SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

DAIRUEN JOZUELL CHIRINOS PUERTO,

Plaintiff,

Index No.: 24210/2018E

- against -

523-525 TIFFANY REALTY LLC., and SIMONE DEVELOPMENT COMPANY LLC,

Defendants.

DECISION and ORDER

523-525 TIFFANY REALTY LLC.,

Third-Party Plaintiff,

- against -

ULTIMATECH CAR WASH EQUIPMENT CORP.,

Third-Party Defendant.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether Industrial Code 12 NYCRR §23-1.5(c)(3) is sufficiently specific to support his Labor Law §241(6) claim. If found sufficiently specific, then this court will address the second issue as to whether Plaintiff demonstrated a violation of Industrial Code 12 NYCRR §23-1.5(c)(3), which served as the proximate cause of his accident.

This court holds that Industrial Code 12 NYCRR §23-1.5(c)(3) is sufficiently specific to serve as predicate for a Labor Law §241(6) claim. Furthermore, this court holds that Plaintiff established by uncontroverted evidence that Defendant/Third-Party Plaintiff 523-525 Tiffany

Realty LLC ("Defendant") violated Industrial Code 12 NYCRR §§23-1.5(c)(3) by allowing him to use an unguarded grinder, which proximately caused his injuries.

According to Plaintiff, on the day of his accident he was hired as a helper by Third-Party Defendant, Ultimatech Car Wash Equipment Corp. Plaintiff testified that on the date of his accident his supervisor, Mario Perez, instructed him to go to the second floor to cut an opening in the plywood floor so that a ventilation/exhaust fan could be installed. In order to accomplish his task, he alleges he was given a grinder. He claims that as he held the grinder with both hands and attempted to cut into the plywood floor, the grinder's saw blade unexpectedly kicked back causing him to lose his grip of the grinder. Upon losing his grip, Plaintiff alleges that it caused the grinder's saw blade to come into contract with his left hand, thereby, rendering him injured.

I. Labor Law §241(6)

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. *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

II. Legal Analysis and Conclusion

Plaintiff cites to Industrial Code 12 NYCRR §23-1.5(c)(3) to support his Labor Law §241(6) claim, therefore, he abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.,* 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC,* 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

A. 12 NYCRR §23-1.5(c)(3)

Plaintiff alleges that Defendant violated 12 NYCRR §23-1.5(c)(3), which provides: "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Plaintiff contends that 12 NYCRR §23-1.5(c)(3) is applicable to grinders such as the one provided to him. Moreover, he argues that 12 NYCRR §23-1.5(c)(3) mandates a specific standard of conduct sufficient to impose liability under Labor Law §241(6). Furthermore, he argues that his uncontroverted testimony established that he was provided a grinder that had a saw blade attached with no guard. He further claims his testimony demonstrated that the grinder ordinarily was equipped with a safety guard, but the guard had been intentionally removed by Defendant. In addition, Plaintiff relies upon his expert witness Professional Engineer, Les Winter, who opined that by Defendant failing to provide Plaintiff with a properly guarded grinder they violated 12 NYCRR §23-1.5(c)(3). Further, Mr. Winter opined that had Defendant provided Plaintiff with a properly guarded grinder it would have prevented his accident.

In opposition, Defendant argues although the Appellate Division, First Department, has held in the matter of *Becerra v. Promenade Apts. Inc.,* 126 A.D.3d 557, 6 N.Y.S.3d 42 (1st Dep't 2015) that 12 NYCRR §23-1.5(c)(3) is specific enough to support a Labor Law §241(6) claim,

the Appellate Division, Second Department, in the matter of *Opalinski v. City of NY*, 164 A.D.3d 1354, 84 N.Y.S.3d 499 (2d Dep't 2018) has held that it is not. Thus, Defendant contends that this court should follow the holding in *Opalinski* and find that the subject Industrial Code is too broad to impose liability under Labor Law §241(6).

In addition, Defendant posits that it did not violate 12 NYCRR §23-1.5(c)(3). It takes the position that the grinder was not damaged but rather modified for Defendant's use, therefore, it was not under any obligation to affix a guard or remove the grinder from use. Lastly, Defendant contends that because it did not have any prior notice that the grinder lacked a guard, Plaintiff failed to meet his *prima facie* burden.

This court finds that it is bound by precedent from the Appellate Division, First Department, therefore, it is constrained to follow the holding in *Becerra*. Consequently, this court finds that 12 NYCRR §23-1.5(3) is sufficiently specific to constitute a proper predicate under Labor Law §241(6). Moreover, this court is unpersuaded by Defendant's argument that it did not violate 12 NYCRR §23-1.5(3). Although the grinder was not damaged Defendant had an obligation to ensure the grinder was properly safeguarded regardless if it was "damaged" or not. *See Becerra* 126 A.D. at 557, 6 N.Y.S. at 44.

Lastly, this court rejects Defendant's argument concerning lack of notice. "Since an owner or general contractor's vicarious liability under [Labor Law] section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure … [is] irrelevant to the imposition of Labor Law §241(6) liability." *Gallina v. Mta Capital Constr. Co.,* 193 A.D.3d 414, 146 N.Y.S.3d 244 (1st Dep't 2021); *see also Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998).

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion seeking judgment as to liability on his Labor Law §241(6) claim is granted.

This constitutes the decision and order of the court.

Dated: January 12, 2022

Lucindo Suarez, J.S.C.

Lucindo Suarez Justice