SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------x

DANIEL ZOTOLLO,

Plaintiff,

-against-

UNITY CONSTRUCTION GROUP, NEWMARK GRUBB KNIGHT FRANK, ESRT ONE GRAND TRUST, INC., and EMPIRE STATE REALTY,

Defendants.

----------x

UNITY CONSTRUCTION GROUP

Third-Party Plaintiff,

-against-

CORD CONTRACTING CO.,

Third-Party Defendant.

----------x

Index No. 162846/15
Motion Sequence 03

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this Labor Law personal injury action, third-party defendant Cord Contracting Co. (Cord) moves pursuant to CPLR 3212 for an order dismissing the complaint and the third-party complaint in their entirety. Cord's primary argument is that plaintiff Daniel Zotollo's (Plaintiff) statements regarding the accident that gave rise to this case are so inconsistent as to render his claims incredulous as a matter of law. Cord also argues that Plaintiff's claims are inactionable under Labor Law §§ 200, 240(1), and 241(6).[1]

BACKGROUND

Plaintiff commenced this action on December 17, 2015. According to the complaint he was injured on February 4, 2014 at a construction site located at One Grand Central in Manhattan when

[1] In his opposition papers Plaintiff withdrew his Labor Law 240(1) claim.

he slipped on a loading dock ramp while pushing a heavy cart filled with sheetrock. Defendant Unity Construction Group was hired by defendant Empire State Realty as the construction site's general contractor to perform work on the building's 23rd and 41st floors. In turn Unity contracted with third-party defendant Cord, Plaintiff's employer, to perform dry wall and carpentry work.

According to Cord, the first time Plaintiff reported that his injury was the result of a slip and fall - as opposed to a strain from lifting sheetrock - was in a Workers' Compensation questionnaire dated July 6, 2015, approximately 18 months after the accident.[2] Plaintiff reiterated that he slipped and fell when he was deposed on February 27, 2018.[3] Plaintiff described that he had been working at the construction site for almost six months prior to the accident and used the loading dock for deliveries on a regular basis. On the date of the accident he and his colleague Louie had already successfully pushed three of four loads of sheetrock up the ramp using his A-frame dolly. Plaintiff testified that on the fourth or fifth trip he was pushing the cart from the bottom when he slipped and fell to his knees and felt a pop in his shoulder (Plaintiff's Deposition pp. 26-27, 49-51, 58-59, 70-73, 79). He does not know what he slipped on other than describing it as a grimy liquid. After he fell Plaintiff got back up and continued to work. In fact, he continued to work for another 10 months following his accident (*id.* at 93, 97, 109-111). Plaintiff described his accident as follows (*id.* at 73-74, 79-80):

> Q. When you would push the A-frames to go up the ramps and into the freight elevator, would it be one person, either you or Louie pushing it or would one of you take the one side of the A-frame or other [sic] would be taking the other?
>
> A. It was always me at the bottom, pushing up and he was guiding the front so we could make that turn when he hit the second ramp. . . .
>
> Q. Can you describe the condition of the first ramp when you started to bring the A- frames up?
>
> A. When I slipped, you mean?

---

[2] Defendant's exhibit M.

[3] Defendant's exhibit F (Plaintiff's Deposition).

Q. No, before you slipped, when you started to go up.

A. Yeah, it was dirty, greasy, grimy.

* * * *

Q. Okay. So you had gone up three or four times and then on the fourth or fifth time you were pushing the ramp up and while you were on the first ramp, you fell?

A. Yes.

Q. How did you fall?

A. By pushing as hard as I could and I slipped and I fell. I jammed my shoulder. I felt something pop right away and it was really like a split second, you know. . . .

Q. Did you fall to the ground?

A. I fell yes, I did. I hit my knees, yep.

Q. You indicated something happened with your shoulder. . . .

A. It popped and it ended up to be a rotator cuff tear. . . .

Q. Did your right shoulder hit anything?

A. It like basically hyperextended because when I slipped the weight of the rock just through it back. Because I had my arm around the actual 14 sheets and that's what just snapped it back.

Cord asserts that it first became aware of Plaintiff's accident ten months later when he reported it to Cord's safety director, Sal LaMantia, on December 4, 2014 (LaMantia Deposition p. 34):

Q. When did you first become aware of the accident that's the subject of this lawsuit?

A. December 4, 2014.

Q. How did you become aware of the accident?

A. I was -- I believe that day I was passing by the job for a reason I don't recall the specific reason and Mr. Zotollo said to me, by the way, Sal, I need to let you know, I hurt my shoulder. I said okay. And then he said back on February 4th and I laughed at him.

Mr. LaMantia completed a C-2 report on December 9, 2014 after speaking with the Plaintiff.[4] The C-2 report states that the Plaintiff was "unloading a sheetrock delivery" when he "felt pain/pop in right shoulder." Mr. LaMantia testified that he based his report on his discussions with the Plaintiff (LaMantia Deposition pp. 44-46):

[4] Defendant's exhibit I.

Q. Tell me what did Mr. Zotollo tell you about his alleged accident when you spoke to him about it on December 4, 2014? . . .

A. He told me that he was doing a sheetrock delivery and that in the course of doing that delivery he felt something pop, and I think it was his right shoulder, and he felt pain but he worked through it and that was that.

Q. Did he say anything about what he believed caused the pain he felt in his right shoulder at that moment?

A. No. . . .

Q. Did Mr. Zotollo tell you that he was lifting a piece of sheetrock when he felt pain in his shoulder? . . .

A. Yes. . . .

Q. Did he tell you whether he slipped on anything at the time he was lifting the sheetrock?

A. No.

In an affidavit submitted in connection with this motion, Mr. LaMantia avers that there were no deliveries to Cord on February 4, 2014, the date Plaintiff claims his accident occurred. Instead, there were deliveries on January 7, 2014, January 16, 2014, January 29, 2014, and February 7, 2014 confirmed by invoices.[5]

Plaintiff's opposition papers include an affidavit from Mr. Jamie Fiorentino, Cord's project manager for the One Grand Central project.[6] While Mr. Fiorentino did not witness the accident, he claims that the Plaintiff told him about it a day or two after it happened. Plaintiff's account to Mr. Fiorentino is consistent with Plaintiff's deposition testimony (Fiorentino Affidavit):

> Daniel Zotollo was an employee of Cord working on this project, and one of the men under my supervision. Mr. Zotollo was Cord's foreman at this construction site. I learned about Mr. Zotollo's accident when I first saw him after it happened. He told me that he had an accident a day or two earlier while unloading a delivery of sheetrock in the loading dock area at the site. This delivery was on February 4, 2014.
>
> He injured his shoulder when he slipped and fell on a greasy, wet substance on the inclined ramp in the loading dock area. At the time, he was lifting and pushing a heavy load of sheetrock on an A-frame cart up the ramp. When Mr. Zotollo slipped, he lost his grip on the cart, and the load crashed into his shoulder.

---

[5] Defendant's exhibit N.

[6] Plaintiff's exhibit A (Fiorentino Affidavit).

Mr. Fiorentino also avers that Cord did receive a delivery on the date in question, although he does not explain the basis of his statement or attach any corroborating documents.

In addition to the testimony and affidavits, Defendant submits Plaintiff's medical and Workers' Compensation records to show that he was injured while lifting sheetrock as opposed to via a slip and fall. In this regard, the earliest written account of Plaintiff's accident is from his visit to Dr. Buccellato on February 10, 2014.[7] His records state that "Patient was unloading sheet rock when patient felt something twitch and something let loose in his right shoulder." Next is a record from a December 8, 2014 visit to Dr. Thomas[8] which provides that Plaintiff was "lifting drywall sheets and experienced pain." Neither record makes reference to a slip and fall. Plaintiff's Workers' Compensation Records are also silent as to Plaintiff's claimed slip and fall. Instead they indicate that he was injured while lifting sheetrock. Plaintiff's Pre-Hearing Statement, dated March 2, 2015, summarizes his claim as "while lifting sheetrock I felt pain in my right shoulder." He gave a similar statement to the Workers' Compensation Board about one month later (Defendant's exhibit L):

THE JUDGE:	Tell us about that injury?
THE CLAIMANT:	I was unloading sheet rock off the truck. I felt something tear, a pop.
THE JUDGE:	You felt a pop to your right shoulder?
THE CLAIMANT:	Yes. I didn't think much of it. I kept going.

After the hearing the Workers' Compensation Board's determined that the Plaintiff sustained a work-related injury to his right shoulder and awarded him insurance benefits accordingly.[9]

---

[7] Defendant's exhibit G.

[8] Defendant's exhibit H.

[9] Plaintiff's exhibit C.

Again, Defendant's position is that Plaintiff's inconsistent statements are fatal to this complaint, and even if the court were to accept that Plaintiff slipped and fell he still does not have a claim under either Labor Law 200, 240(1), or 241(6). Plaintiff opposes on the ground that any inconsistencies in his account of the accident raise triable issues of fact and that there is enough evidence to proceed to trial on his Labor Law 200 and Labor Law 241(6) claims.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Inconsistent Statements

Plaintiff's earliest account of his accident before the Workers' Compensation Board is that he was injured while lifting sheetrock. He now claims that he was injured not while lifting sheetrock, but when he slipped and fell while pushing a cart filled with sheetrock up the loading

dock ramp. The question is whether this inconsistency is enough to award the Defendant summary judgment.

Credibility issues are generally a matter for the trier of fact. See *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). Notwithstanding, in "rare cases," a court may deem testimony "utterly incredible as a matter of law when it is 'manifestly untrue, physically impossible, or contrary to common experience.'" *Price v City of New York*, 172 AD3d 625, 629 (1st Dept 2019) (quoting *Phillips v Katzman*, 90 AD3d 436, 436 [1st Dept 2011]); *see also Carthen v Sherman*, 169 AD3d 416, 417 (1st Dept 2019) ("there are rare instances where credibility is properly determined as a matter of law"); *Goldfien v Cnty. of Suffolk*, 2015 N.Y. Misc. LEXIS 2196, *17 (Sup. Ct. Suffolk Co., June 10, 2015, Pitts, J.); *Boucher v Times-Review Newspapers, Inc.*, 2014 NY Misc. LEXIS 2668, *20 (Sup. Ct. Suffolk Co., June 10, 2014, Martin, J.).

This is not one of those "rare cases" where the plaintiff's version of events cannot be true or where the court must deem his testimony incredible as matter of law. Mr. Zotollo's claims are surely questionable, but his testimony, buttressed by Mr. Fiorentino's affidavit, raises a genuine issue of fact to be determined by a jury.

Labor Law 200

Turning to the merits, Labor Law 200 codifies the common law duty imposed upon owners and general contractors to provide a safe workplace.[10] *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law 200 claims are generally predicated upon a two-prong

[10] Labor Law 200 provides in relevant part that "[a]ll 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. The board may make rules to carry into effect the provisions of this section."

showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 (1st Dept 2006).

As this case involves an alleged defective condition, i.e., a grimy wet substance on the ramp, Cord argues that the defendants had neither actual nor constructive notice. In this regard, Plaintiff testified that he recalls complaining to his supervisor about the conditions in the loading dock, but did not report the specific condition that allegedly caused him to slip and fall (Plaintiff's Deposition pp. 46-47, 55-56, 58, 60-61):

Q. Did you ever speak to Gary about any problems or challenges on the job?

A. Well, I always complained about the loading dock being cluttered and messy. And that Gary was the guy that Joe used to go to. As far as I know about getting areas cleaned up, we have a delivery come in. It was a small loading dock. If there was any garbage down there, it was in the way a lot. . . .

* * * *

Q. You first talked to Joe about the state of the loading dock earlier on in the job, correct?

A. Yes.

Q. What did you speak about?

A. That we needed a clear path and needed it cleaned.

Q. Needed what cleaned, specifically?

A. The floor, the area.

Q. And what was on the floor?

A. Depending on -- the floor basically, the floor, especially when you got close to where the freight was on the lower end where they used to bring the food in. It was grimy and greasy and slippery. Going up towards the back of the loading dock to where the ramp was, there was a whole area of just, you know. It wasn't Joe's fault. That was what was just there from building. But there was, like I said, they had a dumpster to the right. It was stuffed with overflow, out of the dumpster and lay in front. . . .

* * * *

Q. So how did this food make the floors slimy and greasy?

A. Well, the crates are not sealed. So if anything is dripping, they drip right down out of the bottom or out of the sides.

Q. So there is water on the ground?

A. There is water. There is, you know, whatever food might have been there, the food grime came off or whatever.

Q. That's what I'm trying to figure out here, what it was?

A. I don't know what it was exactly. I just know that, you know, grimy or greasy stuff came out of there and it was on the floor. I mean, that is where I slipped. Was turning up to go into that ramp, is where I slipped and jammed my -- my shoulder on that delivery.

* * * *

Q. Did you ever see anyone clean the loading dock area?

A. Building people? No, not that I remember . . . I've seen Joe sweeping up. Joe had to clean it up. It doesn't mean it was cleaned up in time.

Q. But periodically, the area would be cleaned?

A. Then it would clutter up again. This was on a daily basis because garbage would come down. . . .

Q. Well, after Joe cleaned it, what was wrong with it?

A. No. I mean, I guess it was clean to a point. It doesn't mean the grease was taken up or – Joe would sweep up and get rid of the debris. Didn't mean he scraped the cleaned the floor. That wasn't his responsibility

Q. So the area would periodically be removed of clutter and debris?

A. Yes.

Q. But the condition of the substance that you don't know what it was on the floor, was always there?

A. Yes.

Relying upon *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994), Cord argues that the testimony at most demonstrates defendants' "general awareness" of a dangerous condition, which is legally insufficient to constitute notice. *See also Gordon v American Museum of Natural History*, 67 NY2d 836, 838 (1986). This court disagrees. The condition in *Piacquadio* was liquid covering a small area of the floor in a restaurant. The Court held not that general awareness of a condition was insufficient to prove notice, but that "general awareness that a dangerous condition *may be*

present is legally insufficient." *Id.* (emphasis added). This is an important distinction which Cord fails to consider.

Unlike *Piacquadio*, the facts of this case suggest more than just the possibility that a dangerous condition may have been present. To the contrary, Plaintiff's testimony indicates that the ramp was in a constant state of slipperiness due to grease and other substances leaking from a nearby dumpster. Plaintiff indicated that he complained about this condition to his supervisors, and that the condition was never remedied. Plaintiff's testimony in this regard is corroborated by Mr. Fiorentino, whose affidavit is worth reciting (Fiorentino Affidavit):

> I personally inspected the loading dock area where Mr. Zotollo's accident occurred several times before the accident occurred. In order to get from this loading dock area to the elevators, there was a narrow concrete ramp that went up to the elevator bank. This concrete ramp was only a few feet wide, and it made a sharp right hand turn up towards the elevators. This was the only route available to unload deliveries from the loading dock into the site.
>
> The floor in this area was painted concrete and did not have any slip or tread protection. The floor of the loading dock was always coated with a wet, greasy, slippery substance since we began working on the project. Mr. Zotollo and I complained about the wet, greasy, and slippery condition of the ramp many times to both the general contractor and the building superintendent. We made these complaints both before and after his accident.
>
> It was very difficult to walk up the ramp because it was always wet, greasy and slippery. It was also difficult to maneuver the heavy carts up the ramp because of how narrow it was.
>
> Despite our complaints, neither the general contractor nor the building superintendent removed, sanded, or covered the wet, greasy, and slippery ramp. The ramp was hazardous and slippery throughout the entire time we were working at the project. Nonetheless, we had to continue to use the ramp because it was the only available way for us to bring materials and deliveries onto the project.

To the extent Cord challenges Mr. Fiorentino as a disgruntled former employee, it can certainly question him in this regard at trial. For summary judgment purposes, however, Mr. Fiorentino's affidavit and the Plaintiff's testimony are enough to raise a triable issue of fact as to notice. Thus, Plaintiff's Labor Law 200 claims should proceed.

Labor Law 241(6)

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a Labor Law 241(6) cause of action, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998). The only Industrial Code at issue in this case is 12 NYCRR 23-1.7(d), which provides:

> 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.

Cord argues that this provision does not apply here because the Plaintiff does not know what caused him to slip. But neither the Industrial Code nor decisions interpreting this provision requires that the Plaintiff be able to identify the exact substance that he allegedly slipped on. The court also disagrees with Cord's assertion that 12 NYCRR 23-1.7(d) does not apply because the loading dock is not a passageway. 12 NYCRR 23-1.7(e)(1), another Industrial Code, may impose such a strict requirement, but 12 NYCRR 23-1.7(d) does not. 12 NYCRR 23-1.7(d) applies to passageways, but also to floors, walkways, scaffolds, and other elevated working surfaces. *See Manzano v Riverbend Hous. Co., Inc.*, 2010 NY Misc. LEXIS 3635, *8 (Sup. Ct. NY Co. July 27, 2010, Gische, J.). The

only restriction is that the slippery condition not be in an open area or outside of the construction site itself. *See Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 585 (1st Dept 2014); *Raffa v City of New York*, 100 AD3d 558, 559 (1st Dept 2012); *Porazzo v City of New York*, 39 AD3d 731, 731 (2d Dept 2007). Since the ramp in this case provided the only means by which Plaintiff and his coworkers could move materials from the loading dock to the elevator banks, it is this court's opinion that the ramp falls within the scope of 12 NYCRR 23-1.7(d). See *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 (1st Dept 2008).

CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that Defendant's motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that Plaintiff's Labor Law 240(1) claims are severed and dismissed; and it is further

ORDERED that Plaintiff's Labor Law 241(6) claims, except those claims predicated upon 12 NYCRR 23-1.7(d), are severed and dismissed; and it is further

ORDERED that Defendant's motion is otherwise denied; and it is further

ORDERED that counsel all parties appear for a pre-trial conference in Part 30 (60 Centre, Room 408) on December 16, 2019 at 9:30AM.

The Clerk of the Court shall enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 10.21.19

SHERRY KLEIN HEITLER, J.S.C.

[12]