Fanelli v Wenat Realty Assoc. L.P.
2019 NY Slip Op 32828(U)
September 23, 2019
Supreme Court, New York County
Docket Number: 155911/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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FRANK FANELLI,

Plaintiff,

- v -

WENAT REALTY ASSOCIATES L.P. and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 155911/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

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

Motion by Plaintiff Frank Fanelli for partial summary judgment, pursuant to CPLR 3212, on his causes of action under Labor Law § 241 (6) as predicated on violations of Industrial Code §§ 23-1.7 (e) (2) and 23-2.1 (a) (1) is denied for the reasons stated herein.

BACKGROUND

In sum and substance, Plaintiff alleges that he injured his left ankle when tripped and fell on concrete debris at a construction site where he was working on May 7, 2017. On that date, Plaintiff was employed as a lather by non-party CB Construction ("CB"), which was sub-contracted by Urban Construction ("Urban") to install rebar. Defendant Wenat Realty Associates L.P. ("Wenat") was the owner of the construction site and Defendant Tishman Construction Corporation (Tishman) was the construction manager of the site (collectively, "Defendants").

At the time of Plaintiff's accident, Plaintiff was in the process of installing rebar on the columns and walls of the foundation approximately one story below the street-level; and this work area was open to the elements. Plaintiff was performing this rebar work with two coworkers. One of these coworkers happened to be Plaintiff's brother Mark Fanelli ("Mark") and the other was Dan Donovan ("Donovan").

After Plaintiff's accident, Mark photographed the accident site. These photographs in sum and substance show blue scaffolding sitting on top of wooden-planks in certain areas and in other areas sitting directly on grayish dirt and whitish concrete/rocks, while surrounded by rock

or concrete walls. (*See* Affirm in Supp., Ex. 9 [Accident Site Photographs].) These photographs were referenced by Plaintiff, Mark and Donovan during their depositions.

In sum and substance, Plaintiff testified that, at the time of the accident, he had just finished working on one side of a column and that he was walking around the column to work on the other side when he tripped "because a rock, like, slipped out from under my foot and I just tripped." (Affirm. in Supp. Ex 4 [Plaintiff EBT] at 95:13-25.) Although Plaintiff was not allowed by his counsel to mark the area in the photograph where he fell, Plaintiff stated at his deposition that he fell on the portion of the site where the floor was dirt—not on the portion covered by wooden planks—and that if he "had to take an educated guess" the object that he tripped on was "some sort of chipped concrete or rocks." (Id. at 102:21-104:20, 108:25-111:24.)

Mark testified that he witnessed Plaintiff "roll[] his ankle" on "concrete debris" and that he believed said concrete debris was "left over garbage from the demo of the other building that was there." (Affirm in Supp., Ex. 5 [Mark EBT] at 27:21-29:22.) Mark stated that he noticed the concrete debris on his first day on the work-site, on May 4, 2017, and that he asked a man in a Tishman hardhat if they could get the debris cleaned up; and the man told him that they would. (Id. at 48:06-53:14.)

Donovan did not personally witness Plaintiff's fall but came to his assistance immediately thereafter, along with Mark. (Affirm. in Supp., Ex. 6 [Donovan EBT] at 13:07-13, 17:17-20:03.) Donovan described the area as having "rubble" that in his opinion should have been cleaned up by Urban's laborers. (Id.)

During the deposition of Jonathan Horowitz ("Horowitz"), who was the project superintendent for Tishman, Horowitz viewed photographs of the site that he had taken as well as those taken by Mark. Horowitz stated that the site where Plaintiff was working contained "excavation materials" which included concrete and rocks, and possibly bricks. (Affirm in Supp., Ex.8 [Horowitz EBT] at 65:05-88:04.) Horowitz further stated that, at the time of the accident, the site was still being excavated and that some of the excavation materials were to be used to create a berm and that other excavation materials would be hauled out. Horowitz stated that these excavation materials were "all over the site" and that in his experience it was ordinary for such excavation materials to be present given "the time and sequence of the work." (Id.)

Based on the aforesaid, Plaintiff moves for summary judgment, pursuant to CPLR 3212, on his causes of action under Labor Law § 241 (6) as predicated on violations of Industrial Code §§ 23-1.7 (e) (2) and 23-2.1 (a) (1). The Court will discuss the arguments with respect to each Industrial Code provision in turn.

DISCUSSION

"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." (*Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Id.) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Labor Law § 241 (6) states, 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, 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).

Here, Plaintiff seeks summary judgment with regard to Defendants' alleged violations of Industrial Code §§ 23-1.7 (e) (2) and 23-2.1 (a) (1).

Section 1.7 (e) (2) states:

"(e) *Tripping and other hazards*.

(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 23-2.1 (a) states:

"(a) *Storage of material or equipment.*

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

This Court finds that there is a material issue of fact concerning whether there was a violation of either of the two aforesaid provisions. In sum and substance, Plaintiff asserts that the concrete or rock he tripped over was debris and/or construction material that should have been removed from the work area; and Defendants assert, through Horowitz, that it was an inherent part of work site that was still being excavated, and that the material that Plaintiff tripped on was going to be used to create a berm. This issue must be resolved by the fact finder at trial and cannot be summarily resolved as a matter of law on this motion. (*See Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 586 [1st Dept 2014] ["Section 23–1.7(e)(2) is inapplicable because, by his own testimony, plaintiff was walking in an outdoor area where the ground was composed of dirt and rocks. To the extent he tripped over a rock after he initially slipped, the rock was part of the surface of the ground and cannot be considered accumulated 'debris.'"]; *Pereira v New School*, 148 AD3d 410, 412 [1st Dept 2017] ["The testimony also presents an issue of fact whether the concrete placed on the piece of plywood was safely stored, pursuant to 12 NYCRR 23–2.1(a)(1)."].)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Plaintiff Frank Fanelli for summary judgment, pursuant to CPLR 3212, on his causes of action under Labor Law § 241 (6) as predicated on violations of Industrial Code §§ 23-1.7 (e) (2) and 23-2.1 (a) (1) is denied; and it is further

ORDERED that Defendants' counsel shall serve a copy of the instant decision and order with notice of entry within twenty (20) days via NYSCEF.

This constitutes the decision and order of the Court.

9/23/2019
DATE

HON. ROBERT D. KALISH, J.S.C.

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