

<b>Espinal v New York City Economic Dev. Corp.</b>
2019 NY Slip Op 31295(U)
March 20, 2019
Supreme Court, Kings County
Docket Number: 508800/2015
Judge: Devin P. Cohen
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Supreme Court of the State of New York  
County of Kings

Index Number 508800/2015  
*SEP#004*

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

JOSE ESPINAL,

Plaintiff,

against

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND THE CITY OF NEW YORK,

Defendants.

**Papers**

<b>Numbered</b>	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
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Upon review of the foregoing papers, defendants' motion for summary judgment is decided as follows:

**Factual Background**

Defendant New York City Economic Development Corporation ("NYCEDC"), as general contractor, hired Tully Construction Co., Inc./OHL S.A., Joint Venture ("OHL"). Plaintiff, an employee of OHL, was working in the water siphon tunnels between Staten Island and Brooklyn.

Plaintiff described the accident at his examination pursuant to NY Gen. Municipal Law 50-h, and his deposition in this action. On the date of the accident, plaintiff was tasked with disassembling the motor room of the tunnel boring machine (Plaintiff's 50-H Examination Transcript ("Plaintiff's 50-H") at 35, 40-41, 49). At the time the tunnel boring machine was being dismantled, there was oil, water and "muck" in the motor room (Plaintiff's 50-H at 76, 97; Plaintiff's Examination Before Trial ("Plaintiff's EBT") at 108-09). The "muck" and water in the motor room came from the surrounding tunnel area, which was underwater (Plaintiff's 50-H at

96-97; Plaintiff's EBT at 101, 109). Plaintiff wore waterproof muck boots on the date of his accident, which came all the way up to his calves or knees (Plaintiff's 50-H at 105; Plaintiff's EBT at 108).

Disassembling the motor room included disposing of the hoses in the motor room, (Plaintiff's 50-H at 82), which required plaintiff to cut the hoses with a grinder (Plaintiff's 50-H at 47, 51; Plaintiff's EBT at 70). The hoses contained hydraulic oil that spilled to the ground (Plaintiff's 50-H at 74-79; Plaintiff's EBT at 70). As plaintiff was cutting one of the hoses with the grinder, his left foot slipped backwards (Plaintiff's 50-H at 84-89). Plaintiff testified that his left foot slipped on oil, or a combination of oil, water, and muck, on the floor of the motor room (Plaintiff's 50-H at 83, 97; Plaintiff's EBT at 124). As he slipped, the grinder caught, the blade of the grinder broke, injuring his right thumb (Plaintiff's 50-H at 88).

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff asserts claims for negligence and violation of Labor Law §§ 200, 240(1), and 241(6) claims. Pursuant to the Order of the Hon. Genine Edwards dated March 31, 2017, the court dismissed plaintiff's claims for violation of Labor Law § 240(1), and § 241(6) based on Industrial Code §§ 23-1.5(a) and (b), 1.7(a)-(c) and (e)-(h), 1.8, 1.12, 1.13, 1.30 and 2.1, with leave to renew summary judgment as to the plaintiff's remaining claims at the close of discovery.

Defendant now moves for summary judgment to dismiss plaintiff's claims for negligence, violation of Labor Law §§ 200 and 241(6).

“Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work” (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violation of Labor Law § 200 are evaluated using the same analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). A property owner or general contractor is liable in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991-92 [2d Dept 2016], *lv to appeal denied*, 28 NY3d 911 [2016]).

Defendants argue that they did not supervise plaintiff and did not control the means or methods of his work. Plaintiff testified that he received all of his direction from OHL, his employer (Plaintiff's 50-H at 26-30). Defendants argue that they did not have actual or constructive notice of any dangerous condition, and that they did not create any dangerous condition. Larsen states in his affidavit that defendants did not create any dangerous conditions related to oil, water or muck in the motor room, and were not otherwise aware of any such conditions (Larsen Aff., ¶¶ 6-11).

In his opposition, plaintiff does not contest any of defendant's contentions. Indeed, plaintiff makes no attempt to save his negligence and Labor Law § 200 claims. Accordingly the

portion of defendants' motion to dismiss these claims is granted.

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to “provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Plaintiff's Labor Law § 241(6) claim is based on alleged violations of Industrial Codes §§ 23-1.5(c), 23-1.7(d), 23-1.10, and 23-9.2(a). Section 1.5(c)(3) states:

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.

The Second Department in *Opalinski v City of New York* (164 AD3d 1354, 1355 [2d Dept 2018]), decided this past September, determined that the law in this Department is that 12 NYCRR 23-1.5(c)(3) is not specific enough to support a Labor Law § 241(6) claim (citing *Spence v Island Estates at Mt. Sinai II, LLC*, 79 A.D.3d 936 [2d Dept 2010]). However, the Second Department also previously held the year prior that Section 1.5(c)(3) was specific enough (*Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]).

It is not clear how the Second Department envisioned the reconciliation of these two holdings. In any event, Section 1.5(c)(3) does not apply to this accident. The testimony from plaintiff about the accident is that he slipped, the grinder caught, and the blade of the grinder broke. There has been no evidence submitted in this motion that the grinder was broken, inoperable or damaged in any way. Plaintiff also testified that he examined the grinder before

use and it seemed to be in working order (Plaintiff's EBT at 80-81, 117-118).

Turning to section 1.7(d), it states:

Slipping hazards.

Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Although the section specifically identifies certain substances (i.e., ice, snow, etc.), any allegedly slippery substance, including those named, must be "foreign" and not an integral part of the work (*Lopez v Edge*, 11211, LLC, 150 AD3d 1214, 1215 [2d Dept 2017] [protective rosin paper was an integral part of the work and therefore not actionable under section 1.7(d)]; *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1386 [4th Dept 2013] [grain dust that plaintiff was tasked with removing was an integral part of the work]; *Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60 [1st Dept 2004] [because plaintiff was tasked with removing the snow, slipping on such snow could not serve as a basis for violation of section 1.7(d)]; *Debowski v City of New York*, 3 Misc 3d 1109[A], 2004 NY Slip Op 50528[U], \*3 [Sup Ct, Kings County 2004] [mud was not a foreign substance because it was caused by plaintiff power washing and mixing mortar as part of his work]).

Here, the water and "muck" were not foreign because they were present naturally from the environment and integral to working in an underwater tunnel. The oil was not naturally occurring, but was an element of the motor room itself (Plaintiff's 50-H at 75). Oil came at least from the hoses that plaintiff was cutting, which contained hydraulic oil (*id.* at 77-79). This oil spilled from the hose to the ground (*id.*). Steve Corvetti, who worked with plaintiff, states in his

affidavit that the hoses were supposed to be cleaned and dry (Corvetti affidavit at 1). When asked at his 50-H hearing, plaintiff did not know if the hoses were supposed to be cleaned (Plaintiff's 50-H at 79). Under the circumstances, there are questions of fact about whether the oil is "foreign" to the environment, or whether it is an integral part of plaintiff's work.

Next, section 1.10 states:

(b) Electrical and pneumatic hand tools.

1. Power shut-off requirements. Electric and pneumatic hand tools shall be disconnected from power sources and the pressure in hose lines shall be released before any adjustments or repairs are made except for the replacement of bits in electric drills. Before disconnecting any air hose, the air shall be shut off. Every electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator.

2. Electric and hose lines. Electric and hose lines shall be guarded by location or by covering to prevent severe abrasion and to prevent any tripping hazard.

3. Grounding of electrical tools. Electrically operated hand tools shall be grounded during use. The ground wires shall be connected to the frames of the tools and the other ends shall be properly grounded. Approved double-insulated type portable hand tools are exempt from this grounding requirement.

None of these paragraphs seem to relate to this situation: (1) the accident did not occur while the grinder was being adjusted or repaired; (2) plaintiff did not trip on electric or a hose line; and (3) there is no issue with regarding to the grounding of the grinder.

Finally, Section 9.2(a) states:

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. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

Industrial Code § 23-9.1 states that this paragraph applies only to “power-operated heavy equipment or machinery”, which does not include grinders (*Cabrera v Revere Condominium*, 91 AD3d 695, 697 [2d Dept 2012]).

For the foregoing reasons, defendants’ motion is granted except as to plaintiff’s claim for violation of Labor Law § 241(6) based on a violation of Industrial Code § 23-1.7(d).

This constitutes the decision and order of the court.

March 20, 2019  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

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