

Piedra v 111 W. 57th Prop. Owner LLC

2022 NY Slip Op 33194(U)

September 21, 2022

Supreme Court, New York County

Docket Number: Index No. 159441/2017

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III PART 32
Acting Justice

INDEX NO. 159441/2017
MOTION DATE
MOTION SEQ. NO. 003
JOOHONNY PIEDRA, Plaintiff,

- v -

111 WEST 57TH PROPERTY OWNER LLC, JDS DEVELOPMENT LLC, PROPERTY MARKETS GROUP, INC., JDS CONSTRUCTION GROUP LLC, ELICC AMERICAS CORPORATION, 111 CONSTRUCTION MANAGER, LLC

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 79

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

In this action Plaintiff, Joohonny Piedra, seeks to recover for injuries sustained on September 13, 2017, when he allegedly slipped on wood debris and fell down a staircase. This incident occurred at 111 West 57th Street, New York, New York which was owned by Defendant 111 West 57th Property Owners LLC ("Property Owners"). Defendant 111 Construction Manager LLC ("Construction Manager") entered into an agreement with Property Owner to manage a construction project at the subject premises. Defendant JDS Construction Group LLC ("JDS Construction") was also responsible for construction management of the project. Construction Manager retained non-party Park Side Construction Builders Corp. ("Park Side") pursuant to a written agreement as a trade contractor on the project. On the day of the incident, Plaintiff was employed as a carpenter by Park Side.

Plaintiff commenced this action pleading causes of action of common-law negligence as well as violation of Labor Law §§ 200, 240 [1] and 241 [6]. Defendants Property Owner, JDS Development LLC, Property Markets Group, Inc., JDS Construction and ELICC Americas Corporation answered collectively and asserted twelve affirmative defenses.

Now, Plaintiff moves for partial summary judgment pursuant to CPLR §3212 against Defendants Property Owner LLC, JDS Construction Group and Construction Manager pursuant to New York Labor Law 241 [6] and setting the matter down for an assessment of damages at the time of trial. Defendants oppose the motion.

Plaintiff's Deposition

Plaintiff testified that he was hired by Park Side as carpenter to work at the project site. His duties included removing screws from platforms. On the day of the incident, Plaintiff was working on the 29th floor and was engaged in cutting wood pieces and assembling frames to sustain metal mechanical platforms. Plaintiff testified that there was only one permanent staircase to access his work areas, and he would use it every day to arrive and depart the premises. Plaintiff described the stairs as metal steps with wood in the space on each tread. As the stairway was constructed, concrete would be poured onto the space where the wood was located. He did not know which company performed the concrete work. He stated that the incident occurred as he was leaving work, passing between the 27th floor to the 26th, as he did every day, to change his clothing and depart the premises. Plaintiff stated that while descending at that location and holding the handrail with his right hand, his right foot slipped on a piece of wood debris ["a two by four"] causing him to fall approximately six to seven steps. Plaintiff averred that after he fell, he felt something on his foot, which he observed to be a piece of two by four wood that was about six to eight inches long. Plaintiff testified that there was wood debris and little garbage on each of the steps and estimated he saw between one to five pieces of wood on the stairs. In photographs that were marked at the deposition, Plaintiff identified the accident location as well as the piece of wood that allegedly caused him to fall.

He stated that on the day of the incident, he did not notice any pieces of wood or other debris on the staircase prior to the accident. Plaintiff testified there was a safety supervisor at the job site but did not know if there were any laborers or trades employed or in charge of cleaning up debris. However, Plaintiff remembered seeing personnel cleaning the debris from the floors where he and others were working. When questioned about JDS Construction Group, Plaintiff testified that when he was working with Parkside, "the people from JDS, ... they would give us instructions". Plaintiff stated that he spoke to Charles from JDS about the building and the work that being completed.

