Saginor v OSIB-BCRE 50th St. Holdings, LLC
2019 NY Slip Op 31308(U)
May 8, 2019
Supreme Court, New York County
Docket Number: 152479/2013
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MICHAEL SAGINOR,

Plaintiff,

Index No. 152479/2013

v

OSIB-BCRE 50TH STREET HOLDINGS, LLC, and FLINTLOCK CONSTRUCTION SERVICE, LLC,

DECISION AND ORDER

MOTION SEQ 006

Defendants.

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JOHN J. KELLEY, J.S.C.

The defendants move in limine to preclude the plaintiff from adducing evidence of insufficient illumination at the job site unless he adduces evidence that someone other than the defendants had actual or constructive notice of such insufficient illumination. They also seek to preclude the plaintiff from adducing evidence that the protruding metal floor track or rail over which he tripped constituted a hazardous condition that would support a cause of action to recover for common-law negligence or a violation of Labor Law § 200.

The motion is denied.

LABOR LAW § 241(6) AND NOTICE

Labor Law § 241(6) imposes a nondelegable duty upon general contractors "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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation and internal quotation marks omitted]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code,

rather than generalized regulations for worker safety (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation of the particular Industrial Code provision was a proximate cause of his or her injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Contrary to the defendants' contention, the absence of actual or constructive notice sufficient to prevent or cure a dangerous condition irrelevant to the imposition of liability under Labor Law § 241 (6) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Wrighten v ZHN Contr. Corp.*, 32 AD3d 1019, 1020-1021 [2d Dept 2006]).

The crux of the defendants' argument is that, inasmuch as a plaintiff generally is obligated to establish that an owner created or had actual or constructive notice of a dangerous premises condition in order to establish that the premises were negligently maintained, and Labor Law § 241(6) is a negligence-based, rather than strict liability, statute (*see Leon v J&M Peppe Realty Corp.*, 190 AD2d 400, 409 [1st Dept 1993]), notice to *someone* must thus be a condition of recovery under Labor Law § 241(6). They further argue that, inasmuch as liability under Labor Law § 241(6) must arise from the violation of an Industrial Code regulation, and violation of a regulation is merely "some evidence of negligence" (*Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 453 [2002]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 26 [1st Dept 2003]), proof of something more than an Industrial Code violation is required to recover under the statute.

In the first instance, the defendants do not explain who would be required to have notice of the condition violative of the Industrial Code or how notice to such a person or entity would affect an owner or general contractor's statutory liability. As the Court of Appeals made clear in *Rizzuto*, "[s]ince an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient

to prevent or cure [is] irrelevant to the imposition of Labor Law § 241(6) liability" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352; *see Wrighten v ZHN Contr. Corp.*, 32 AD3d at 1020-1021; *Amirr v Calcagno Constr. Co.*, 257 AD2d 585, 586 [2d Dept 1999]). The duties imposed by Labor Law § 241(6), like those imposed by the strict liability provisions of Labor Law § 2401(1), are "nondelegable" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505) and "require reference to outside sources to determine the standard by which a defendant's conduct must be measured" (*id.* at 503). In *Rizzuto*, the Court of Appeals thus unambiguously created an exception to the notice requirements applicable to common-law negligence claims, and impliedly concluded that violation of a specific, concrete Industrial Code provision is sufficient to establish an owner's or general contractor's negligence regardless of who created the condition, or who may have had actual or constructive notice thereof.

Here, the plaintiff claims that the defendants violated Industrial Code provision 12 NYCRR 23-1.30, which provides that:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

There is no requirement that the plaintiff prove that the defendants created or had actual or constructive notice of insufficient illumination in violation of this provision, and there is no basis for the defendants' attempt to impose a requirement that some other person or entity have notice of that condition before they may be held liable under Labor Law § 241(6) (*see Antretter v 660 Twelfth Unit One, LLC*, 2008 NY Slip Op 30448[U] [Sup Ct, N.Y. County, Feb. 5, 2008]; *cf. Hall v Queensbury Union Free Sch. Dist.*, 147 AD3d 1249, 1252 [3d Dept 2017] [suggesting that, even if the defendants violated 12 NYCRR 23-1.30, they could establish their prima facie entitlement to judgment as a matter of law dismissing a Labor Law § 241(6) claim by showing that they lacked notice of inadequate illumination, but concluding that the plaintiff raised a triable issue of fact with respect to the issue of notice in any event])

LABOR LAW § 200

By decision and order dated November 27, 2018, the Appellate Division affirmed an order awarding the defendants summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised on purported violations of 12 NYCRR 23-1.7(e)(1) and (2), which regulate construction-site tripping hazards. The Court concluded that those Industrial Code provisions did not support the Labor Law § 241(6) cause of action "as the allegedly hazardous condition was integral to the work plaintiff was to perform at the time he was injured" (*Saginor v Friars 50th St. Garage, Inc.*, 166 AD3d 529, 529 [1st Dept 2018]). There is no merit to the defendants' contention that this determination has preclusive effect over his claim that the defendants are liable for common-law negligence or violated the general provisions of Labor Law § 200 by failing to provide him with a safe place to work by permitting the tripping hazard to exist.

It is well settled that 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]). An owner, general contractor, or site supervisor may only be held liable under Labor Law § 200 and the common law for an allegedly dangerous condition upon which a plaintiff falls if it had control over the work site, created or had actual or constructive notice of the condition, and had the opportunity to remedy it (*see Korostynskyy v 416 Kings Hway, LLC*, 136 AD3d 758 [2d Dept 2016]).

Although a Labor Law § 241(6) cause of action will be barred where the allegedly hazardous condition is "integral to the work," Labor Law § 200 imposes a less stringent prohibition. Thus, the duty to provide a safe place to work does not extend to hazards which are "part of or inherent in the very work which the contractor is to perform," or where the worker is engaged for the specific purpose of repairing the defect, or where the hazard may be readily observed by the reasonable use of the senses,

having in view the age, intelligence, and experience of the worker (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963]; *see Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004]; *Brown v 44th St. Dev., LLC*, 48 Misc 3d 234, 246-247 [Sup Ct, N.Y. County 2015]). Here, at the time he tripped, the plaintiff was carrying a ladder and heavy electrical cable in order to install the cable in the course of electrical work in another portion of the construction site. The hazard over which he tripped was not inherent in or part of the work that the electrical contractor for whom he worked was to perform. The plaintiff was not employed by the contractor who installed the allegedly hazardous floor track. He was not engaged to repair the protruding floor track. There is a sharp dispute over whether the hazard was readily observable. Thus, these exceptions are inapplicable.

Thus, even where a court finds that a tripping hazard was an integral part of the work, so as to defeat Labor Law § 241(6) claims based on violations of 12 NYCRR 23-1.7(e)(1) and (2), a plaintiff is not necessarily precluded from proving that the same hazard may give rise to liability under Labor Law § 200 and for common-law negligence (*see Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313 [4th Dept 2009]). In *Konopczynski*, the plaintiff was a worker at a construction site in which approximately 132 depressions, measuring 7" in length, 5" in width, and 6" in depth, were permanently embedded into the flooring so that the floor could be adjusted or relocated by lifting hooks, and then used as an earthquake simulator. Since the alleged tripping hazard caused by these depressions was an integral part of the construction, the plaintiff's Labor Law § 241(6) cause of action was summarily dismissed. The Court nonetheless held that his common-law negligence and Labor Law § 200 causes of action, based on the very same hazard, were not precluded by its determination of the Labor Law § 241(6) cause of action. It thus ruled that the Labor Law § 200 and negligence causes of action and should not have been dismissed. In fact, the Court concluded that the defendant failed to show, prima facie, that it lacked actual and constructive notice of the defects (*cf. Sanders v. St. Vincent Hosp.*, 95 AD3d 1195 [2d Dept 2012] [summarily dismissing Labor Law § 241(6) cause of action based on violation of 12 NYCRR 23-

1.7(e)(1) because the object over which plaintiff fell was integral to the work, and dismissing Labor Law § 200 cause of action not because hazard was inherent in or part of the work, but because defendant lacked notice of hazardous condition]).

Accordingly, it is

ORDERED that the defendants' motion is denied.

This constitutes the Decision and Order of the court.

Dated: May 8, 2019

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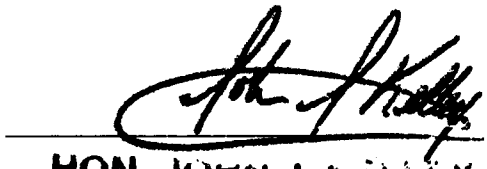

HON. JOHN J. KELLEY
J.S.C.