

Miljanic v Riverside Ctr. Parcel 2 Bit Assoc., LLC

2020 NY Slip Op 32016(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 157895/15

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

PETAR MILJANIC

INDEX NO. 157895/15

- v -

MOT. DATE

MOT. SEQ. NO. 001

RIVERSIDE CENTER PARCEL 2 BIT ASSOCIATES, LLC et al.

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s).
Replying Affidavits ECFS Doc. No(s).

This action is brought pursuant to the Labor Law for personal injuries sustained on a construction site. Defendants Riverside Center Parcel 2 Bit Associates (Riverside and/or defendants) and Tishman Construction Corporation (Tishman and/or defendants) now move for summary judgment on plaintiff's Labor Law §§ 200, 240[1] and 241[6] claims as well as for common law negligence (CPLR § 3212). Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The following facts are based on the documents filed with the court. On April 8, 2015, the date of the accident, plaintiff was employed by a company called Regal as a "fullbook" or laborer. Plaintiff had worked for Regal for more than one year but less than two years prior to his accident. The construction site where plaintiff's accident occurred was located at 59th Street and 11th Avenue, New York, New York (the "Premises") where a high-rise building was being constructed. Plaintiff had worked at the site for "about a year" before the accident. Plaintiff stated at his deposition that he was in the column yard, which is an open space, next to the building, on the date of the accident "preparing for the load for the day to go on the deck". Plaintiff described the work he performed as follows: "I was a laborer. Working with steel" and "Mostly carry heavy steel. Rebar", "Yes, we pick up scrap metal and put them into a container for recycle". Plaintiff testified that he was not responsible for work site safety, any cleaning on the job site nor was he responsible for creating and/or covering any holes on site.

Plaintiff testified that on the day of the accident "We were supposed to prepare for the columns and the sheet walls and prepare them for the deck. I was gathering rebar for the ladders". Plaintiff did not recall the names of the approximately 10 co-workers who were around at the time of his accident. Plaintiff claimed that he moved rebar before his accident but was not sure how many pieces he moved nor did know the weight or size of the rebar. He stated that the size of the column yard was "pretty big" and when pushed for a size testified "No, maybe half a building. Actually, a quarter. More than a quarter", "I am not sure. It is open space".

Dated: June 24, 2020

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Right before the accident, plaintiff testified that he “was going to the bending machine. I was going all over. To the columns to where the rebar is stacked. I was picking up rebar. Tiny pieces of rebar. They were scattered all over the place. I started working all over the column yard mostly”. He further testified that he was “inside the building” and taking rebar out of the building just prior to the accident. He stated that he wasn’t sure how much rebar he was carrying, but approximated “around ten pieces” and that the bundle was “pretty heavy”.

Plaintiff testified that he did walk in that location on previous occasions. Plaintiff further testified that at that location it was a temporary passageway that was there for about a week. He stated the temporary passageway was constructed of wood and that it was at an incline and 5’5” or 6 feet in length. Plaintiff stated that the bundle he was carrying was a typical amount of weight that he would carry and that he bundles was around 4-5 feet.

About the accident, plaintiff stated:

Q. Can you describe your accident on the ramp?

A. I was walking, and I tripped and fell on the ramp. I slid down the ramp. I was coming from inside. It was elevated.

...

Q. Do you know what you tripped on?

A. It was debris or something like that. A combination of tie wires and dirt and nails. Something like that. Not exactly specific

Q. Was there any one of those specifically that you slipped on, or was it a combination of the three??

A. A combination. Probably wire gets tied up in the nails. I don’t know exactly what it was. I had hit hard. I don’t remember pretty much what happened. I remember the moment I slipped, and I hit the ground. I was sliding from the ramp.

Q. After you slipped, you fell and hit the ground?

A. Yes.

Q. Then you slid down the ramp some more?

A. Yes, I was sliding. I didn’t fall on the ramp. I fell after. Right when I was sliding when I hit the ground. I hit the ground right outside the ramp on the dirt.

...

Q. Your body didn’t actually hit the ramp?

A. It did. I was stumbling and hitting the ramp on the side and hit the ground.

...

Q. The ground after the ramp, was that dirt, gravel or something else?

A. It was dirt. It was like a ditch. Holes. A ditch right where I fell.

...

- Q. How far from the end of the ramp was the hole??
- A. Pretty close.
- Q. Couple of inches or a foot?
- A. Maybe a foot.
- ...
- Q. How wide was the hole?
- A. Maybe – I am not sure. A foot or a foot and a half maybe. I am not sure.
- ...
- Q. When you saw the debris, dirt, tie wire as you --?
- A. I didn't see it as I entered the building.
- Q. When you entered the building, you didn't see it?
- A. I didn't see it.
- ...
- Q. Did any part of your body fall into the hole?
- A. The side. My knee. The side.
- Q. So, I am clear how you were positioned?
- A. On the side.
- Q. On the side of your body?
- A. Yes.
- Q. Your knee is in the hole?
- A. Yes. Basically, yes. It is a big hole. It fit. Most of my lower body fit in the hole.
- ...
- Q. You said a foot to a foot and a half. Do you think it was bigger than that?
- A. I think it is. I don't know. It is bigger than that. Like a ditch.
- Q. You were on your right side; is that correct?
- A. Yes.
- Q. Your right leg is in the hole?
- A. Not my right leg? My left body. I was covering the hole basically when I fell in.
- ...

- Q. You landed on the ground on what side of the body?
- A. My right side of the body.
...
- Q. You fell with your foot behind you and your butt landed on your foot?
- A. Yes, something like that. I was twisted when I fell.
...
- Q. Your right foot, was that in the hole?
- A. Yes.
- Q. Was your left foot in the hole?
- A. I was on my right side. I was laying on my right side. Maybe half my body was in the hole. So half.
...
- Q. Were you dropping rebar as you were falling?
- A. I was trying to hold it. When I fell down, I let it go. I didn't drop it. When I was falling, I had some bars on me. I felt the pain and let go.
- Q. When you came to. Stop, was there any rebar on you?
- A. Yes.
- Q. Where was the rebar?
- A. On the shoulder.
...
- Q. You didn't actually drop the rebar during your fall?
- A. No, all the time when I fell, I tried to hold on and a couple fell out.

Plaintiff testified that he saw the hole he fell into on the way into the building and before the accident. He stated that he never made any complaints and that "everything in the column yard" was not safe.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue

(*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 240

Defendants contend that plaintiff has abandoned his Labor Law § 240 claim and further, that "[e]ven if we accept the plaintiff's new version of the accident as accurate, there is still no liability under Labor Law Section 240." As to the former, Labor Law § 240[1] is not referenced in any of the three bills of particulars. On the latter point, defendant asserts that plaintiff's slip and fall on a ramp cannot give rise to liability under this statute and that the hole plaintiff slipped into was not of sufficient depth and size to sustain the claim. Further, defendants further contend that the accident and ER reports indicate that "plaintiff's knee simply gave out or buckled, causing him to fall".

Meanwhile, plaintiff argues that he did not abandon his Labor Law § 240 claim as it is asserted in the original bill of particulars and that the second and third bills supplemented the original bill and not meant to replace it. Plaintiff's counsel maintains that plaintiff's use of the ramp was a tool used in the performance of his work and that his injuries were caused by the lack of proper safety devices at the time of the accident. Plaintiff further contends that the ramp constitutes a safety device under Labor Law 240 that failed to provide plaintiff with property protection from a gravity related risk.

Plaintiff maintains that summary judgment is "not appropriate at this time" because there are disputed issues of fact as to whether a ramp even existed in the area of plaintiff's accident, lack of credible facts as to elevation of the alleged ramp and whether the ramp provided proper protection.

Assuming *arguendo* that the claim was not abandoned, defendants are entitled to summary judgment dismissing it on the merits. Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned, and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Plaintiff testified that the location where the accident occurred was a temporary passway, that it was constructed of wood and that it was 5'5' or 6 feet in length, slipped/tripped on wires, nails, dirt, debris in the middle when started. He used the ramp on the way into the building that day.

Plaintiff also testified that the building was approximately 4 to 5 feet high from the column yard and that the ramp was used to carry rebar.

Q. Why did they tell you to use the ramp?

A. That was the ramp made for us. We use the ramp to carry rebar. To work.

Q. Where was the ramp attached to the building in any way?

A. Yes, it was.

Q. How was it attached to building?

A. Attached with nails and by pieces of wood.

Crediting plaintiff's version of the accident, there is no evidence or testimony that the ramp was insufficient for the task provided. Indeed, there is no dispute that the ramp was a sufficient device to traverse the subject area and that it was not a defect or deficiency with respect to the ramp that cause plaintiff's accident, but rather, debris which plaintiff tripped and/or slipped upon.

To the extent that plaintiff argues that the ramp was not a sufficient safety device to protect him from a height differential between himself and the hole, the court agrees that defendants have established that the hole was not of sufficient depth and size to trigger liability under Labor Law § 240[1].

Accordingly, for at least these reasons, defendants' motion for summary judgment dismissing the Section 240[1] claim is granted.

Labor Law § 241(6)

Next, defendants argue that plaintiff has failed to plead and sufficiently prove Industrial Code sections 23-1.7, 23-1.15, 23-1.23.

Plaintiff argues that section 23.17(d) and (e), slipping hazards and tripping and other hazards, are supported by plaintiff's deposition testimony that describe his accident as "a combination of slipping and tripping" and that the ramp was wet with debris on it, which plaintiff argues he and his co-workers previously complained about in violation of sections 23.17 (d) and (e).

Since plaintiff did not address the balance of the alleged Industrial Code section violations, the court will deem those sections abandoned. Therefore, the Labor Law § 241[6] claim premised upon alleged violations of Industrial Code §§ 23-1.30, 23-2.1, 23-1.5, 23-1.15 and 23-1.23 are severed and dismissed.

Labor Law § 241(6) imposes certain safety requirements upon owners, general contractors and their agents. The liability imposed on owners, general contractors, and their agents, is absolute, non-delegable, and unrelated to questions of negligence when injuries occur to a worker as a result of their breach of such requirements irrespective of whether they controlled, directed or supervised the work site. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102 (1985); *Page v. La Buzzetta*, 73 AD2d 483, 426 NYS2d 597 (3rd Dept 1980); *Allen v. Cloutier Construction Corporation*, 44 NY2d 290, 405 NYS2d 630 (1978).

To establish a cause of action under Labor Law § 241(6), a plaintiff has the burden of proving that the defendants violated a rule or regulation of the NYS Commissioner of Labor, who set forth specific standards of conduct in the NYS Industrial Code. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 (1993); *see also, Owen v. Commer. Sites, Inc.*, 284 AD2d 315, 725 NYS2d 574 (2nd Dept. 2001) (find that a plaintiff must plead a violation of the NYS Industrial Code).

Section 23-1.7(d), which applies to "Slipping Hazards", reads, in relevant part, "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 in relevant part: "(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."

Defendant has failed to establish, as a matter of law, that Industrial Code §§ 23-1.7(d) and (e) were not violated. Even if they did, affording Plaintiff's testimony the benefit of all reasonable inferences, there is a question of fact as to whether the debris was the proximate cause of plaintiff's accident and whether the alleged wet condition on the ramp caused plaintiff to fall in violation of section 23-1.7(d) and (e). Plaintiff testified that the accident occurred around 7:30 in the morning and when asked about the weather that day he testified "Cloudy. It was raining the day before. It was raining that day. I am not sure". Furthermore, a review of the medical records affirmed by Dr. Nathaniel Bonfanti provide a different version of what caused plaintiff's accident.

Defendants' arguments go to plaintiff's credibility, which remains for a factfinder to determine. Accordingly, defendants' motion as to this cause of action is denied.

Labor Law § 200

Defendants move to dismiss Plaintiff's claims under Labor Law § 200 and theories of common law negligence as against them.

"To establish liability against an owner or general contractor pursuant to the Labor Law provision requiring landowners to provide workers with a reasonably safe place to work, it must be established that the owner or general contractor exercised supervision and control over the work performed at the site or had actual or constructive notice of the allegedly unsafe condition." McKinney's Labor Law § 200.

Common law and Labor Law § 200 impose a duty upon employers to provide their employees with a safe place to work. It applies to owners, contractors, or their agents, who had control over, or supervised the work, or who created the dangerous condition and had actual or constructive notice of it. *Kim v. Herbert Construction. Co.*, 275 AD2d 709, 713 NYS2d 190 [2nd Dept 2000].

Where the dangerous condition is created by a contractor's methods the owner cannot be held liable unless the owner supervised or controlled the work. *Zavesky v Decato* 223 AD2d 642, 636 NYS2d 419 (2nd Dept 1996). There is no duty imposed upon an owner or general contractor to inspect the machinery and tools furnished by a subcontractor, which that contractor exclusively possesses and controls; nor any duty, after an inspection disclosing defects, to repair defective appliances. *Iacono v Frank & Frank Contr. Co.* 259 NY 377 (1932).

Where an accident is caused not by the method of work, but by a condition of the workplace, a plaintiff need not prove that the owner or construction manager supervised or controlled the work, only that they had notice of the dangerous condition. *Griffin v NYCTA*, 16 AD3d 202, 791 NYS2d 98 [1st Dept 2005].

Plaintiff argues that Tishman's project manager testified that he was responsible for overseeing plaintiff's boss" and that "Petar and his coworkers complained of the condition of the site, putting the

Defendants on notice" therefore, defendants have not their burden of proof as questions of fact exist that preclude dismissal.

Defendants argue that plaintiff's Section 200 claim should be dismissed as neither one of them directed or controlled plaintiff's method or manner of work which plaintiff testified to that he took all of his instructions from his employers and not defendants. Defendants further contend that absent supervision or control, defendants must be on notice of the allegedly dangerous condition, which did not exist.

The court agrees. Here, there is no credible evidence, other than plaintiff's self-serving statement that he and his co-workers complained of the condition of the site. Indeed, plaintiff's vague allegation is insufficient to put defendants on notice of the alleged dangerous condition.

Plaintiff was asked the following:

Q. Did you ever complain to anyone about the holes?

A. No.

Q. Do you know if any of your co-workers ever complained about the holes?

A. They did.

Q. Do you know which co-workers?

A. Not sure which. They complain about the situation they are working in. They were complaining. Not just the hole. Everything in the column yard. It was not safe.

Q. Did you personally make any complaints like that?

A. No.

Q. You don't know any of the names of any of the coworkers that made any of these complaints?

A. No

Plaintiff doesn't know the names of his co-workers. Plaintiff admits that he never made any complaints of his own regarding the work site conditions. Andrew Cranford testified that he was unaware of any complaints received by Tishman or CRSG by any subs concerning safety issues on-site, which confirms the fact that plaintiff did not make any complaints.

Furthermore, plaintiff's deposition testimony confirmed that no one other than his employer, Regal, told him what to do or where to work at any time on the construction site. Therefore, defendants cannot be held liable as they did not control or direct plaintiff's work.

Based on the foregoing, the Labor Law 200 and common law negligence claim are also severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby:

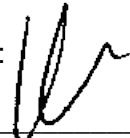
ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's Labor Law §§ 200, 240[1] and common law negligence claims are severed and dismissed; and it is further

ORDERED that the balance of defendants' motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: June 24, 2020
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.