Castaldo v F.J. Sciame Constr. Co., Inc.
2022 NY Slip Op 33474(U)
October 12, 2022
Supreme Court, New York County
Docket Number: Index No. 158417-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

DOMENICO CASTALDO et al.

INDEX NO. 158417-2018

MOT. DATE

- v -

MOT. SEQ. NO. 003

F.J. SCIAME CONSTRUCTION CO., INC. et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s).______
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s).______
Replying Affidavits ECFS Doc. No(s).______

This is a personal injury action arising from a trip and fall due to a loose hose at a construction project. Defendants F.J. Sciame Construction Co. Inc. and Sciame Construction LLC (collectively "Sciame" and sometimes "defendants") move for summary judgment dismissing plaintiffs' complaint. Plaintiffs oppose parts of the motion but have withdrawn the Labor Law § 240[1] claim and do not oppose Sciame's motion as to the Labor Law § 241[6] claim predicated upon certain violations of the Industrial Code. Plaintiffs also cross-move for summary judgment on the issue of liability against defendants on their Labor Law § 241[6] predicated upon Industrial Code §§ 12-1.7[e][1], 12-1.7[e][2], 23-1.7[f] and 23-2.1[a] as well as the Labor Law § 200/common law negligence claim. Sciame opposes the cross-motion. Defendant Tishman Construction Corporation has not appeared in this action. Meanwhile, Sciame has recently filed a third-party action against Five Star Electric Corp. ("Five Star").

Issue has been joined as to plaintiffs and Sciame and the motion was timely brought after note of issue was filed. As for the cross-motion, it was brought more the 120 days after note of issue was filed. Therefore, it is untimely. However, since plaintiffs' arguments asserted in the cross-motion relate to Sciame's timely motion, the court will consider the untimely cross-motion. Therefore, summary judgment relief is available to each side.

At the outset, plaintiffs' Labor Law § 240[1] is withdrawn and plaintiffs have not opposed Sciame's motion for summary judgment on the Labor Law § 241[6] claim predicated upon Industrial Code §§ 23-1.11, 23-1.22, 23-1.23, 23-1.24, 23-1.25, 1.26, 23-1.27, 23-1.28, 23-1.30, 23-2.2, 23-2.3, 23-4, 23-5 and 23-6, and Article 1926 of OSHA. Therefore, these claims are severed and dismissed. The relevant facts are as follows.

The construction project at which plaintiff was injured was located at 285 Jay Street, Brooklyn, New York. The premises at which the project was taking place was owned by non-party City University of

Dated: 10. 12. 22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

New York ("CUNY"), which in turn, through the City University Construction Fund, contracted with Sciame to act as construction manager at the project.

Plaintiff Domenico Castaldo worked at the project as an apprentice union electrician for Fire Star. At his deposition, plaintiff testified that his accident occurred as he was pushing a four-post dolly filled with materials up a ramp when he tripped "on a protruding hose." The ramp, which was 7-12 feet wide[i] and had an incline of approximately 20-30 degrees, was the only ramp utilized to bring in deliveries from the ground level to the first floor of the project. Plaintiff claims that he complained to his foreman about the hose on the ramp during the first week he was at the project. According to plaintiff, the hose "was always there coiled up on one side and ending on the other side, but there was no purpose for it. I never seen it used." Before the accident, plaintiff did not observe any debris on the ramp. After he tripped and fell, plaintiff testified that he "noticed it [the hose] was out protruding about two feet."

An incident report was prepared by Michael Felipe, a foreman, in connection with the accident. The report provides in pertinent part as follows:

> What was employee doing when injured?
>
> Taking in delivery – pushing a dolly full of material/conduit down a ramp.
>
> How did injury occur?
>
> He tripped over a water hose laying on the floor on the ramp.
>
> Describe in full detail how the accident occurred...
>
> Dom claims that he was taking in a delivery and pushing a 4 post dolly full of material and conduit up the entrance ramp on the 1st fl when he tripped on a water hose laying on the floor causing him to fall forward/twisting and landing on the front right side of his body causing pain to his back/neck/rt arm/shoulder. Rt leg.

Sciame argues that "it is undisputed from Plaintiff's testimony that he had a clear path and visibility to wheel the dolly up the ramp; sufficient room between the stored materials against either side of the ramp (which is self-evident by the fact that he had just wheeled the same dolly down the same ramp to get the materials he was wheeling back up the ramp); was aware the stored hose had been coiled in the same location on the ramp for weeks; and, that the ramp was not defective in any way." Meanwhile, plaintiff maintains that he is entitled to summary judgment as the hose was clearly debris since it had no purpose and was protruding onto the ramp and that defendants were aware the hose served no purpose and was a tripping hazard that remained on the walkway/ramp.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

Industrial Code § 12-1.7[e], entitled "Protection from general hazards", states as follows:

> (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.

The court agrees with Sciame that the hose does not qualify as debris within the meaning of Section 12-1.7[e]. That the hose was not connected to a water source or that it even had "no purpose" according to plaintiff does not make it debris such that it should have been removed. Indeed, plaintiff plainly testified that the hose was typically coiled and stored along the ramp before his accident. Relatedly, assuming the hose protruded out onto the ramp as plaintiff pushed the dolly before his accident, instead of being neatly coiled and stored as plaintiff had previously observed for weeks before the accident, this fact does not transform the hose into debris within the ordinary meaning of the Industrial Code. On this record, Section 12-1.7[e][1] does not apply to plaintiff's accident. Accordingly, Sciame's motion as to this provision is granted.

As for Section 12-1.7[e][2], plaintiffs' cross-motion is granted. The undisputed facts are that plaintiff tripped and fell on a hose that was protruding onto the ramp. As such, plaintiff has established *prima facie* that the ramp was not kept free from materials in a manner consistent with the work being performed. In turn, Sciame has failed to raise a triable issue of fact. Its counsel's unsubstantiated assertion that the "ramp provided ample room for workers, equipment and/or materials to work freely and unobstructed" is not supported by the record. Nor did plaintiff testify that the hose was "neatly" colied against the edge of the ramp when his accident occurred. In light of this result, Sciame's motion as to this provision is denied.

Industrial Code § 23-1.7[f] states in pertinent part as follows:

> (f) 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.

The court finds that plaintiff has failed to establish a violation of this provision, since there was no defect or dangerous condition with respect to the ramp which caused plaintiff's accident. Accordingly, Sciame's motion as to Section 23-1.7[f] is granted.

Finally, Industrial Code § 23-2.1[a], entitled "Maintenance and housekeeping", provides in pertinent part as follows:

> (a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Plaintiffs' cross-motion as to Section 23-2.1[a] is also granted. While Sciame denies that the ramp was a passageway, the court disagrees. Sciame's argument on this point is premised upon its mistaken belief that plaintiff testified the ramp was 70 feet wide. Otherwise, plaintiff's undisputed testimony that the hose protruded onto the ramp is sufficient to establish a violation of Section 23-2.1[a]. Accordingly, defendants' motion as to this provision is also denied.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Plaintiff's accident occurred due to a dangerous condition at the project, specifically a loose, protruding hose along a ramp. While Sciame has certainly failed to establish a lack of notice as a matter of law through admissible evidence in its motion-in-chief sufficient to warrant summary judgment dismissing this claim, plaintiff has also failed to demonstrate that Sciame should be charged with constructive notice of the condition as a matter of law. Accordingly, both the motion and cross-motion as to Section 200 are denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Sciame's motion is granted to the extent that the Labor Law § 240[1] claim as well as the Labor Law § 241[6] claim predicated upon Industrial Code §§ 12-1.7[e][1], 23-1.7[f], 23-1.11, 23-1.22, 23-1.23, 23-1.24, 23-1.25, 1.26, 23-1.27, 23-1.28, 23-1.30, 23-2.2, 23-2.3, 23-4, 23-5 and 23-6, and Article 1926 of OSHA are severed and dismissed; and it is further

ORDERED that Sciame's motion is otherwise denied; and it is further

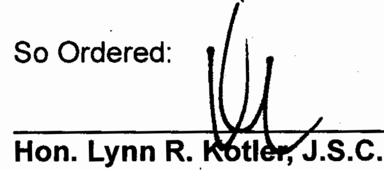
ORDERED that plaintiffs' cross-motion is granted to the extent that plaintiff is entitled to summary judgment on the issue of Sciame's liability for violation of Labor Law §241[6] predicated upon Industrial Code §§ 12-1.7[e][2] and 23-2.1[a]; and it is further

ORDERED that the cross-motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/12/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

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[i] There is back and forth between the parties about an apparent discrepancy in the court reporter's transcript of plaintiff's deposition regarding the width of the ramp and whether plaintiff tesitifed that it was 70 feet wide or 7-8 feet wide. The court reporter states in an affidavit that the original transcript stating 70 feet wide was a typographical error and the correct transcript should read 7-8 feet wide. Sciame argues that the court should not consider the reporter's affidavit because its counsel has tried to contact the reporter and Sciame will otherwise be prejudiced by the court's consideration of the affidavit. Meanwhile, plaintiffs' counsel points out that defendants hired the court reporter and that otherwise there is no indication that the ramp was 70 feet wide on this record. The court will consider the affidavit as it was apparently made to correct what is clearly a typographical error.