Charles Rose- JDS Construction Group

Charles Rose ("Rose"), the superintendent for JDS Construction Group, testified he was assigned to the project site at 111 West 57th Street at the time of Plaintiff's accident. Rose was not involved in any contract negotiations as a superintendent during this time. Rose averred that there was a project director, project manager, superintendent, assistant superintendent and laborers on site. Rose's duties as a superintendent included overseeing construction operations and multiple contractors on site, erection of the superstructure, operation of the crane and all the different construction tasks. Rose stated that JDS Construction provided laborers for the site whose duties included general housekeeping which he described as including sweeping and bringing out garbage. In addition to the work areas, the laborers were also responsible for sweeping the staircases. Rose also stated there was a foreman for the laborers, but he did not recall whether the foreman was employed by JDS Construction Group. However, Rose stated that he interacted with the foreman including instructing him what work needed to be done and calling him if an area required cleaning. Rose testified that he did not know whether debris or wood was removed from the top of the steps of the staircase at the date and time of the accident. However, he did acknowledge that the laborers would be required to remove the debris they saw on the steps.

Greg Gleicher- JDS Construction Group

Greg Gleicher ("Gleicher"), a senior director of Acquisitions and Development for JDS Construction, testified that Property Owner was the owner of 111 West 57th Street in 2017. He stated that Defendant Construction Manager were the contractors hired to manage the project. Gleicher testified that JDS Development LLC ("JDS Development") is an affiliate entity with JDS Construction

Group, but he could not identify any employees, members, owners, or principals of JDS Development LLC. Gleicher indicated that JDS Construction and JDS Development do not hold any membership interest in Property Owner. He was familiar with Defendant ELICC Americas Corp (“ELICC”) involvement in the projects at 111 West 57th Street which he stated to be as curtain wall contractors that dealt with the exterior façade of the building. Gleicher also testified that JDS Construction was the construction management company involved in the project in the building in 2017. He averred Parkside was a subcontractor on the project and its work included superstructure and concrete work. Gleicher stated that Michael Stern (“Stern”) is the head and construction manager of JDS Construction and holds an ownership interest in the company. Gleicher testified Stern is also part owner of the property located at 111 West 57th Street and holds an ownership interest in and is a signatory for Construction Manager.

Gleicher testified regarding the construction management agreement between Property Owner and Construction Manager. He acknowledged that JDS Development is referenced with regards to receiving mailings at 104 Fifth Avenue, New York, New York. Gleicher admitted that Property Markets Group, Inc. was also a construction manager at the project. Regarding a safety program handbook marked at the deposition, Gleicher could not explain why JDS Development’s logo appeared thereon and then stated he believed no such entity existed. He averred he was “not sure who put together this exact safety document” and professed ignorance to the statement contained in the handbook: “Section one is meant 3 to identify general JDS Development Group’s 4 policy and site requirements”. He was also unaware if the handbook was issued to Parkside. He testified that JDS Construction had employees on the site during the construction operations, including John Sekulski and Charles Rose, and that there were onsite laborers at the project site responsible for cleaning. However, he could not confirm whether those laborers were employed by JDS Construction.

Documentary Evidence

Property Owner and Construction Manager entered a contract which memorialized its retention of Construction Manager to perform certain pre-construction management services on the site located at 111 West 57TH Street New York, NY. The agreement stated that “Construction Manager can use trade contractors retained by Construction Manager...to perform all the required work, which is...required by the contract documents, and includes all labor, materials, tools, equipment, temporary utilities, supervision and management necessary to complete the construction of the Project in accordance with the Contract Documents.” That agreement also provided as follows:

- 3.2 Trade Contracting. With the exception of general conditions, protections, cleaning, rubbish removal and other portions of the Work customarily performed by Construction Manager’s own forces, the Work shall be performed, and materials and equipment supplied under contracts with trade contractors, suppliers or vendors.
- 3.4 Construction Manager’s Construction Services.
- [b] supervise the performance of the Work by Trade Contractors and coordinate and schedule the work of all Trade Contractors.
 - [d] perform general condition, cleaning and similar services normally performed by Construction Manager.

Also produced was the handbook about which Gleicher testified. It is emblazoned with multiple logos for JDS Development, contains over one-hundred references to JDS Development Group and is titled "JDS DEVELOPMENT SAFETY PROGRAM AND HANDBOOK". It contains the address of the project site and states it was prepared by "SAFETY and QUALITY PLUS". In the foreword, it proclaims the document is "meant to serve as a guide to the implementation of safety procedures and administration for the project". In Part 2, it provides that project safety manager would be designated by JDS Development Group. Additionally, the handbook provides:

2.3 General Requirements for Safety at Construction Sites

- All stairwells must have standard handrails and be illuminated.

House keeping

- All areas used by the public and workers shall be maintained free from ice, Snow, grease, debris, equipment, materials, projections, tools or other items, substance or conditions that may constitute a slipping, tripping or other hazard. [Throughout day]
- Floors, roof and stairs shall be clean of excess debris.

3.23 Housekeeping Tips

3. Movement-Keep Traffic Lanes and work areas open for safe movement.
 - Always keep ramps, ladders, runways, stairways, scaffolds, and all paths of travel clear.

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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of triable material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

As to the branch of Plaintiff's motion for summary judgment on his claim under Labor Law §241[6], that section requires that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). The duty imposed under Labor Law §241[6] upon owners and contractors is nondelegable and exists regardless of their control and supervision of the job site (*see Rizzuto v L.A. Wenger Contracting Co., Inc., supra*). In support of the

motion, Plaintiff was required to establish *prima facie* proof of each element of this claim (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941 [2d Dept 2019]; *see also Davis v Commack Hotel*, 174 AD3d 501, 502 [2d Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]).

Here, it is undisputed that Property Owner the owner of the premises where the accident occurred. Plaintiff claims both JDS Construction and Construction Manager were “contractors” on the project within the meaning of Labor Law §241[6]. Defendants do not dispute the applicability of the statute to Property Owner and Construction Manager. However, they claim JDS Construction cannot be liable as it was a subcontractor without authority to control the work.

“Labor Law § 241 (6) does not automatically apply to all subcontractors on a site or in the ‘chain of command’” (*Vargas v Peter Scalmandre & Sons, Inc.*, 105 AD3d 454, 455 [1st Dept 2013], *citing Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). “Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control, either over the plaintiff, the specific work area involved or the work that gave rise to the injury” (*id* at 455). Additionally, a contractor “may nonetheless become responsible if [they have] been delegated the authority and duties of a general contractor, or if [they function] as an agent of the owner of the premises” (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Johnsen v City of New York*, 149 AD3d 822 [2d Dept 2017]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a Plaintiff is injured (*see Labor Law* §§ 200, 241[6]; *Russin v Picciano & Son*, 54 NY2d 311, 318 [1981]). “The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right” (*Santos v Condo 124 LLC.*, 161 AD3d 650, 653 [1st Dept 2018]; *see also Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 434 [2015]).

Here, Plaintiff established with the deposition testimony of Rose, that JDS Construction was a statutory contractor within the meaning of the Labor Law. As summarized in Plaintiff’s statement of material facts, Rose’s role was “to oversee construction operations and the contractors on site including their construction tasks”, that the laborers responsible for cleaning the stairways were hired by JDS Construction and that Rose instructed the laborers’ foreman about daily tasks, which included sweeping. Although Defendants provided a counterstatement of material facts, it did not challenge any of these allegations (*see Uniform Rules for Trial Courts* §202.8-g[e]). Since JDS Construction admitted it oversaw all construction, was responsible for cleaning the area where Plaintiff’s accident occurred and provided the workers to accomplish same, it was an agent of the owner and/or contractor (*see Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]; *Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 413 [1st Dept 2019]; *see also Herrera v Keny Ave. Prop. III LLC*, 203 AD3d 512 [1st Dept 2022]).

