Supreme Court of the State of New York
County of Kings

Index Number 501390/2018
Seq. 006 and 007

Part 91

DECISION/ORDER

OMROY CLARKE AND SHAEEDA FACEY,

Plaintiffs,

against

ALBEE DEVELOPMENT LLC, ZDG, LLC, THE SAFETY GROUP LTD and CITY OF NEW YORK,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	3, 4
Replying Affidavits	5, 6
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion for partial summary judgment on liability against defendants Albee Development LLC, the City of New York, and ZDG, LLC (Seq. 006) and the motion for summary judgment (Seq. 007)[1] filed by defendants Albee Development LLC, ZDG LLC, the Safety Group Ltd, Albee Retail Development LLC, ACRS II LLC, Acadia Realty Trust [c/o Albee Development LLC], Acadia Realty Limited Partnership, City Point Retail Development, Acadia-Washington Square Tower 2 LLC, Alamo City Point LLC, Board of Managers for City Point Condominium, Capital Fire Sprinkler Co. of L.I., LLC, and the City of New York,[2] are decided as follows:

Introduction

Plaintiff Omroy Clarke commenced this action against defendants for injuries allegedly

[1] 22 NYCRR 202.8-b states that moving memoranda and affidavits may be no greater than 7,000, excluding certain sections. Defendants acknowledge that their moving memorandum of law is 9,040 words. Likewise, defendants acknowledge that their moving affirmation is 8,579 words. Counsel is admonished for this failure to follow the local rules and must comply in future filings, or risk rejection of their papers.

[2] All references to "defendants" in this decision and order means these moving defendants unless otherwise stated.

caused by defendants' negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), together with a loss of society claim on behalf of plaintiff Shaeeda Facey.

Previously, defendants Century 21 Fulton, LLC, SLCE Architects LLP, Alamo City Point LLC, Albee Tower I Owner LLC, and BFC City Point Builders LLC were dismissed from the action by stipulations of discontinuance signed by all parties.

During the time that this decision was reserved, the parties have also stipulated to discontinue the action against Albee Retail Development LLC, ACRS II LLC, Acadia Realty Trust, Acadia Realty Limited Partnership, City Point Retail Development, Acadia-Washington Square Tower 2 Owners LLC, Board of Managers for City Point Condominium, and Capital Fire Sprinkler Co. of L.I. LLC. Pursuant to a so-ordered stipulation dated January 26, 2023, the caption has been amended to reflect these discontinuances.

Factual Background

Craig Coluzza, the Director of Risk Management with Acadia Realty Trust, testified that the City of New York was the owner of the property located at 445 Gold Street, Brooklyn, NY 11201 (Coluzza EBT at 12, 29–30). He further testified that the City of New York leased the property to Albee Development LLC (*id.* at 30). Albee Development was the owner of the construction project on the property at the time relevant to this action (*id.* at 19, 35).

Frank Giambrone, a former site safety manager with The Safety Group, testified that ZDG was the general contractor for the construction (Giambrone EBT at 10, 47). ZDG or the owner hired The Safety Group (*id.* at 52). Kevin Coronato, a foreman with non-party A-Plus Sheet Metal, testified that A-Plus Sheet Metal was hired to perform work on the construction project (Coronato EBT at 10, 19). A-Plus employed plaintiff Omoy Clarke to work on the project (*id.* at 28).

Mr. Coronato further testified that he directed Mr. Clarke and two apprentices, Bill Compton and Krystopher Valetin, to unload a truck and move the contents that were resting on a pallet (Coronato EBT at 35, 43, 45). These contents were fire smoke dampers wrapped in cardboard and shrink wrap (*id.* at 52–53). Depending on the size of the damper, there may be anywhere from two to four dampers on a pallet (*id.* at 164–65). The fire smoke dampers and pallet weighed approximately 250 pounds (*id.* at 48). Mr. Coronato claims that, on March 2, 2015, he directed the three workers to break the group of dampers down into smaller components and move the dampers up a ramp using a cart, rather than moving the entire group of dampers and pallet (*id.* at 7, 34–35). On top of the ramp was a metal wire mesh (*id.* at 75). Mr. Coronato claims that he gave these instructions because the pallet jack's wheels might get stuck on the mesh due to the size of the wheels and the weight of the entire load, and because the ramp was wet (*id.* at 47–49).

Mr. Clarke testified that, at the time, he was wearing North Face construction boots (Clarke EBT, dated February 21, 2019 ["Clarke First EBT"] at 68). Mr. Coronato testified that, at the time, Mr. Clarke was wearing "sneaker boots", which he believed to be insufficient for the work (Coronato EBT at 65). Mr. Clarke denies that Mr. Coronato ever told him that he needed to change his footwear (Clarke First EBT at 97–98). The Safety Group's entry for its daily log on the day of the accident, states that "[a]t time of inspection all workers were using proper PPE" (*see also* Giambrone EBT at 17).

Mr. Clarke further testified that he, Mr. Compton, and Mr. Valentin moved the pallet and dampers up the ramp, which had snow on it (Clarke First EBT at 82–83, 87–88). He testified that Mr. Coronato did not give any instructions about breaking the pallet down into smaller parts or using the cart (*id.* at 98). Mr. Compton and Mr. Valentin also did not recall any such

instructions (Compton EBT at 29–30; Valentin EBT at 34, 50). Mr. Clarke testified that he was pulling the jack, facing down the ramp with his back to the top of the ramp (Clarke First EBT at 89). As he was pulling, he slipped and fell backwards on to the ramp, but not off the ramp or from the ramp to the ground below (*id.* at 90–93).

Mr. Giambrone testified that, immediately following the accident, he arrived at the accident site to investigate what had happened (Giambrone EBT at 31–34). As part of his investigation, he drafted an accident report and took photographs of the area on the day of the accident (*id.* at 32–34). Mr. Giambrone submits an affidavit, to which he attaches those photographs. The photographs show a wooden ramp with a metal wire mesh over the top surface of the ramp. The ramp itself appears wet with some mud. There appears to be ice or snow in parts of the side edges of the ramp. Mr. Giambrone states in his affidavit that, in his opinion, the wetness of the ramp was not dangerous, due in part to the metal wire mesh (Giambrone Aff. at ¶ 4). He also states that he inspected the ramp on the day of Mr. Clarke's accident and prior to the accident and found the ramp to be safe (*id.*). In his testimony, Mr. Clarke denied that these photographs show the ramp on which he fell (Clarke First EBT at 75–78, 81; Clarke EBT, dated March 6, 2019, at 46–48, 52)].

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's Claims for Negligence and Violation of Labor Law § 200

Defendants seek summary judgment dismissing plaintiff's claims for negligence and violation of Labor Law§ 200 against them. "Labor Law § 200 is a codification of the common law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of the use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]). Mr. Clarke does not contest that the moving defendants did not supervise him or control the means and methods of Mr. Clarke's work.

Defendants also argue that there was no dangerous condition, according to the affidavit and testimony of Mr. Giambrone. However, the pictures attached to Mr. Giambrone's affidavit shows snow, ice, and wetness on the ramp where the plaintiff fell. Mr. Giambrone's characterization of the condition as "safe" is not offered as an expert's assessment of the situation—it is the testimony of the site safety manager at the time of the plaintiff's accident. Accordingly, Mr. Giambrone's testimony alone about whether the condition was safe or not is inadequate to raise an issue of fact.

Defendants also reference Mr. Coronato's testimony that he did not receive or make any complaints about the ramp prior to plaintiff's accident (Coronato EBT at 72). Mr. Coronato also testified that he was not aware of anyone who had slipped on the ramp prior to plaintiff's accident (*id.*). Likewise, Mr. Compton and Mr. Valentin, who assisted Mr. Clarke, testified that they were not aware of prior accidents at the site or complaints about the ramp (Compton EBT at 18, 30–31; Valentin EBT at 35–36). While this evidence is relevant to defendants' actual notice, it does not address whether defendants had constructive notice of the condition.

Conversely, Mr. Clarke testified that the ramp was wet with snow (Clarke EBT at 82–83). In their post-accident statements, Mr. Compton and Mr. Valentin stated that the ramp was wet (Compton EBT at 36; Valentin EBT at 30–31). Leon Spencer, a co-worker of Mr. Clarke, also states in his affidavit that he saw the ramp's condition at the time of the accident and that the ramp was "slippery and wet with ice, snow, and slush and water" (Spencer Aff. at 1). Mr. Coronato also described the ramp as wet and slippery with snow on it (Coronato EBT at 48, 75, 76, 208–210, 215, 216). Accordingly, there are triable issues of fact concerning whether defendants are liable in negligence and violation of Labor Law § 200.

Lastly, and contrary to defendants' contention otherwise, there is no evidence that snow and slippery conditions are ordinary, obvious, and/or inherent conditions of Mr. Clarke's employment (*compare Spence v Is. Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 938 [2d Dept 2010]; *compare also Marin v San Martin Rest., Inc.*, 287 AD2d 441 [2d Dept 2001]). Likewise, defendants' cases concerning precautions during on-going precipitation are not applicable, as defendants do not show that there was on-going precipitation (*compare Dubensky v 2900*

Westchester Co., LLC, 27 AD3d 514 [2d Dept 2006]).[3]

Plaintiff's Labor Law § 240(1) Claim

Plaintiffs and defendants move for summary judgment with respect to Mr. Clarke's claim for violation of Labor Law § 240 (1). Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

Mr. Clarke does not claim that an object fell on him. Thus, *Aramburu v Midtown W. B, LLC* (126 AD3d 498 [1st Dept 2015] [equipment fell onto plaintiff after he fell on a ramp]), *Landi v SDS William St., LLC* (146 AD3d 33 [1st Dept 2016]), and *Kandatyan v 400 Fifth Realty, LLC* (155 AD3d 848, 849 [2d Dept 2017]), on which he relies, are inapplicable. In addition, Mr. Clarke did not fall from a height, but rather fell backwards going up the incline of the ramp. Consequently, *Valente v Lend Lease (US) Const. LMB, Inc.* (143 AD3d 625 [1st Dept 2016]) and *Arrasti v HRH Const. LLC* (60 AD3d 582 [1st Dept 2009]), on which he relies, are not applicable.

In essence, the plaintiff neither fell a distance nor was struck by an object which fell (or rolled) a distance (*see e.g. Georgopulos v Gertz Plaza, Inc.*, 13 AD3d 478, 479 [2d Dept 2004]). Accordingly, plaintiff's claim for violation of Labor Law § 240 (1) as against defendants Albee Development LLC, ZDG LLC, the Safety Group Ltd, and the City of New York, is dismissed.

[3] The plaintiff attaches a certified weather report to his motion, which shows periods of precipitation and periods where there is no precipitation. Unfortunately, the entirety of the "date" column and a portion of the "time" column on this report are either obstructed or are missing from the report.

Plaintiff's Labor Law § 241 (6) Claim

Plaintiffs and defendants move for summary judgment with respect to Mr. Clarke's claim for violation of Labor Law § 241 (6). In order to prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Mr. Clarke predicates his Section 241(6) claim on violation of Industrial Code §§ 23-1.7 (d) and 23-18 (c), and withdraws his claim based on Industrial Code §§ 23-1.5 (a) and (b), 23-1.7 (e); 23-1.15, 23-1.22 (b) and (c), 23-1.28, 23-1.32, and 23-2.1. Lastly, Mr. Clarke does not oppose defendants' motion to dismiss the claim based on Industrial Code §§ 23-1.5 (c) and 23-1.8 (c) (3). Although the plaintiff's obligation to prove a violation of the Industrial Code as a predicate to liability makes summary judgment under this section less common than § 240 (1), it remains an appropriate remedy when such a violation is evident from the papers submitted to the court (*see e.g. Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982 [2014]).

Industrial Code § 23-1.7 (d) states:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

As an initial matter, courts have held that a ramp constitutes a "passageway" within the meaning of 23-1.7 (d) (*Trotman v Boston Properties, Inc.*, 59 Misc 3d 1230[A] [Sup Ct, Bronx County 2018]; *Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 458 [1st Dept 2017]; *Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392, 1394 [4th Dept 2015]; *Conklin v Triborough Bridge and Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008]).

Separately, Industrial Code § 23-1.8 (c) (2) states:

> Foot protection. Every person required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes.

The parties' arguments about the alleged violations of these sections are interestingly intertwined. The record contains ample evidence that the ramp was wet at the time of the accident (*see* Clarke EBT at 82–83; Compton EBT at 36; Valentin EBT at 30–31; Coronato EBT at 48, 75, 76, 208–210, 215, 216). Notably, in their arguments about liability pursuant to Labor Law § 240 (1), the defendants contend that the plaintiff was wearing inadequate, "forbidden" shoes for the job and therefore was the sole proximate cause of his accident (Memorandum of Law at ¶ 7). The defendants reference Mr. Coronato's testimony that Mr. Clarke's shoes were inadequate for the task and that he told the plaintiff to change his shoes (Coronato EBT at 65, 67–68, 75, 145–150). There is no evidence in the record that *any* party offered to provide proper footwear. By making this argument, defendants seem to concede either that the Industrial Code provision on slipping hazards was violated or that the provision on proper foot protection was violated, or both.

Notwithstanding this apparent admission, the defendants advance arguments seeking dismissal of the plaintiff's claims as to both provisions of the Industrial Code. As to Industrial Code § 23-1.8 (c) (2), the only arguments that the defendants advance in opposition is that Mr. Clarke was not required to work in water and that Mr. Clarke's work did not regularly involve this condition (Aff. in Opp. at ¶ 19–20). However, the code provision does not require that the work *regularly* encounter this condition, but rather that workers be provided with proper footwear if required to work with a wet footing.

As to the alleged violation of Industrial Code §§ 23-1.7 (d), defendants argue that Mr. Giambrone's testimony contradicts the evidence in the record that the ramp was wet. However, again, the movants' own papers belie facts adverse to their position—Mr. Giambrone admits that

he "did observe some dampness on the ramp where the plaintiff's accident took place" (Giambrone Aff. at ¶ 4). Mr. Giambrone's subsequent statements that the dampness on the ramp was not a hazard were not offered as the analysis of a disinterested expert. Rather, these statements represent merely the self-serving observation of the employee of a party defendant (*i.e.* The Safety Group, Ltd.). Accordingly, Mr. Giambrone's testimony alone about whether the condition was safe or not is inadequate to raise an issue of fact (*see e.g. Wright v South Nassau Communities Hospital*, 254 AD2d 277 [2d Dept 1998]).

Finally, the defendants also argue that the cause of the accident is in dispute. Defendants contend that Mr. Clarke's improper footwear and decision to transport the dampers by pallet jack caused the accident, rather than the ramp's condition. Although comparative fault is a defense to a claim for violation of Labor Law § 241 (6) (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]), Mr. Clarke need not demonstrate his freedom from comparative fault to obtain summary judgment on his claim (*Ortega v R.C. Diocese of Brooklyn*, 178 AD3d 940, 941–42 [2d Dept 2019]).

Mr. Clarke's decision to use the pallet jack did not sever the causal link between the ramp's condition and Mr. Clarke's accident (*Hain v Jamison*, 28 NY3d 524, 529 [2016]). Moreover, if Mr. Clarke was wearing improper shoes, he was not required to obtain different shoes, but rather the defendants owner and general contractor were required to provide them. Even if correct, both of these allegations about Mr. Clarke's culpability suggest only some degree of comparative fault on the plaintiff's part.

Based on the evidence before the court, including the undisputed testimony that the ramp was wet, accepting as true the defendants' contention that the plaintiff was wearing improper shoes while working on the wet ramp, and accepting also that no parties offered the plaintiff

proper footwear, Mr. Clarke is awarded summary judgment on his claim for violation of Labor Law § 241 (6) based on Industrial Code § 23-1.7 (d) and Industrial Code § 23-1.8 (c) (2). The issue of whether Mr. Clarke also bears any responsibility for the accident as a partial defense to this claim is reserved for trial.

Conclusion

As an initial matter, to the extent that the plaintiffs seek summary judgment against a party and the action has been discontinued against that party, that portion of the relevant motion is denied as moot. Plaintiffs' motion (Seq. 006) is granted to the extent that Mr. Clarke is awarded summary judgment against defendants Albee Development LLC, the City of New York, and ZDG, LLC, on his claim for violation of Labor Law § 241 (6) based on Industrial Code § 23-1.7 (d) and 23-1.8 (c) (2). The issue of whether Mr. Clarke is comparatively at fault as a partial defense to his claim based on section 23-1.7 (d) is reserved for trial.

Similarly, any motion by a defendant for summary judgment made by a defendant against whom the action has been discontinued is denied as moot. The remaining defendants' motion (Seq. 007) is granted to the extent that plaintiff's claims against them for negligence and violation of Labor Law § 200 based only on the means and methods of work are dismissed. Summary judgment is denied on plaintiff's Labor Law § 200 claim to the extent that it is predicated on a dangerous condition. Additionally, plaintiffs' claims against these defendants for violation of Labor Law §§ 240 (1), and 241 (6) based on Industrial Codes §§ 23-1.5 (a), (b) and (c), 23-1.7 (e); 23-1.8 (c) (3), 23-1.15, 23-1.22 (b) and (c), 23-1.28, 23-1.32, and 23-2.1 are dismissed.[4] The motion is otherwise denied.

[4] Defendants arguments about the third-party contractual indemnification claims of Albee Tower I Owners LLC and BFC City Point are moot as the action has been discontinued against these defendants.

This constitutes the decision and order of the court.

February 2, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court

[Order deciding motion sequences 006 and 007 in the action *Omroy Clarke et al. v Albee Development LLC et al.*, 501390/2018.]