

<b>Hernandez v Madison Dev. Group LLC</b>
2021 NY Slip Op 31267(U)
April 16, 2021
Supreme Court, New York County
Docket Number: 154294/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

-----X

INDEX NO. 154294/2017

MAXIMILIANO HERNANDEZ,
Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 001 002

MADISON DEVELOPMENT GROUP LLC,
Defendant.

ORDER - OTHER (NON-
MOTION)

-----X

MADISON DEVELOPMENT GROUP LLC,
Third-party Plaintiff,

Third-Party
Index No. 595755/2017

- v -

KINGDOM ASSOCIATES, INC.,
Third-party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30-42, 61-68, 75, 77
were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43-60, 69-74, 76, 78
were read on this motion for summary judgment.

By notice of motion, defendant Madison Development Group, LLC moves pursuant to
CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes. (Mot. seq. one).

By notice of motion, third-party defendant Kingdom Associates, Inc. (Kingdom) moves
pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.
(Mot. seq. two).

## I. BACKGROUND

By contract dated June 2, 2016, defendant hired third-party defendant to construct the foundation and superstructure of a building owned by defendant at 143-145 Madison Avenue in Manhattan. Pursuant to section 6.2 of the contract, Kingdom “shall use its best skill and attention for the proper administration, coordination, supervision and superintendence of the Work,” and pursuant to section 6.12, it “shall clear all rubbish created by its operations on a daily basis and collect same in a central location on each floor or in a contained provided by the Owner as directed by the Owner’s superintendent.” (NYSCEF 40).

A site safety log prepared by defendant’s site safety manager reflects that on November 18, 2016, the site’s floors were “clean from excess debris.” (NYSCEF 58).

At his deposition, plaintiff testified that on November 18, 2016, he was employed by Kingdom to work on the construction project, specifically, he and a coworker were to gather rebar and place it throughout the site, as directed solely by Kingdom’s foreperson. That morning, carpenters had installed plywood on the front half of the building’s first floor. Plaintiff was tasked with unloading rebar from a truck, carrying it with his co-worker, and putting it on “horses” in the area where plywood flooring had been installed. Also, in the area where plywood had already been installed, he observed the carpenters operating electric saws to cut more plywood for the remaining portions of the first floor. He did not know who employed the carpenters, although they wore the same green vests and t-shirts as the rebar workers.

At about noon, he and his co-worker lifted a 70-pound load of rebar from a truck and brought it into the building. Plaintiff carried the load and after walking approximately 10 steps into the building, his co-worker placed the front half of the load of rebar on a horse. Then plaintiff carried his end of the rebar to the other horse when, after some five steps, his right leg

slipped, causing him to fall and sustain injury. He testified that he had slipped on sawdust left over from the carpenters sawing the plywood, and that there was a small amount of sawdust on the floor when he first started carrying the rebar. By the time of his accident, there was a great deal more. Plaintiff did not see the sawdust before he slipped, had never complained about it, and did not know who was responsible for cleaning it. (NYSCEF 36).

At his deposition, defendant's owner testified that in November of 2016, defendant owned the property located at 143-145 Madison Avenue in Manhattan and began constructing a new building. Defendant did not retain a general contractor for the construction; it hired all of the trades that worked on the building, including Kingdom to build the foundation and superstructure, and it supplied the rebar for the project. When constructing the superstructure, Kingdom needed to lay plywood down in advance of framing for concrete. If necessary, it would cut the plywood with saws, although defendant's owner never personally observed any cutting.

Defendant had a safety manager on site that was responsible for ensuring compliance with OSHA regulations. The safety manager was not required to clean the site, as the subcontractors were responsible for their own housekeeping. He was however, authorized to sanction subcontractors for noncompliance with OSHA regulations and would alert defendant's owner of any sanctions. Defendant's owner would go to the site two to three times a week and received no complaints about housekeeping at the site. Defendant also had a site superintendent who was responsible for overseeing progress of the entire project, but he did not direct the trades on how to do their work, nor was he allowed to do so. Defendant's owner learned of the accident from plaintiff's attorney in December of 2016, and neither the site safety manager nor the superintendent had any knowledge of it. (NYSCEF 39).

At his deposition, plaintiff's foreperson testified that he was employed by Kingdom and

was responsible overseeing the installation of rebar. At the time of plaintiff's accident, he was working on the sidewalk outside, and was thus unaware of whether the carpenters were working at that time. He did not see plaintiff's accident and could not recall whether carpenters were cutting plywood while plaintiff and his coworkers were bringing in the rebar, but some carpenters were assisting by carrying the rebar, as they do when they finish their work. The installation of rebar cannot occur until the carpenters finished their work.

Before the truck with the rebar was unloaded, the foreperson entered the first floor of the building and saw that plywood was completely installed. He saw no sawdust. After all of the rebar was unloaded, the foreperson went to the area of plaintiff's accident and saw no sawdust. The carpenters were employed by Kingdom but reported to a different foreperson. No one complained to the foreperson about the site being unclean or littered with debris, and he claimed that all of his crew were responsible for cleaning. (NYSCEF 38).

By summons and complaint dated May 8, 2017, plaintiff commenced this action, alleging that his injuries were due to defendant's negligence and violations of Labor Law §§ 200, 240(1), and 241(6). (NYSCEF 32).

By third-party summons and complaint dated September 19, 2017, defendant commenced the third-party action, seeking indemnification and/or contribution. (NYSCEF 33).

By verified bill of particulars dated October 3, 2017, plaintiff alleges violations of Industrial Code §§ 23-1.7(d) and (e). (NYSCEF 35).

## II. DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20,

25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

In opposition, plaintiff withdraws his Labor Law § 240(1) claim and his Labor Law § 241(6) claim to the extent that it is premised on 12 NYCRR § 23-1.7(e)(1), and they are thus not addressed. (NYSCEF 63, 69).

A. Common-law negligence and Labor Law § 200

1. Contentions

a. Defendant (NYSCEF 31)

Defendant denies having supervised or controlled plaintiff’s work, and thus argues that it cannot be held liable for his accident. The contract between it and Kingdom obligates the latter to supervise plaintiff’s work and clear all rubbish created by its work. Plaintiff, moreover, testified that he received instructions only from Kingdom’s foreperson. Defendant also contends that Kingdom’s acceptance of the obligation to defend and indemnify evidences that it cannot be held liable. It also denies having caused or created the allegedly hazardous condition, or having had notice of it.

b. Kingdom (NYSCEF 44)

Kingdom contends that defendant did not exercise any actual supervision or control over its work at the site, and thus it cannot be held liable. It observes that plaintiff alleges that he

slipped due to sawdust generated by its carpenters. Moreover, the site safety report generated by defendant's site safety manager reflects that defendant lacked notice of the hazardous condition.

c. Plaintiff (NYSCEF 63, 69)

Plaintiff contends that defendant and Kingdom fails to establish, *prima facie*, that defendant did not have constructive notice of the hazardous condition. He denies that his injuries were due to the "means and methods" of his work, as his accident resulted from a slippery condition on the premises. Thus, defendant, as the owner and general contractor, may be held liable. He also argues that there is no evidence as to a cleaning schedule for the site or when the site was last inspected, and he denies that plaintiff's foreperson's testimony is probative as to whether the area was clean. According to plaintiff, defendant was in control of the entire job site, as it had a superintendent and safety manager on site every day.

d. Defendant's reply (NYSCEF 77)

In reply, defendant observes that plaintiff concedes that it exercised no control over the means and methods of plaintiff's work, and argues that plaintiff fails to meet his burden of demonstrating that it had notice of the hazardous condition, observing that plaintiff himself was unaware of the sawdust before his fall and plaintiff's foreperson testified that the first floor was clear of sawdust that morning.

e. Kingdom's reply (NSYCEF 78)

In reply, Kingdom contends that plaintiff's accident arose out of the means and methods of its work, as plaintiff maintains that carpentry work, which resulted in the sawdust, was ongoing throughout the day of his accident. It observes that plaintiff's foreperson testified that he was outside that day and did not observe the working going on inside the building, and thus, his testimony does not support an inference that there was no carpentry work occurring that day. The

general supervisory authority that defendant had over the site, it argues, is insufficient to demonstrate control over the means and methods of its work.

## 2. Analysis

Labor Law § 200 provides that:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

There are two standards applicable to cases brought under this statute, depending on the kind of accident at issue: (1) when the accident is the result of the means and methods used by a contractor to do its work, or (2) when it results from a dangerous condition that is inherent in the premises. (See *McLeod v Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]; see also *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Plaintiff’s testimony that the sawdust which caused his fall was created by Kingdom’s work and had accumulated during the day of his accident, reflects that his accident was caused by the means and methods of Kingdom’s work, and not a dangerous condition on the premises. (Compare *Serrano v Consol. Edison Co. of New York Inc.*, 146 AD3d 405, 405–06 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017] [plaintiff’s slip and fall on dust generated by his and his coworker’s work arose from means and methods of defendant’s work], and *Ocampo v Bovis*

*Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept 2014] [plaintiff's slip and fall on ice while carrying metal pipes for wall demolition implicates means and methods where plaintiff's employer used water to minimize risks associated with asbestos], *with DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467, 467 [1st Dept 2019] [dust existing before plaintiff's arrival at site and not part of plaintiff's work was dangerous condition], *and Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017] [plaintiff's trip on loose pipe on floor analyzed under dangerous condition standard where pipe present before plaintiff's arrival at site and was not "created by the manner in which the work was performed by plaintiff or his employer"]).

Instead of relying on his own testimony concerning the carpentry work that day, plaintiff relies on the testimony of his foreperson that the first floor construction had been completed by the time he arrived the morning of plaintiff's accident. And yet, the foreperson could not recall whether carpenters were cutting plywood that day, as he was outside. Consequently, his testimony does not raise an issue of fact as to whether the sawdust was created by Kingdom on the day of plaintiff's accident.

As it is undisputed that plaintiff was directed solely by his supervisor, defendant cannot be held liable for negligence and a violation of Labor Law § 200. (*Garces v Windsor Plaza, LLC*, 189 AD3d 539 [1st Dept 2020]). The presence of defendant's superintendent and site safety manager on site is immaterial, as neither had anything more than "general supervisory authority over the construction site, which is insufficient to demonstrate control over plaintiff's work." (*Herrero v 2146 Nostrand Ave. Assocs., LLC*, — AD3d —, 2021 NY Slip Op 02071 [1st Dept 2021]).

#### B. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to

provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating that the defendant violated a regulation setting forth a specific standard of conduct, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

1. 12 NYCRR § 23-1.7(d)  
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.

a. Contentions

Kingdom contends that this Industrial Code provision is inapplicable, because plaintiff did not slip on a “foreign substance.” Rather, the sawdust was an integral byproduct of its work. (NYSCEF 44, 78).

In opposition, plaintiff argues that as he personally did not work with plywood or create

the sawdust, the provision is applicable. (NYSCEF 69).

b. Analysis

Although Kingdom's carpenters necessarily produced sawdust while constructing the plywood floor, plaintiff was not involved with their work. Thus, as the sawdust is a foreign substance not integral to the moving of rebar, the provision is applicable. (*Compare Pereira v New Sch.*, 148 AD3d 410, 412 [1st Dept 2017] [concrete on which plaintiff slipped was foreign substance, as plaintiff did not work with concrete], *with Giglio v Turner Constr. Co.*, 190 AD3d 829 [2d Dept 2021] [water and wet plastic sheet on which plaintiff slipped not a foreign substance, as it was "direct and natural results" of plaintiff's work]).

In *Ocampo*, for example, the plaintiff allegedly slipped and fell on ice while performing wall demolition work on an asbestos abatement project. (123 AD3d at 457). The plaintiff's common-law negligence and Labor Law § 200 claims were dismissed, as the ice was used by the plaintiff's employer, the sole company present at the site, to minimize the risks associated with asbestos, and the defendant did not supervise or control the means and methods of the plaintiff's employer's work. (*Id.*). The plaintiff's Labor Law § 241(6) claim premised on 12 NYCRR § 23-1.7(d), however, was not dismissed as the ice was "not integral to the work." (*Id.*).

2. 12 NYCRR § 23-1.7(e)(2)  
*Tripping and other hazards*

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.

a. Contentions

Defendant argues that this provision is inapplicable given plaintiff's allegation that he slipped, not tripped, on the sawdust. Moreover, plaintiff's foreperson testified that the carpenters

were not sawing wood on the day of plaintiff's accident, and thus, the evidence reflects that there was no sawdust. In any event, defendant argues, sawdust is integral to defendant's work, and does not qualify as a violation. (NYSCEF 31, 77).

Kingdom argues that the sawdust was an integral part of the work being performed at the time of plaintiff's accident, and thus, the provision is inapplicable. (NYSCEF 44, 78).

In opposition, plaintiff asserts that the provision applies to both tripping and slipping hazards, and he denies that the dust was integral to the work he was performing. (NYSCEF 63, 69).

#### b. Analysis

That plaintiff allegedly slipped, not tripped, is immaterial, as the provision applies to both. (*Ohadi v Magnetic Constr. Grp. Corp.*, 182 AD3d 474, 476 [1st Dept 2020]). Moreover, the dust was not integral to plaintiff's work. (*See supra* at II.B.1.b.).

To the extent that the testimony of plaintiff's foreperson as to whether carpenters were sawing on the day of plaintiff's accident contradicts plaintiff's testimony, it raises a credibility issue that cannot be resolved through summary disposition. (*Coldwell Banker Com. Hunter Realty v Rainbow Holding Co., LLC*, 160 AD3d 548 [1st Dept 2018]).

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's and third-party defendant's motions for summary judgment are granted to the extent that plaintiff's common-law negligence claim, Labor Law §§ 200 and 240(1) claims, and Labor Law § 241(6) claim premised on 12 NYCRR § 23-1.7(e)(1) are severed and dismissed, and are otherwise denied (motion sequences one and two); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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4/16/2021

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: