

Goodfellow v Long Is. R.R.

2022 NY Slip Op 32629(U)

August 1, 2022

Supreme Court, New York County

Docket Number: Index No. 160278/2015

Judge: Alexander Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH PART **18**

Justice

-----X

JOSEPH GOODFELLOW, MARY GOODFELLOW,
Plaintiffs,

INDEX NO. 160278/2015

MOTION DATE 03/24/2021

MOTION SEQ. NO. 001

- v -

LONG ISLAND RAILROAD, MTA CAPITAL
CONSTRUCTION COMPANY,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, defendants move for summary judgment dismissing plaintiffs' complaint in its entirety.¹

BACKGROUND

Plaintiffs commenced the instant action seeking damages for personal injuries allegedly sustained on November 26, 2014, while Joseph Goodfellow (hereinafter "plaintiff") worked on a construction site as an employee of non-party Michels Corporation, general contractor for the CM005 East Side Access project pursuant to contract with Metropolitan Transportation Authority (NYSCEF Doc. No. 46, defendants' undisputed facts at ¶ 1).

On the date of the incident Billy McDonald, plaintiff's foreman, instructed plaintiff and another individual to "clean up the [mezzanine] area and sort out the rebar, bring it threw [sic] the passageways and over to the crane to be flew [sic] out" (NYSCEF Doc. No. 41, plaintiff's EBT transcript at 72:11-13). Plaintiff was to clean up the mezzanine area by removing all debris, rebar,

¹ The Court will not address plaintiff's Labor Law § 240 (1) claim, which was withdrawn during oral argument.

framing, concrete, and anything else located in the work area, and to bring certain items to the crane, located about 50 feet from the debris area, for those items to be transported from the upper level to the lower level of the mezzanine area (id. at 72-73). Plaintiff testified he and his partner did not have a time frame in which to complete this task, nor did they have to complete the task in a certain manner, as it was left to their discretion (id. at 74). However, plaintiff and his partner chose to “attack the 11 bar [rebar]” first, as it was in a distinctive pile of debris and was the largest material to move (id. at 80:10-12). Before plaintiff began to clean-up, he scoped the area to determine which part afforded him the clearest passageway to remove the rebar, as there was debris all around (id. at 76). Not long after plaintiff started cleaning up, he fell to his knees after the toe area of his left foot hit a piece of rebar that was sticking out of the passageway (id. at 80-81). According to plaintiff, “[i]t was a clear aisle between the distinct piles of rebar and debris where [he] was able to see the concrete and get good footing” as he tried to move the rebar but tripped and fell (id. at 81:19-21). About 15 minutes later, plaintiff fell again. He “was pulling [rebar] backwards and...tripped over another piece that was sticking out of the rebar... on the outside of the aisles of the passageway” (id. at 91:4-12). At some point later in the evening plaintiff fell a third time as he was dragging debris backwards throughout the area and tripped due to a wire that was embedded in concrete (id. at 100-101). Plaintiff fell a fourth and final time as he was hooking pieces of rebar to 4x4 pallets for the crane to transport. Plaintiff hit the 4x4 pallet with his right foot causing him to fall forward on his knees (id. at 115). Plaintiff testified that as he worked, he tried to clear the debris and create a pathway (NYSCEF Doc. No. 35, plaintiff’s 50-H transcript at 36). But the path would change every time a piece of rebar was removed from the area, as “everything [changed] with each bar you pull out” (NYSCEF Doc. No. 41, plaintiff’s EBT transcript at 98:2-9).

DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The “evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). “In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist” (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion “should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents “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” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-02 [1993]; Everitt v Nozkowski, 285 AD2d 442, 443 [2d Dept 2001]). As with Labor Law § 240 (1), the duty imposed under Section 241 (6) is nondelegable (Ross, 81 NY2d at 502-503).

In support of their motion for summary judgment, defendants argue plaintiff’s claims under § 241 (6) should be dismissed as they are inapplicable and were otherwise not violated. Defendants contend that for § 241 (6) to apply, plaintiff must assert violations of “concrete specifications of the Industrial Code,” as opposed to broad and non-specific regulatory standards (Ross, 81 NY2d

at 495). Defendants further argue 12 NYCRR § 23-1.7 (d) and (e) are inapplicable because plaintiff's accidents were not caused by a slipping hazard, plaintiff's falls did not occur in a passageway, and plaintiff tripped over the very material being used in the performance of his task. Defendants also argue 12 NYCRR § 23-1.7 (f) is inapplicable because plaintiff's alleged falls did not involve a stairway, ramp, or runway.

In opposition, plaintiff claims defendants violated 12 NYCRR § 23-1.7 (d) by failing to provide a safe passageway for plaintiff to work, and that defendants position that the area in which plaintiff worked was not a passageway presents an issue of fact, as plaintiff purports the area was a passageway, which should deny defendants relief for summary judgment. Plaintiff also argues 12 NYCRR § 23 1.7 (e) (2) was violated because defendants failed to keep the passageway clear of all debris and other obstructions that may cause tripping.

12 NYCRR § 23-1.7 (d)

Section 1.7 (d) of Part 23 of the Industrial Code provides as follows:

(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.

The Court finds defendants met their prima facie burden, and plaintiff failed to meet his burden in opposition that section 23-1.7 (d) is applicable to the facts of this case because plaintiff's trip and fall accidents were not the result of slippery conditions within the meaning of the regulation. For § 23-1.7 (d) to apply, there must be a "surface which is 'in a slippery condition'" upon it that presents a risk of injury (see Cooper v State, 72 AD3d 633, 634 [2d Dept 2010], quoting § 23-1.7 [d]; see also Ventura v Lancet Arch, Inc., 5 AD3d 1053, 1054 [4th Dept 2004] [plywood on which the mixer was situated constituted a "platform" and the spilled wet mortar

could be a “foreign substance which may cause slippery footing”]; Salinas v Barney Skanska Const. Co., 2 AD3d 619, 622 [2d Dept 2003] [finding the section “ inapplicable because the demolition debris upon which the plaintiff slipped was not the type of foreign substance contemplated by [that] provision”]; Hammond v Int'l Paper Co., 161 AD2d 914, 915 [3rd Dept 1990] [Section 23-1.7 (d) requires employers to remove, sand, or cover any ice, snow, grease, water or other foreign substance which might cause a floor, passageway or walkway to become slippery]). Plaintiff’s deposition testimony does not reflect that he slipped and fell due to a slippery substance. Plaintiff testified that he tripped and fell, and there was no mention of a slippery condition or surface that presented the risk of slipping and falling.

In response, plaintiff asserts defendants violated 23-1.7 (d) by “failing to provide a safe passageway as plaintiff’s tripping accident occurred in a passageway” (NYSCEF Doc No. 58, plaintiff’s memorandum of law in opposition at 9). Plaintiff’s argument in opposition fails to rebut the argument raised by defendant, as plaintiff’s arguments address subset (e) of the regulation, instead of subset (d). As such, plaintiff’s claim under 23-1.7 (d) is dismissed as plaintiff fails to show that issues of fact exist.

12 NYCRR 23-1.7 (e) (1)

Section 1.7 (e) of Part 23 of the Industrial Code provides as follows:

(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.

“Although the regulations do not define the term ‘passageway,’ courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (Quigley v Port Auth. of New York, 168 AD3d 65, 67 [1st Dept 2018], quoting Steiger v LPCiminelli, Inc., 104 AD3d 1246, 1250 [4th Dept 2013] [internal quotation marks

omitted] [alteration omitted]). Section 23-1.7 (e) (1) requires passageways to be kept clear of debris or other obstructions which may cause tripping; however, plaintiff's testimony establishes he was working in the mezzanine area which was equivalent to an open area and not a passageway. Therefore, defendants contend the 23-1.7 (e) (1) regulation does not apply to this case.

Plaintiff argues an issue of fact exists and defendants' motion for summary judgment should be denied because plaintiff testified he fell due a tripping hazard in a passageway. To the contrary, plaintiff's assertion that he fell due to a tripping hazard in the passageway does not present an issue of fact because the area in which he suffered his injuries does not constitute a passageway. When asked to describe the layout of the area where plaintiff was working on the date of his accident, plaintiff testified that it was an open, square like area without a walkway or pathway used to traverse between different areas.

Q: And this area you were working, that you were assigning [sic] to work in, how big is that area?

A: About 50-foot radius.

Q: So the room or the location where you were working it was, like, a 50-foot square area; correct?

A: Correct.

Q: Did that 50-foot area include the location where you were dropping off?

A: Yes.

Q: Was it an open layout between you and the crane?

A: Yes. (NYSCEF Doc. No. 41, plaintiff's EBT transcript at 80-82).

Plaintiff's testimony establishes the passageway plaintiff refers to is not the type of passageway recognized under 23-1.7 (e) (1) because the work area lacked a walkway or pathway permitting one to traverse to a separate area. Without such walkway or pathway the work area

cannot be regarded as a passageway, and contrary to plaintiff's position, this is not an issue for a jury to decide (see Bazdaric v Almah Partners LLC, 203 AD3d 643 [1st Dept 2022] [Section 23-1.7 (e) (1) is not applicable because the escalator was not serving as a "passageway" but rather was a work area]; Lech v Castle Vil. Owners Corp., 79 AD3d 819, 820 [2d Dept 2010] [the sidewalk bridge was not a "passageway" within the meaning of 12 NYCRR 23-1.7(e) (1), and was therefore not applicable]; Schroth v New York State Thruway Auth., 300 AD2d 1044, 1045 [4th Dept 2002] [the suspended platform beneath the bridge on which claimant was working was not a passageway]; Alvia v Teman Elec. Contracting, Inc., 287 AD2d 421, 423 [2d Dept 2001] ["the evidence did not establish that [12 NYCRR 23-1.7 (e) (1) and (2)] are applicable to the facts of this case" as plaintiff "was working on an open floor, not in a passageway"]). Given that plaintiff's work area was an open area that included the debris he had to clean up, as well as the location of where he was dropping off the rebar and other materials, plaintiff has failed to raise a question of fact as to the applicability of 23-1.7 (e) (1).

12 NYCRR 23-1.7 (e) (2)

Section 1.7 (e) of Part 23 of the Industrial Code provides as follows:

(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.

The section, "requires that certain 'working areas' must be kept free from enumerated tripping hazards, 'insofar as may be consistent with the work being performed,' does not apply where, as here, 'the object on which plaintiff tripped ... was an integral part of the work he was performing'" (Lech at 820-21, quoting Alvia, 287 AD2d at 423 [internal quotations omitted]). Plaintiff testified at the time of his accident his work responsibilities were to "clean up the area" (plaintiff's EBT transcript at 75:11-13). This included removing the rebar and all the other things

out that were in the area (*id.* at 75). Defendants contend that Section 23-1.7 (e) (2) is not applicable because the objects that caused plaintiff to trip and fall were the same items he was tasked with removing.² Therefore, these items were consistent with the work being performed.

In opposition, plaintiff asserts defendants should not be allowed to rely on the argument that 23-1.7 (e) (2) does not apply because plaintiff was hauling pieces of rebar and happened to trip and fall due to pieces of rebar and other materials in the debris. For allowing defendants to do so neglects the duty to provide a clean and safe work area.

Plaintiff's duty was to clean up the mezzanine area by removing all the material within, and to bring certain items to the crane for removal. Plaintiff testified the area "was a mess [] [t]he whole place was completely surrounded with piles everywhere of different types of rebar, garbage (NYSCEF Doc. No. 35, plaintiff's 50-H transcript at 27:14-17)]. According to plaintiff there was no organization to this work area (*id.* at 29). Nevertheless, § 23-1.7 (e) (2) is not applicable because it was plaintiff's job to clear this area of all the material, including the material that caused him to trip and fall (*id.* at 24). The portion of § 23-1.7 (e) (2) that states "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" does not apply because it was plaintiff's job to remove these materials from the work area. And that portion of § 23-1.7 (e) (2) that states "insofar as may be consistent with the work being performed" becomes the controlling factor (see Smith v New York City Hous. Auth., 71 AD3d 985, 987 [2d Dept 2010] [NYCHA demonstrated the materials that the injured plaintiff alleges he tripped over were integral to the work being performed]; Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389, 390 [1st Dept 2007] ["Nor is 12

² To the extent plaintiff's claim is premised upon the trip and fall over the earth wire, which was embedded in the concrete, the Court would also find the regulation inapplicable, as the wire would also be considered as "an integral part of the floor on which he was working" (see O'Sullivan v IDI Constr. Co., Inc., 28 AD3d 225, 226 [1st Dept 2006]).

NYCRR § 23-1.7(e)(2) applicable, because the debris covering the scaffold resulted directly from the masonry work plaintiff and his co-worker were performing, and thus constituted an integral part of that work”]; Harvey v Morse Diesel Int'l, Inc., 299 AD2d 451, 453 [2d Dept 2002] [finding the regulation inapplicable where plaintiff “tripped over a six-inch piece of cable” which was of the same “type with which she was working”]; Sharrow v Dick Corp., 233 AD2d 858, 860 [4th Dept 1996] [12 NYCRR § 23-1.7 (e)(2) does not apply because object on which plaintiff tripped was an integral part of the work he was performing]).

To further support his argument that 23-1.7 (e) (2) is applicable, plaintiff argues his case is analogous to that of the plaintiff in Rodriguez v DRLD Dev., Corp., in which the First Department determined there was an issue of fact as to whether the defendant violated Industrial Code 23-1.7 (e) (2) (109 AD3d 409, 410 [1st Dept 2013]). However, there is a distinct difference between this case and Rodriguez. The plaintiff in Rodriguez “was assigned to tape and polish installed sheetrock walls on the first floor of a construction project[], [plaintiff] tripped on a metal cable, dislodging a pile of sheetrock boards [] which...[were] not in use. Plaintiff attempted to stop boards from falling... but [] could not support their weight, and suffered injuries” (id. at 409). The Court held there were issues of fact as to whether the cable plaintiff tripped over was an inherent part of the construction of the building or debris. Within this case, there is no such contention because the items that caused plaintiff to trip and fall were the same items he was instructed to remove. Namely, the rebar and pallet were inherent to his duties at the construction site. Furthermore, the plaintiff in Rodriguez had a duty to install sheetrock. The metal cable she tripped over may not have necessarily been an integral part of the work she was performing. For these reasons the Court finds that 23-1.7 (e) (2) is not applicable.

12 NYCRR 23-1.7 (f)

Section 1.7 (f) of Part 23 of the Industrial Code provides as follows:

Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

There is no indication that 23-1.7 (f) is implicated within this case. Plaintiff makes no reference to stairways, ramps, or runways within his deposition testimony. Furthermore, plaintiff does not oppose defendants' motion seeking dismissal of this claim.

Therefore, this Court finds that the Labor Law § 241 (6) claim as none of the cited regulations are applicable.

Labor Law § 200 & Common Law Claims

Defendants move to dismiss plaintiff's Labor Law § 200 and common law negligence claims arguing they did not supervise or control plaintiff's work, and the accident was not caused by any allegedly dangerous condition on the worksite. Plaintiff claims in opposition the defendants were not only owners but exercised control under Labor Law § 200, which prevents defendants claim for summary judgment as there are issues of fact regarding the level of control and supervision.

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981]; see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352-54 [1998]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin, 54 NY2d at 317; see Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]).

“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.’ Furthermore, 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” (Lundy v Austein, 170 AD3d 703, 705 [2d Dept 2019]).

The Court finds that defendants met their initial burden by relying on, inter alia, Christen’s deposition testimony to prove they did not supervise or control plaintiff’s work. In opposition, plaintiff fails to demonstrate an issue of fact with respect to defendants’ involvement with the work plaintiff performed. The materials plaintiff moved are not by themselves dangerous or defective, therefore, this Court will interpret the Labor Law § 200 claim under the methods or materials of work prong, in which a property owner’s liability hinges on the ability to supervise the work.

The evidence in the record shows the contractor, non-party Michel’s Corporation, who was plaintiff’s employer, had a duty to make sure the work being performed by their employees was carried out in accordance with the safe work plan Michel’s provided (NYSCEF Doc. No. 43, Christen EBT transcript at 33). Defendants did not have a duty to make sure the safety protocols were adhered to, as that was the contractor’s duty (id. at 35). Though defendants hired a team that would visit the job site to make sure the contractor was conforming with their safety requirements, this does not equate to supervision, or control of the methods or materials of work performed (see id. at 33). “[G]eneral supervisory duties...in the absence of actual authority to control the activity bringing about the injury, will not suffice to hold a [party] liable” (Reilly v Newireen Assocs., 303 AD2d 214, 221 [1st Dept 2003]).

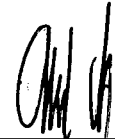
Moreover, as plaintiff testified, he received all his assignments from Billy McDonald, his foreman and immediate supervisor on the job site (plaintiff’s EBT transcript at 74). Plaintiff was never instructed by any of defendants’ employees regarding the work he performed. “A defendant

has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (Southerton v City of New York, 203 AD3d 977 [2d Dept 2022]). Since defendants did not have a duty as to how plaintiff completed his work, beyond general supervisory duties, plaintiff’s claims under Labor Law § 200 and common law negligence are dismissed.

CONCLUSION

Accordingly, it is hereby ORDERED that the motion is granted and the complaint is dismissed.

This constitutes the decision and order of the Court.



8/1/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE