Speziale v SimplexGrinnell, LP
2020 NY Slip Op 35695(U)
September 29, 2020
Supreme Court, Queens County
Docket Number: Index No. 706993/2018
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JOE SPEZIALE,

Plaintiff,

- against -

SIMPLEXGRINNELL, LP, STEKOR OPERATING CORP. d/b/a JOHNNY ROCKETS, TOTAL SAFETY CONSULTING, LLC, M. CARY, INC., SIMON PROPERTY GROUP, INC. and VVC, LLC,

Defendants.

- x

Index No.: 706993/2018

Motion Date: 8/27/2020

Motion Nos.: 58 & 59

Motion Seqs.: **3 & 4**

The following electronically filed documents read on this motion by defendants M. CARY, INC. (M. Cary) and STEKOR OPERATING CORP. d/b/a JOHNNY ROCKETS (Stekor) (**seq. no. 3**) for an Order pursuant to CPLR 3212, dismissing plaintiff's complaint and all cross-claims; and on this motion by defendant SIMPLEXGRINNELL, LP (SimplexGrinnell) (**seq. no. 4**) for an Order pursuant to CPLR 3212, granting summary judgment to SimplexGrinnell and dismissing all claims against SimplexGrinnell; on this cross-motion by defendants VCC, LLC (VCC) and TOTAL SAFETY CONSULTING, LLC (Total Safety) for an Order pursuant to CPLR 3212, dismissing plaintiff's complaint as well as any cross-claims against Total Safety and dismissing all claims of negligence as to VCC; and on this cross-motion by plaintiff for an Order pursuant to CPLR 3212, granting summary judgment on the issue of liability, finding VCC completely liable for the subject incident pursuant to New York Labor Law 241(6):

	Papers Numbered:
Notice of Motion (**seq. no. 3**)-Affirmation-Exhibits..	EF 180 - 201
SimplexGrinnell's Aff. in Opposition-Exhibits.....	EF 237 - 244
Stekor and Cary's Aff. in Opposition-Exhibits.....	EF 245
Reply Affirmation.....	EF 264
Notice of Motion (**seq. no. 4**)-Affirmation-Exhibits-Memo. of Law.....	EF 206 - 213
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 214 - 236
Plaintiff's Affirmation in Opposition-Exhibits.....	EF 246 - 247
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 248 - 262
Reply Affirmation.....	EF 265

On April 15, 2015, plaintiff commenced this action to recover damages for personal injuries sustained on December 16, 2014 when he slipped and fell at a construction site in the food court of the Roosevelt Field Mall. At the time of the incident, he was working as a laborer for Donaldson Interiors, Inc. (Donaldson). Donaldson was a subcontractor of VCC, the general contractor. Total Safety was the safety contractor. Stekor was a mall tenant that operates a Johnny Rockets restaurant in the mall. Stekor's general contractor was M. Cary. SimplexGrinnell had contracts to install the sprinkler system both with the mall general contractor VCC and with several tenant-specific general contractors, including M. Cary.

At his examination before trial, plaintiff testified that he was involved in an incident on December 16, 2014. He began working at the subject jobsite in September of 2013. His responsibilities included cleaning up debris, sweeping the floor, protecting the floor, and protecting the outside store glass fronts. The incident occurred in the food court. He previously worked in the food court, putting down Masonite floor protection. The VCC foreman, Sal Fugerol, would give him his assignment for the day. On the date of the incident, he was assigned to his normal work area. He was later called to the food court by "Shawn", the super for VCC. He was directed by Shawn to pick-up all of the Masonite in the food court area because the Masonite had been damaged by water. He saw that the Masonite was wet and curled up. There were water puddles all over. The long sides of the four by eight foot pieces of Masonite were curled, the short sides had been taped down. He picked up a Masonite board by the window, where he was directed to start the removal work. While he was walking with the Masonite board, he slipped on top of the wet Masonite, causing his foot to slide underneath one of the curled pieces and causing him to fall. He had removed about four to five boards prior to the incident. His right foot slipped first, then his right foot went underneath a board, and then, his left foot slid under the same board. He landed on both knees. About five minutes prior to the incident, he saw a fellow laborer trip in the exact manner as his own subsequent fall. The other laborer was carrying a piece of Masonite when his foot got caught on the flooring.

James Shawn Burkhart appeared for an examination before trial on behalf of VCC and testified that in 2014, he was a superintendent for VCC and worked at the Roosevelt Field Mall. VCC was the general contractor for the mall expansion and renovation project. He is aware that a subcontractor for a tenant contractor had a leak of some sort in December of 2014. He was on the jobsite at the time of the leak. The leak was at the Johnny

Rockets space. Donaldson would have purchased and placed the Masonite on the tiles. He would have instructed the Donaldson employees to put the Masonite down. When he learned about the leak, he went to the leak, and saw that it was pouring from a popped sprinkler head. He recalls that M. Cary paid SimplexGrinnell to repair or replace the leak in the sprinkler. The leak created a 6,000 foot puddle or pool of water. He directed Jimmy, a foreman for Donaldson, to clean up the water. There was tiling work being done in the food court on the date of the incident.

Edward Flynn appeared for an examination before trial on behalf of Total Safety and testified that he is employed by Total Safety as a safety coordinator. He was a safety rep at the Roosevelt Field Mall project. It was not uncommon to have a water condition. If he observed a leak from the sprinkler heads, he would have contacted either Rusty Manor or Shawn Burkhart, both of whom worked for VCC. The mess would be cleaned up, the floor protection replaced, and the job would continue. Masonite was put down over the tile flooring for protection. When he discussed the subject incident with the project manager, Anthony Brown, he told him the broken sprinkler was on the Johnny Rockets side. He would have the authority to stop the work if he observed a hazardous condition. On the date of the incident, plaintiff informed him that he had tripped on damaged floor protection and tweaked his knee. In his role, standing water would be a hazardous condition that he would address.

Robert Epstein appeared for an examination before trial on behalf of M. Cary and testified that M. Cary was hired to build the tenant space for Johnny Rockets. M. Cary had no contractual relationship with the company that owned the Roosevelt Field Mall. The general contractor for the overall mall project was VCC. M. Cary had no contractual relationship with VCC. M. Cary had no interactions with VCC as part of the work being done at the Johnny Rockets. SimplexGrinnell was the sprinkler and fire alarm subcontractor to M. Cary for the Johnny Rockets space. M. Cary employees did not put down Masonite at any point in time. He had the authority to shut down the Johnny Rockets job site if work was being done in an unsafe manner. M. Cary did not have any authority to shut down any work taking place outside of the Johnny Rockets space; that authority belonged to VCC. VCC did not have the authority to shut down any work being performed within the Johnny Rockets space.

Angela Fortgang appeared for an examination before trial on behalf of Stekor and testified that she was the general manager for Stekor. Stekor ran the Johnny Rockets. Stekor hired M. Cary to build the new space.

Under Labor Law § 241(6), liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the owner or contractor did not supervise or control the worksite. Liability under Labor Law § 200 will attach if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see Pirotta v EklecCo., 292 AD2d 362 [2d Dept. 2002]; Kobeszko v Lyden Realty Investors, 289 AD2d 535 [2d Dept. 2001]; Giambalvo v Chemical Bank, 260 AD2d 432 [2d Dept. 1999]). However, liability may not be imposed where the condition on the property was, as a matter of law, an open and obvious one that was readily observable by the reasonable use of one's sense and not inherently dangerous (see Ulrich v Motor Parkway Props., LLC, 84 AD3d 1221 [2d Dept. 2011]).

M. Cary and Stekor move for summary judgment, dismissing all claims against them, on the grounds that neither defendant was an owner or contractor with respect to the site where plaintiff's incident occurred.

Here, M. Cary and Stekor established that they were not the owner or general contractor of the jobsite where plaintiff was injured. Moreover, based on Mr. Epstein's testimony that he had no authority with respect to work being done outside the Johnny Rockets space and plaintiff's testimony that he only took instructions from VCC and his employer, it is undisputed that neither M. Cary nor Stekor had any control or authority to exercise such control over the worksite where plaintiff was injured. Accordingly, the Labor Law claims must be dismissed as against M. Cary and Stekor (see Parra v Allright Parking Mgt., Inc., 59 AD3d 346 [1st Dept. 2009][finding that in the absence of any authority to control the work causing the plaintiff's injury, the defendant may not be held liable]. Parenthetically, this Court notes that SimplexGrinnell and Total Safety are neither owners nor general contractors under the Labor Law. Thus, any Labor Law claims asserted against SimplexGrinnell and Total Safety must also be dismissed (see Cappabianca v Skanska USA Building Inc., 99 AD3d 139 [1stt Dept. 2012][finding that a safety consultant for a construction project cannot be liable as an owner's agent or a general contractor's agent for injuries sustained by a subcontractor's employee where, as here, the contract limits the responsibilities and does not confer upon the safety consultant any authority to supervise or control the worker's performance of the work]).

M. Cary and Stekor also seek summary judgment on their cross-claims for contractual indemnity against SimplexGrinnell. According to the contract, SimplexGrinnell must defend and indemnify M. Cary "for any claims, damages or expenses that may arise in connection with subcontractor's obligation under this contract, except for losses resulting from the contractor's sole negligence". The contract between M. Cary and Stekor incorporates the M. Cary/SimplexGrinnell contract.

However, issues of fact remain as to whether, inter alia, the injuries arose in connection with SimplexGrinnell's work at Johnny Rockets. Thus, issues of fact as to whether the indemnity provision was triggered preclude summary judgment on the contractual indemnification claims.

Regarding the common law negligence and Labor Law § 200 claims, there is no duty to protect from a hazardous condition "that can be readily observed by the reasonable use of the senses" (Olsen v New York, 25 NY2d 665, 666 [1969]). Here, plaintiff testified that he saw water puddles all over the place and that the Masonite was soaked, warped, and curled up. Additionally, plaintiff even witnessed a coworker fall in the same manner prior to his fall. Thus, this Court finds that the dangerous condition alleged herein was visible and created no unreasonable risk of harm (see Boehme v Edgar Fabrics, 248 AD2d 344 [2d Dept. 1998][finding that summary judgment in favor of the defendant was proper since the plaintiff testified that he had seen the alleged dangerous condition, and the condition, a stack of cardboard, was in plain view]).

Accordingly, defendants established, prima facie, that the condition which allegedly caused plaintiff to fall was open, obvious, and not inherently dangerous (see DiSanto v Spahiu, 169 AD3d 861 [2d Dept. 2019][finding that sand and dirt that was present on the subject construction site was an open and obvious condition that was readily observable by the reasonable use of one's senses and which was not inherently dangerous]). In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff himself admitted to seeing the puddles of water and the warped Masonite. Thus, defendants were under no duty to protect or warn against the condition and all common-law negligence and Labor Law § 200 claims must be dismissed.

Plaintiff also moves for summary judgment against VCR as to his Labor Law § 241(6) claim. To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger

Contracting Co., Inc., 91 NY2d 343 [1998]). Plaintiff alleges that VCC violated 12 NYCRR § 23-1.7(d), which provides that employers shall not suffer or permit any employee to use a floor which is in a slippery condition.

Regarding § 23-1.7(d), plaintiff established that a slippery condition on a floor caused him to slip and fall. Moreover, plaintiff asserts that he is free from comparative fault as he was following his employer's directives, using the equipment provided, and wearing the proper shoes (see Serranot v Con Ed, 146 AD3d 405 [1st Dept. 2017]; Burnett v City of New York, 104 AD3d 437 [1st Dept. 2013]). Plaintiff also asserts that liability based upon a violation of § 23-1.7(d) is not precluded merely because the foreign substance which caused the incident was part of the work being performed (see Hageman v Home Depot U.S.A., Inc., 45 AD3d 730 [2d Dept. 2007]).

In opposition to plaintiff's motion for summary judgment and in support of its motion, VCC contends that the very condition which plaintiff was charged with removing was what he slipped on (see Gaisor v Gregory Madison Avenue, LLC, 13 AD3d 58 [1st Dept. 2004]; Applebaum v 100 Church, LLC, 6 AD3d 310 [1st Dept. 2004]; Galazka v WFP One Liberty Plaza Co., LLC, 55 AD3d 789 [2d Dept. 2008][finding that the wet plastic upon which the injured plaintiff slipped was an integral part of the asbestos removal project on which the injured plaintiff was working]).

Here, this Court finds that whether the water upon which plaintiff slipped was a foreign substance as contemplated by § 23-1.7(d) and, inter alia, whether the incident was the result of VCC's failure to remove or cover the water are questions of fact for a jury (see Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139 [1st Dept. 2012].

Plaintiff also alleges that VCC violated 12 NYCRR § 23-1.7(e), which provides that the floors shall be kept free from accumulations of dirt and debris. However, § 23-1.7(e) does not apply because there is no claim that plaintiff's fall occurred due to any accumulation of dirt or debris.

Accordingly, and for all of the reasons stated above, it is hereby

ORDERED, that the motion by defendants M. CARY, INC. and STEKOR OPERATING CORP. d/b/a JOHNNY ROCKETS (**seq. no. 3**) is granted only to the extent that plaintiff's claims are dismissed as against defendants M. CARY, INC. and STEKOR OPERATING CORP. d/b/a JOHNNY ROCKETS; and it is further

ORDERED, that the motion by defendant SIMPLEXGRINNELL, LP (**seq. no. 4**) is granted and plaintiff's claims are dismissed as against defendant SIMPLEXGRINNELL, LP; and it is further

ORDERED, that the cross-motion by defendants VCC, LLC and TOTAL SAFETY CONSULTING, LLC (**seq. no. 4**) is granted only to the extent that plaintiff's claims are dismissed as against defendant TOTAL SAFETY CONSULTING, LLC and plaintiff's common-law negligence and Labor Law § 200 claims are dismissed as against VCC, LLC; and it is further

ORDERED, that the cross-motion by plaintiff (**seq. no. 4**) is denied.

Dated: September 29, 2020
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.

FILED
9/30/2020
1:41 PM
COUNTY CLERK
QUEENS COUNTY