Albano v Cornell Tech
2020 NY Slip Op 31107(U)
April 30, 2020
Supreme Court, New York County
Docket Number: 155516/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

CHRISTOPHER ALBANO,

Plaintiff,

- v -

CORNELL TECH and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

----------X

INDEX NO. 155516/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by Defendants Cornell Tech and Tishman Construction Corporation (collectively, "Defendants") for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted in part and denied part as described herein.

BACKGROUND

This is an action for personal injuries that Plaintiff Christopher Albano ("Plaintiff") allegedly sustained, on May 15, 2017, when he tripped and fell off of a flatbed truck while unloading three ornamental steel panels, pursuant to work being performed on a construction site on Roosevelt Island.

More particularly, Plaintiff states that he was employed by non-party IDA Exterior Inc. ("IDA") and assigned to the "ground crew" where – as an apprentice – he assisted his co-workers in unloading crated panels from the dunnage of a flatbed truck. (NYSCEF Doc. No. 21 [Plaintiff EBT] at 57:04-58:12.) Plaintiff states that there were three crated panels on the truck, which were roughly 20-25 feet long and they were also "pretty wide" such that the truck had to be flagged as carrying an oversized load. (Id. at 73:02-74:23.) Plaintiff states that his work consisted of removing portions of the crating, assisting in rigging up the panel to a crane hook and then guiding the panel to "the actual place of where the panel was going to be." (Id. at 74:24-75:13.)

Plaintiff states that his accident occurred as the third panel was being hoisted and describes it as follows:

> **A.** So the panel was -- was lifted up like abruptly, and instead of it being, you know, balanced out and going, the panel just swung.

So as I was -- as the panel is swinging, I'm stepping over the skeleton of the crate left, and its forcing me to the back of the truck, because there -- it wasn't balanced right. There was no -- there was nobody really on the panel, itself. So it kind of was pushing me to the back of the truck.

…

As I was stepping over the wood, because I remember stepping over the skeleton part of the crate, and I managed to actually make it through there. As it was pushing me to the back, my foot got wedged as I was stepping over in like a -- like a -- like a burr lip kind of protruding up where my heel -- not my heel, my toe and the welt of my shoe, my right foot got caught.

Q. Was that the part of the wood framing you got caught in … or something else?

A. No. It was -- it was more of the part of where the platform of the truck meets the metal of the truck, like the bumper area, it kind of like -- it feels like there was a – somebody shoved something inside there and bent it up, and it kind of like protruded out.

So now my foot gets wedged, and if, you know, my foot wasn't in there, I would have been able to get off the truck and avoid the panel coming.

But -- so I was getting off the truck, I realized, oh shit, my foot is stuck, and went ass over tea kettle. My leg dis -- my foot dislodged. The only thing I was worried about is not getting crushed. Like I didn't want to lose a leg. They always teach you like that's gonna kill you.

So as I was getting out of the way, and I was struck in that protruding piece of bent metal, I went over, braced myself, and kind of like realized I was alive.

Q. Where did you fall to?

A. From off the rear of the truck to the cement road.

(Id. 78:13-80:18.)

Robert Youngman ("Youngman") was the supervisor on the project from IDA on the day of the accident. (NYSCEF Doc. No. 22 [Youngman EBT] at 11:11-21.) Youngman testifies that he did not witness Plaintiff's accident, but he was working on the same truck at the time of the accident and spoke with Plaintiff afterwards. (Id. at 27:03-28:07.) Youngman states that Plaintiff told him that the panel "came up quickly, and he stepped out of the way" and that as he did so "he tripped over that in the back of the truck." (Id.) Youngman states that he then investigated the back of the truck where Plaintiff fell from and states that "[t]here's an angle in the back of the truck where the wood goes underneath, and there's like a – it sticks out." (Id. at 31:04-32:05.) Youngman further states that the "angle" was not something that was bent or broken, but was "a projection" in the back of the truck and that looking at it, "[i]t's obvious that your foot would get

caught underneath it." (Id. at 36:21-37.) Youngman adds that "[i]t looked like a ribbon around it" or that it was a "steel plate" sticking up from the wooden floor." (Id. at 37:16-38:24.) Youngman does not believe anyone took a picture of the "angle" following Plaintiff's accident. (Id. at 31:12-13.)

In his complaint, Plaintiff asserts causes of action under a theory of common law negligence and for statutory violations of Labor Law §§ 200, 240 (1) and 241 (6). With regard to his claims under Labor Law 241 § (6), Plaintiff alleges the following violations of the Industrial Code sections: 23-1.5, 23-1.7, 23-2.1, 23-4, 23-5, 23-6, 23-7, 23-8 and 23-9.[1]

However, in opposing this motion, Plaintiff only argues that Defendants can be found liable pursuant to Labor Law § 241 (6) as based on violations of the following subsections of the Industrial Code:

- 23-1.7 (e) (2)
- 23-8.1 (f) (1)(iii)
- 23-8.1 (f) (1)(iv)
- 23-8.1 (f) (2) (i)
- 23-8.1 (e) (3)[2]
- 23-8.2 (c) (3)

As such, this Court finds that Plaintiff has abandoned his other causes of action—including but not limited to those based on Labor Law §§ 200, 240 (1) and common law negligence—and the branch of Defendants' motion seeking dismissal of said causes of action is granted. (*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].)

Defendants do not submit any reply papers contesting Plaintiff's arguments.

This Court will now turn to analyzing Plaintiff's claims under the remaining theories of liability.

---

[1] The parties do not submit a bill of particulars and, therefore, the Court cannot determine if Plaintiff previously provided notice to Defendants as to the specific subsections that he alleges were violated, as set forth in the complaint. Nonetheless, Plaintiff has now identified these subsections in his opposition papers. While Defendants do note that there is a certain lack of specificity with regard to the alleged violations of the Industrial Code, Defendants do not argue that this is a basis for wholly dismissing Plaintiff's claims pursuant to Labor Law § 241 (6). Moreover, even if Defendants made such an argument, this Court would reject it, as Plaintiff has not raised any new theories of liability or made new factual allegations. As such, there is no prejudice to Defendants.

[2] Plaintiff refers to this subsection as 23-8.1 (d) (3). However, this is a clearly a typographical error as the quoted language is from subsection 23-8.1 ***(e)*** (3). Accordingly, the Court will refer to subsection (e) (3)—not (d) (3).

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] [interpreting CPLR 3212 (f)]; *see also Integrated Logistics Consultants v Fidata Corp.,* 131 AD2d 338, 340 [1st Dept1987].) "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 NY3d 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 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 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 non-delegable 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 recover under 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.) At the same time, the Court of Appeals has stressed that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace." (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011].)

The Court will now analyze Plaintiff's claims as they relate to each remaining Industrial Code section.

I. Industrial Code § 23-1.7 (e) (2)

Defendants argue that the predicate Industrial Code regulations, on which Plaintiff bases his Labor Law § 241 (6) claim, are inapplicable. Defendants argue that section 23-1.7 in general is inapplicable and specifically argue that subsection 23-1.7 (d) is inapplicable. In opposition, Plaintiff does not dispute such argument as to subsection 23-1.7(d). However, Plaintiff argues that subsection 23-1.7 (e) (2) is applicable, and Defendants, in their moving papers, do not make any arguments as to this specific subsection. Further, Defendants have not submitted any reply papers to dispute Plaintiff's arguments here.

This provision states as follows:

"§ 23-1.7 Protection from general hazards

(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."

As a preliminary matter this Court notes that subsection (e) (2) "is sufficiently specific to sustain a claim under Labor Law § 241(6)." (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]; *White v Vil. of Port Chester*, 92 AD3d 872, 877 [2d Dept 2012].)

Here, there is no dispute that Plaintiff was in the process of performing his work assignment on the flatbed truck when he was injured. As such, in keeping with the liberal reading of the statute, this Court finds that the area where Plaintiff was injured is arguably an "area[] where persons work" for purposes of subsection (e) (2). (*See Cafarella v Harrison Radiator Div. of Gen. Motors*, 237 AD2d 936, 938 [4th Dept 1997] [holding that subsection (e) (2) "arguably applie[d]" where plaintiff allegedly slipped and fell on mud and oil in the rear bed of a dump truck while loading scaffolding]; *Clark v Town of Scriba*, 280 AD2d 915, 915 [4th Dept 2001] [denying summary judgment as to subsection 23-1.7 (e) (2) in case where "Plaintiff's foot became caught on something on the bed of the truck, causing plaintiff to trip and fall to the ground"]; *Hernandez v 137 Riverside Owners, Inc.*, 2020 N.Y. Slip Op. 30185[U], *5 [N.Y. Sup Ct, NY County 2020] [Billings, J.] [finding that area of flatbed truck where the plaintiff was injured was an area "where persons work" for purposes of subsection (e) (2)].)

Further, this Court finds that there is a triable question of fact as to whether the "angle" that Plaintiff's foot got caught on constitutes a "sharp projection" within the meaning of subsection (e) (2), as the Appellate Division, First Department has found this phrase to mean any "distinct object jutting out from the rest of the floor's surface." (*See Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 393 [1st Dept 1997] [holding that door stop—on which the plaintiff tripped—was a "sharp projection" for purposes of subsection (e) (2) and rejecting the defendants' argument that the definition of "sharp projection" should be limited to projections which are capable of cutting or puncturing]; *Rizzo HRH Const. Corp.*, 301 AD2d 426, 427 [1st

Dept 2003] [affirming denial of summary judgment where the record was "too sparse to permit findings that the drainpipe was a 'sharp projection' within the meaning of that rule [subsection (e) (2)]"].)

To the extent that Defendants argue that, this "angle" constitutes an integral part of part of the work being performed, this Court finds that Defendants failed to establish this as a matter of law, as, arguably, the flooring of the flatbed truck itself was not under construction and thus could not be an integral part of the work being performed. (*Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 393 [1st Dept 1997].)

Moreover, to the extent that Defendants argue otherwise, because an owner or general contractor's vicarious liability under Labor Law § 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice is irrelevant to the imposition of liability under this section. (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998].)

As such, the court finds that Defendants have failed to establish, as a matter of law, that Industrial Code § 23-1.7 (e) (2) does not apply to the alleged facts. Further, the Court finds that, based upon the testimony, there are triable issues of fact as to whether Industrial Code § 23-1.7 (e) (2) was violated, and, if so, whether such violation proximately caused the subject accident. (*Mullen v Hines 1045 Ave. of the Americas Inv'rs, LLC*, 2019 N.Y. Slip Op. 33247[U], *11 [N.Y. Sup Ct, NY County 2019] [Kalish, J.] [finding same with regard to allegedly "warped" Masonite].)

II. Industrial Code § 23-8

Defendants argue that Industrial Code § 23-8 – as an entire section – applies to the operation of cranes and derricks only, and, as such, is wholly inapplicable to the facts at hand. Defendants assert that Plaintiff "was not injured by, or while using, any crane or derrick." (NYSCEF Doc. No. 17 [Def. Memo] at 9.)

In opposition, Plaintiff argues that that the following subsections of the Industrial Code are applicable and that there are triable issues of fact concerning whether they were violated, and, if so, whether said violation(s) proximately caused the accident.

- 23-8.1 (f) (1)(iii)
- 23-8.1 (f) (1)(iv)
- 23-8.1 (f) (2) (i)
- 23-8.1 (e) (3)
- 23-8.2 (c) (3)

As previously mentioned, as Plaintiff does not oppose dismissal of any other subsection aside from those listed above, this Court dismisses Plaintiffs claims to the extent premised on other subsections of Industrial Code. (*See Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code

cited in his bill of particulars by failing to address them either in the motion court or on appeal."].)

This Court will now analyze the viability of Plaintiff's claims with regard to the above subsections.

With particular regard to Plaintiff's claims related to subsections **23-8.1 (f) (1)(iv), 23-8.1 (f) (2) (i) and 23-8.1 (e) (3)**, this Court finds that Defendants have failed to establish as a matter of law that the subsections are not applicable and finds that there are triable issues of fact as to whether these sections were violated, and, if so, whether said violations proximately caused the accident.

These subsections state in relevant part:

§ 23-8.1 General provisions

(f) Hoisting the load.

(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

(2) During the hoisting operation the following conditions shall be met:

(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.

§ 23-8.2 Special provisions for mobile cranes

(c) Hoisting the load.

(3) Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard.

As a preliminary matter, these subsections are sufficiently specific to provide a basis for liability under Labor Law § 241 (6). (*McCoy v Metro. Transp. Auth.*, 38 AD3d 308, 309-10 [1st Dept 2007].) In addition, these provisions are also applicable to the alleged facts in this case, as Plaintiff testifies that the panel "lifted up like abruptly" and was "swinging," and then pushed him off the flatbed truck. (*See id*. ["When a crane is being used to move a large, heavy or unwieldy item from one spot to another, the term 'hoisting' should not be read so narrowly as to apply only to the part of the process in which the item is being moved in an upward direction, and to preclude the part of the operation when the load, having been lifted upward, is being propelled horizontally."].) Further, there are triable issues of fact as to whether these sections were violated, and, if so, whether they proximately caused the accident

Similarly, with regard to subsection **23-8.1 (f) (1) (iii)**—which states that before starting a hoisting operation "[t]he hook shall be brought over the load in such manner and location as to prevent the load from swinging when hoisting is started"—this Court finds this subsection is sufficiently specific to form a basis for imposing liability under Labor Law § 241 (6). (*McCoy v Metro. Transp. Auth*., 38 AD3d 308, 309-10 [1st Dept 2007].) Further, Defendants have failed to establish, as a matter of law, that this subsection is not applicable. Based on Plaintiff's aforesaid testimony that the panel was "swinging," there is a reasonable inference that the panel was not properly hooked-up pursuant to this subsection. As such, there are triable issues of fact as to whether this subsection was violated, and, if so, whether it proximately caused the accident.

Finally, with regard to **subsection 23-8.1 (e) (3)**—which states that "[w]here slings are used to hoist material of long length, spreader bars shall be used to space and keep the sling legs in proper balance"—this Court finds that this subsection is sufficiently specific to form a basis for imposing liability under Labor Law § 241 (6). (*McCoy v Metro. Transp. Auth*., 38 AD3d 308, 309-10 [1st Dept 2007].) Further, this Court finds that Defendants have failed to establish as a matter of law that this subsection is inapplicable. Further, there are triable issues of fact concerning whether this subsection was violated and, if so, whether it proximately caused the accident.

Accordingly, the Court finds that Defendants have failed to establish prima facie that the above Industrial Code subsections do not apply to the instant case. Further, there are issues of as to whether the subsections were violated, and, if so, whether said violations proximately caused the accident.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendants Cornell Tech and Tishman Construction Corporation (collectively, "Defendants") for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted in part and denied in part, to the extent that all of Plaintiff Christopher Albano's claims are dismissed ***except*** for those pursuant to Labor Law 241 (6) as premised on violations of Industrial Code §§ 23-1.7 (e) (2), 23-8.1 (e) (3), 23-8.1 (f) (1) (iii), 23-8.1 (f) (1) (iv), 23-8.1 (f) (2) (i) and 23-8.2 (c) (3); and it is further

ORDERED that the counsel for Plaintiff shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days after Governor Cuomo's Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20).

The foregoing constitutes the decision and order of this Court.

4/30/2020
DATE

ROBERT DAVID KALISH, 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**