Cevallos v Site 1 DSA Owner LLC
2020 NY Slip Op 31970(U)
May 12, 2020
Supreme Court, Queens County
Docket Number: 701739/2018
Judge: Cheree A. Buggs

Cevallos v Site 1 DSA Owner LLC, Index No. 701739/2018, Buggs, J. (May 11, 2020)

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS IA Part 30
Justice

LILIANA CEVALLOS,

Plaintiff,

-against-

SITE 1 DSA OWNER LLC and TRITON CONSTRUCTION COMPANY, LLC,

Defendants.

x Index Number 701739/ 2018

Motion Date January 8 , 2020

Motion Seq. No. _2___

The following papers read on this motion by defendants Site 1 DSA Owner, LLC (Site 1) and Triton Construction Company, LLC (Triton) pursuant to CPLR 3211 and 3212 dismissing the complaint with prejudice.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF Doc. #27-#38
Answering Affidavits - Exhibits	EF Doc. #41-#43
Reply Affidavits	F Doc. #44

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries she sustained on December 18, 2017, during the course of her employment by nonparty DYDI Corp. (DYDI) as an laborer on a construction project for the erection of a museum and 15-story residential condominium building, located at 242 Broome Street in Manhattan, New York. Plaintiff alleges that she stepped on debris while descending an interior staircase leading from the second floor to the first floor of condominium building, which made her foot roll

and her leg twist, and caused her to fall to the mid-floor landing below. She allegedly landed on her side, with her right leg hitting the concrete floor first, and her back striking the wall that was to her right. Plaintiff named Site 1, the owner of the property, and Triton, the construction manager/general contractor for the project, as the party defendants. According to plaintiff, Triton hired nonparty Gotham Construction Company, LLC (Gotham) as the carpenters, and DYD1 was hired by Gotham to provide laborers to perform Gotham's contracted work. Plaintiff alleges claims based upon common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Defendants Site 1 and Triton served a joint answer, denying the material allegations of the complaint and asserting various affirmative defenses.

Defendants Site 1 and Triton move for summary judgment dismissing the complaint insofar as asserted against them. Plaintiff opposes the motion.[1]

It is well established that 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 demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers *(see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, citing to *Zuckerman v City of New York*. 49 NY2d 557, 562).

In support of the motion, defendants submit a copy of the pleadings, the deposition testimony of plaintiff and Richard Saxton, the project engineer for defendant Triton at the project, and affidavits of Carlos Villalba, the labor foreman employed by DYDI in December 2017, and Gerard O'Donnell, a safety coordinator employed by Total Safety Consulting, a non-party, which had been retained to act as a safety consultant for the project. Defendants also offer a photograph annexed to the Villalba affidavit, and a document denominated "SAFETY MANAGER'S LOG" and another document setting forth various "Posts."

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[1] The court notes that to the extent plaintiff relies upon the affidavit of her expert Kathleen Hopkins in opposition to the motion (*see* affirmation of D. Allen Zachary, Esq. dated December 12, 2019 ¶ 2), that affidavit is not efiled and thus the court did not consider it when determining this motion.

Plaintiff's claim based upon violation of Labor Law § 240(1)

Labor Law § 240(1) requires property owners and contractors to provide workers with "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 the workers (Labor Law § 240[1]). Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*id.* at 7; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513, [1991]).

In plaintiff's bill of particulars, she alleges that her injuries stem from defendants' failures to (1) maintain the stairs properly, thus allowing a slipping/tripping hazard to exist, (2) properly inspect the premises, and (3) provide a handrail and proper illumination for the staircase. Plaintiff testified at her examination before trial (with the aid of a Spanish interpreter) that she was uncertain if the stairway upon which she fell was identified as "Stair A" or "Stair B," but admitted she was not assigned to work, or working in the stairway at the time of her accident, but rather was using the stairway as a means of access to her work area following eating lunch on the second floor. The rest of her testimony, as confirmed by the other testamentary and documentary evidence, indicates the stairways at the building and museum were permanent, fixed interior staircases, and not designed as safety devices to afford protection from an elevation-related risk (*see Kanarvogel v Tops Appliance City*, 271 AD2d 409 [2d Dept 2000], *lv dismissed* 95 NY2d 902 [2000]). Since her claimed injury did not result from a failure to provide adequate elevation security to prevent a height-related hazard contemplated to be protected by the statute, Labor Law § 240(1) is inapplicable to the facts of this case and defendants may not be held liable for a claimed violation of Labor Law 240(1) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Kanarvogel v Tops Appliance City*, 271 AD2d 409, 410-411). Furthermore, plaintiff does not specifically oppose this branch of defendants' motion.

Plaintiff's claim based upon violation of Labor Law § 241(6)

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Rizzuto v L.A. Wenger Construction Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis Palmer Hydro-Electric Co.*, 81 NY2d 494, 501). To prevail on a Labor Law § 241(6) claim, a

plaintiff must establish a violation of a New York State Industrial Code which contains a specific, positive command applicable to the circumstances of the accident, that such violation was a proximate cause of his injuries (*see Rizzuto v L.A. Wenger Construction Co.*, 91 NY2d 343, 348; *Ross v Curtis Palmer Hydro-Electric Co.*, 81 NY2d 494, 501; *Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept 2009]).

Plaintiff's cause of action pursuant to Labor Law § 241(6) is premised upon violations of 12 NYCRR 23-1.7(b), (d), (e), (f) and 12 NYCRR 23-2.7(b), (c), (d) and (e), and (ii) the rules and regulations of the Occupational Safety and Health Administration (OSHA) (*see* Plaintiff's Bill of Particulars ¶ 14). 12 NYCRR 23-1.7(b) concerns hazardous openings, 12 NYCRR 23-1.7(d) concerns slipping hazards in a passageway, 12 NYCRR 23-1.7(e)(1) and (e)(2) concern "tripping and other hazards" and 12 NYCRR 23-1.7(f) governs vertical passageways. 12 NYCRR 23-2.7 concerns stairway requirements during the construction of buildings.

Plaintiff's claim under Section 23-1.7(b)

Plaintiff alleges that as she was descending the concrete staircase between the second and first floor, she fell from the second or third step to the landing below. Even though there is a height differential between the step and the landing below, the step from which she fell did not constitute a "hazardous opening" within the meaning of 12 NYCRR 23–1.7(b)(1) (*see Rookwood v Hyde Park Owners Corp.*, 48 AD3d 779, 781 [2d Dept 2008]; *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2007]) (*see also Pope v Safety and Quality Plus, Inc.*, 74 AD3d 1040 [2d Dept 2010], *lv to appeal dismissed* 15 NY3d 862 [2010]).

Plaintiff's claim under Section 23-1.7(d) and 23-17(e).

Section 23-1.7(d) 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."

Section 23-1.7(e) provides:

> "Tripping and other hazards.
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could

> cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Section 23–1.7(d) has been deemed a specific provision sufficient to support a Labor Law § 241(6) claim (*see Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 AD3d 378 [2d Dept 2006]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [2d Dept 1999]), as has section 23-1.7(e), subdivisions (1) and (2) (*see Herman v. St. John's Episcopal Hosp.*, 242 AD2d 316 [2d Dept 1997]).

Defendants have established prima facie that 12 NYCRR 23-1.7(d) is inapplicable under the facts alleged. Plaintiff, during her deposition, admitted there was no slippery, wet or greasy substance in the stairwell on the stairway where she fell. To the extent she testified the slipping hazards were "small pieces of sheetrock, small screws and leftovers of cement from the walls" of the stairway, created by electricians sometime earlier when breaking through the walls to pass cables, such accumulated debris on the stairwell is not the type of slippery condition or foreign substance contemplated by section 23-1.7(d) (*see Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 [2d Dept 2003]; *cf. Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730 [2d Dept 2007]).

Defendants contend that 12 NYCRR 23-1.7(e) also is inapplicable under the facts alleged, because the stairway where the accident occurred is not a "passageway" under 12 NYCRR 23-1.7(e)(1) or a "working area" under 12 NYCRR 23-1.7(e)(2). The word "passageway" is not specifically defined in the regulation, but courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area (*see e.g. Rose v. A. Servidone, Inc.*, 268 AD2d 516 [2d Dept 2000]; *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]), and to pertain to "an interior or internal way of passage inside a building" (*Quigley v Port Authority of N.Y. and N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Viewed in the light most favorable to plaintiff, that she fell while walking in the stairwell, which had allegedly had debris on the stairs, to access her work area. Defendants therefore have failed to establish prima facie that the accident did not occur on a passageway meet their initial burden of establishing the inapplicability of the 12 NYCRR 23-1.7(e)(1) and (2).

Plaintiff's claim pursuant to 12 NYCRR 23-1.7(f)

Section 23-1.7(f) provides:

> (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Section 23-1.7 (f) has been held to be sufficiently specific to support a section 241(6) claim (*see Miano v Skyline New Homes Corp*, 37 AD3d 563, 565 [2d Dept 2007). That section imposes a duty upon a defendant to provide a safe staircase, free of defects or debris left thereon (*see Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [1st Dept 20l0]; *Murphy v American Airlines,* 277 AD2d 25, 26 [1st Dept 2000]). Defendants have established a prima facie showing that the stairways themselves at the building were of a permanent nature by the time of the accident, and the stairway where the accident is alleged to have occurred provided plaintiff access to her work location.

Defendants assert that the stairs were free of debris at the time of plaintiff's accident. They contend that photographs were taken of the stairway where plaintiff fell within 5 minutes after her accident, which show no debris, including sheetrock, cement, wood, screws or nails, etc. The only photograph, however, submitted to the court is annexed to the affidavit of Villalba.[2] Villalba indicates that the photograph (admittedly not taken by him) accurately depicts "Stair B at the time of the accident and at the location of the accident where [p]laintiff fell," but he does not state it is a fair representation of the condition of such staircase. Moreover, the photograph has a red arrow across its face obstructing a clear, full view of the second step. In addition, notwithstanding the statements by Villalba and O'Donnell that there was no construction debris or slippery substance on the stair/steps, the photograph appears to show small debris on the landing, first, second and third stairs, and dried drippings on all the stair risers. Plaintiff, furthermore, during her deposition testimony, did not accept or adopt the designation "Stair B" to identify the stairway where she fell. Rather, she indicated that she believed and thought the location of her accident "was the A [stairway]," and identified the stairs where she had the accident "accessed the street." Villalba states in his affidavit that he witnessed plaintiff "miss a step when she was on the second step from the bottom of the stairs," causing her to lose her balance. Nevertheless, he admits he asked her "why she fell," and that there were people following behind plaintiff on

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[2] To the extent defendants contend that photographs, along with an accident report authored by O'Donnell, are annexed to O'Donnell's affidavit, such exhibits are not efiled.

the stairs between him and her at the time. That she responded "I think I mis-stepped," does not eliminate triable issues of fact as to the cause of plaintiff's accident. Plaintiff, moreover, testified that Villalba came to her aid "minutes" after it happened, notwithstanding his averment that he had been on the top landing of the stairs at the time of the accident. Thus, there is conflicting evidence whether the stairs had debris on them, and thus a question of fact exists as to whether section 23-1.7(f) was violated by defendants.

Plaintiff's claim pursuant to 12 NYCRR 23-2.7(b), (c) and (d)

Defendants have established prima facie that the stairs were permanent stairs by the time of the accident and made of concrete, as opposed to skeleton iron, steel or wood. Under such circumstances, defendants have established that 12 NYCRR 23-2.7(b), (c) and (d) are inapplicable to this action.

Plaintiff's claim pursuant to 12 NYCRR 23-2.7(e)

Section 23-2.7(e) provides:

> (e) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with the Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

Defendants assert that section 23-7(e) is inapplicable to the facts, because contrary to plaintiff's claim that she fell on a staircase on a construction site that lacked railings (*see Kanarvogel v Tops Appliance City*, 271 AD2d 409 [2d Dept 2000], *lv dismissed* 95 NY2d 902 [2000]), temporary wooden handrails had been installed in Stairs A and B by the time of plaintiff's accident. However, to the extent defendants rely upon the deposition testimony of Rashid Saxton to establish that the temporary handrails were already installed in the stairwell where plaintiff fell on the date of the accident, Saxton merely testified that the temporary and permanent railings were in place, in "December of 2017." He fails to state whether temporary or permanent railings were in the stairway on December *18*, 2017. Furthermore, Saxton's testimony that the handrails were installed in December 2017 raises a question of fact regarding Villalba's and O'Donnell's respective statements in their affidavits that a handrail had been present in the stairway for months before the accident. Again, that defendants contend a photograph taken shortly after the accident, and annexed to an incident report of O'Donnell, shows a handrail, the incident report and annexed photograph have not been submitted to the court.

During her deposition, plaintiff denied there were handrails, or any pieces of wood along the side of the stairwell where she fell. To the extent defendants questioned her about a photograph during her deposition, they have failed to present the photograph to the court. In any event, plaintiff testified that a piece of wood appearing in the "upper left-hand corner" of that photograph "was not a handrail" and she denied a piece of wood like it was present at the location where she had her accident. In addition, plaintiff offers, in opposition to the motion, an affidavit of her then coworker at the site, Christian Guadarrama, in which Guadarrama states he witnessed plaintiff's fall. According to Guadarrama, there were no handrails in "Staircase A" at the time, but approximately two or three days later, handrails were installed in the same stairwell where plaintiff fell.

Plaintiff's claim based upon violation of OSHA

Although plaintiff alleges violations of OSHA regulations, such violations do not provide a basis for liability under Labor Law § 241(6) (*see Shaw v RPA Associates, LLC*, 75 AD3d 634 [2d Dept 2010]; *Cun–En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]).

Plaintiff's claim pursuant to Labor Law § 200 and common-law negligence

Labor Law § 200 codifies the common-law duty of property owners and general contractors to provide workers with a safe work site (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]). Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises, the movant seeking summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence (*see Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 149 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Defendants' submissions are sufficient to show that the stairway was properly illuminated, and thus, safe for its use. Plaintiff testified that the lighting conditions at the accident location were "okay, good" and "illuminated," and thus has failed to state a cause of action against defendants for violation of Labor Law § 200 and common-law negligence based upon an alleged improper lighting condition.

To the extent plaintiff claims there was no handrail present on the stair from which she slipped/tripped and fell, defendants have failed to establish prima facie they had no actual or constructive notice of any lack of handrail at the time of the accident. Their own submissions, on the other hand, show the stairwells were being regularly used by persons prior to the time of the accident.

To the extent plaintiff claims she slipped/tripped and fell on debris on the stair, defendants have established prima facie they had no actual notice of its presence there at the time of the accident. Although plaintiff testified at her deposition that "[a]lways there were some things there substance, but never humid or wet" on the stairs between the first and second floor where she had her accident, she admitted she did not complain about the condition of the stairway to anyone, or hear about anyone else doing so. O'Donnell states in his affidavit that prior to the incident, he never received any complaints of any slippery substances or garbage or construction debris on "Stair B." Plaintiff has failed to raise a question of fact as to whether defendants were on actual notice of the alleged debris condition.

In addition, to the extent plaintiff claims the steps were dangerous because of the presence of small pieces of sheetrock, small screws and leftover cement, defendants established prima facie that they did not create or have constructive notice of such debris condition. O'Donnell states in his affidavit that he inspected Stair B, at a minimum, twice before the accident, and he had last inspected "Stair B" at about 11:30 A.M. on the date of the accident, and did not note any slipping or tripping hazards in his Site Safety Log. He indicates that since he would mark all observed safety hazards in work areas and passageways in the daily Site Safety Log, the lack of any note for the day in question means he did not observe any such hazards. He also states that when he went to the accident site at approximately 12:40 P.M., plaintiff was sitting on the stairs, and there was no water, grease, slippery substance, garbage, dirt, or tripping hazards on the steps or dirt or debris on plaintiff's clothing. Plaintiff admitted that she had not observed anything on the first, second or third step of the stairway as she went up the stairs for lunch, because "I was not looking what was there." Although plaintiff testified that Christian Gonzalez told her that he saw pieces of sheetrock, screws and cement, plaintiff has failed to demonstrate when Gonzalez first noticed the debris. Thus, plaintiff has failed to raise a triable issue of fact as to whether defendants were on constructive notice of the dangerous debris condition on the stairs.

Defendants also have established entitlement to summary judgment dismissing plaintiff's claim of common-law negligence under the doctrine of res ipsa loquitur. They have shown the doctrine does not apply insofar as the stairway was not under their exclusive control (*see Correa v Matsias,* 153 AD3d 1312 [2d Dept 2017]). Plaintiff testified that the stairway in which she fell was used by numerous trades during the course of the day.

Under such circumstances, defendants are entitled to partial summary judgment dismissing so much of the complaint as is based upon alleged violations of Labor Law § 240(1), Labor Law § 241(6) predicated upon violations of 12 NYCRR 23.1-7(b) and (d), 12 NYCRR 23.2-7(b), (c) and (d) and OSHA, and Labor Law § 200 and common-law negligence predicated upon claims of a dangerous condition at the premises due to improper lighting, and debris on the stair, and the doctrine of res ipsa loquitur. The motion by defendants is granted only to the extent of granting defendants partial summary judgment dismissing so much of the complaint as is based upon based upon alleged violations of Labor Law § 240(1), Labor Law § 241(6) predicated upon violations of 12 NYCRR 23.1-7(b) and (d), 12 NYCRR 23.2-7(b), (c) and (d) and OSHA, and Labor Law § 200 and common-law negligence predicated upon claims of a dangerous condition at the premises due to improper lighting, and debris on the stair, and the doctrine of res ipsa loquitur.

Dated: May 12, 2020

HON. CHEREÉ A. BUGGS, J.S.C.