Bravo v Paredes
2021 NY Slip Op 30056(U)
January 7, 2021
Supreme Court, Kings County
Docket Number: 510779/2017
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

FLAVIO BRAVO,

Plaintiff,

-against-

ARTURO M. PAREDES and CARLOS A. RODRIGUEZ,

Defendants.

ARTURO M. PAREDES and CARLOS A. RODRIGUEZ,

Third-Party Plaintiffs,

-against-

AZAN DELI CORP.,

Third-Party Defendant.

ARTURO M. PAREDES and CARLOS A. RODRIGUEZ,

Second Third-Party Plaintiffs,

-against-

BROOKLYN GROUP CONTRACTORS, INC.,

Second Third-Party Defendant.

DECISION / ORDER

Index No. 510779/2017
Motion Seq. No. 3, 4
Date Submitted: 11/19/20

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motion for summary judgment and plaintiff's cross motion for partial summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	41-53
Notice of Cross Motion, Affirmations and Exhibits Annexed.....	55-62
Affirmation in Opposition and Exhibits Annexed.....	63-70, 72-73
Reply Affirmation.....	74

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Upon the foregoing papers, defendants move, (Mot. Seq. # 3) pursuant to CPLR 3212, for an order granting them summary judgment dismissing plaintiff's complaint, which includes claims for common-law negligence and Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff cross-moves (Mot. Seq. # 4) for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his Labor Law § 241 (6) cause of action.

Background

This personal injury action stems from an accident which occurred on November 20, 2016 when the plaintiff was performing carpentry work at a building located at 545 Central Avenue, Brooklyn, NY. Defendants owned the building since 2004 as tenants in common. The property, according to defendants' attorney, is a "taxpayer," meaning it is a store with two apartments above. The store was leased to third-party defendant Azam Deli, pursuant to a lease agreement entered into in September 2016, which granted the tenant three months' occupancy without rent, so "Tenant will remodel store at own expense" (Aff. In Support of Marisa Carpentiere, Esq., ¶ 9). At the time of the accident, plaintiff was employed by Brooklyn Group Contractors, Inc., and was supervised by Mohammed Al Salamani.

Plaintiff testified at his deposition that he was working in the rear of the store, and that there were plumbers and electricians working in the front of the store, which was approximately 95 feet long, covering almost the entire lot. He said the deli owners had hired the company. The accident occurred when plaintiff tripped and fell on an electrical cable, which was on the floor in the front of the store, as he was walking toward his boss, who was standing in the store.

Plaintiff subsequently commenced this personal injury action, alleging violations of Labor Law §§ 200, 240 (1), 241 (6), as well as common-law negligence. Defendants interposed an answer to the complaint and brought two third-party actions, one against the deli and one against the plaintiff's employer. The parties engaged in discovery, and this summary judgment motion and cross motion ensued.

Defendants' Motion for Summary Judgment

Defendants move for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims, as well as his common-law negligence claim. In support of their motion, defendants provide the pleadings, the lease between defendants and Azam Deli, the EBT transcripts of plaintiff and of defendants, and counsel's affirmation in support. Counsel first avers that defendants did not hire the company, but that their tenant had. She next points out testimony that her clients did not visit the location while the work was being done, and that they did not know the nature of the work or the scope of it.

Counsel avers that plaintiff's claim of a violation of Labor Law § 240 (1) must be dismissed, as (¶47) "It cannot be established that plaintiff's accident was the result of a fall from a height or were struck by a falling object."

Counsel next avers that plaintiff's claim of a violation of Labor Law § 200 and his claim under the laws of common-law negligence must be dismissed, as (¶49) "It cannot be established that Defendants controlled and/or supervised plaintiff's work or that Defendants had notice of, or created a dangerous and/or defective condition."

With regard to Labor Law § 241 (6), counsel argues (¶50) "In order for plaintiff to succeed in claiming that Defendants violated New York State Labor Law § 241(6), he must that [sic] Defendants violated a concrete specification of the Industrial Code.

There is no evidence that the New York State Department of Labor Industry Rules cited by plaintiff are relevant to his accident or that Defendants violated the cited provisions."

In opposition to the motion, plaintiff opposes only the branch of the motion which is addressed to plaintiff's claim under Labor Law § 241 (6), and counsel's affirmation is silent (E-File Doc 56 and 63) with regard to plaintiff's other claims. Therefore, those branches of the defendants' motion are granted without opposition, and plaintiff's claims for common-law negligence, and for violations of Labor Law §§ 200 and 240 (1), are dismissed.

Plaintiff's Cross Motion for Partial Summary Judgment - Labor Law § 241 (6)

In opposition to defendants' motion, and in support of plaintiff's cross motion, plaintiff seeks partial summary judgment as to liability on his Labor Law § 241 (6) claim.

Plaintiff claims he tripped and fell over construction debris/garbage as he walked from the rear of the store toward the front. "The debris pile included, but was not limited to, concrete, electrical cables, pieces of sheetrock, paper, and old food. None of the debris was produced from the work he was performing. The debris pile (on which he tripped) was approximately three to four feet wide and three and a half feet high. See, Exhibit 'A' - Affidavit of Merit of Plaintiff" (Aff. of Julianne Friedman, Esq. ¶27).

Defendants oppose plaintiff's cross motion in part on the grounds that "plaintiff's cross-motion is untimely because it is not made on 'nearly identical grounds' as Defendants' " motion. Counsel is incorrect. A cross motion for summary judgment on Labor Law § 241 (6) is identical to a motion for summary judgment on Labor Law § 241(6).

Discussion

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 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see also, Smalls v AJI Indus. Inc.,* 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, however, 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 [1980]).

Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, plaintiffs must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York,* 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.,* 35 AD3d 378,

379 [2006]).

The court notes that a plaintiff's comparative negligence is not a bar to summary judgment under Labor Law 241 (6). In *Rodriguez v City of New York* (31 NY3d 312 [2018]), the Court of Appeals addressed the question of "[w]hether a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability, when . . . defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence" (*id.* at 315). The Court determined that the existence of an open question as to a plaintiff's comparative fault did not bar the granting of summary judgment to the plaintiff on the issue of the defendant's liability (*id.* at 315, 323-325). The Court held that a plaintiff moving for summary judgment on the issue of defendant's liability is not required to demonstrate the absence of his or her own comparative fault, and that a plaintiff's comparative fault (if any) relates to the issue of damages, not the defendant's liability (*id.* at 318-321; *see O'Leary v S & A Elec. Contracting Corp.,* 149 AD3d 500, 502 [2017]).

Here, in his bill of particulars, the plaintiff alleges that defendants violated Industrial Code 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.7 (e) (1), 23 1.7 (e) (2), and 23-2.1. In support of their motion, defendants argue that all of the cited Industrial Code sections are either not sufficiently specific to support a claim or do not apply to the facts herein. In opposition to defendants' motion, and in support of his own motion, the plaintiff only relies upon sections 23-1.7 (e) (1) and 23-1.7 (e) (2) in support of his Labor Law § 241 (6) cause of action, and does not address any of the other above-referenced Industrial Code provisions, except to refer to his expert's affidavit, (Andrew R. Yarmas, P.E. – E-File Doc 65), which also claims a violation of 23-1.5 (a). As such, the court will only

consider sections 23-1.5 (a), 23-1.7 (e) (1), and 23-1.7 (e) (2) as predicates for plaintiff's Labor Law § 241 (6) claim. Plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [2013]; *see also Cardenas v One State St., LLC*, 68 AD3d 436, 438 [2009]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]).

Defendants correctly point out that plaintiff cannot use § 23-1.5 as a predicate for a New York State Labor Law § 241(6) violation, as it is not sufficiently specific (*Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2d Dept 2010] [finding that section requires employers to provide safe working conditions, setting forth a general standard of care, and could not serve as a predicate for Labor Law section 241(6) liability]); *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [2d Dept 1997]).

The two sections relied on by plaintiff as both applicable and violated are 23-1.7 (e) (1) and 23-1.7 (e) (2). Section 23-1.7 (e) is entitled "Tripping and other hazards." Industrial Code section 23-1.7 (e) (1) provides 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."

As "passageway" is not defined in the Code, "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 Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018] quoting *Steiger v LP Ciminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). Here, plaintiff was not walking in a "passageway" at the time of his accident. Thus,

section 23-1.7 (e) (1) is not applicable (*see Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [the provision applies to tripping hazards in passageways, but the plaintiff was not using the area as a passageway when the incident occurred]; *Adams v Glass Fab, Inc.*, 212 AD2d 972. 973 [4th Dept 1995] [plaintiff was not in a passageway when he tripped]; *O'Sullivan v IDI Const. Co. Inc.,* 28 AD3d 225 [1st Dept 2006], *affd* 7 NY3d 805 (2006) [there was no violation of the section where plaintiff was injured in an open workspace and not a passageway]; *see also Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 158 [1st Dept 2005] [no violation of § 23-1.7 (e) (1) or IC § 23-2.1 (a) (1) where plaintiff was injured while working in a room, "not a passageway"]).

The court finds that as plaintiff's accident did not take place in a "passageway," his § 241 (6) claim based on this section of the Industrial Code must be dismissed.

The remaining Industrial Code Section to be considered is § 23-1.7 (e) (2). Industrial Code section 23-1.7 (e) (2) provides: "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."

Counsel for defendants does not address this section of the Industrial Code whatsoever in her affirmation in support of defendants' motion, other than in Paragraphs 34 and 87 of her affirmation in support, where she lists the Industrial Code Sections listed in plaintiff's bill of particulars. Thus, in the absence of any support for defendants' argument that plaintiff's Labor Law § 241 (6) claim should be dismissed as based upon Industrial Code section 23-1.7(e) (2), the court cannot grant that relief.

Turning to plaintiff's cross motion for partial summary judgment on his Labor Law § 241 (6) claim, as based upon Industrial Code section 23-1.7 (e) (2), the court finds that this section is applicable to plaintiff's accident and that it is sufficiently specific to be a predicate for a Labor Law 241(6) violation, and thus the court must determine whether plaintiff makes a prima facie case for summary judgment.

Plaintiff supports his cross motion with an affirmation from counsel, an affidavit from plaintiff, an engineer's affidavit, and photos of the store after the work was finished. Plaintiff's counsel states that "The evidence herein demonstrates that defendants are the owners of the subject building and they failed their non-delegable duty to 'provide reasonable and adequate protection and safety' for plaintiff. Specifically, plaintiff alleges violations of Industrial Code sections 23-1.7 (e) (1) and (2) (tripping hazards in "passageways" and "working areas") and that those violations were the proximate cause of the accident.

Plaintiff's counsel states that the deposition transcripts of the defendants indicate that they "consented to allow Azan Deli Corp to renovate the commercial space/deli; the renovation included new interior walls, shelving, ceiling and lighting. . . Brooklyn Construction Group was hired to do part of the remodel of the deli . . . On November 18, 2016, November 19, 2016, and November 20, 2016, Plaintiff was working at 545 Central Avenue, Brooklyn New York. His primary job was carpentry; taking measurements, putting up framing and eventually sheetrock. He was the only worker from Brooklyn Construction he saw working at the deli prior to his injury. . . On all three days that [plaintiff] was working at the subject location there were other workers at the construction site. The other workers were plumbers and electricians; they were not

employed by Brooklyn Construction" (Friedman Aff. ¶¶ 14, 15, 18, 19).

Plaintiff testified at his EBT that he tripped on an electrical cable that he did not see before he tripped on it, and that the area was full of debris and garbage (EBT Pages 65-67). He testified that the electricians were working in the front of the store and he was working in the back. He testified that on the prior workday, Saturday, there was a pile of debris/garbage on the floor (EBT Pages 53-54) but he did not specify whether it included electrical cables. It is inferable from his EBT that when he arrived at 8:00 a.m. on the date of his accident there was already a pile of construction debris in the front part of the store. But he does not mention that this included electric cables. He provides an affidavit, E-File Doc 57, which defendants claim is inconsistent with his EBT testimony and "raises a feigned issue of fact."[1]

In his affidavit, he states that "There was a lot of construction debris in the front of the deli where the plumber and electrician were working; I do not know where the debris came from, it was already there when I reported for work in the morning. I do not know who was responsible for removing this debris. . . For approximately one hour before the accident happened, I was working in the back of the deli putting up framing for the sheetrock. Plumbers and electricians were working in the front of the deli. Around 9:00 am my boss called for me from the front of the deli; as I was walking to him, I tripped on a pile of debris/garbage and injured myself. There were several piles

[1] Counsel states: "Clearly, plaintiff s affidavit was tailored to support his cross-motion for summary judgment and consequently, contradicts his deposition testimony." In fact, it seems more that he did not mention that there were any cables in the "debris" at his deposition, as his first mention of a cable at his deposition is when he described the accident. Rather than being a contradiction, it is more accurate to say his EBT testimony is unclear with regard to when he first saw the cables he ultimately tripped over.

of debris in the front of the deli. I walked approximately eighteen to twenty-two feet, from the back of the deli to the front, then I tripped on the debris. I was approximately four feet away from my boss when I tripped. I tripped on electrical cables that were in a pile of construction debris/garbage. I did not see the cables before I tripped. The debris pile included, but was not limited to, concrete, electrical cables, pieces of sheetrock, paper, and old food. None of the debris was produced from the work I was performing. The debris pile was approximately three to four feet wide and three and a half feet high."

Defendant Rodriguez testified that the deli put in new lighting and the end result was more light fixtures and a different kind of bulbs (EBT Pages 12-14). Defendant Paredes testified that the deli switched from regular bulbs to LED bulbs to save energy (Page 13) but he did not know if the deli put in more fixtures, or different ones. Neither defendant had any further information about the work done, the workers, or the debris. They were unaware of plaintiff's accident prior to the lawsuit.

Plaintiff's expert, Andrew R. Yarmus, P.E., provides an affidavit which concludes that "By permitting Mr. Bravo to work, and necessarily travel through, a worksite which contained large and abandoned piles of uncontained debris, garbage, and cabling, without regard for worker safety, Defendants did not comply with the requirements of [Industrial Code sections 23-1.7 (e) (1) and (2)], and thus these sections were violated."

Defendants oppose plaintiffs' cross motion, and counsel argues that plaintiff's papers are defective, and that Mr. Yarmus' opinion is conclusory and not based on any facts, and also mis-states that defendants' liability is actual when it is purely vicarious. Counsel argues that plaintiff's affidavit is defective because "there is no accompanying affidavit by a translator that says the affidavit was translated from English into

Spanish." Counsel also argues that plaintiff's affidavit contains statements which are inconsistent with his deposition testimony and are nothing more than an attempt to raise a feigned factual issue to avoid the consequences of dismissal, citing *Krakowska v Niksa*, 298 AD2d 561 (2d Dept 2002). Counsel also makes the argument that "Predicating a violation of Labor Law § 241(6) on Industrial Code § 23-1.7 (e) will not be successful where the object that caused the plaintiff's injury was an integral part of the work being performed," citing *Lopez v New York City Dept. of Environmental Protection,* 123 AD3d 982, 984, (2d Dept 2014) and *Castillo v Starrett City*, 4 AD3d 320, 322. She avers "this defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident."

It has indeed been held that any dirt, debris, tools, or materials that are an "integral part" of the work being performed are not a violation of § 23-1.7 (e) (2) (*see Tucker v Tishman Constr. Corp. of New York*, 36 AD3d 417, 417 [1st Dept 2007] ["(T)here is no liability under [§ 23-1.7 (e) (2)] because the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris."]). The relevant inquiry is whether the debris or material was a part of any ongoing work at the accident location at the time of plaintiffs accident (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668, 668 [1st Dept 2019] ["(D)ebris, consisting of cables . . . was not inherent in, or an integral part of, the work being performed by either plaintiff electrician or (defendant demolition contractor) at the time of the accident."]). The cases thus distinguish debris which is in the process of actively being created by the work being done by (any of) the workers at the job site, and that which "rather constituted an

accumulation of debris which [one of the contractors] was required to keep the work areas free of" (*see Rossi*, 171 AD3d at 668; *Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577, 68 NYS3d 60 [1st Dept 2017]).

In *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 (2d Dept 2003), the court found section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed. In *Bond v York Hunter Constr.*, 270 AD2d 112, 113 (1st Dept 2000), *affd* 95 NY2d 883 (2000), the court found "the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability."

Here, plaintiff has stated in his affidavit that there was a pile of debris on the floor when he arrived at 8:00 a.m. on the date of his accident, a Sunday morning, and that it was not related to his work. He went to the back of the store to work, and there were two or three other workers in the front of the store. Two were working on the electrical work (EBT Page 57). He wasn't sure what the other person was working on. At some point, his boss arrived and called for him to come to the front of the store. He stopped what he was doing and walked towards his boss. He testified at his EBT on Page 66:

Q. So you tripped on something, you slipped on something?

A. I tripped with the cable.

Q. Now, when you say there were cables was that electrical cables?

A. Yes, cables, electric ones.

Q. Were there electricians in and around the area where that electrical cables were on the floor?

A. They were working there on ladders. At that moment I didn't really see anybody, I just saw my boss.

Q. You also said that there were electrical cables and garbage. What do you mean? by garbage, was there other construction debris? What was there?

A. Construction garbage. . . . The food, the old food, paper. Concrete was there. Pieces of Sheetrock, all of that. There was a little bits of everything there and I don't know what else was there.

In order to make a prima facie case for summary judgment, plaintiff must establish whether 12 NYCRR 23-1.7 (e) (2) was violated, and whether said violation was a substantial cause of plaintiff's injuries (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [2008]). Because plaintiff's claim is based on this section, to prove that this section was violated, he must prove that the debris that he claims he tripped over was not an integral part of the work being performed by him or by other workers at the work site, which includes the electricians at the work site. It is not sufficient that he stated at his EBT that the cable he tripped over was not part of the work that he was performing. He was aware that the electricians were working in the front of the store, and said they were there when he arrived. Plaintiff has failed to establish, clearly and unequivocally, that the electrical cable he tripped over was "debris" which was not cleaned up at the end of the prior workday and was not instead being used by the electricians on the morning of his accident. The court notes that neither side provided any evidence from any of the other workers, from plaintiff's boss, or from the deli owner who hired the electricians. As this issue must be determined in his favor in order for plaintiff to make a prima facie case, and it has not been, the cross motion must be denied.

Conclusion

For the reasons stated above, the branches of the defendants' motion (Seq. #3) for summary judgment dismissing plaintiff's claims for common law negligence, and for violations of Labor Law §§ 200 and 240 (1) are granted, and those claims are dismissed. The branch of defendants' motion for summary judgment seeking to dismiss plaintiff's Labor Law § 241 (6) claim is denied to the extent that said claim is predicated upon Industrial Code section 23-1.7 (e) (2), and is granted insofar as said claim is based upon any other Industrial Code sections, including 23-1.5, 23-1.7 (e) (1), and 23-2.1.

Plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law § 241 (6) cause of action is denied.

The foregoing constitutes the decision and order of the court.

Dated: January 7, 2021

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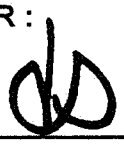

Hon. Debra Silber, J.S.C.