

Alvarado v SC 142 W. 24 LLC
2022 NY Slip Op 30027(U)
January 7, 2022
Supreme Court, New York County
Docket Number: Index No. 156474/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART 47**

Justice

-----X

ANGEL ALVARADO,

Plaintiff,

- v -

SC 142 WEST 24 LLC, MCSAM HOTEL GROUP,
LLC, OMNIBUILD CONSTRUCTION INC.,

Defendants.

-----X

SC 142 WEST 24 LLC, MCSAM HOTEL GROUP, LLC,
OMNIBUILD CONSTRUCTION INC.

Plaintiffs,

-against-

SKY MATERIALS, INC.

Defendant.

-----X

SC 142 WEST 24 LLC, MCSAM HOTEL GROUP, LLC,
OMNIBUILD CONSTRUCTION INC.

Plaintiffs,

-against-

RELIANCE SAFETY CONSULTING, LLC

Defendant.

-----X

INDEX NO. 156474/2019
MOTION DATE 10/25/2021
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595751/2019

Second Third-Party
Index No. 595711/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this labor law action after he slipped and fell on mud in an excavation pit of dirt on September 11, 2018. The day prior to the accident, it had rained heavily, and so the pit was very muddy. Plaintiff now moves for summary judgment on his Labor Law

241(6) claim insofar as it is premised on a violation of Industrial Code Section 23-1.7(d).

Defendants/third-party plaintiffs oppose the motion and cross-move for summary judgment seeking dismissal of the complaint and summary judgment on their contractual indemnification claim against third-party defendant Sky Materials, Inc., plaintiff's employer at the time of the accident.

Industrial Code Section 23-1.7(d) provides that "[e]mployers 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." Here, the plaintiff has met his prima facie burden to show a violation of this provision by submitting testimony showing that he was working at the bottom of an excavation pit at the time of the accident, which was very muddy due to the heavy rain from the prior day. In their opposition, defendants/third-party plaintiffs, as well as the third-party defendant, do not controvert this testimony. Rather, they argue that since the pit was made of dirt, the mud on which the plaintiff slipped cannot be considered a "foreign substance" within the meaning of this provision. However, whether or not the mud is considered a foreign substance is irrelevant as plaintiff has demonstrated that the first part of the provision was violated, namely that he was permitted to work on a slippery floor. *See Velasquez v. 795 Columbus LLC*, 103 A.D.3d 541 (1st Dep't 2013); *Temes v. Columbus Centre LLC*, 48 A.D.3d 281 (1st Dep't 2008). Further, while the dirt and earth on which plaintiff was working was an integral part of the surface, the rain which caused the muddy conditions was not and constitutes a foreign substance under this provision. *See Sweet v. Packaging Corporation of America*, 297 A.D.2d 421 (3d Dep't 2002) (precipitation causing slipper surface was not integral part of the work site); *compare with Galazka v. WFP*

One Liberty Plaza, 55 A.D.3d 789 (2d Dep't 2008) (wet plastic surface which caused plaintiff's accident was specifically designed to be wet and thus was an integral part of the work site).

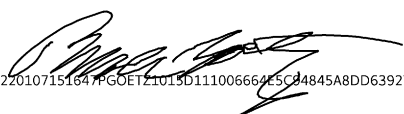
Accordingly, plaintiff is entitled to summary judgment on this claim. However, it is premature to dismiss defendants' affirmative defense of contributory negligence at this juncture.

In light of this ruling, defendants/third-party plaintiffs' cross-motion for summary judgment is academic. *Squicaray v. Con. Edison Co. of NY, Inc.*, 2017 NY Misc LEXIS 4060, 2017 NY Slip Op 32277 [U], *aff'd* 171 AD3d 416 (1st Dept 2019) (holding "[s]ince the court properly granted partial summary judgment in favor of the [plaintiff on his] Labor Law § 240 (1) claim, [defendant's] remaining arguments, concerning plaintiff's Labor Law § 241 (6) claim, are academic", *citing Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]). Further, to the extent that defendants seek dismissal of the claims against defendant MCSAM Hotel Group, they have failed to submit any admissible evidence in support of this relief. Finally, defendants/third-party plaintiffs request for summary judgment on their contractual indemnification claim against plaintiff's employer, third-party defendant Sky Materials Inc., must be denied. In support of this relief, defendants/third-party plaintiffs rely on a contract which was submitted by plaintiff in support of his motion for summary judgment and which was introduced without any testimony authenticating this document. Since the contract is not authenticated as required by CPLR 4518(a) and it is inadmissible and cannot form the basis to grant summary judgment (*Clarke v. American Truck & Trailer*, 171 A.D.3d 405, 406 [1st Dep't 2019] [holding agreement between parties, annexed to an attorney affirmation, was not authenticated and therefore was not admissible and not an appropriate basis on which to grant summary judgment]). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on his Labor Law 241(6) claim against defendants SC 142 West 24 LLC and Omnibuild Construction Inc. is GRANTED; and it is further

ORDERED that plaintiff's motion to dismiss defendants' contributory negligence affirmative defenses is DENIED; and it is further

ORDERED that defendants/third-party plaintiffs' motion for summary judgment is DENIED.


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1/7/2022

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

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DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE