Pace v Shvo
2019 NY Slip Op 33170(U)
October 23, 2019
Supreme Court, New York County
Docket Number: 159487/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 159487/2016

ROCCO PACE,

MOTION SEQ. NO. 005

Plaintiff,

- v -

MICHAEL SHVO, SHVO INC., VS 125 LLC, NEW VALLEY LLC, BIZZI AND PARTNERS DEVELOPMENT LLC, and PLAZA CONSTRUCTION LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, defendants Michael Shvo ("Shvo"), Shvo Inc. ("Shvo Inc."), VS 125 LLC ("VS"), New Valley LLC ("New Valley"), Bizzi and Partners Development LLC ("Bizzi") and Plaza Construction LLC ("Plaza") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Rocco Pace (Doc. 75-91). Plaintiff opposes the motion (Doc. 95-113). After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted in part**.

FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2016, plaintiff was employed with Urban Foundation/Engineering LLC ("Urban") and was working at a construction site located at 22 Thames Street, New York, NY

("22 Thames Street") (Doc. 1; 88 at 72, 80).[1] While carrying a wood plank at the work site, plaintiff slipped on burlap that was covering the foundation and was injured (Doc. 77 at 2). He commenced the instant action on November 10, 2016 by filing a summons and complaint (Doc. 1). In the complaint, plaintiff alleged that defendants violated applicable laws, statutes and ordinances, including, but not limited to, Labor Law §§ 200, 240 (1), and 241(6) (Doc. 1 at 9-10). After joinder of issue (Doc. 8), defendants moved for summary judgment seeking dismissal of the complaint (Doc. 75) (motion sequence 005). Specifically, they argue that (1) various defendants in the complaint are not proper Labor Law parties; (2) that Labor Law § 240 (1) is inapplicable because plaintiff's accident did not arise from a gravity-related hazard; (3) that Labor Law § 241(6) is inapplicable because plaintiff's accident was not caused by a violation of the Industrial Code; and (4) that the Labor Law § 200 and common-law negligence claims must be dismissed because Plaza and VS did not supervise, direct or control the work of plaintiff, and neither created nor had notice of any dangerous condition (Doc. 76 at 1-2).

In support of their motion, defendants submit plaintiff's deposition testimony (Doc. 88). Plaintiff was injured at 22 Thames Street while he was working for Urban as a carpenter (Doc. 88 at 80). His deposition testimony establishes that he fell onto the same level that he was standing on (Doc. 88 at 36-37, 46-49). Moreover, plaintiff conceded that the burlap, measuring 1/8 inch in thickness, was on top of the concrete foundation (Doc. 88 at 74). Plaintiff had never seen burlap used in this manner at other work sites (Doc. 88 at 114, 130-131). According to plaintiff, he was carrying a wood plank when he slipped on the burlap (Doc. 88 at 122-126). Although he did not trip over debris, plaintiff indicated that there was debris everywhere and that

[1] The address of the construction site is also referred to as 125 Greenwich Street (Doc. 77 at 1).

he had to navigate his way around it (Doc. 88 at 135). He testified that the burlap was not fastened down, that it was wet and slippery, and that it "twisted" out beneath him (Doc. 88 at 133-135, 142, 154). Additionally, he averred that it was raining the day or night before the accident and that water was all over the work site, which he referred to as a "pit" (Doc. 88 at 96-97, 99, 136-137). Plaintiff claimed that only employees of Urban, specifically "Ian" and "Chewy," supervised him at the site, and that one of the individuals directed him to build a scaffold (Doc. 88 at 84-85, 87-88, 132). No one at the work site instructed plaintiff as to how to perform the work (Doc. 88 at 82-83). When questioned about VS, Shvo Inc., Shvo, Bizzi and New Valley, he was unable to testify as to the extent of their involvement in the project (Doc. 88 at 77-78

Defendants submit, *inter alia*, the affidavit of Michael Danna, the General Superintendent of Urban (Doc. 77). Urban was retained by Plaza to construct the building foundation of the project at 22 Thames Street (Doc. 77 at 1).[2] As general superintendent, Danna was tasked with overseeing Urban's work pursuant to the contract; walking the work site; coordinating the scheduling; sequencing the progress of the work; ensuring compliance with construction specifications and interacting with Plaza regarding the project (Doc. 77 at 2). According to Danna, Urban poured the concrete of the foundation at the project on April 5, 2016 (Doc. 77 at 2). Consistent with construction specifications designed by the engineer of record and by practice in the trade, they watered the concrete and placed burlap over it to properly cure the concrete and to regulate the temperature and moisture levels (Doc. 77 at 2-3). Danna stated that burlaps and blankets were commonly used during the curing process, especially after mass

[2] Although Danna refers to Plaza as the general contractor of the project (Doc. 77 at 2), other evidence refers to Plaza as the construction manager (Doc. 89 at 14-15).

concrete pours like the one at issue here (Doc. 77 at 2-3). He also affirmed that Urban workers were expected to walk on top of the burlap during their ongoing assignments (Doc. 77 at 3-4).

Defendants also submit the deposition testimony of Steven Salla, a partner of Bizzi, a development company that entered into a development agreement with VS, the owner of 22 Thames Street, to construct a residential building –with retail at the base – at said property (Doc. 90 at 11, 13). New Valley, a holding company, had an ownership interest in VS (Doc. 90 at 16). Although Salla signed contracts on behalf of VS in his capacity as authorized signator, Salla testified that it was VS that retained the architectural firm that prepared the blueprints for the construction project and retained the structural and mechanical engineers that worked together with the architectural design (Doc. 90 at 23-24). Salla insisted that VS retained Plaza as construction manager for the project (Doc. 90 at 25, 27).

Salla visited the site twice a month to oversee the progress of the construction and, during his visits, he stayed approximately five minutes talking to the superintendent of Plaza and the foreman of Urban (Doc. 90 at 33). He further stated that he did not conduct any inspection of the site (Doc. 90 at 55-56). Salla insisted that he never went into the area where the foundation was being laid (Doc. 90 at 39). However, when asked whether he could have pointed out any safety hazards to Plaza or the safety manager during his visits, Salla answered in the affirmative (Doc. 90 at 56). He claimed that Urban placed the burlap on the concrete foundation, which was customary after installing a pressure slab of concrete (Doc. 90 at 45, 51, 53). Salla also testified that Bizzi did not provide any scaffolding, sidewalk bridges, or any other safety equipment for the construction (Doc. 90 at 61). Salla clarified that Shvo Inc. had no connection to the subject property (Doc. 490 at 41). However, Shvo had another marketing LLC – not Shvo, Inc. – that had an ownership interest in VS (Doc. 90 at 42-43). Nevertheless, Shvo had since relinquished

any ownership interest in VS (Doc. 90 at 43). Also, Shvo was involved in branding, and he took no part in the construction of the foundation (Doc. 90 at 45).

Defendants also submit the deposition testimony of Nichols Papageorge, the superintendent of Plaza (Doc. 89 at 11-12). In his role as superintendent, Papageorge engaged in various tasks, including overseeing subcontractors at work (Doc. 89 at 14). Plaza had a contract with Urban to lay the foundation of the project (Doc. 89 at 34-35, 41). Pursuant to their agreement, Urban was "in charge of securing, excavating and placing the foundation as designed by the . . . engineer of record" (Doc. 89 at 41). He claimed that a representative from Bizzi came to the site occasionally to see the progress of the project (Doc. 89 at 30-31). Plaza received site safety manager reports and, if there were any complaints about conditions at the site, it was authorized to address them (Doc. 89 at 55-57). Papageorge also indicated that, if he saw any issues with the burlap, he could have alerted the site safety manager (Doc. 89 at 76-77). He observed Urban sprinkling the foundation with water and covering it with burlap pursuant to specifications provided by consulting engineers (Doc. 89 at 69-73). The burlap was provided by Urban, and Papageorge indicated that Urban was responsible for any debris on the site (Doc. 89 at 74). Papageorge stated that the excavation site was "open to the weather" (Doc. 89 at 77).

In opposition, plaintiff submits, *inter alia*, the affidavit of his expert Stanley Fein, a licensed professional engineer, who affirms that "it is common practice and acceptable practice to use burlap to cover concrete foundation surfaces" (Doc. 113 at 2). However, Fein claims that "to put burlap on a concrete floor where persons are working and walking over the burlap is an extremely poor, dangerous and hazardous condition" (Doc 113 at 2). He stated, "[t]he burlap on a concrete floor would have an extremely low coefficient of friction in the range of 0.2 to 0.3 where good and accepted engineering safety practice and the American Society of Testing

Materials Code D2047-04, and in particular Section 3.1.5 state that a surface having a static coefficient of 0.5 or greater is considered to have adequate slip resistance" (Doc. 113 at 2). Fein also references previous violations issued by the City of New York for the "extremely poor" housekeeping of the work site (Doc. 113 at 2).

Included in his submissions, plaintiff proffers climatological data showing that it had rained at or near the location of the work site during the days preceding plaintiff's accident (Doc. 99). Plaintiff also included a journal entry by Plaza reflecting that the concrete had been sprinkled with water on April 5, 2016 (Doc. 101). On April 6, 2016, Plaza was issued three citations by the Commissioner of the Department of Buildings for violations observed at the site (Docs. 102-104). One of the citations indicated that there was garbage material and construction debris over the egress and ingress, the pathways, and in the areas where laborers performed their tasks, which was a tripping hazard (Doc. 104). In their "Certificate of Correction" submitted in response to the violations, Plaza claimed to have remedied these violations (Doc. 106-108). Plaintiff also submits a decision by the City's Environmental Control Board, which concluded that there was improper housekeeping due to debris throughout the work site and that this caused an immediately hazardous condition (Doc. 109). Based on this determination, penalties were imposed for the violations (Doc. 109).

LEGAL CONCLUSIONS:

a) Improper Labor Law Defendants

As an initial matter, this Court finds that defendants are entitled to dismissal of all claims as against Bizzi, Shvo, Shvo Inc. and New Valley. Defendants' proof establishes that Shvo, Shvo Inc. and New Valley were not involved in the construction work or the installation of the

concrete slab. Moreover, the aforementioned defendants cannot be held liable for the obligations of VS by virtue of their former status as members (*see* Limited Liability Company Law § 609; *Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017]; *Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007]; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]). Defendants also met their burden on their motion seeking dismissal of the claims as against Bizzi insofar as their proof establishes that Bizzi was not involved in the supervision, direction and control of the project (*see Ahern v NYU Langone Med. Ctr.*, 147 AD3d 537, 538 [1st Dept 2017]; *Marcano v Hailey Dev. Group, LLC*, 117 AD3d 518, 518 [1st Dept 2014]). In addition to the foregoing, this Court finds that dismissal of all claims as against these defendants is warranted because plaintiff abandoned all claims against them by failing to raise arguments in his papers in opposition to the instant motion (*see Grabowski v Bd. of Mgrs. of Avonova Condominium*, 147 AD3d 913, 914-915 [1st Dept 2017]; *Foley v Consol. Edison Co. of N.Y., Inc.*, 84 AD3d 476, 478 [1st Dept 2011]). Thus, that branch of the motion seeking dismissal of the complaint against Shvo, Shvo Inc., New Valley and Bizzi is granted.

b) Labor Law 240 (1)

Defendants are also entitled to dismissal of plaintiff's Labor Law § 240 (1) claims against VS and Plaza because their evidence establishes that plaintiffs' injuries did not result from a gravity-related hazard (Doc. 88 at 36-37, 42-43, 125, 132-135, 142-147) (*see Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [2d Dept 1999]; *Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405, 406 [2d Dept 2017]). Importantly, in opposition to defendants' motion, plaintiff fails to address the applicability of Labor Law § 240 (1) and has thus indicated

an intention to abandon this theory of liability (*see Grabowski v Bd. of Mgrs. of Avonova Condominium*, 147 AD3d at 914-915; *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d at 478). Therefore, that branch of defendants' motion seeking summary judgment to dismiss plaintiff's Labor Law § 240 (1) causes of action is granted.

c) Labor Law § 241(6)

This Court grants that branch of defendants' motion seeking summary judgment on plaintiffs' Labor Law § 241 (6) claims against Plaza and VS. Defendants argue, *inter alia*, that this cause of action, premised on a violation of 12 NYCRR § 23-1.7(d), must be dismissed because the burlap was not a "foreign substance" within the meaning of the code (Doc. 76 at 15-19). In opposition, plaintiff argues, *inter alia*, that the burlap was a "foreign substance" and not integral to the work because the burlap became slippery when it became exposed and that "whatever legitimacy the burlap may once have enjoyed, by the time [plaintiff] encountered it, . . . had become primarily a 'foreign substance'" (Doc. 96 at 24-26).

"Labor Law § 241 (6) imposes a nondelegable duty upon owners, contractors and their agents to provide adequate protection and safety for workers and, to establish a claim under this section, plaintiff must allege that defendants violated a rule or regulation promulgated by the Commissioner of Labor that sets forth a specific standard of conduct" (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]; *Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 1277 [3rd Dept 2009]). As relevant here, the Industrial Code provides that "[e]mployers 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" (12 NYCRR § 23-1.7[d]; *see Cross v Noble Ellenburg Windpark, LLC*, 157 AD3d 457, 458 [1st Dept 2018]).

Here, plaintiff relies on Labor Law § 241 (6) only to the extent that he alleges that defendants violated 12 NYCRR § 23-1.7 (d). However, this Court finds that 12 NYCRR § 23-1.7 (d) is not applicable to the facts herein. Defendants' submissions on their motion for summary judgment establishes that burlap is commonly utilized to cure the concrete foundation surfaces, that water is a necessary element to ensure the ideal moisture and temperature levels of the newly poured concrete, and that the use of burlap is consistent with the construction specifications designed by the engineer of record and the practice in the trade. Furthermore, plaintiff testified at his deposition that he slipped on the burlap and not on anything else. Defendants have therefore met their burden for summary judgment on this claim by demonstrating that the wet burlap was not a "foreign substance" within the meaning of the code.

The burden thus shifts to plaintiff to raise a triable issue of fact. However, he fails to meet this burden. Plaintiff's own evidence, in the form of Fein's affidavit, establishes that burlap is commonly used on concrete foundation surfaces, and this Court rejects his argument that exposure of the wet burlap had somehow transformed the burlap into a "foreign substance" within the meaning of 12 NYCRR § 23-1.7 (d) (*see Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789-790 [2d Dept 2008], *lv denied* 12 NY3d 709 [2009]; *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 [2d Dept 2003]; *compare Urquiza v Park and 76th St., Inc.*, 172 AD3d 518, 519 [1st Dept 2019]; *Sweet v Packaging Corp. of Am., Tenneco Packaging*, 297 AD2d 421, 422 [3d Dept 2002]). Furthermore, this Court finds that Fein's affidavit fails to raise an issue of fact insofar as it is conclusory in nature (*see Bedder v Windham Mountain Partners, LLC*, 86 AD3d 428, 428 [1st Dept 2011]; *DeCintio v Lawrence Hop.*, 138 AD3d 414,

414 [1st Dept 2016], *lv denied* 28 NY3d 915 [2017]). Thus, Plaza and VS are entitled to summary judgment on plaintiff's Labor Law § 241 (6) claims.

d) Labor Law § 200 and Common-Law Negligence

This Court finds that issues of fact preclude summary judgment with respect to plaintiff's Labor Law § 200 and common-law negligence claims. Defendants argue, *inter alia*, that VS and Plaza are not liable under the statute because there is no liability where the substance constituting the hazard is inherent to the worksite or integral to plaintiff's work. Moreover, they claim that VS and Plaza did not create the allegedly dangerous condition, nor did they have actual or constructive notice thereof (Doc. 76). In response, plaintiff argues, *inter alia*, that his injuries arose from the dangerous condition of the construction site (Doc. 96). Specifically, he argues that the allegedly "dangerous condition" was the exposed wet burlap. Plaintiff argues that "the point is not whether it was proper to put down burlap and make it moist. The point is that it was negligence on the part of [VS] and [Plaza] to permit the burlap to become exposed, especially when it had become further soaked by an inch of non-evaporating rain and especially when it lay in the middle of an exhausting debris-ridden obstacle course" (Doc. 96 at 9-10).

"Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012] [citation omitted]). Generally, personal injury claims under this statute and the common law fall into two categories: "(1) those arising from an alleged defect or dangerous condition existing on the premises and (2) those arising from the manner in which the work was performed" (*Cappabianca*, 99 AD3d at 143–44 [bracketed numbering added]). Thus, an owner or general contractor is liable under § 200 if they

created the defective condition or had actual or constructive notice of it (the first category), or if they exercised supervisory control over the injury-producing work (the second category) (*see id.* at 144-145).

Even without considering Fein's affidavit, which defendants argue is speculative and fails to specify how he arrived at his calculations, this Court finds that the parties' proof raises issues of fact for the jury. It had been raining during the days prior to plaintiff's accident and the construction site was wet. This is sufficient to raise a question of fact as to whether the excess water on the exposed burlap caused a dangerous condition at the work site (*see Harrington v Fernet*, 92 AD3d 1070, 1072 [3rd Dept 2012]; *Carrion v LSG 365 Bond Street LLC*, 62 Misc 3d 1203 [A], 2018 Slip Op 51896[U], *7 [Sup Ct, NY County 2018]).

Defendants claim that the violation for debris on the work site is immaterial and has no bearing on plaintiff's accident because plaintiff did not slip on debris or any other object (Doc. 117 at 9). This argument is without merit. Although plaintiff testified that he slipped on the burlap, his testimony revealed that he had to make his way around the debris and construction materials while caring the wood plank. Thus, the presence of debris and other materials at the work site raises a question of fact as to whether the work site was safe for plaintiff to navigate, especially in light of the existence of wet burlap (*see DeMercurio v 605 West 42nd Owner LLC*, 172 AD3d 467, 467-468 [1st Dept 2019]; *Moura v City of New York*, 165 AD3d 434, 435 [1st Dept 2018]; *Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539 [1st Dept 2018]; *Carrera v Westchester Triangle Housing Development Fund Co.*, 116 AD3d 585, 587 [1st Dept 2014]). Moreover, there is at least a question of fact as to whether VS and Plaza had constructive knowledge of the alleged condition of the workplace since they had notice of the rain and the prior citations issued to Plaza.

The remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby:

ORDERED that the branch of defendants' motion for summary judgment seeking dismissal of all claims against Shvo, Shvo Inc. New Valley and Bizzi is granted and the complaint is dismissed against said defendants; and it is further

ORDERED that defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240 (1) claims as against VS 125 LLC and Plaza Construction LLC is granted; and it is further

ORDERED that defendants' motion is otherwise denied.

ORDERED that the dismissed claims against defendants are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the caption is hereby amended to delete the dismissed defendants therefrom, and shall hereinafter read as follows:

ROCCO PACE,

Plaintiff,

Index No. 159487/16

v

VS 125 LLC and PLAZA CONSTRUCTION LLC,

Defendants.

And it is further

ORDERED that, within twenty days of the entry of this order, counsel for defendants shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141 B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties are required to appear for a previously scheduled Early Settlement Conference with JHO Miles Vigilante on November 14, 2019 at 80 Centre Street, Room 106 at 10:00 a.m.; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that this constitutes the decision and order of this Court.

10/23/2019
DATE

KATHRYN E. FREED, J.S.C.

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