Trinidad v Turner Constr. Co.
2019 NY Slip Op 33353(U)
November 12, 2019
Supreme Court, New York County
Docket Number: 150133/2015
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ROBERT TRINIDAD,

Index No.: 150133/2015

Plaintiff,

DECISION/ORDER

-against-

TURNER CONSTRUCTION COMPANY,

Defendant.

---x

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries allegedly sustained by a laborer on October 3, 2012, when, while working at a construction site located at 130-30 28th Street, Queens, New York (the "Premises"), the wheeled container filled with construction debris that he was pushing tipped over when it ran over a plywood floor cover, causing the cover to collapse under its weight.

In motion sequence number 006, defendant Turner Construction Company ("Turner") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 007, plaintiff Robert Trinidad moves, pursuant to an order to show cause, seeking leave to amend the bill of particulars to assert a violation of Industrial Code sections 23-1.28 (b) and 23-1.7 (e) (1).

BACKGROUND

On the day of the accident, Turner served as the construction manager on the New Police Academy's project to construct three buildings at the Premises (the "Project"). Pursuant to a

subcontract, Turner hired nonparty J-Track to be in charge of keeping the construction site clear of debris, providing safety and fall protection, and constructing and installing protective wood coverings over floor openings. Plaintiff was employed by J-Track as a laborer on the Project, and his work primarily entailed garbage and debris removal at the site.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was working as a laborer for J-Track for the Project. Plaintiff explained that his work required him to move garbage and debris from one area within the site to garbage trucks located in another area. Plaintiff's J-Track supervisors directed his work on the Project.

In order to perform his work, it was necessary for plaintiff to utilize metal containers, which he described as about chest-high. The containers had four steel wheels on the bottom which swivelled.

Plaintiff testified that shortly after he arrived at the Premises on the day of the accident, he was directed to pick up some containers that were filled with concrete debris at a hoisting area and then take them to the waiting garbage trucks. When filled, the containers weighed "thousands of pounds" (plaintiff's tr at 110).

In order to reach the garbage trucks from the hoisting area, it was necessary for plaintiff to take a path through a hallway with cement slab floors. Plaintiff noted that he was able to push the container without help, and that he pushed it in front of him, using both of his hands.

Plaintiff testified that along the route of the hallway, there was an approximately three-inch-wide gap in the floor, which was completely covered by plywood. Plaintiff further explained that the gap was in their "pathway towards the truck" (*id.* at 96). The gap spanned the

entire width of the five-foot-wide hallway.

Plaintiff explained that the gap was actually a small trough where at "certain time[s]" the Project's plumbers and electricians installed various pipes (*id.* at 99). Plaintiff had observed electricians and plumbers removing the plywood covers on occasion, and also carpenters replacing them with new ones because as "[t]he plywood pieces deteriorate, they get replaced" (*id.* at 103).

Plaintiff testified that after he had pushed one of the containers about 50 feet, its front wheel "dove into the plywood and the container tipped over" (*id.* at 112). Plaintiff further asserted that "[t]he wheel got sunk into the plywood" (*id.*). At this time, the plywood "broke" (*id.* at 113) and "[t]he container went down" (*id.* at 115).

Plaintiff also testified that prior to the accident, he never had any problems with the container that he was using at the time of the accident. In addition, he had never complained about the plywood cover's condition, asserting that it was "flush with the floor" prior to the accident (*id.* at 105).

Wellington Moreaux's Deposition Testimony (Turner's Project Superintendent)

Wellington Moreaux testified that Turner was the construction manager on the Project, and that he was Turner's project superintendent on the day of the accident. As such, it was his job to coordinate the construction schedule and manage the Project's budget. Moreaux also performed "daily" walk-throughs of the site to observe the progress of the construction (Moreaux tr at 55). Moreaux maintained that only Turner employees were required to report to him.

Moreaux explained that Turner hired J-Track to provide the laborers and carpenters necessary to keep the site clean, perform safety work and construct wood covers to protect the

various openings in the floor during construction. Moreaux noted that a company called Royal served as the waste management vendor for the Project, and that it provided the waste containers for garbage and debris removal. Royal also arranged for the transport of the garbage off the site.

Moreaux testified that he never received any complaints "about any improperly protected hazardous openings or holes" at the site (*id.* at 56). In addition, when he was asked if he was aware of any other similar accidents occurring in the subject area, he replied, "No" (*id.* at 67).

The Affidavit of Wellington Moreaux

In his affidavit, Moreaux stated that J-Track employees were responsible for pushing containers of construction debris and garbage from the hoisting area of the East Building to waiting garbage trucks. He stated that the condition that plaintiff alleges caused his accident consisted of a small one-foot-deep channel/gutter that spanned the hallway. Moreaux maintained that "the channel was covered with a piece of plywood made flush with the abutting portions of concrete slab floor" (Moreaux aff).

Moreaux also asserted that "Turner never received any complaints . . . pertaining to the subject wood cover or the channel at any point prior to the plaintiff's accident" (*id.*). In addition, "during his daily walks and inspections of the East Building during the weeks prior to the plaintiff's accident, [he] traversed the subject wood covering and channel . . . [and] did not notice any issues with the wood covering or channel when [he] stepped onto it during these walks" (*id.*).

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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept

2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim Against Turner

Turner moves for dismissal of the Labor Law § 240 (1) claim against it. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's

injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

In his opposition papers, plaintiff concedes that his accident did not involve the type of elevation-related hazard intended to be covered by Labor Law § 240 (1), and he does not oppose that part of Turner's motion seeking to dismiss said claim against it.

Thus, Turner is entitled to dismissal of the Labor Law § 240 (1) claim against it.

The Labor Law § 241 (6) Claim Against Defendants

Turner moves for dismissal of the Labor Law § 241 (6) 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 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, and withstand a defendant's motion for summary judgment, 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).

Initially, while plaintiff asserts multiple alleged Industrial Code violations in his bill of particulars, plaintiff has not opposed Turner's request for summary judgment dismissing said violations. Therefore, those alleged Industrial Code violations contained in the bill of particulars are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, Turner is entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on the abandoned provisions.

That said, plaintiff moves for an order granting him leave to amend the bill of particulars to assert violations of Industrial Code sections 23-1.28 (b) and 23-1.7 (e) (1). It should be noted that

> "[l]eave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] ha[s] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). In seeking amendment, a "plaintiff need not establish the merit[s] of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]

[internal citation omitted]).

As set forth below, plaintiff has not established that sections 23-1.28 (b) and 23-1.7 (e) (1) apply to the facts of this case. Moreover, as plaintiff failed to offer any explanation for his "lengthy delay" in amending the bill of particulars, plaintiff's motion is denied (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003]).

Industrial Code 12 NYCRR 23-1.7 (e) (1)

Initially, Industrial Code 12 NYCRR 23-1.7 (e) (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]).

Section 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.

Here, it is not disputed that the accident occurred in a passageway for the purposes of section 23-1.7 (e) (1). That said, it is disputed as to whether the subject plywood cover could be considered a condition which could cause tripping. Although plaintiff concedes that the subject plywood cover was not a tripping hazard prior to the moment of the accident, he argues that it then became a tripping hazard once it collapsed under the weight of the container. However, the court rejects plaintiff's attempt to put the cart before the horse. Moreover, it should be noted that the container did not "trip" over the plywood cover, which was flush with the floor at the time that the container began to move over it, but rather, the container sunk down into it when its

weight caused the plywood to break. Plaintiff testified that after he pushed one of the containers, its front wheel "dove into the plywood and the container tipped over" (plaintiff's tr at 112) and there is no evidence that either he or the container "tripped" (*see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013] [23-1.7 (e) (1) inapplicable "since plaintiff testified that he slipped on wet plywood while carrying a heavy beam, and there is no evidence in the record that plaintiff tripped"]; *see also Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014] [no 23-1.7 (e) liability where plaintiff slipped on an unsecured piece of masonite, "which was not a tripping hazard"]).

Industrial Code 12 NYCRR 23-1.28 (b)

Section 23-1.28 (b) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Brasch v Yonkers Constr. Co.*, 306 AD2d 508, 510 [2d Dept 2003]).

Section 23-1.28 (b), which covers the requirements for wheels and handles on hand-propelled vehicles, states, in pertinent part, that "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of vehicles."

Here, the testimonial evidence in this case is totally devoid of any evidence that the container's wheels were defective in any way. In fact, first and foremost, the accident was caused due to the collapse of the plywood cover under the weight of the container, rather than because the container's wheels were not "free-running" (*Garcia v 95 Wall Assoc.*, LLC, 116 AD3d 413, 413 [1st Dept 2014] [no section 23-1.28 (b) liability where the plaintiff's testimony established that "the subject accident was not caused by a defect in the cart's wheels," but rather, it was caused "when the left handle came loose" as he was pushing the cart down the ramp]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009] [defendants were not

entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.28 (b) when they failed to "carry their burden as movants to show that the wheel [on the equipment cart that tipped over] was not defective"]).

Thus, based upon a "lack of nonspeculative evidence, in admissible form, that one of the [container's] wheels was defective," plaintiff is not entitled to an order granting him leave to amend the bill of particulars to add an alleged violation of section 23-1.28 (b) (*see Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 343 [1st Dept 2005]; *compare Ahern v NYU Langone Med. Ctr.*, 147 AD3d 537, 538 [1st Dept 2017] [a question of fact existed as to whether section 23-1.28 (b) applied to the facts of the case where the plaintiff testified that before his accident, the wheel on the mini-container he was pushing "became stuck, and that as a result, he was injured when . . . he forcefully pulled it in an attempt to move it"]).

The Common-Law Negligence and Labor Law § 200 Claims

Turner moves for dismissal of the common-law negligence and Labor Law § 200 claims 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

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: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [court dismissed

common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, plaintiff was injured when, while pushing a container over a plywood floor cover, which had been temporarily placed over a gap by J-Track workers, the cover collapsed, causing the container to topple over. Therefore, the accident was caused due to the means and methods of the work involved with the design, installation and/or maintenance of the cover.

Here, there is no evidence in the record indicating that Turner was responsible for designing, installing and/or maintaining the plywood floor cover that caused plaintiff to become injured. In fact, the testimony in this case shows that those tasks were solely the responsibility of plaintiff's employer, J-Track. To that effect, Moreaux testified that J-Track's carpenters were charged with providing and maintaining the plywood floor covers on the Project (*see Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014] [no Labor Law liability where the defendants did not "have responsibility for maintenance of the Masonite on the floor where plaintiff's injury occurred, since that level of the building had been turned over to a nonparty entity"]).

It should be noted that Turner would also be entitled to dismissal of the common-law

negligence and Labor Law § 200 claims against it under an unsafe condition analysis because the alleged defect in the floor cover was not visible upon inspection prior to the accident, and, therefore, Turner did not have actual notice of any defect in the plywood floor cover. Plaintiff testified that prior to the accident, he observed the plywood cover to be flush with the floor, and that he never had cause to complain about the condition of the cover at issue in this case. In addition, Moreaux also asserted that he never observed any problematic issues with the plywood floor cover, even when he stepped on it during his daily walks (*id.* [even though the testimonial evidence indicated that "the duct tape securing the masonite . . . needed 'sprucing up' because it was starting to 'deteriorate,' this testimony [was] insufficient to establish that defendants had actual notice that the subject masonite was unsecured at the time of plaintiff's accident"]).

While it might be argued that a question of fact might exist as to whether Turner should have had constructive notice of the alleged unsafe condition, here "there was no evidence of a recurring condition . . . that routinely went unaddressed" (*id.*). In any event, "[w]hen a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" (*Schnell v Fitzgerald*, 95 AD3d 1295, 1295 [2d Dept 2012] [condition was not discoverable upon reasonable inspection where the exterior staircase broke underneath the plaintiff, causing her to fall and become injured]; *Lal v Ching Po Ng*, 33 AD3d 668, 668 [2d Dept 2006] [where the concrete abutment adjoining the front steps of the premises where the plaintiff was sitting gave way, the court held that the defendants did not have notice of the unsafe condition because it was not discoverable upon reasonable inspection]).

Thus, Turner is entitled to dismissal of the common-law negligence and Labor Law § 200 claims and all cross claims against it.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Turner Construction Company's ("Turner") motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims are dismissed as against Turner, with costs and disbursements to Turner as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Turner; and it is further

ORDERED that plaintiff Robert Trinidad's motion for an order granting him leave to amend the bill of particulars to assert violations of Industrial Code 12 NYCRR 23-1.28 (b) and 23-1.7 (e) (1) is denied.

Dated: November 12, 2019

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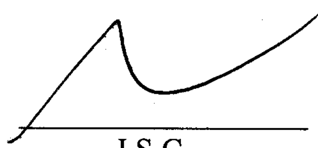

J.S.C.

HON. **SHLOMO S. HAGLER, J.S.C.**