

<b>Agustin v CPG Partners, L.P.</b>
2022 NY Slip Op 31677(U)
May 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 519184/2016
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brookly, New York, on the 20th day of May, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

-----X  
JOSE LUIS AGUSTIN and CHARO VIRGILL,

Plaintiffs,

Index No.: 519184/2016

-against-

DECISION AND ORDER  
MS #6, #7, and #8

CPG PARTNERS, L.P., HOLT CONSTRUCTION CORP.,  
and INTERSTATE DRYWALL CORP.,

Defendants.

-----X

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	244-246, 264-265, 285, 287-289
Answering Affidavit (Affirmation) _____	303
Reply Affidavit (Affirmation) _____	306, 308-309
Supplemental Affidavit (Affirmation) _____	
Pleadings – Exhibits _____	247-258, 290-299, 266-284
Stipulations – Minutes _____	
Filed Papers _____	

This action arises from a construction accident that occurred Monday, May 18, 2015 on the roof of the “Market Hall” building project located at Woodbury Commons Premium Outlets of the Hamlet of Central Valley, Orange County, New York (the Premises). Defendant CPG PARTNERS, L.P. (Defendant CPG) owned the Premises. Defendant HOLT CONSTRUCTION CORP. (Defendant HOLT) was the General Contractor and coordinated the trades and

subcontractors for the project. Defendant INTERSTATE DRYWALL CORP. (Defendant INTERSTATE) was hired as a framing contractor for the project.

Plaintiff JOSE LUIS AGUSTIN was employed by non-party Barrett Roofing as a journeyman roofer. Barrett Roofing was hired as a roofing contractor for the project.

Plaintiff was working as a roofer for Barrett Roofing at the Premises. On the morning of his accident, Plaintiff arrived at the Premises and upon stepping on the roof noticed metal joists and stud debris left behind from another subcontractor. The debris prevented Plaintiff from starting his work. At the time of his accident, Plaintiff was cleaning up the debris and, in the process, a scrap piece of cut metal joist trapped Plaintiff's right foot causing him to fall back to his right. His right side and head landed on a piece of metal rebar.

The metal joists and studs Plaintiff tripped over were left by Defendant INTERSTATE who had been using the materials for framing the roof area two days before, on Saturday.

Plaintiff's second amended complaint alleges three causes of action: common law negligence, Labor Law § 200, and Labor Law § 241(6). Plaintiff moves for partial summary judgment against Defendants CPG, HOLT, and INTERSTATE on his common law negligence, Labor Law § 200, and Labor Law § 241(6) claims.

Defendants CPG and HOLT cross-move to dismiss the complaint as against them.

Defendant INTERSTATE cross-moves to dismiss the complaint as against it.

### **Labor Law § 241(6)**

Plaintiffs move for summary judgment on the issue of liability pursuant to Labor Law § 241(6) as against all Defendants.

Defendants CPG and HOLT and Defendant INTERSTATE cross-move to dismiss Plaintiffs' Labor Law § 241(6) claim.

## DEFENDANT INTERSTATE

Defendant INTERSTATE argues that it is not liable under Section 241(6) because it didn't supervise or control Plaintiff's work and that the Industrial Code sections cited by Plaintiff are either not specific or inapplicable.

“Labor Law § 241(6) imposes a nondelegable duty upon an owner [an owner's agent] or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Grant v. City of New York*, 109 AD3d 961, 963 [2d Dept 2013]). “To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the Code” (*Galarraga v. City of New York*, 54 AD3d 308, 309 [2d Dept 2008]).

“[A] party with ‘the ability to control the activity which brought about the injury’ may be vicariously liable as an owner's agent or a contractor under those provisions of the Labor Law” (*Cando v Ajay Gen. Contr. Co. Inc.* 200 AD3d 750,754 [2<sup>nd</sup> Dept 2021]; *Natoli v City of New York*, 32 AD3d 507, 508 [2<sup>nd</sup> Dept 2006].) “To hold a defendant liable as an agent of the general contractor or the owner for violations of Labor Law §§ 240(1) and 241(6), there must be a showing that it had the authority to supervise and control the work that brought about the injury” (*Fiore v. Westerman Construction Company*, 186 AD3d 570, 571 [2d Dept 2020]). “The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right” (*id.*, quoting *Bakhtadze v. Riddle*, 56 AD3d 589, 590 [2d Dept 2008]).

Here, while Defendant INTERSTATE did not have authority to supervise or control the work of Plaintiff, it did have authority to control the work that brought about Plaintiff's injury.

INTERSTATE was hired to perform framing work and the Plaintiff's foot got caught on debris that was left on the work site by INTERSTATE workers.

John Pizzano, General Superintendent of Defendant INTERSTATE, confirmed that INTERSTATE was the only contractor doing framing work and recognized the subject debris as pieces of metal tracks, joists and studs being used by INTERSTATE.

INTERSTATE also argued that Industrial Code Section 23-1.7(e)(2) is inapplicable because the debris was open and obvious and therefore not a tripping hazard. However, Pizzano acknowledged in his deposition that any materials left lying on the roof would be a tripping hazard.

#### **DEFENDANTS CPG and HOLT**

Defendants CPG and HOLT argue that the industrial codes cited by Plaintiff are inapplicable to the facts of this case.

While Plaintiff pled violations of Industrial Code §§ 23-1.5(a), 23-1.7(e), 23-2.1(a)(1), 23-2.1(a)(2), and 23-2.1(b), Plaintiff only addresses violations of Industrial Codes §§ 23-1.7(e), 23-2.1(a)(1), 23-2.1(a)(2), and 23-2.1(b) in their instant motion. Further, Plaintiff concedes in his Reply that the only sections at issue are §§ 23-1.7(e)(1) and (2). Therefore, that part of the 241(6) claim based on §§ 23-2.5(a), 23-2.1(a)(1), 23-2.1(a)(2), and 23-2.1(b) must be dismissed.

Industrial Code section 23-1.7(e) protects workers from tripping hazards and states:

(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.

Section of 23-1.7(e)(1) is inapplicable here as it relates to tripping hazards in passageways. The area in which Plaintiff tripped was a work area, not a passageway as depicted in the photo of the area Plaintiff's accident occurred which shows an open roof work area (*see Castillo v. Starrett City*, 4 AD3d 320 [2d Dept 2004]).

As such, Section 23-1.7(e)(2), "working areas", is the applicable section here. However, Defendants argue this section is inapplicable because the metal joists were integral to the work being performed and were also open and obvious.

"12 NYCRR 23-1.7(e)(2) is 'inapplicable [where] the material over which [a plaintiff] alleges he [or she] tripped was integral to the work being performed'" (*Martinez v. 281 Broadway Holdings, LLC*, 183 AD3d 712 [2d Dept 2020]; quoting *Cody v. State*, 82 AD3d 925 [2d Dept 2011]).

Plaintiff testified that on the day of his accident, upon stepping on the roof, he noticed metal joists and stud debris left by another subcontractor and that he had to clean up the debris because it prevented him from starting his work. He admitted the debris was open and obvious.

Michael Foti, Superintendent of Defendant HOLT, testified that it would be necessary for the roof or decking to be clear of any remnants of cut track debris for Plaintiff to do his job.

Section 8.7.1 of the contract between Defendants HOLT and INTERSTATE required INTERSTATE to keep the building and premises free from debris and unsafe conditions resulting from its work and broom clean each work area prior to discontinuing work.

Therefore, the cut tracks and debris were not an integral part of Plaintiff's work as it was left after INTERSTATE completed its work. The debris was not part of Plaintiff's work and in fact prevented Plaintiff from starting his work.

Further, while the debris was open and obvious, the testimony of both Foti and Pizzano demonstrated that the debris on the roof, was a dangerous tripping hazard and had to be cleaned before Plaintiff could begin his work.

Any comparative negligence on the part of Plaintiff is not a bar to granting him summary judgment.

Based on the foregoing, Plaintiffs' motion as to Labor Law § 241(6) to the extent it is based on a violation of Industrial Code § 23-1.7(e)(2) must be granted and Defendants' motion to dismiss the § 241(6) claim should be granted as to the other sections of the Industrial Code cited by Plaintiffs.

### **Labor Law § 200 and Common Law Negligence**

Plaintiffs move for summary judgment on the issue of liability pursuant to Labor Law §200 and common law negligence as against all Defendants.

Defendants CPG and HOLT, and Defendant INTERSTATE cross-move to dismiss Plaintiffs' Labor Law § 200 and common law negligence claims.

“Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work” (*Zukowski v. Powell Cove Estates Home Owners Association*, 187 AD3d 1099, 1101 [2d Dept 2020], quoting *Lombardi v. Stout*, 80 NY2d 290, 294 [1992]). Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

Here, Plaintiff's accident arose from a dangerous condition at the premises, not by the means or methods employed.

“A subcontractor ‘may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area’” (*Sledge v. S.M.S. General Contractors*, 151 AD3d 782, 783 [2d Dept 2017], quoting *Poracki v. St. Mary's R.C. Church*, 82 A.3d 1192, 1195 [2d Dept 2011]). “An award of summary judgment in favor of a subcontractor on a negligence or Labor Law § 200 cause of action is improper ‘where the evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries’” (*id.*, quoting *Erickson v. Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2d Dept 2010]).

As discussed above, Defendant INTERSTATE created the condition that caused Plaintiff's injury. Further, the contract provided that Defendant INTERSTATE was responsible for keeping its work areas free from debris and unsafe conditions resulting from their work. INTERSTATE has offered no non-negligent explanation for it having left the debris on the roof. INTERSTATE has raised no questions of fact as to whether by leaving pieces of metal tracks and studs on the roof, it launched a force of harm that was a proximate cause of Plaintiff's injury. Therefore, Plaintiffs are entitled to summary judgement against INTERSTATE on their Labor Law Section 200 and common law negligence claims and INTERSTATE's motion to dismiss those claims must be denied.

However, Defendants CPG and HOLT are not vicariously liable for the negligence of INTERSTATE pursuant to Section 200.

“Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident

or had actual or constructive notice of the dangerous condition that caused the accident” (*Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

There is an issue whether Defendants CPG and HOLT had constructive notice of the condition.

“A defendant has constructive notice of a defect when it is visible and apparent and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected” (*Nicoletti v. Iracane* 122 AD3d 811, 811 [2d Dept 2014]).

Plaintiff testified that he noticed the debris on the morning of his accident before he started working. Foti testified that two days prior to Plaintiff’s accident, on Saturday, INTERSTATE was working in the area where Plaintiff fell, and that INTERSTATE did not work on Sunday. Plaintiff argues that the debris had been there for several days, therefore creating constructive notice. However, Plaintiff nor Defendants submit anything evidence to demonstrate exactly how long the debris was on the open roof area. Plaintiff’s testimony only demonstrates that the dangerous condition, existed on the morning of his accident. This fails to establish how long the dangerous condition existed and constructive notice, or lack of constructive notice, cannot be established.

Additionally, Defendant HOLT is not liable under Section 200 because as the general contractor it owed no duty to Plaintiff in relation to hazardous conditions at the premises.

Based on the foregoing, Plaintiffs’ motion as to Labor Law § 200 and common law negligence against Defendant CPG must be denied and Defendants CPG cross-motion as to Labor Law § 200 and common law negligence must be denied; and Plaintiff’s motion as to Labor Law § 200 and common law negligence against Defendant HOLT must be denied and Defendant HOLT’s cross-motion as to Labor Law § 200 and common law negligence must be GRANTED.

WHEREFORE, it is ORDERED that Plaintiffs' motion for summary judgment as to Labor Law § 241(6) against Defendants CPG and HOLT and Defendant INTERSTATE is GRANTED as to Industrial Code § 23-1.7(e)(2) only; and it is further

ORDERED that Defendants CPG and HOLT's and Defendant INTERSTATE's cross-motions for summary judgment as to that part of Plaintiffs' Labor Law § 241(6) claim alleging violation of Industrial Code §§ 23-1.5(a), § 23-1.7(e)(1), 23-2.1(a)(1), 23-2.1(a)(2), and 23-2.1(b) is GRANTED; and it is further

ORDERED that Plaintiffs' motion for summary judgment as to Labor Law § 200 and common law negligence as against Defendant INTERSTATE is GRANTED; and it is further

ORDERED that Defendant INTERSTATE's cross-motion for summary judgment as to Labor Law § 200 and common law negligence is DENIED; and it is further

ORDERED that Plaintiffs' motion for summary judgment as to Labor Law § 200 and common law negligence as against Defendant CPG is DENIED; and it is further

ORDERED that Plaintiffs' motion for summary judgment as to Labor Law § 200 and common law negligence as against Defendant HOLT is DENIED; and it is further

ORDERED that Defendant CPG's cross-motion for summary judgment as to Labor Law § 200 and common law negligence is DENIED; and it is further

ORDERED that Defendant HOLT's cross-motion for summary judgment as to Labor Law § 200 and common law negligence is GRANTED.

This constitutes the decision and order of the Court.

ENTER,



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J.S.C.