

Rodriguez v Morningside Hgts. Hous. Corp.
2022 NY Slip Op 34359(U)
December 20, 2022
Supreme Court, New York County
Docket Number: Index No. 157166/2017
Judge: Richard Latin
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD LATIN **PART** **46V**

Justice

-----X

PATRICK RODRIGUEZ,

Plaintiff,

- v -

MORNINGSIDE HEIGHTS HOUSING CORPORATION,
FIRSTSERVICE RESIDENTIAL NEW YORK, INC.,

Defendant.

-----X

MORNINGSIDE HEIGHTS HOUSING CORPORATION,
FIRSTSERVICE RESIDENTIAL NEW YORK, INC.

Plaintiff,

-against-

TEAM ELECTRIC, INC.

Defendant.

-----X

INDEX NO. 157166/2017

MOTION DATE 09/29/2022,
09/29/2022,
09/29/2022

MOTION SEQ. NO. 003 004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595015/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 140, 146, 148, 151, 154, 155, 156, 157, 162, 167, 168, 169 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 149, 152, 163, 166, 170, 171, 172, 174, 175 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 141, 142, 143, 144, 145, 150, 153, 158, 159, 160, 161, 164, 165, 173 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that ordered that plaintiff's, defendants/third-party plaintiffs', and third-party defendant's respective motions for summary judgment are determined as follows:

Plaintiff commenced this action alleging he was injured after he tripped and fell on pieces of rebar sticking out from a damaged concrete parking bumper while working to install exterior lighting on the rooftop level of a parking garage located at 100 LaSalle Street, New York, New York on November 13, 2015. The relevant parties to the action are Morningside Heights, the property owner, FirstService Residential New York, Inc., the property manager, and Team Electric, plaintiff's employer retained to replace and install the exterior lighting along the walls of the parking garage.

With his motion, plaintiff seeks summary judgment on his Labor Law §§ 200 and 241(6) claims.¹ Defendants and third-party defendant each seek summary judgment, dismissing plaintiff's complaint, on the basis that plaintiff was the sole proximate cause of his injuries for walking the narrow space between the cars and the wall instead of behind the cars. Additionally, each argue that the site of plaintiff's injury was not a working area as defined by the industrial code. Third-party defendant also seeks summary judgment dismissing the third-party complaint.

Recalcitrant Worker/Sole Proximate Cause

Here, it is undisputed that the accident took place after plaintiff had just finished part of his job and was walking away to figure out what should be done next. Additionally, there is conflicting evidence at best as to whether the plaintiff was directed not to walk in front of the cars in the parking lot. As such, issues of fact remain as to whether plaintiff was the sole proximate cause of his injuries.

Labor Law § 200 and Common-Law Negligence

It is well settled that Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to

¹ Plaintiff withdraws that portion of the 241(6) claim predicated on Industrial Code § 23-1.7(e)(1) only.

work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). “Claims under Labor Law § 200 and the common law fall under two categories: ‘those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed’” (*Jackson v Hunter Roberts Constr., L.L.C.*, -- AD3d -- , 2022 NY Slip Op 03321, *1 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

“Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work”

(*id.* [internal quotation marks omitted]).

Here, plaintiff’s accident resulted from the exposed rebar. The rebar “was not a condition created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff’s arrival on the . . . floor that day” (*Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]). Nevertheless, triable issues of fact exist as to how long the condition existed and as to whether defendants had constructive notice. Accordingly, the branches of the motions seeking summary judgment concerning Labor Law § 200 are all denied.

Labor Law § 241 (6)

Labor Law §241 (6) reads as follows:

“Construction, excavation and demolition work

. . .

“6. All 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 commissioner

may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

“To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision ‘mandating compliance with concrete specifications’” (*Ennis v. Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022], citing *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In addition, the rule or regulation alleged to have been breached must be a “specific, positive command” (*Toussaint* at 93, quoting *Rizzuto v L.A. Wenger Contr. Co.* at 349).

“Labor Law § 241(6) imposes a non-delegable duty on owners and contractors 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 (*Toussaint v. Port Auth. of N.Y.*, 38 NY3d 89, 93 [2022])[internal quotations marks and citations omitted].

The non-delegable duty is absolute and “imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998], citing *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Industrial Code 12 NYCRR 23-1.7 (e) (2)

Industrial Code 12 NYCRR 23-1.7 (e) (2) governs “working areas.” It is sufficiently specific to support a Labor Law § 241 (6) claim (*Vieira v Tishman Constr. Corp.*, 255 AD2d at 235). It provides the following:

“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.”

(*id.*).

Here, triable issues of fact remain as to whether the site at which plaintiff fell was part of the working area and whether the exposed rebar constituted debris or the concrete bumper was integral to the work (*compare Krzyzanowski v City of New York*, 179 AD3d 479 [1st Dept 2020] with *Quigley v Port Authority of NY and NJ*, 168 AD3d 65 [1st Dept 2018]; *Burnett v City of New York*, 104 AD3d 437 [1st Dept 2013]; *Lester v JD Carlisle Dev. Corp.*, 156 AD3d 577 [1st Dept 2017]). Accordingly, the branches of the motions seeking summary judgment concerning Labor Law § 241(6) are all denied, except that the portion of the claim predicated on 23-1.7 (e) (1) is dismissed.

Dismissal of Third-Party Complaint

Absent an amendment to plaintiff's verified bill of particulars, the common law third-party claims against the third-party defendant are dismissed as Team Electric, Inc. was plaintiff's employer and plaintiff has not suffered a "grave injury" (*see National Union Fire Ins. Co. of Pittsburgh, PA v 221-223 West 82 Owners Corp.*, 120 AD3d 1140 [1st Dept 2014]).

As to the contractual indemnification and contribution claims, they must also fail as this accident either occurred due to plaintiff's own negligence or due to the pre-existing dangerous condition that was defendants' responsibility, and it would be void against public policy for the third-party defendant to indemnify the third-party plaintiffs for their own negligence (*see Gonzalez v G. Fazio Constr.*, 176 AD3d 610 [1st Dept 2019]). Accordingly, third-party defendant's motion for summary judgment, dismissing the third-party complaint is granted.

Accordingly, plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' summary judgment motion is granted solely to the extent that the Labor Law § 241(6) claim is dismissed as predicated upon 23-1.7 (e) (1); and it is further

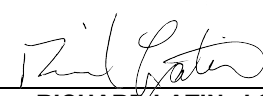
ORDERED that the third-party defendant’s motion is granted to the extent that the third-party complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the third-party defendant is directed to serve a copy of this order with notice of entry within 30 days of entry on NYSCEF; and it is further

ORDERED that the parties shall appear for a settlement conference to take place via Microsoft Teams on March 1, 2023 at 10am.

This constitutes the decision and order of the Court.

<u>12/20/2022</u> DATE	 RICHARD LATIN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE