Murphy v NYU Hosps. Ctr.
2020 NY Slip Op 34277(U)
December 21, 2020
Supreme Court, Kings County
Docket Number: 500135/2017
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of December, 2020.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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KAITLYN A. MURPHY AND MARGARET B. DAY, AS ADMINISTRATORS OF THE ESTATE OF PETER A. CARTER, DECEASED,

Plaintiffs,

- against -

NYU HOSPITALS CENTER, NYULMC REAL ESTATE DEVELOPMENT, NEW YORK UNIVERSITY, TURNER CONSTRUCTION COMPANY,

Defendants.

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DECISION/ORDER

Index No. 500135/2017

Mot. Seq. 3 and 4

The following e-filed papers read herein:	NYSCEF Doc. Nos.	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	72-84	110-133
Opposing Affidavits (Affirmations)	111-133	138
Reply Affidavits (Affirmations)	137	141

Upon the foregoing papers, plaintiffs, Kaitlyn A. Murphy and Margaret B. Day, as administrators of the estate of Peter A. Carter, deceased, (plaintiffs) move, in motion sequence three, for an order pursuant to CPLR 3212 granting them partial summary judgment on their Labor Law § 241(6) claim. Defendants NYU Langone Hospitals s/h/a NYU Hospitals Center and NYULMC Real Estate Development, New York University (NYU defendants) and Turner Construction Company (Turner) cross-move, in motion sequence four, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiffs' Labor Law §§ 200, 240(1), 241(6) and common-law negligence claims.

Plaintiffs commenced this action by the filing of the summons and complaint on January 4, 2017 asserting causes of action based on common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiffs allege that their decedent, Peter A. Carter, (Carter) was injured on August 18, 2016 when he slipped and fell on a piece of styrofoam insulation on an interior staircase at the NYU Langone Medical Center Science Building construction site in the course of his employment for non-party plumbing subcontractor Olympic Plumbing & Heating Services, Inc. Plaintiffs claim that defendants were negligent in, inter alia, causing or permitting unsafe conditions, including construction debris and

inadequate lighting, to exist at the construction site. In the complaint and bill of particulars, plaintiffs allege that their Labor Law § 241(6) claim is premised upon violations of Industrial Code sections 12 NYCRR 23-1.2, 23-1.4, 23-1.5, 23-1.7(d) and (e), 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.23, 23-1.30, 23-2.1 and 23-2.7. Plaintiffs also allege violations of OSHA standards and regulations. In their response to plaintiffs' notice to admit, defendants admitted that NYU Hospitals Center s/h/a NYU Hospitals Center and NYULMC Real Estate Development are the owners of the property. They further state that defendant New York University entered into a construction management agreement with Turner in connection with the construction of the NYU Langone Medical Center Science Building. Plaintiffs contend that Turner also acted as general contractor.

Standard of Review

It is well settled 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977, 978 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Labor Law § 240(1) claim

Plaintiffs failed to oppose the branch of defendants' cross motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 240(1) claim. As defendants demonstrated that Carter's injuries did not occur as the result of an elevation- or gravity-related risk within the meaning of the statute, that branch of the motion seeking to dismiss plaintiffs' Labor Law § 240(1) claim is granted (*see Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 950, 953 [2d Dept 2018]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *see also Elam v Ryder Systems, Inc.*, 176 AD3d 675, 676 [2d Dept 2019] [section 240(1) claim abandoned by plaintiff due to failure to address claim in opposition to defendant's motion for summary judgment]).

Labor Law § 241(6) claim

Plaintiffs seek summary judgment on their Labor Law § 241(6) claim to the extent that it is premised upon violations of Industrial Code sections 12 NYCRR 23-1.7(e)(1) and (e)(2), 23-2.1(a) and 23-1.7(f), the last of which defendants claim was raised for the first time in plaintiffs' motion papers. Defendants cross-move for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim. With the exception of the code provisions referenced in plaintiffs' moving papers and opposition to defendants' cross motion, the remaining Industrial Code provisions set forth in plaintiffs' complaint and bill of particulars are hereby deemed abandoned (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d at 835; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]).

As an initial matter, the Court notes that violations of OSHA regulations cannot serve as a predicate for liability under Labor Law § 241(6) (*see Marl v Liro Engrs., Inc.*, 159 AD3d 688, 689 [2d Dept 2018]). As such, that branch of the defendants' motion seeking dismissal of plaintiffs' Labor Law § 241(6) claim as premised on these regulations is granted.

As to 12 NYCRR 23-1.7(d), to the extent that plaintiffs have not abandoned this code section, defendants have demonstrated that this section is inapplicable to the facts of this case as the styrofoam insulation on which Carter slipped is not a "foreign substance" or "slippery condition" within the meaning of section 23-1.7(d) (*see Nankervis v Long Island University*, 78 AD3d 799, 801 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 765 [2d Dept 2009]).

With respect to 12 NYCRR 23-1.7(e)(1), providing that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping," defendants demonstrated that this code provision is inapplicable because Carter testified at his deposition that he did not trip, but rather slipped on the piece of styrofoam insulation (*see Keener v Cinalta Const. Corp.*, 146 AD3d 867, 868 [2d Dept 2017]; *Passantino v Made Realty Corp.*, 121 AD3d 957, 959 [2d Dept 2014]). Section 23-1.7(e)(2) is similarly inapplicable as it applies only to tripping hazards (*see Serpas v Port Authority of N.Y. and N.J.*, 2020 NY Slip Op 3213[U] [Sup Ct, Kings County 2020], citing *Keener v Cinalta Constr. Corp.*, at 867; *see also Lundy v Austein*, 170 AD3d 703, 704 [2d Dept 2019] [section 23–1.7(e) "prohibits tripping hazards in passageways and working areas"]; *Costa v State*, 123 AD3d 648, 658 [2d Dept 2014]; *Cooper v State*, 72 AD3d 633, 635 [2d Dept 2010] ["12 NYCRR 23.1-7(e)(2) requires owners and contractors to maintain working areas free from tripping hazards... This regulation is designed to protect against tripping hazards and sharp projections on floors and platforms" (internal quotation marks omitted)]). Plaintiffs' reliance on *Ohadi v Magnetic Constr. Group Corp.* (182 AD3d 474 [1st Dept 2020]) is misplaced as that holding is not binding on this Court and is premised on appellate rulings that are contrary to those in the Appellate Division, Second Department.

Plaintiffs also assert a violation of 12 NYCRR 23-1.7(f), which relates to vertical passages and states that "[s]tairways, 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." Citing *Pita v Roosevelt Union Sch. Dist.* (156 AD3d at 835) and *Tesoro v BFP 300 Madison II LLC* (98 AD3d 1031, 1032 [2d Dept 2012]), defendants argue that this provision is inapplicable because the permanent staircase on which Carter slipped was not used as a means of access to a different "working level." They further argue that this code section was improperly raised for the first time in plaintiffs' motion. In opposition, plaintiffs contend that their failure to identify § 23-1.7(f) in the complaint or bill of particulars is not fatal to their claim. Plaintiffs argue that this code section is applicable based on the undisputed fact that Carter was descending the staircase from the second floor to the first floor when he slipped and fell on construction debris.

While plaintiffs' failure to identify the specific subsection in the complaint or bill of particulars is not fatal to their claim (*see Doto v Astoria Energy II, LLC*, 129 AD3d 660, 664 [2d Dept 2015]), the Court finds that section 23-1.7(f) is inapplicable to the facts of this case based on the rationale articulated in *Pita v Roosevelt Union Sch. Dist.* and *Tesoro v BFP 300 Madison II LLC*. As in *Pita*, here, according to his own deposition testimony, Carter was not utilizing the staircase as a means of access to another working level or performing work within the meaning of the regulation. Instead, he testified that he was descending the staircase to return to the makeshift locker room for Olympic Plumbing employees to pick up his lunch and personal belongings (*see Pita v Roosevelt Union Sch. Dist.*, 156 AD3d at 835 ["defendants made a prima facie showing that 12 NYCRR 23–1.7(f) is inapplicable to the facts of this case as the plaintiff was not performing work on the upper level of the roof, but rather, was walking across it to return to the mechanical room" to retrieve an extension ladder (internal citations omitted)];

see also Tesoro v BFP 300 Madison II LLC, 98 AD3d at 1032 ["since the plaintiff's accident occurred on a permanent, concrete ramp which was a part of the building, section 23-1.7(f) is inapplicable."]). Plaintiffs failed to raise a triable issue of fact as to the applicability of this provision.

The Court finds that the final code section relied upon by plaintiffs, 12 NYCRR 23-2.1(a), is inapplicable to the facts of this case as Carter's injury did not occur as a result of improperly stored building material or equipment (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]). As noted by defendants, section 23-2.1(b) lacks the specificity required to support a cause of action under Labor Law § 241(6) (*see Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014]).

Based upon the foregoing, that branch of defendants' motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 241(6) claim is granted and said claim is hereby dismissed.

Labor Law § 200 and Common-Law Negligence

Defendants also move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims. Labor Law § 200 is a codification of the common-law duty to maintain a safe work site (*Villada v 452 Fifth Owners, LLC*, 2020 NY Slip Op 07121, *1 [2d Dept 2020]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Boody v El Sol Contr. & Constr. Corp.*, 180 AD3d 863, 864 [2d Dept 2020], quoting *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). Where the plaintiff's accident arose from an alleged dangerous condition at the work site, liability may be imposed upon a defendant if it either created the condition or had actual or constructive notice of it (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 715 [2d Dept 2020]). "[W]hen the manner and method of work is at issue in a Labor Law § 200 analysis, the issue is 'whether the defendant had the authority to supervise or control the work'" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Poalacin v Mall Props. Inc.*, 155 AD3d 900, 900 [2d Dept 2017]).

Here, plaintiffs allege that Carter was injured as a result of a dangerous condition involving construction debris on the subject staircase. Upon review of the submitted papers and deposition testimony, the Court finds that Carter's accident arose out of an alleged dangerous premises condition, and not the means and methods of work (*see Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d at 763 [where accumulation of debris in stairwell constituted dangerous or defective condition]). Accordingly, in order to prevail on their summary judgment motion, defendants must demonstrate that they did not create or have actual or constructive notice of the alleged condition (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 699 [2d Dept 2016]).

Defendants demonstrated by submission of, inter alia, the affidavits and testimony of Elvis Karlic, Stephen Haney, and Carter that they did not create the alleged dangerous condition of the debris and styrofoam insulation on the staircase or have actual notice of it. Elvis Karlic, project superintendent for Turner, and Stephen Haney, assistant director of construction safety for NYU Langone Hospitals and NYU, stated that there were no prior incidents or complaints involving construction debris or small pieces of styrofoam insulation in the subject stairwell. Defendants further note that Carter testified at his deposition that he did not make any prior complaints regarding debris in the stairwells and that he was not aware of any such complaints from other workers on the site.

Defendants, however, failed to demonstrate that they lacked constructive notice of the alleged condition. While Karlic's testimony and affidavit provided information as to Turner's general inspection and cleaning practices at the site, "[m]ere reference to general cleaning practice, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish lack of constructive notice" (*Griffin v PMV Realty LLC*, 181 AD3d 912, 913 [2d Dept 2020]). Defendants failed to adequately establish by submission of testimony or affidavit of an individual with personal knowledge of the condition of the subject stairwell that the stairwell was in fact inspected and cleaned at the end of the prior work day or that the alleged condition did not exist at that time (*see Doto v Astoria Energy II, LLC*, 129 AD3d at 663-664).

Karlic's affidavit, in which he avers that "[t]o [his] knowledge, the area at issue was last inspected and/or cleaned at the end of the previous work day … at or near 3:00 p.m.," is insufficient to establish that Turner's general inspection and cleaning practices were followed at the relevant times. The affidavit fails to demonstrate that Karlic has personal knowledge of the specific times and dates that the inspections occurred beyond his familiarity with Turner's general procedures. Defendants failed to submit any documentation, such as a site safety log or other daily report, to otherwise substantiate their claim that the stairwell was in fact inspected and/or cleaned prior to the incident (*cf. Cevallos v. Site 1 DSA Owner LLC*, 2020 NY Slip Op 31970[U], *6 [Sup Ct, Queens County 2020] [defendants established lack of constructive notice by submission of affidavit of safety coordinator in which he averred that he inspected stairwell on the date of the accident and did not note any slipping or tripping hazards in the daily site safety log]).

Moreover, defendants' representations as to the inspection and cleaning of the subject stairwell are contradicted by Carter's deposition testimony that, on the date of the incident, he observed construction debris, including short pieces of wiring, a loose piece of rebar sitting on the steps, pieces of wood, rocks and styrofoam, on the subject staircase at 7:35 or 7:45 a.m., less than an hour after the start of the work day. He testified that there were no laborers working in the subject stairwell at the time. He also indicated that he had observed similar construction debris in other stairwells at the work site in the weeks before his accident.

Dismissal as a matter of law based on defendants' claim that the alleged condition of the debris and styrofoam was open and obvious and not inherently dangerous is also not warranted. In light of Carter's uncontroverted testimony as to the presence of the debris and claims of inadequate lighting, along with the absence of any other evidence establishing the condition and appearance of the stairwell at the time of the incident, defendants failed to establish that the alleged condition was "readily observable by the reasonable use of one's senses, and not inherently dangerous" (*DiSanto v Saphiu*, 169 AD3d 861, 863 [2d Dept 2019]; *see also McLean v 405 Webster Ave. Assocs.*, 98 AD3d 1090, 1092 [2d Dept 2012]; *Walsh v New York University*, 2018 NY Slip Op 31583[U], *10 [Sup Ct, New York County 2018] [defendants' summary judgment motion on plaintiff's section 200 defect claim denied where there was an issue of fact as to whether alleged condition was "dangerous"]).

In light of the foregoing issues of fact, that branch of defendants' motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is denied (*see Croshier v New Horizons Resources, Inc.*, 185 AD3d 780, 781 [2d Dept 2020]; *Merchant v New York City Tr. Auth.*, 183 AD3d 647, 648 [2d Dept 2020]).

The Court notes that the relationships among the moving defendants have not been adequately set forth and no contracts have been submitted by either party.

Conclusion

Plaintiffs' motion seeking partial summary judgment as to liability on their Labor Law § 241(6) claim is denied. Defendants' cross motion for summary judgment on plaintiffs' Labor Law §§ 200, 240(1), 241(6) and common-law negligence claims is granted to the extent that plaintiffs' Labor Law § 240(1) and 241(6) claims are dismissed. Defendants' motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: December 21, 2020
Brooklyn, New York

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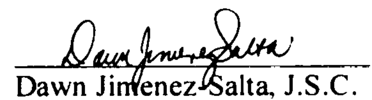

Dawn Jimenez-Salta, J.S.C.

Justice c.