To establish liability on a Labor Law §241[6], a claimant must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable to the situation (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Each section of the Industrial Code relied upon by a claimant must be a “concrete specification” “mandating a distinct standard of conduct” and “not merely a restatement of common-law principles” (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-*

Elec. Co., supra; see also *Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (see *Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a claimant is not required to demonstrate freedom from comparative fault on a motion for summary judgment (see *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, supra; see also *Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

As cited in the supplemental bill of particulars, Plaintiff relies on alleged violations of 12 NYCRR §23-1.7[d] and [e]. Both are sufficiently specific to be actionable (see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, supra; *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]).

Industrial Code section 23-1.7[d], titled “Slipping Hazards” 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 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 stairway where Plaintiff fell was a “passageway” within the meaning of the section as it was the only means of access to his work area (see *Tolk v 11 W. 42 Realty Invs., L.L.C.*, 201 AD3d 491, 492 [1st Dept 2022]; *Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 643 [1st Dept 2013]). However, the wood and other debris described by Plaintiff does not constitute a “slippery condition” within the meaning of this section (see *Cruz v Metro. Tr. Auth.*, 193 AD3d 639 [1st Dept 2021]; *D’Acunti v. N.Y. City Sch. Constr. Auth.*, 300 AD2d 107 [1st Dept 2002]; see also *Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458 [2d Dept 2017]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]).

Industrial Code section 23-1.7[e], titled “Tripping and other hazards” provides that:

- [1] Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed covered.
- [2] Working areas. The parts of floors, platforms, and similar areas where persons 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.

Like the previous section, Industrial Code §23-1.7[e][2] is applicable as Plaintiff demonstrated that the stairway qualified as under the term “passageways” as it was the sole access to his work area (see *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]; see also *Harasim v Eljin Constr. of N.Y., Inc.*, supra). Contrary to Defendants’ assertion, “[t]he fact that plaintiff slipped, rather than tripped, on the piece of [wood] does not render 12 NYCRR 23-1.7 (e) inapplicable” (*Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 459 [2d Dept 2017]; see also *Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]). Too, the piece of wood at issue constitutes “debris” under the statute (see *Rudnitsky v Macy’s Real Estate, LLC*, 189 AD3d 490, 491 [1st Dept 2020])[Plaintiff “tripped over a two-by-four piece of lumber wrapped in orange construction netting at the top of a staircase”). As such, Plaintiff demonstrated entitlement to partial summary judgment on his Labor Law §241[6] claim predicated on a violation of Industrial Code §23-1.7[e][2] (see *Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405 [1st Dept 2017]; *Fitzgerald v Marriott Intl., Inc.*, supra).

In opposition, Defendant did not plead in its answer or raise in its opposition to the motion an “integral-to-the-work” defense that the wood debris Plaintiff asserts caused his fall was a residual effect of the construction work being performed (see *Krzyzanowski v City of New York*, 179 AD3d 479, 480 [1st Dept 2020]; cf. *Davis v. Trustees of Columbia Univ. in the City of N.Y.*, 199 AD3d 481 [1st Dept 2021]). Indeed, Plaintiff was not in his work area or engaged in his job when the accident occurred. Defendant’s argument that the alleged stairway hazard was open and obvious is unavailing as they “would not therefore be relieved of such statutory . . . obligations as they otherwise had to maintain the workplace premises in reasonably safe condition” (see *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]).

To the extent Plaintiff’s motion seeks a finding that he was without comparative fault, that branch of the motion is denied as Plaintiff’s own deposition testimony raises issues of fact as to “whether the condition was readily observable, which bears upon the issue of the plaintiff’s comparative negligence” (*Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 719 [2d Dept 2020]).

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for partial summary judgment on the Labor Law § 241[6] claim is granted only to the extent it is based upon Industrial Code §23-1.7[e][2] but is denied as to the other Industrial Code sections.

9/21/2022

DATE

F. A. Kahn III

FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

HON. FRANCIS A. KAHN III
J.S.C.
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: