

Cummings v NYU Hosps. Ctr.
2022 NY Slip Op 35263(U)
September 30, 2022
Supreme Court, Queens County
Docket Number: Index No. 708076/2016
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

-----X
STANLEY CUMMINGS,

IAS Part 20

Plaintiff,

Index No.: 708076/2016

-against-

Motion Seq. No.: 7

NYU HOSPITALS CENTER, NEW YORK UNIVERSITY,
NYU MEDICAL CENTER, NYU LANGONE HEALTH
SYSTEM, LEND LEASE (US) CONSTRUCTION LMB
INC., and COMMODORE CONSTRUCTION CORP.,

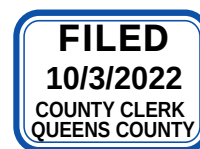
Motion Date: 3.9.2022

Motion Cal. No.: 5

Defendants.

-----X
LEND LEASE (US) CONSTRUCTION LMB INC.,

Third-Party Plaintiff,



-against-

ELITE INTERIOR SYSTEMS, INC.,

Third-Party Defendant.

The e-filed papers bearing NYSCEF document numbers 126-160, 189-193, 244 were read on the motion made by the plaintiff, Stanley Cummings (the "Plaintiff"), for an Order granting summary judgment against: (1) NYU Hospitals Center, NYU Medical Center and NYU Langone Health System (collectively, "NYU"); and (2) Lend Lease (US) Construction LMB Inc. ("Lend Lease").

The Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained in a work-related accident. Presently before the Court is the Plaintiff's motion for summary disposition against NYU predicated upon Labor Law § 241 [6] and Lend Lease pursuant to Labor Law §§ 241 [6] and 200, and common law negligence. For the following reasons, the motion is granted in part and denied in part.

I. Background

The Plaintiff, a carpenter in the employ of the third-party defendant Elite Interior Systems, Inc. ("Elite"), alleges that he was injured on March 7, 2016 in an accident that occurred in the

course of this employment (the "Accident"). The Accident occurred at the Medical Science Building at NYU Langone Medical Center, which is located at 550 First Avenue, New York, New York (the "Premises"). The Premises, which had been damaged by Super Storm Sandy, was undergoing a gut renovation and rebuild when the Accident occurred (the "Project").

As explained below, the Plaintiff contends that two electrical cords (the "Cords") that were on the floor caused him to trip and fall.

Prior to the Accident, NYU and Lend Lease entered into a construction management agreement (the "CMA") pursuant to which the latter was to serve as the construction manager for the Project. Pursuant to the CMA, Lend Lease was to "furnish all appropriate business administration, supervision, coordination and management required for the Work." Lend Lease's responsibilities included, *inter alia*, the administration, supervision and management of the performance and completion of the work; coordination and scheduling the work of the subcontractors; monitoring and inspecting the work to determine whether it was being performed in accordance with the contract documents; guarding against defects and deficiencies; and implementing a quality control program.

Lend Lease personnel walked the Premises on a daily basis to look for safety concerns and make sure work was being performed properly. Lend Lease supervisors had authority to stop the work of a subcontractor if they observed an unsafe condition.

Lend Lease had an independent site safety consultant, Omiros Alexiadis ("Alexiadis"), an employee of Pro Safety Services, for the Project. He was required to enforce Lend Lease's safety policy for the Project. Alexiadis conducted the site safety orientation that all subcontractors were required to attend prior to being permitted to work on site. Alexiadis walked the site once or twice daily, looking for safety issues and concerns. In the month prior to the incident, he walked the Project continuously throughout the day.

Alexiadis testified that he would have addressed a cord on the ground as a safety issue and tripping hazard, and would have made sure that the condition was rectified immediately.

One of the subcontracts that Lend Lease entered into was with Elite, which required the latter to furnish and install all carpentry work, including walls, sheetrock and ceilings. The Plaintiff testified that he was directed only by fellow Elite employees.

The Plaintiff implicates two electrical cords as the cause of the Accident. At that time, he was carrying a piece sheetrock measuring 4x8. The Plaintiff claims that after stepping over a cord with his right foot, he attempted to walk forward with his left foot. However, the cord caught his left foot, causing him to lose his balance. As the Plaintiff was trying to catch his balance while holding the sheetrock, he alleges that another cord caused him to trip further and to fall through the temporary wall of plastic that separated his work area from another work area.

The first cord was a yellow cord that ran from left to right across the hallway. It ran from a temporary outlet on Plaintiff's left side, across a pipe, and down and through the temporary wall that was to his right. The cord came through the wall approximately six inches above floor level.

The second cord was located approximately five or six feet from the yellow cord. The second cord was black and was connected to a large orange commercial heater behind a plastic barrier.

According to the Plaintiff, both cords were lying on the floor when he began the initial framing of the wall a week and a half prior to the Accident. He also contends that at that time he advised Mike Moran ("Moran"), Elite's foreman, about the presence of the cords on the floor. However, Moran testified at his deposition that the Plaintiff never advised him of the subject condition. The day after he claims to have advised Moran about the cords, the Plaintiff claims that he observed one of Lend Lease's laborers pick the cords up, throw them over a pipe, make a hole in the wall with his hammer and run the cords through the hole. This laborer, according to the Plaintiff, was wearing a Lend Lease vest and helmet. The cords remained in that same spot for a week and a half, as per the Plaintiff.

Alexiadis was notified of the Accident and thereafter asked a Lend Lease supervisor to have the yellow cord removed and the black cord restrung back up in position in the ceiling. The request was complied with. Alexiadis' actions therefore confirm the placement of the cords at the time of the Accident as alleged by the Plaintiff.

The Lend Lease Daily Safety Inspection report prepared by Alexiadis on the date of the Accident notes that extension cords were not being used properly, and that he "reminded workers cords must be off ground." However, he did not recall whether his safety inspection on that day took place before or after Accident, or whether he gave that directive before or after the Accident.

Alexiadis admitted at his deposition that photographs he was shown depicted the two cords involved in the Accident. He believed that the black cord was connected to a heater. Alexiadis also admitted that had he observed the black cord as shown in one of the photographs, he would have addressed it as an instant safety concern and that the area would have been closed off. Alexiadis further stated that had he seen the yellow cord running through the temporary wall below the eight-foot mark, he would have addressed it as a safety concern and had it "redone."

Moran was not a witness to the Accident, but he was advised of same shortly after it occurred and went to the scene. When he arrived, Moran observed: (1) that a cord was connected to a heater; (2) that a yellow cord was on the floor in the vicinity, but did not know what that cord was used for; (3) that the cords were raised somewhat off the floor, as depicted in a photograph he was shown at his deposition; (4) and that they constituted tripping hazards, which he would have addressed as a safety issue if his workers were in the area.

II. Discussion

A. The Plaintiff's Summary Judgment Motion Against NYU and Lend Lease Predicated Upon Labor Law § 241 [6]

The Plaintiff moves for summary disposition on his Labor Law § 241 [6] claim against NYU and Lend Lease.

“Labor Law § 241 [6] provides: [a]ll contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: ... (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. Labor Law § 241(6) imposes a nondelegable 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” (see *Zukowski v Powell Cove Estates Home Owners Assn., Inc.* 187 AD3d 1099, 1102–1103 [internal quotation marks and citations omitted]).

To establish liability on a Labor Law § 241 [6] claim, a plaintiff “... must demonstrate that his or her injuries were proximately caused by a violation of the Industrial Code applicable under the circumstances of the case” (*Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 874–875 [2d Dept 2021] [internal quotation marks, brackets and citations omitted]; see *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]).

The absence of actual and constructive notice to prevent or cure a dangerous condition is “irrelevant to the imposition of Labor Law § 241 [6] liability” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; see *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d &40 [2d Dept 2015]).

The Court now turns to the various Industrial Code provisions the Plaintiff relies upon.

Preliminarily, the Plaintiff contends that Industrial Code § 23–1.7(e) was violated. Same states as follows:

- (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 record supports the Plaintiff’s position with respect to the violation of Industrial Code § 23–1.7(e)(1). The Accident took place in a passageway, which consisted of a 6-8 foot lane that the Plaintiff had to traverse while he carried sheetrock to where it was to be installed. The two cords on the floor of the passageway constituted tripping hazards. Consequently, NYU and Lend Lease violated the duty to imposed by the subject Industrial Code provision to keep the passageway “free ... from obstructions and conditions that could cause tripping.”

The record further discloses that Industrial Code § 23–1.7(e)(2) was also violated. Preliminarily, the Accident took place on a passageway and same is a “similar area ... where

persons work and pass.” Second, the cords constituted “materials” that should not have been present.

Because the Plaintiff’s testimony that the Accident took place as the result of tripping on the two cords is not rebutted, the subject cords are deemed to be the proximate cause of the Accident.

The Plaintiff also seeks summary disposition on the theory that Industrial Code § 23–1.10(b) was violated. The subject provision states as follows:

- b) Electrical and pneumatic hand tools.
- (2) Electric and hose lines. Electric and hose lines shall be guarded by location or by covering to prevent severe abrasion and to prevent any tripping hazard.

Summary judgment based on this Industrial Code provision is denied because: (1) with respect to the black cord, same was utilized for a space heater, not an electrical hand tool; and (2) with respect to the yellow cord, there is insufficient evidence in the record to demonstrate that same was being utilized with respect to an electrical hand tool.

In sum, the Plaintiff’s motion against NYU and Lend Lease on his Labor Law § 241 [6] is granted because Industrial Code § 23–1.7(e) was violated.

B. The Plaintiff’s Summary Judgment as Against Lend Lease

The Plaintiff also moves for summary disposition against Lend Lease pursuant to Labor Law § 200 and common law negligence.

Labor Law § 200 is a codification of the common law duty placed upon owners and contractors to provide employees with a safe place to work (*see Kim v Herbert Constr. Co.*, 275 AD2d 709 [2nd Dept 2000]).

“Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54 [2nd Dept 2008]). “These two categories should be viewed in the disjunctive” (*see id.*).

“Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner [or general contractor] either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*see id.*).

“[W]hen the manner of work is at issue, no liability will attach to the owner [or general contractor] solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed. Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under

Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work ... general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*see id.* at 57 AD2d 61)

With respect to control, the determinative factor is not whether a defendant furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed (*see Eldoh v Astoria Generating Co., L.P.*, 81 AD3d 871, 875, 917 N.Y.S.2d 289 [2nd Dept 2011]).

The branch of the motion grounded on the manner of work theory of liability, *i.e.*, that Lend Lease controlled the Plaintiff’s work, is denied because there are triable issues of fact as to whether Lend Lease did so. Here, the Plaintiff admitted at his deposition that the work he performed was directed only by Elite employees.

With respect to the premises’ condition -- the two cords that the Plaintiff asserts he tripped over-- there are triable issues of fact as to actual and constructive notice. The Plaintiff testified at his deposition that he complained to his foreman, Moran, about the presence of the cords on the floor a week and a half prior to the Accident. However, Moran disputes receiving this complaint and he never relayed any complaints about the cords to Lend Lease. There is therefore a triable issue of fact as to whether Lend Lease received actual notice of the presence of the cords on the floor.

There is also a triable issue of fact with respect to constructive notice. Here, once again, there is conflicting testimony. Alexiadis testified that at 7:00 a.m. on the date of the Accident he observed no cords on the ground and that the black cord was properly elevated. The Accident took place at approximately 11:15 a.m., approximately four hours and 15 minutes after Alexiadis’ inspection.

Lastly, in light of the conflicting testimony noted above, triable issues of fact exist as to whether Lend Lease created the allegedly defective condition. While the Plaintiff testified that before the Accident a Lend Lease laborer punched a hole in temporary sheetrock and ran the yellow cord that the Plaintiff implicates as a cause of the Accident, Alexiadis, who inspected the Accident location after the subject work was done and approximately four hours and 15 minutes before the Accident, testified that he did not observe the yellow cord on the floor.

In sum, the Plaintiff’s motion for summary judgment on his Labor Law § 200 and common law negligence claims is denied.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's summary judgment motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted summary judgment against NYU and Lend Lease on his Labor Law § 241 [6] because Industrial Code § 23-1.7(e) was violated; and it is further,

ORDERED, that the Plaintiff's motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 30, 2022



MOJGAN C. LANCMAN, J.S.C.

