

Verbanac v Turner Constr. Co.

2022 NY Slip Op 35007(U)

September 30, 2022

Supreme Court, Queens County

Docket Number: Index No. 716913/19

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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EDI VERBANAC,

Index No. 716913/19

Plaintiff,

Motion

Date: February 7, 2022

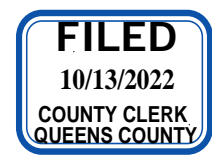
-against-

M# 1

TURNER CONSTRUCTION CO., et al.,

Defendants.

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The following papers numbered EF 39-75 read on this motion by the defendants Turner Construction Company and Citigroup Technology, Inc. for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and for summary judgment on their cross claim against defendant Robert B. Samuels, Inc.; and cross motion by defendant Robert B. Samuels, Inc. for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 39-51
Notice of Cross Motion - Affidavits - Exhibits.	EF 62-67
Affirmations in Opposition	EF 52-54
	EF 58, 68
	EF 70-71
Replying Affirmations.....	EF 69,
	72-75

Upon the foregoing papers it is ordered that this motion by the defendants Turner Construction Company ("Turner") and Citigroup Technology, Inc. ("Citigroup") for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and for summary judgment on their cross claim against defendant Robert B. Samuels, Inc. and cross motion by defendant Robert B. Samuels, Inc. for summary judgment dismissing the complaint and all cross claims insofar as asserted against it are decided as follows:

Plaintiff, an employee of Skillman Mechanical, allegedly sustained serious injuries on May 21, 2019 at a construction site located at 388 Greenwich Street in Manhattan. Turner was the Construction Manager for the project. Plaintiff's employer was contracted to install piping for the air conditioning units on the 23rd floor of the premises. Defendant Samuels, the electrical subcontractor, was installing low voltage data cabling at the premises pursuant to a contract with Turner. Plaintiff was working at the premises when he allegedly fell into a 2' x 2' hole due to a missing floor tile at the site. The complaint alleges that Turner and Citigroup owned, controlled and managed the premises. Plaintiff commenced the instant action to recover damages for violations of Labor Law §§ 200, 240(1) and 241(6) as well as common law negligence. Defendants Turner and Citigroup now move for summary judgment. Defendant Samuels cross moves for summary judgment.

The court notes that plaintiff does not oppose the branch of the motion for summary judgment dismissing the causes of action pursuant to Labor Law § 240(1).

Labor Law § 241(6) imposes a nondelegable duty upon an owner and general contractor to provide adequate and reasonable protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. (*Oretga v Roman Catholic Diocese of Brooklyn*, 178 AD3d 940, 941 [2d Dept 2019]; *Grant v City of New York*, 109 AD3d 961, 963 [2d Dept 2013].) To recover under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident. (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006].)

22 NYCRR § 23-1.7(e)(1), relating to passageways, provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." This section is applicable to the facts herein inasmuch as plaintiff fell into a hole as a result of a missing tile. Defendants contend that provision is inapplicable since the condition herein, the missing floor tile, was open and obvious. The fact that a condition is open and obvious, however, does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of plaintiff's comparative negligence. (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2003].)

Plaintiff has not opposed the branch of the motion to dismiss the Labor Law § 241(6) cause action to the extent that it is premised on other sections of the Industrial Code.

Labor Law § 200 codifies the common law duty of an owner or contractor to provide employees with a safe place to work. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [].) A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from dangerous or defective conditions of the premises, or the manner in which the work is performed (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018].) To be held liable under Labor Law § 200 for injuries arising from the manner in which the work is performed, a defendant must have the authority to exercise supervision or control over the work. (*Dasilva v Nussdorf*, 146 AD3d 859, 860 [2d Dept 2017].) Where a plaintiff's injuries arise from a dangerous condition on the property, an owner may be liable under Labor Law § 200 if it either created or had notice of the dangerous condition. (*Salgado v Rubin*, 183 AD3d 617 [2d Dept 2020]; *Dasilva v Nussdorf*, 146 AD3d at 860.)

In the case at bar, the defendants failed to make a prima facie showing that they did not have notice of the hole in the hallway in which plaintiff fell. Defendants have not established when the area at issue was last inspected prior to the subject accident. (see *Trinidad v Turner Construction Co.*, 189 AD3d 565, 566-567 [1st Dept 2020]; *Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 443 [1st Dept 2020].)

The movants also seek summary judgment on their claim for common law and contractual indemnification against defendant Samuels.

Pursuant to the subcontract at issue, Samuels agreed to defend and indemnify Turner for all claims caused by, resulting from, arising out of or occurring in connection with the execution of the work by Samuels. The movants assert that the incident herein arose entirely from Samuels' actions as an electrical subcontractor. These defendants maintain that an employee of Samuels removed a floor tile prior to the plaintiff's accident. Defendants rely on the deposition testimony of Richard Vierno, the witness for Samuels. However, Timothy Terry, the General Superintendent for the project, testified on behalf of defendant Turner that there were five other electrical contractors working at the site. Mr. Vierno, Samuels' witness, similarly testified. Thus, there are issues of fact as to which contractor removed the floor tile and whether Samuels caused the incident.

With respect to the cross motion by defendant Samuels, as noted above, there are issues of fact as to who removed the floor tile. Therefore, the branch of the motion for summary judgment dismissing the Labor Law § 241(6), Labor Law § 200 and common law negligence claims are denied. In addition, since it is unclear whether defendant Samuels removed the floor tile, the branch of its motion for summary judgment dismissing the claims for common law and contractual indemnification are denied.

Accordingly, the branch of the motion by the defendants Turner Construction Company and Citigroup Technology, Inc. for summary judgment dismissing the Labor Law § 240(1) cause of action is granted.

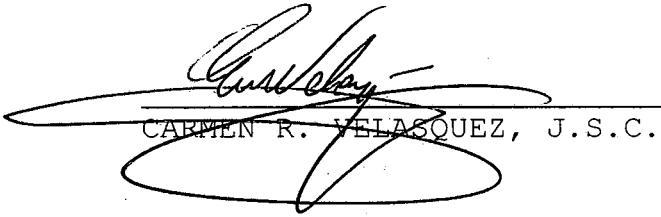
The branch of the motion by the defendants Turner Construction Company and Citigroup Technology, Inc. for summary judgment dismissing the Labor Law § 241(6) cause of action is denied to the extent that the claim is predicated upon 12 NYCRR § 23-1.7(e)(1).

The branch of the motion by the defendants Turner Construction Company and Citigroup Technology, Inc. for summary judgment is denied to the extent that the claim is predicated upon all other sections of the Industrial Code.

The branch of the motion by the defendants Turner Construction Company and Citigroup Technology, Inc. for summary judgment on their cross claim against defendant Robert B. Samuels, Inc. is denied.

The cross motion by the defendant Robert B. Samuels, Inc. for summary judgment is denied.

Dated: September 30, 2022


CARMEN R. VELASQUEZ, J.S.C.

