

Munoz v T.G. Nickel & Assoc., LLC
2022 NY Slip Op 31892(U)
April 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 516502/2018
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Index Number 516502/2018
Seq. 002–003

Part 91

DECISION/ORDER

GALO ONOFRE MUNOZ,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-2</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>3-4</u>
Replying Affidavits	<u>5-6</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

T.G. NICKEL & ASSOCIATES, LLC, THE HUDSON
COMPANIES INCORPORATED and CADMAN ASSOCIATES
LLC,

Defendants.

Upon the foregoing papers, plaintiff’s motion for summary (Seq. 002) and defendants’ motion for summary judgment (Seq. 003) are decided as follows:

Introduction

This action was commenced by the filing of a summons and complaint on August 13, 2018. All defendants joined issue by filing an answer through their attorney on November 26, 2018. Defendants’ answer contained a third affirmative defense alleging that Mr. Munoz’s “culpable conduct” or “negligence or assumption of risk” were proximate causes of his injuries. Defendants’ eighth affirmative defense alleges that Mr. Munoz “assumed all risks attendant with his conduct” and did not act in a “reasonable and prudent” manner. Plaintiff subsequently filed his note of issue on March 18, 2021.

Facts

Galo Roberto Onofre Munoz was an employee of Trident, a construction company, which was known as “ACS” when the plaintiff was first hired (Munoz EBT at 40, 42). On June 18,

2018, the plaintiff was working on a project at One Clinton Street in Brooklyn (*id.* at 76). Mr. Munoz had been working for Trident for approximately eight months prior to the accident (*id.*). The project involved both demolition and construction of an apartment complex, with approximately thirty-six super-terranean floors and three sub-terranean floors (*id.* at 79–80). It is undisputed that Hudson Companies Incorporated (“Hudson”) was an owner of the site and that T.G. Nickel & Associates, LLC (“Nickel”) was the general contractor at the site. The contract between Nickel and Cadman Associates LLC (“Cadman”) lists Cadman as an owner, and affiliates Cadman with Hudson in a rider to the contract listing indemnitees and additional insureds (Contract at Exhibit G).

The plaintiff testified as follows: On June 18, 2018, he was working in the “second basement” of the building, which was the middle basement (*id.* at 81).¹ Mr. Munoz was tasked with moving beams from one part of the basement to another by hoisting them up onto his shoulder and carrying them (*id.* at 82, 103). These beams were between thirteen to fifteen feet in length and weighed approximately 150–200 pounds each (*id.* at 104–105). Mr. Munoz describes the process of lifting the beams as follows: squatting down to get under the beam, lifting the beam vertical, and then tilting the beam onto the shoulder until it is balanced (Munoz EBT at 105–106). Mr. Munoz testified that at other sites there was “a small machine . . . like a lift, like a pallet to transport, small machines to lift pallets” (*id.* at 159).

Mr. Munoz indicated that the walkway where he and his co-workers were required to carry the beams was “between five and six feet” wide with various debris scattered on the ground (*id.* at 234). Mr. Munoz testified that while carrying a fourteen-foot beam that weighed between

¹ There is conflict as to whether the accident occurred in the first sub-basement or the second sub-basement. Ultimately, the question is irrelevant because under either set of facts the outcome of the instant motion will be the same (*see Bowen v Farrell*, 140 AD3d 1001 [2d Dept 2016]).

150 and 200 pounds, he moved toward the side of the hallway to allow his co-worker to pass him and thereafter tripped over a piece of two-by-four lumber and fell (*id.*). Dadobertho Herrera Cortes, one of Mr. Munoz's co-laborers at the site, testified that garbage, including pieces of 2x4s would gather in the basement, and could not be removed unless a boss gave the order (Herrera EBT at 20–21).² The defendants acknowledged a recurring problem that garbage frequently built up at the site, to the point that Nickle felt obligated to fine Trident more than once (Ryan Payton, designated representative of T.G. Nickle, EBT at 86). After landing on his knee, “the edge point of the beam hit the floor and it fell on top of” the plaintiff (Munoz EBT at 234–235).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's § 240 (1) Claim

Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites

² There are two points to address here. The first is that, in his EBT, Mr. Herrera says that the surname he ordinarily employs is “Herrera,” and not “Cortes” (Herrera EBT at 11–12). That will be my convention in this decision. Second, the defendants raise an argument about Mr. Herrera's credibility. This challenge stems from Mr. Munoz failing to count Mr. Herrera among his co-workers at the accident on the first day of his deposition, and then adding Mr. Herrera into his narrative at the second day of his deposition several months later. Issues of credibility are not to be resolved on motions for summary judgment (*see Chimbor v Bolivar*, 142 AD3d 944 [2d Dept 2016]). Therefore, this court will rely on the testimony of Mr. Herrera only in those instances where he is testifying in his capacity as an employee at the same jobsite as Mr. Munoz, a capacity about which the defendants raise no challenges.

(*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from “gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]). To prevail on his Labor Law § 240 (1) claim, plaintiff must prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). “Labor Law § 240 (1) . . . is directed at elevation-related hazards only, and recovery under the statute is unavailable where the injury results from other types of hazards even if proximately caused by the absence of an adequate scaffold or other required safety device” (*Charles v City of New York*, 227 AD2d 429, 430 [2d Dept 1996]).

Plaintiff argues that gravity caused the beam to make him fall and that the beam fell on him. Plaintiff provides the expert affidavit of Nicholas Bellizzi in support of his claim that the plaintiff should have been provided with an alternative means of transporting the beams, like a cart (Bellizzi Aff. at ¶ 19). The expert report does not address the question of elevation-difference between the beam and the plaintiff.

Defendants argue that Labor Law § 240 (1) is not applicable because the beam was not being hoisted at the time. Defendants have a point that there is no evidence of height differential between the beam and plaintiff when both fell. Defendants also submit an expert affidavit that states defendants did not violate Labor Law § 240 (1).

Ultimately, plaintiff was carrying the beam on level ground when he allegedly tripped on debris and the beam fell on him. That fact alone means that plaintiff fails to meet his prima facie burden under Labor Law § 240 (1). Moreover, the lack of the height differential and the fact that plaintiff was carrying the beam is sufficient for the defendants to be awarded summary judgment

to the extent of dismissing plaintiff's Labor Law § 240 (1) claim (*see Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955 [2018] [defendants granted summary judgment on § 240 [1] when plaintiff was carrying heavy beams across level ground and down permanent stairs]). Defendants' motion for summary judgment on plaintiff's Labor Law § 240 (1) claim is therefore granted.

Plaintiff's Labor Law § 200 and Negligence Claims

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "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" (*id.*) In a case where the question arises out of means or manner of the work, "recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*id.*). The plaintiff claims that this is both a dangerous condition case and a means and methods case. Each claim will thus be analyzed in turn.

First, plaintiff claims that this is a dangerous condition case because of both the accumulation of debris in the hallway and the inadequate illumination of the walkway in the subterranean basement. In support of these contentions, the plaintiff points to Mr. Munoz's testimony that the only light that he had while working in the basement came from the open

elevator shaft and that, in that relatively small amount of light, he was able to see debris on the ground.

The defendants claim, and plaintiff does not appear to contend otherwise, that they did not cause the condition to occur. It is clear from the testimony that Trident was the only company that had workers engaged at the situs of the accident. Moreover, Mr. Payton testified that there was no actual notice of the defective condition, and that testimony is uncontroverted. Accordingly, plaintiff can only prevail on this theory of liability if the defendant had constructive notice of the dangerous condition.

To support the claim of constructive notice, plaintiff points to Mr. Payton's testimony that he was aware of the accumulation of garbage at the site due to the work being performed by Trident (Payton EBT at 86). Indeed, Mr. Payton testified that the accumulation of waste was a "daily problem." To rebut this contention, the defendants proffer site-safety reports that indicate that no violations were found. Although these reports do not have sufficient foundation to be considered competent evidence, the respondents may use inadmissible hearsay to resist summary judgment. The defendants contend that if there had been cleanliness violations at the site on the date of the accident, it would have been contained in these reports—as there is no violation, there must not have been any accumulated debris. However, these safety reports do not provide any positive evidence about conditions at the site—they merely confirm the absence of any reported violation at the site. Accordingly, the testimony of the plaintiff that he fell on debris and the testimony of the other witnesses, including defendants' own representative, that there was a pattern of debris being left at the site are sufficient to demonstrate that defendants had constructive notice of the dangerous condition at the site that caused the plaintiff's injury. Defendants are therefore liable under Labor Law § 200. The court need not reach the plaintiff's

additional theory of liability under this section about means and methods.

Plaintiff's § 241 (6) Claim

In order to prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). It is uncontested in this case that the plaintiff was on a job site, was engaged in enumerated qualifying work, and suffered an injury.

To meet the final requisite allegations of his Labor Law § 241 (6) claim, Mr. Munoz alleges violations of Industrial Code §§ 23–1.7 (d) [slipping hazards], 1.7 (e) (1–2) [tripping hazards], 1.8 [personal protective equipment], 1.30 [insufficient illumination], and 2.2(d) [failure to dispose of concrete forms after use]. Defendants seek dismissal of §§ 1.8 [personal protective equipment], 1.30 [insufficient illumination], and 2.2 [disposal of forms after use]. Defendants contend that §§ 23–1.7 (d), 1.8, and 2.2 are inapplicable, and that the evidence shows that §§ 23–1.7 (e) and 1.30 were not violated.³ In their own motion, the defendants move for summary judgment dismissing plaintiff's § 241 (6) action as far as it is predicated upon I.C. § 23–1.8, 1.30 and 2.2. Notably, the plaintiff does not oppose the defendant's motion as to I.C. § 23–1.8; that claim is therefore dismissed without opposition.

The relevant code provisions read as follows:

Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass (I.C. § 23–1.30).

³ There is a question in the defendant's opposition as to whether plaintiff plead a violation of I.C. § 23–2.1 (b). Upon review of plaintiff's papers, it does not appear that the plaintiff plead this section. It is therefore not before this court to make a determination as to whether this subsection of the regulation was violated.

(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 (I.C. § 23-1.7).

(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 (I.C. § 23-1.7).

I.C. § 23-2.2 (d) Stripping. After stripping, forms shall be promptly stockpiled or removed from areas in which persons are required to work or pass. Protruding nails, wire ties and other form accessories not necessary for subsequent work shall be pulled, cut or otherwise made safe.

First, the defendants are correct that the plaintiff does not allege facts implicating I.C. § 23-1.7 (d); the plaintiff provides no evidence of a slippery condition at the worksite.

However, the plaintiff does satisfactorily support his contention that there was a tripping hazard in the hallway where he was carrying the beam in that he testified that he tripped on debris. As noted in the foregoing section analyzing the plaintiff's claim under Labor Law § 200, the general safety reports offered by the defendants are unsatisfactory to rebut plaintiff's affirmative testimony that he fell on debris. The presence of this debris is evidence that debris had accumulated in violation of I.C. § 23-1.7 (e). The plaintiff's Labor Law § 241 (6) claim is therefore granted summary judgment; defendant's motion for summary judgment is denied as to this claim.

On the issue of illumination, Mr. Payton testified that Sigma Electric ("Sigma") was sub-contracted to install temporary lighting in the walkways where Trident was working in the sub-

cellar (Payton EBT at 104–105). However, Mr. Payton also testified that Sigma could not hang lighting until stripping was completed and the plywood was removed; before that, the sub-contractor was responsible for providing stanchion lighting (*id.* at 133). Mr. Munoz testified that on the date of the accident there was “no type of light. You were able to see a little bit” (Munoz EBT at 255). There was only light coming from the elevator shafts (*id.* at 291). He also testified that he was able to see up to approximately twenty feet in front of him (*id.* at 293). With that amount of visibility, irrespective of whether there was a violation of the regulation requiring artificial illumination or not, there is a question of fact as to whether the lack of illumination caused the plaintiff’s accident. Similarly, while there is testimony that stripping occurred in the sub-cellar, there is not dispositive evidence that frames from stripping were the cause of the plaintiff’s accident, but rather questions of fact. Accordingly, I.C. § 23–2.2 (d) does not provide a sufficient basis for the plaintiff’s claim. Both of these considerations are moot, however, in light of the plaintiff’s meritorious claim pursuant to his allegations of a violation of I.C. § 23–1.7 (e).

Conclusion

The plaintiff’s motion (Seq. 002) is granted to the extent of his Labor Law § 200 and Labor Law § 241 (6) claim predicated on a violation of I.C. § 23–1.7 (e); plaintiff’s motion is otherwise denied.

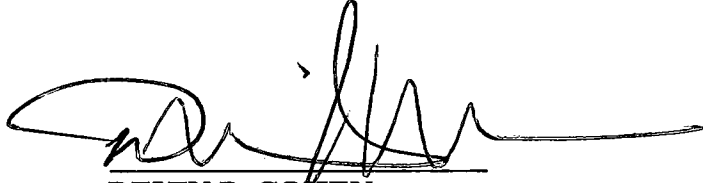
The defendants’ motion (Seq. 003) is granted to the extent of dismissing plaintiff’s Labor Law § 240 (1) claim and his Labor Law § 241 (6) claim as predicated on violations of I.C. § 23–1.8 and 1.7 (d); defendants’ motion is otherwise denied.

This action shall proceed to trial on damages.

This constitutes the decision and order of the court.

April 29, 2022

DATE



DEVIN P. COHEN

Justice of the Supreme Court

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