his "job title [was] concrete laborer . . . [and that he] was doing cleaning with them at that site" (plaintiff's tr at 11). Plaintiff maintained that he "did whatever [his employer] told him to do" (*id.* at 14). Plaintiff asserted that he received his instructions solely from his Pinnacle supervisors, which included "instructions as to how the work should be performed" (*id.* at 20). Plaintiff's safety equipment was provided by either Pinnacle or himself.

Just prior to the accident, plaintiff was told to go to the fifth floor of the Premises to "clean it up because [Pinnacle was] finished stripping [forms]" (*id.* at 28). When he got there, at

the request of a Pinnacle supervisor, plaintiff and his co-workers "started loading pallets on the pallet jack . . . trying to get stuff out of there to go to the dumpster" (*id.* at 30). Plaintiff described the subject pallets as "wooden skids," which were "basically wood, built in . . . a square and you put materials on top of [them]" (*id.*). The pallet jacks were owned by Pinnacle. At that time, plaintiff noticed "debris. Concrete debris. Lumber splinters . . . a lot of crap" on the ground in the area where he was working (*id.* at 33).

As he was pulling the pallet, the pallet stopped short after getting caught on something, causing plaintiff to "jerk" and fall backwards onto his back (*id.* at 34). After he fell, plaintiff noticed some concrete chips and wooden splinters stuck in the wheel of the jack.

Plaintiff never made any complaints about the condition of the fifth floor or the condition of the pallet jack prior to the time of the accident. He also maintained that he did not observe any other trades working on the fifth floor on the day of the accident.

Deposition Testimony of Edward Bigley (Vice President and General Superintendent for Gotham)

Edward Bigley testified that he was Gotham's vice president and superintendent, which meant that he "was the individual with the highest level of responsibility for the job" (Bigley tr at 16). He testified that Gotham had "several assistant[s] or area supers, a site safety manager, a fire safety manager, [and] a labor foreman" on staff at the Project, which entailed the construction of a new 54-story residential tower for Extell (*id.* at 17). In addition, there were also various tradesmen on the job, including Pinnacle, "the concrete superstructure contractor" (*id.* at 23).

Bigley explained that Pinnacle was "involved in pouring the concrete that would create the floors and pouring it into molds that would create the structural beams" (*id.*). Pinnacle was also responsible for "installing the formwork [for the concrete pours] and taking it down" (*id.* at 24). Pinnacle was responsible for the means and methods of said work, and Gotham never supervised or directed it. In addition, Pinnacle supplied its workers with all of the equipment *and* tools needed to perform their work.

Bigley also testified that "Typically the contract language says that the trades . . . are to center pile their debris" (*id.*). Thus, it was Pinnacle's responsibility to turn over its work areas "broom clean" (*id.* at 26). When asked who was "responsible for taking that center pile of debris off of any particular floor to allow another trade to come in and do something else," Bigley responded that it was the trades' job to remove the center pile (*id.* at 24-25). Notably, however, when asked if anyone from Gotham was responsible for "go[ing] in after Pinnacle and see[ing] whether or not they adequately cleaned up their space," he replied, "Yes" (*id.* at 25). When asked who from Gotham was sent for this task, he replied, "one of [Gotham's] area supers" (*id.*). Bigley also noted that, prior to the day of the accident, a number of trades had carried out various tasks on the fifth floor of the Premises, including the installation of pipes and other building components.

Plaintiff filed a note of issue on May 17, 2018. Doc. 20. On July 16, 2018, defendants and the 555 Tenth Avenue defendants filed the instant motion for summary judgment. Plaintiff opposes the application.

LEGAL CONCLUSIONS

"'The 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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Claims Against the 555 Tenth Avenue Defendants

Defendants and the 555 Tenth Avenue defendants move for dismissal of all remaining claims asserted against the 555 Tenth Avenue defendants. Initially, plaintiff does not oppose that part of defendants' and the 555 Tenth Avenue defendants' motion to dismiss all remaining claims against the 555 Tenth Avenue defendants. In any event, the 555 Tenth Avenue defendants neither owned the premises on the day of the accident nor contracted with any entity to perform work on the project. Thus, the 555 Tenth Avenue defendants are entitled to dismissal of all remaining claims asserted against them. Accordingly, the remainder of this decision will address only the claims asserted against defendants.

The Labor Law § 241 (6) Claim Against Defendants

Defendants move for dismissal of the Labor Law § 241 (6) claim against them. 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' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). However, Labor Law § 241 (6) is not self-executing, and 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.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code, he addresses only sections 23-1.7 (e) (1) and (2) in his opposition to defendants' motion. Thus, his reliance on all other sections is deemed abandoned (*see Foley v Consolidated Edison Co. of N.Y.*, 84 AD3d 476, 478 [1st Dept 2011]) and defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim insofar as it is predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2)

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]).

Sections 23-1.7 (e) (1) and (2) provide, in pertinent part:

"(e) Tripping and other hazards.

> (1) Passageways. All passageways shall be kept free from . . . debris and from any other obstructions or conditions which could cause tripping.
>
> * * *
>
> (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."

Section 23-1.7 (e) (1), which addresses tripping hazards in passageways, does not apply to the facts of this case, because there has been no showing whatsoever that plaintiff's accident occurred in a passageway (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dept 2007]; *O'Sullivan*, 28 AD3d at 225-226; *Appelbaum*, 6 AD3d at 310). Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (e) (1).

However, section 23-1.7 (e) (2), which regulates tripping hazards in working areas, does apply to the facts of this case, as plaintiff's accident occurred when the wheel of the pallet jack

he was moving got caught on the concrete chips and wood splinters present on the ground, and this material constituted an "accumulation of . . . debris" for the purposes of the provision.

In support of their motion, defendants argue that they are entitled to dismissal of the section 23-1.7 (e) (1) and (2) claims because the concrete chips and wood splinters could be considered integral to the work being performed by Pinnacle at the time of the accident (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607 [1st Dept 2015] [alleged section 23-1.7 (e) (2) violation dismissed where plaintiff tripped over a screw, which was an integral part of the raised tile floor system being installed]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather an integral part of the work being performed]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed]; *Bond v York Hunter Constr.*, 270 AD2d 112, 113 [1st Dept 2000], *affd* 95 NY2d 883 [2000] ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]).

However, the evidence in the record indicates that at least a question of fact exists as to whether the concrete chips and wooden splinters that got caught in the jack's wheel were an integral part of the work, rather than simply debris which was not properly cleared from plaintiff's work area. To that effect, plaintiff's assigned duty at the time of the accident was to pick up and throw into dumpsters the wood forms that had been stripped by Pinnacle workers as part of their concrete work. There is no indication in the record that plaintiff was to also remove

smaller debris from the area. In addition, it has not been established that the subject debris, which may have even been left behind by another trade, was necessary for the task of Pinnacle's wood form removal work, or any other trade's work, underway at the time of the accident.[1] Thus, defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (e) (2).

Defendants also argue that they are not liable under section 23-1.7 (e) (2) because plaintiff was the sole proximate cause of the accident. In support of this argument, defendants assert that plaintiff testified that he was aware of the presence of the debris on the floor as he was pulling the jack backwards, and that he was focusing his attention on the jack, rather than where he was walking at the time of the accident.

However, since defendants' violation of section 23-1.7 (e) (2) "constitute[d] *some evidence of negligence*," plaintiff cannot be the sole proximate cause of the accident. Further, "[a]n owner or general contractor may . . . raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory or comparative negligence" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998] [emphasis original]). Accordingly,"[i]t now remains for the jury to determine the remaining factual issues including . . . comparative negligence" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

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[1]It should also be noted that it is of no consequence that the by-product was not related to plaintiff's work, as the defense also applies when the material is the by-product of other work underway at the site (*see Bond v York Hunter Constr.*, 270 AD2d at 113 ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]). Here, the deposition testimony in the record indicates that Pinnacle was the only trade working on the floor on the day of the accident.

The Common-Law Negligence and Labor Law § 200 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "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 on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when 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 AD3d 796, 797-798 [2d Dept 2007]).

"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 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and

control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

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 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, plaintiff was injured when, while rolling the jack backwards, concrete debris and wooden splinters, which allegedly should have been cleared from the area, got caught in the jack's wheel, causing it to stop short and make plaintiff fall backwards.

Therefore, the accident was caused due to the means and methods not only of plaintiff's work, but of the clean-up work at the site as well.

There is no evidence in the record suggesting that Extell either supervised plaintiff's work or the clean-up work on the project. Thus, Extell is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

However, Gotham supervisors performed general walk-throughs and inspections of the various work areas and, while the individual trades, such as Pinnacle, were responsible for clearing their own debris and materials, center piling it and then removing it from the site, Gotham was responsible for then inspecting the work areas after the trades left the various floors in order to make sure that the trades had properly cleaned the areas. Since Pinnacle was still working on the floor at the time of the accident, it was premature for Gotham to inspect and clean-up after Pinnacle.

However, a question of fact exists as to whether any other trade or trades created the subject unsafe debris condition on the fifth floor and then failed to properly remove it, and whether Gotham may have failed in its duty to inspect and clean up behind any such trade once it had left the floor. Thus, Gotham is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants Gotham Construction Company LLC (Gotham) and Extell 4110 LLC (Extell) (together, defendants) and 555 Tenth Avenue LLC and 555 Tenth Avenue II LLC's (together, the 555 Tenth Avenue defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety against the 555 Tenth Avenue defendants is granted, and the complaint is dismissed as against the 555 Tenth Avenue defendants, with costs and disbursements to the 555 Tenth Avenue defendants as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of the 555 Tenth Avenue defendants; and it is further

ORDERED that the branch of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing those portions of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code section 23-1.7 (e) (1) and the abandoned Industrial Code sections is granted, and any claim based on these sections are dismissed as against defendants; and it is further

ORDERED that the branch of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against Extell are granted, and these claims are dismissed as against Extell, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: May 6, 2019

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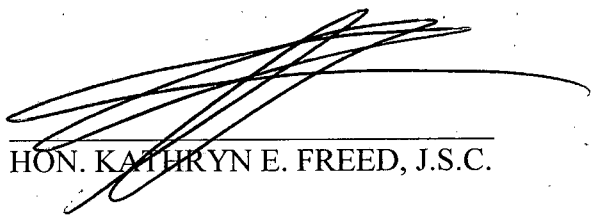

HON. KATHRYN E. FREED, J.S.C.