Gray v Tishman Constr. Corp.
2022 NY Slip Op 34082(U)
December 5, 2022
Supreme Court, New York County
Docket Number: Index No. 157595/2020
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** ***Justice*** **PART** **57TR**

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KEITH GRAY,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, T-C 425 PARK AVENUE, LLC,425 PARK AVE GROUND OWNER LLC

Defendants.

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INDEX NO. 157595/2020

MOTION DATE 11/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This personal action arises out of an accident that occurred October 2, 2019, when plaintiff alleges that he hyperextended his left knee when his left foot became stuck under a piece of silver pipe located on the floor of a construction project located at 425 Park Avenue, New York, New York (Subject Premises) while he was pushing a container cart full of garbage.

Plaintiff asserts causes of action against the alleged owners of the Subject Premises, T-C Park Avenue LLC (T-C) and 425 Park Ave Ground Owner LLC (425), and construction managers, Tishman Construction Corporation and Tishman Construction Corporation of New York (collectively “Tishman”) sounding in common law negligence and violation of Labor Law §§ 200, 240(1) and 241(6), as well as violation of New York Industrial Code Rule 23 §§ 1.5(a), 1.5(c), 1.7(e)(1)-(2), 1.30, 1.32, and 2.1.

PENDING MOTIONS

On October 7, 2022, defendants moved for an order pursuant to CPLR §3212: (1) granting summary judgment in favor of 425 on all claims; (2) dismissing plaintiff's first, second and fourth causes of action in their entirety as to all defendants; and (3) dismissing plaintiff's third cause of action for violation of Labor Law § 241(6) as to all defendants, insofar as the same is predicated on violation of Industrial Code Rule 23 §§ 1.5 and 1.32.

On November 9, 2022, plaintiff cross-moved for partial summary judgment as to liability.

On that date the motions were fully briefed, marked submitted and the court reserved decision.

ALLEGED FACTS

Plaintiff was a member of Sheet Metal Workers Local 28 and was employed as a foreman for Aabco Sheet Metal (ASM) on the project, which was an HVAC subcontractor retained by Tishman. Plaintiff had been working on the project since the end of 2017. The Project consisted of a combined alteration of an existing building with the construction of a new building.

Tishman held weekly site safety meetings where debris removal was discussed. Plaintiff testified that Tishman required its subcontractors to report any safety concerns and that Tishman employed two safety managers, Cornell Sutton and Luis Rivera, at the project site. According to plaintiff, the laborers employed by Tishman were responsible for removing debris from the project site.

Tishman's supervision of ASM's work included making sure that ducts were being installed in a timely fashion, but they did not direct or instruct plaintiff or ASM on how to do their work. Rather, they would coordinate the installation of ductwork with the project's other trade contractors.

On the date of the accident, plaintiff arrived at the Subject Premises around 6:30 am, entered the site, walked down some steps, and began walking to ASM's shanty on the B2 level. When he reached the bottom of the stairs at the B2 level, there was a wheeled garbage container in his way, so plaintiff pushed the container out, walked forward, and then caught his left foot under a silver pipe that was laying on the ground, causing his knee to hyperextend. Following the accident, plaintiff walked to ASM's shanty, prepared an accident report, took photographs of the condition, and then reported the accident to Tishman.

Plaintiff made complaints about debris on the site prior to the October 2, 2019, accident and he averred that he had seen debris by the stairwell daily.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of

credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Portions of Defendants Motion Are Granted without Opposition

Plaintiff does not oppose those portions of defendants' motion seeking:

(1) dismissal of all claims as to 425;

(2) dismissal of plaintiff's fourth cause of action for violation of Labor Law § 240(1) in its entirety, which was withdrawn by stipulation; and

(3) dismissal of plaintiff's third cause of action for violation of Labor Law § 241(6), insofar as the same is on based on violations of Industrial Code Rule 23 §§ 1.5 and 1.32.

As such those portions of defendants' motion are granted.

Plaintiff's Cross-Motion for Partial Summary Judgment is Denied as Untimely

Plaintiff's cross-motion was filed roughly two months beyond the 60-day period set by the Court in its last discovery order. Plaintiff does not explain or otherwise set forth any good cause for the delay.

CPLR §3212(a) sets forth the statutory timing requirements for filing summary judgment motions, stating:

> [a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

In *Brill v. City of New York*, the Court of Appeals expressly concluded that CPLR 3212(a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute—only the movant can show good cause—as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" 2 N.Y.3d 648, 652 (2004).

Pursuant to the court's status conference order dated April 6, 2022, dispositive motions were to be filed within 60 days of the Note of Issue. Plaintiff filed the Note of Issue on June 28, 2022 but did not cross-move for affirmative relief until 121 days later.

Based on the foregoing, plaintiff's motion for partial summary judgment as to liability is denied as untimely.

The Motion to Dismiss the Common Law Negligence and Labor Law §200 claims is Denied

It is well settled that where a construction site injury arises not from the manner and method in which the work is performed, but from the condition of the workplace, an owner or general contractor will be held liable under Labor Law §200 and in common-law negligence if the defendant either created the dangerous condition or failed to remedy a dangerous condition of which it had actual or constructive notice. *Bridges v. Wyandach Community Development Corp*., 66 A.D.3d 938 (2d Dep't 2009).

In *Barillaro v. Beechwood RB Shorehaven, LLC*, 69 A.D.3d 543 (2d Dep't 2010) the Second Department held that the lower court improperly dismissed plaintiff's Labor Law §200 and common-law negligence claims, where the defendant owner failed to prove as a matter of law that it did not have actual or constructive notice of the uncapped rebar that had caused the

plaintiff's injury. *See also Acquilera v. Pistilli Const. & Development Corp.*, 63 A.D.3d 763 (2d Dep't 2009); *Schultz v. Hi-tech Construction & Management Services, Inc.*, 69 A.D.3d 701 (2d Dep't 2010).

Plaintiff alleges that his injury arose not from the means and methods of the work, but from a dangerous and recurring debris condition in the work area, namely, the construction debris at the bottom of the stairwell. Plaintiff alleges he made complaints about debris on the work site prior to his October 2, 2019, accident, including complaints he made to Tishman's laborer foreman Sal.

Plaintiff's testimony demonstrates that triable issues of fact exist as to whether the defendants had actual or constructive notice of the recurring debris condition. Defendants do not dispute plaintiff's testimony that there was piled-up construction debris blocking the bottom of the stairwell when he was on his way to the Aabco work shanty, or that he tripped over a length of pipe on the floor as he was pushing the debris out of his way. Moreover, Mr. Rivera of Tishman acknowledged that the presence of pipes and other debris in the walkway would present a safety concern.

Nor does Tishman provide evidence contradicting dispute plaintiff's sworn deposition testimony that Tishman's laborers were responsible for the removal of debris from the site, which condition plaintiff described as existing daily. These complaints are persuasive evidence that Tishman had actual notice of the debris condition, and at raise a triable issue of fact as to notice.

Moreover, because it is undisputed that plaintiff's accident occurred before 7:00 a.m., when the workday was just beginning, it may reasonably be inferred that the piled-up debris had been present in this location at least since the evening before the accident. A triable issue of fact

thus exists as to whether the debris plaintiff tripped on had been present in this location for a sufficient period of time for defendants to have discovered the and remedied the recurring and ongoing debris condition on the job site. *See, e.g., Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986); *see also McClean v. 405 Webster Ave. Assocs*., 98 A.D.3d 1090 (2d Dep't 2012).

It is well settled that a plaintiff is not required to prove that a defendant property owner knew or should have known of the existence of a defect or hazardous condition where the defendant had actual notice of a recurrent dangerous condition. *O'Connor Miele v. Barhite & Holzinger*, 234 A.D.2d 106 (1st Dep't 1996). In addition, the courts have held that a defendant who has actual knowledge of a recurring dangerous condition may be charged with constructive notice of each specific reoccurrence of that condition. *Brown v. Linden Plaza Housing Co., Inc*., 36 A.D.3d 742 (2d Dep't 2007); *Anderson v. Great Eastern Mall, L.P.*, 74 A.D.3d 1760 (4th Dep't 2010).

Based on the foregoing the court finds there are triable issues of fact as to the common law negligence and Labor Law §200 claims and defendants' motion for summary dismissal of these claims is denied.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the motion of defendant 425 PARK AVE GROUND OWNER LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)]; and it is further

ORDERED that the motion to dismiss plaintiff's fourth cause of action for violation of Labor Law § 240(1), which was withdrawn by stipulation, is granted without opposition; and it is further

ORDERED that the motion to dismiss plaintiff's third cause of action for violation of Labor Law § 241(6), insofar as the same is on based on violations of Industrial Code Rule 23 §§ 1.5 and 1.32, is granted without opposition; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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12/5/2022							SABRINA KRAUS, J.S.C.
DATE							
CHECK ONE:	[ ]	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	X	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE