

Freyberg v Adelphi Univ.
2021 NY Slip Op 33310(U)
February 16, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 612302/2016
Judge: John H. Rouse
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Index Number: 612302/2016

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART I2 - SUFFOLK COUNTY**

PRESENT:

HON. JOHN H. ROUSE, ACTING J.S.C.

MOTION DATE: 04/08/2020

ADJ. DATE: 12/09/2020

MOT. SEQ. 001-MG

CASEDISP

e-filed full participation

Douglas Freyberg,

Plaintiff

DECISION AND ORDER

-against-

Adelphi University,

Defendant

TO:

DECOLATOR, COHEN
& DIPRISCO, LLP
1399 FRANKLIN AVE., STE 300
GARDEN CITY, NY 11530
516-742-6575

LEWIS BRISBOIS BISGAARD & SMITH
77 WATER STREET, SUITE 2100
NEW YORK, NY 10005
646-783-0909

Upon the reading and filing: (1) Notice of Motion by Defendant for an order: (a) pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212, granting defendant's ADELPHI UNIVERSITY, motion for summary judgment dismissing plaintiff's Verified Complaint asserted against it; and (b) for such other and further relief as this Court may deem just and proper; (2) e-filed documents 1-35; it is:

ORDERED, that Defendant's motion (Sequence 001) for summary judgment on all claims made against it by Plaintiff is granted and the case is dismissed.

ENTER

DECISION

Plaintiff, Douglas Freyberg, commenced this action on August 9, 2016 to recover damages for personal injuries arising out of an incident that occurred on December 23, 2015, at Adelphi University Campus located in Garden City, New York. Plaintiff alleges that he was working in the course of his employment as a foreman carpenter with Total Concept Construction when he struck his foot on plywood that was approximately twelve inches by twelve inches square and one inch thick. This plywood was covering a hole on the floor of the room where he was working. Plaintiff alleges Adelphi University was negligent and violated Labor Law §200 and §241(6) based upon claimed violations of the Industrial Code 23-1.7(b); 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(1)(2). Issue has been joined, a note of issue filed, and Defendant has made this timely motion for summary judgment.

Defendant's Motion for Summary Judgment

Defendant moves for summary judgment. Defendant has made a *prima facie* case that it did not put the plywood in place and it did not have actual or constructive notice that the plywood had been used to temporarily cover a hole while construction was ongoing, and it had no authority to direct or control the work being done.

Where a plaintiff's injuries stem from a dangerous condition on the premises, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice." *Chowdhury v Rodriguez*, 57 AD3d 121, 128 (2nd Dept. 2008). Where the injury "arises out of defects or dangers in the methods or materials of the work," the property owner's potential liability hinges on his or her authority to supervise the work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998).

Plaintiff has failed to raise a material issue of fact as to whether the Defendant was on actual or constructive notice of the alleged trip hazard or that Defendant otherwise had authority to supervise or control the work. Accordingly, the Defendant's motion for summary judgment is granted with respect to those claims based upon common law negligence and Labor Law § 200.

Defendant also moves for summary judgment on Plaintiff's claims based upon Labor Law § 241(6) and the Industrial Code 12 NYCRR § 23-1.7(b); 12 NYCRR § 23-1.7(d) and 12 NYCRR § 23-1.7(e)(1) and (2).

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. The particular safety rule or regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply set forth general safety standards."

Lopez v NY City Dept. of Env'tl. Protection, 123 AD3d 982 (2d Dept 2014)

The several subsections of 12 NYCRR § 23-1.7 of the Industrial Code the Plaintiff alleges were violated are as follow:

(b) Falling hazards.

(1) Hazardous openings.

(i) Every hazardous opening into which a person may step, or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

(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.

(e) Tripping and other hazards.

(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.

Neither subsections (b) or (d) are at issue in this case. On the facts as alleged Plaintiff does not contend that Defendant failed to prevent Plaintiff from falling in or through a hazardous opening, *see Vitale v Astoria Energy II, LLC, 138 AD3d 981 (2d Dept 2016)*, and Plaintiff does not allege that the plywood was a slipping hazard. Accordingly, Defendant shall have summary judgment with respect to Plaintiff's allegations Defendant violated 12 NYCRR § 23-1.7(b) and (d) of the Industrial Code.

Plaintiff's claims founded on Labor Law § 241(6) and 12 NYCRR § 23-1.7(e)(1) and (2)

Plaintiff contends that on the date of the incident he was at work and he needed to move a four wheeled dolly loaded with tile so that he could set up scaffolding to permit him to begin his work on the ceiling. Plaintiff moved the dolly so that he could begin his work where the dolly had been left. Plaintiff testified at his deposition that as he was pushing the dolly out of the way his foot caught on a twelve-inch by twelve-inch square of plywood that was an inch thick and nailed to the floor to cover a hole in the floor. Plaintiff alleges this plywood that was routinely used to cover holes in the floor for safety purposes was not adequately secured, was raised above the floor level, and constituted a trip hazard. Plaintiff alleges these facts give rise to liability under 12 NYCRR § 23-1.7(e)(1) and (2).

Labor Law § 241(6) and 12 NYCRR § 23-1.7(e)(1)

Defendant contends that 12 NYCRR § 23-1.7(e)(1) does not apply to this case because Plaintiff fell in a work area and not a passageway. This is correct. *See Gancarz v Brooklyn Pier 1 Residential Owner, L.P.*, ___AD3d___, (2nd Dept., January 27, 2021). Accordingly, Defendant shall have summary judgment upon the Plaintiff's claim based upon Labor Law 241(6) and an alleged violation of 12 NYCRR § 23-1.7(e)(1).

Labor Law § 241(6) and 12 NYCRR § 23-1.7(e)(1)(2)

Plaintiff alleges that the plywood affixed to the floor over which he tripped gives rise to liability under 12 NYCRR § 23-1.7(e)(2) which 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.

Defendant contends that the plywood that was used to cover the hole and protect the Plaintiff from tripping in that hole was an integral part of the work being performed and cannot form a basis for owner liability under Labor Law § 241(6) and an alleged violation of 12 NYCRR § 23-1.7(e)(2). *See Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 (1st Dept 2013), *protective covering had been purposefully installed on the floor was an integral part of the renovation project and cannot be construed as accumulated debris or scattered materials.*

Defendant property owner has made a *prima facie* case that the plywood was an integral part of the work being done, and the Plaintiff's contention that this plywood was not adequately secured may give rise to a claim of negligence as against the party supervising the work, but it does not give rise to liability against the owner of the premises under Labor Law § 241(6). *See Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712 (2d Dept 2020). Accordingly, Defendant shall have summary judgment upon the Plaintiff's claim based upon Labor Law § 241(6) and an alleged violation of 12 NYCRR § 23-1.7(e)(2).

The foregoing shall constitute the decision and order of the court.

Dated: February 16, 2021

ENTER:


JOHN H. ROUSE

ACTING J.S.C.

FINAL DISPOSITION