

Singh v Manhattan Ford Lincoln, Inc.

2019 NY Slip Op 32369(U)

August 5, 2019

Supreme Court, New York County

Docket Number: 160884/2016

Judge: Margaret A. Chan

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**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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BALWINDER SINGH,

Plaintiff,

- v -

MANHATTAN FORD LINCOLN, INC., BENNY & SON
CONSTRUCTION, CORP., GEORGETOWN ELEVENTH
AVENUE OWNERS, LLC, THE GEORGETOWN
COMPANY, LLC,

Defendants.

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INDEX NO. 160884/2016

MOTION DATE 11/28/2018,
12/03/2018

MOTION SEQ. NO. 3, 4

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 3) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 83, 84, 85, 86, 87, 88, 94, 95

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 4) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 89, 90, 91, 92, 93

were read on this motion to/for JUDGMENT - SUMMARY

This is a Labor Law action. In motion sequence (MS) 3, defendant/third-party plaintiff Manhattan Ford Lincoln, Inc. (Manhattan) moves pursuant to CPLR 3212 for summary dismissal of the complaint as against it. In MS 4, plaintiff Balwinder Singh moves pursuant to CPLR 3212 for summary judgment in his favor as to liability on his claim under Labor Law § 241 (6) against Manhattan and defendant/second third-party plaintiff Benny & Son Construction, Corp. (Benny) (collectively, defendants).¹ MS 3 and 4 are consolidated for disposition.

Factual Background

Plaintiff was a construction worker performing demolition work outside a construction site located at 878 Eleventh Avenue, in the city, county and state of New York (Premises). Plaintiff claims that on July 9, 2015, he slipped and fell on demolition debris on the street adjacent to the Premises. Manhattan was the owner of the Premises. Manhattan hired Benny to provide general contractor services for a

¹ By stipulation dated February 17, 2017, plaintiff discontinued this action as against defendants Georgetown Eleventh Avenue Owners, LLC and The Georgetown Company, LLC (NYSCEF # 6, Stipulation of Discontinuance).

renovation project at the Premises. Benny, in turn, hired third-party defendant/ second third-party defendant SKS Construction NY, Inc. (SKS) to perform façade work at the Project. Plaintiff was a laborer employed by SKS.

The complaint alleges causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) as against defendants.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by SKS as a laborer. Plaintiff only received directions from his two supervisors, "Sunil" and "Mohammed," both SKS employees (NYSCEF # 62, plaintiff's tr # 1 at 42).

Plaintiff explained that SKS workers primarily performed masonry work on the building's façade, including "grinding," "pointing" and installing terra-cotta. They also performed demolition work on the roof (*id.* at 33). However, on the day of the accident, the only work being done at the Premises was debris clearing, and plaintiff was directed by his supervisors to clean and to remove debris that day. Specifically, plaintiff explained that, in order to perform said work, he moved heavy-duty three-foot by four-foot wheeled "containers" full of debris consisting of "[p]lastic pieces, cement and little rocks" from the interior of the Premises to an exterior dumpster (the Dumpster) (*id.* at 36, 72). Then, aided by two coworkers, he would lift the container and empty it into the Dumpster.

Plaintiff testified that there was a sidewalk bridge surrounding the entire building. The sidewalk bridge extended from the building to the edge of the sidewalk, covering the sidewalk entirely. The Dumpster was located on the street, adjacent and parallel to the sidewalk. Plaintiff also testified that Benny workers placed orange cones on the street that demarked the staging area for SKS's debris containers. In addition, cones were placed around the street side of the Dumpster, creating a path on the street for workers to push the containers.

On the day of the accident, Benny workers were throwing debris from the sidewalk bridge into the Dumpster below. According to plaintiff, some of that debris missed the Dumpster and fell onto the sidewalk and the street below, where a Benny worker regularly swept, pushing the sidewalk debris into the street near the Dumpster. Plaintiff asserted that the debris, made up of sand and marble-sized pieces of terra-cotta and cement, "was everywhere" on the ground around the Dumpster (*id.* at 80).

On the day of the accident, plaintiff and his coworkers successfully disposed of three containers full of debris prior to the accident. While lifting the fourth container, he stepped slightly to the right, when his right foot stepped on some debris and he "slipped," falling to the ground and injuring himself (*id.* at 78).

Deposition Testimony of Arnold Simmons (Manhattan's Witness)

Simmons testified that at the time of the accident, he was employed by non-party Ford Motor Company (Ford). Simmons' work entailed "selling assets and boxing up records" (NYSCEF # 64, Simmons tr at 7).

As owner, Manhattan hired Benny to repair the Premises in advance of Manhattan's wind-up, so that the building could be sold. Benny was tasked with hiring all subcontractors and handling all the renovation work. While Manhattan had a facilities manager on site every day, Manhattan did not direct or control any of the construction work at the Premises.

Deposition Testimony of Arben Lipe (Benny's Owner)

Lipe testified that on the day of the accident, he was the owner of Benny, the general contractor of the Project. Benny hired SKS, plaintiff's employer, to assist in the façade renovation at the Project. Benny's scope of work included the entirety of the project, including demolition, cleanup and removal of debris from the Premises. Lipe was present at the Project on the day of the accident and witnessed SKS workers moving containers of debris to the Dumpster, but he did not see the accident.

According to Lipe, Benny placed cones in the street around the Dumpster for safety purposes; to direct vehicles away from workers and to create a "path . . . so [workers] can bring the mini containers from [the building]" (NYSCEF #65, Lipe tr at 84). Because the street was quiet, he directed SKS to use the street to access the dumpster, rather than the sidewalk.

Lipe also testified that, occasionally, debris would fall from the scaffold to the sidewalk. Also, debris would "sometimes" spill out of SKS's debris containers on the way to the Dumpster (*id.* at 49-50). Because of this, Benny's laborers were tasked with sweeping the sidewalk to keep it clear of debris, including sweeping the sidewalk debris into the street.

Discussion

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once *prima facie* entitlement has been established, in order to defeat the motion, the opposing party must "assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being

established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

In his opposition to Manhattan’s motion for summary judgment, plaintiff consents to the dismissal of all claims against defendants except for the common-law negligence, Labor Law § 200 claims and those Labor Law § 241 (6) claims predicated upon violations of Industrial Code § 12 NYCRR 23-1.7 (d) and (e) (1) and (2). Accordingly, the Labor Law § 240 (1) claim and the § 241 (6) claims predicated on all other Industrial Code violations are dismissed.

Labor Law § 241 (6)

Plaintiff moves for summary judgment in his favor on the Labor Law § 241 (6) claim against defendants. Manhattan moves for summary judgment dismissing said claim against it.

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 of reasonable care upon owners and 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]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff’s injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Industrial Code 12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) provides, in pertinent part:

“Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway [or] walkway . . . 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.”

Plaintiff alleges that he slipped on demolition debris. However, there is no evidence establishing that the subject debris was a “foreign substance” within the meaning of section 23-1.7 (d) (*see Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 458 [1st Dept 2017] [a six-inch piece of mud-covered insulation on a ramp was not a foreign substance within the meaning of section 23-1.7 (d)]; *Nankervis v Long is. Univ.*, 78 AD3d 799, 801 [2d Dept 2009] [debris covered pipe]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 765 [2d Dept 2009] [accumulation of debris in a stairwell]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [demolition debris “was not the type of foreign substance contemplated by this provision”]; *D’Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 107 [1st Dept 2002]). Accordingly, section 23-1.7 (d) is inapplicable, as plaintiff slipped on demolition debris and not the type of foreign substance contemplated by this provision.

Plaintiff’s reliance on *Luciano v New York City Hous. Auth.*, 157 AD3d 617 (1st Dept 2018) and *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 742 (2d Dept 2015) is misplaced. *Luciano* involved a slip on water and *Reynoso* involved a slip on snow and ice, both of which are foreign substances contemplated by section 23-1.7 (d).

Thus, Manhattan is entitled to summary judgment dismissing that part of the section 241 (6) claim as against it, and plaintiff is not entitled to summary judgment in his favor on the same as against defendants.

Industrial Code 23-1.7 (e) (1)

Industrial Code 12 NYCRR 23-1.7 (e) (1) provides, 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.”

Initially, the fact “[t]hat plaintiff ‘slipped,’ rather than ‘tripped’ . . . does not render 12 NYCRR 23-1.7 (e) . . . inapplicable to his case” (*Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405, 406 [1st Dept 2017]; *lv dismissed* 29 NY3d 1118 [2017] [granting plaintiff summary judgment in his favor with respect to his claim predicated on a section 23-1.7 (e) violation, where plaintiff testified that he “slipped and fell” on an accumulation of paint chips and dust]; accord *Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 458 [1st Dept 2017] [granting plaintiff summary judgment in his favor on the section 23-1.7 (e) claim, where plaintiff testified that he slipped on a piece of insulation]; *DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 626 [1st Dept 2015] [section 23-1.7 (e) applied where plaintiff testified that he slipped on a pipe]; *Nankervis v Long Is. Univ.*, 78 AD3d at 800 [denying summary judgment seeking dismissal of a section 23-1.7 (e) claim where plaintiff alleged that he slipped on a debris covered pipe]; *but c.f. Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014] [section 23-1.7 (e) “is inapplicable because plaintiff does not allege that he tripped”). Accordingly, section 23-1.7 (e) may be applicable to plaintiff’s accident.

Plaintiff contends that the street outside of the Premises where the accident occurred was a passageway because it was bounded on one side by the Dumpster and on the other side by orange cones. However, the First Department recently defined a passageway in respect to section 23-1.7 (e) (1) as an “interior or internal way of passage inside a building” (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Here, the accident occurred on the street outside of the Premises and not in an interior or internal way of passage inside a building.

Accordingly, plaintiff was not within a passageway at the time of his accident and section 23-1.7 (e) (1) is inapplicable to this action.

Thus, Manhattan is entitled to summary judgment dismissing that part of the section 241 (6) claim predicated on a violation of Industrial Code section 23-1.7 (e) (1) as against it, and plaintiff is not entitled to summary judgment in his favor on the same as against defendants.

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

Industrial Code 12 NYCRR 23-1.7 (e) (2) provides in pertinent part:

(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.”

Manhattan argues that the debris plaintiff tripped over was integral to the work being performed in the accident area at the time of the accident, i.e. the active removal of said debris from the Premises. Any dirt, debris, tools or materials that are an “integral part” of the work being performed are not a violation of § 23-1.7 (e) (2) (*see Tucker v Tishman Constr. Corp. of New York*, 36 AD3d 417, 417 [1st Dept 2007] [“there is no liability under [§ 23-1.7 (e) (2)] because the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris . . .”]). The relevant inquiry is whether the debris or material was a part of any ongoing work at the accident location at the time of plaintiff’s accident (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668, 668 [1st Dept 2019] [“debris, consisting of cables . . . was not inherent in, or an integral part of, the work being performed by either plaintiff electrician or [defendant demolition contractor] at the time of the accident”]).

Here, plaintiff’s accident involved debris that was in the process of being cleared from the Premises. Specifically, plaintiff testified that on the day of the accident, the project was in the cleanup phase and all the trades present were actively clearing debris. In addition, testimony by plaintiff and Lipe establish that the debris near the Dumpster was created by Benny’s active clearing methods (i.e. sweeping sidewalk debris into the street near the accident area). Moreover, Lipe testified that SKS’s own workers dropped debris in the accident area while performing their work. Accordingly, the subject debris was an integral part of the work being performed at the time and location of the accident, either by plaintiff or by Benny workers. Therefore, there is no liability under section 23-1.7 (e) (2).

Thus, Manhattan is entitled to summary judgment dismissing that part of the section 241 (6) claim predicated on a violation of Industrial Code section 23-1.7 (e) (2) as against it, and plaintiff is not entitled to summary judgment in his favor on the same as against defendants.

Common-Law Negligence and Labor Law § 200

Manhattan moves for summary judgment dismissing the Common-Law Negligence and Labor Law § 200 claims as against it.

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” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1 Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). 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: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 “when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the accident was caused due to construction debris that was allowed to remain on the street adjacent to the Premises, rather than being properly removed. Therefore, plaintiff’s claim implicates the means and methods of the work being performed, i.e. the manner in which the debris was cleared. Accordingly, to be liable under section 200 or the common-law, Manhattan must have actually supervised the clearing of debris at the Project. Here, there is no evidence in the record that Manhattan had such supervisory control over this work. To that effect, it was Benny that was in charge of the manner of clearing debris, as evidenced by Lipe, Benny’s owner, who testified that he directed Benny workers to sweep debris from the sidewalk into the street, and that he directed SKS workers to use the street to dispose of their own debris.

It should be noted that Manhattan had an employee (the building's facilities manager) who was on site on a daily basis. However, there is no evidence that the facilities manager had any role in the Project, aside from scheduling or coordinating the contractors' work. Such supervision is general in nature, and general supervisory control is insufficient to impute liability under section 200, as even where a defendant "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

Thus, Manhattan is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff Balwinder Singh's motion (MS 4), pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 241 (6) claims predicated on alleged violations of Industrial Code sections 23 NYCRR 1.7 (d), (e) (1) and (e) (2) as against defendant/third-party plaintiff Manhattan Ford Lincoln, Inc. and defendant/second third-party plaintiff Benny & Son Construction, Corp., is denied; it is further

ORDERED that the motion of defendant/third-party plaintiff Manhattan (MS 3), pursuant to CPLR 3212, for summary dismissal of the complaint as against it is granted, and the complaint is dismissed as against; it is further

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

ORDERED that counsel for Manhattan Ford Lincoln, Inc. shall serve a copy of this order with notice of entry within ten (10) days of entry.

This constitutes the Decision and Order of the court

8/5/2019
DATE


MARGARETA CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE