

**Keys v City of New York**

2023 NY Slip Op 30712(U)

March 8, 2023

Supreme Court, New York County

Docket Number: Index No. 156867/2018

Judge: Richard Latin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

KEVIN KEYS,

Plaintiff,

- v -

THE CITY OF NEW YORK, VOLUNTEERS OF AMERICA-
GREATER NEW YORK, INC., DEPARTMENT OF
HOMELESS SERVICES, RICHARDS PLUMBING AND
HEATING CO.,

Defendant.

-----X

RICHARDS PLUMBING AND HEATING CO.

Plaintiff,

-against-

RVS CONSTRUCTION CORP

Defendant.

-----X

THE CITY OF NEW YORK

Plaintiff,

-against-

RVS CONSTRUCTION CORP

Defendant.

-----X

INDEX NO. 156867/2018
MOTION DATE 02/15/2023
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595045/2019

Second Third-Party
Index No. 595770/2021

The following e-filed documents, listed by NYSCEF document number (Motion 005) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 224, 226, 227, 228, 229, 230, 231, 232, 233, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents and for the reasons spread across the record during oral argument, it is ordered that plaintiff's motion for summary judgment and defendants the City of

New York (“City”) and Richards Plumbing and Heating. Co.’s (“Richards”) cross motion for summary judgment are determined as follows:

Plaintiff commenced this action alleging he was injured while navigating a narrow passageway with a wheelbarrow in order to perform his backfilling duties when he fell into an unprotected, uncovered, and unsecured portion of the subject trench. With his motion, plaintiff seeks summary judgment on his claims pursuant to Labor Law §§ 240, 200, and 241(6) as predicated on Industrial Code §§ 23-1.7(b)(1), (e)(1), and (e)(2), Industrial Code § 23-3.3(c), and Industrial Code § 23-4.2(i). With their cross motion, moving defendants are seeking summary judgment dismissing plaintiff’s complaint and all counter claims arising therefrom with respect to defendants City, Richards, and Department of Homeless Services (“DHS”) and argue that plaintiff was the sole proximate cause of his injuries.

***Plaintiff’s Labor Law § 240 (1)***

Labor Law § 240 (1), also known as the Scaffold Law (*See Ryan v. Morse Diesel, Inc.*, 98 AD2d 615 [1st Dept 1983]) reads as follows:

“Scaffolding and other devices for use of employees

“1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

To prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*See Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003]).

Here, it is clear that defendant City and DHS are deemed owners under the Labor Law. Further, it is undisputed that plaintiff is a covered worker engaging in a covered activity. Additionally, a failure to protect an open trench with protective barriers or coverings is a per se violation of the Labor Law (*see Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561 [1st Dept 2011]). Moreover, the 1<sup>st</sup> Department has already found that in situations like this, the act of walking a backfill truck backwards is, at most, comparative negligence and not the sole proximate cause of a plaintiff's injury (*see Dias v City of New York*, 110 AD3d 577 [1st Dept 2013]). Accordingly, plaintiff is entitled to summary judgment on his 240(1) claims as to the City and DHS. Nevertheless, questions of fact remain as to whether or not Richards was the general contractor and, thus, summary judgment is denied.

***Plaintiff's Labor Law § 200 and common law negligence claims***

Labor Law § 200 (1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

Labor Law § 200 “codifies an owner’s or general contractor’s common-law duties of care, there are ‘two broad categories’ of personal injury claims: ‘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’” (*Ana Rosa, as Administrator of the Estate of Danny Rosa, v 47 East 34th Street (NY), L.P., et al.*, 208 AD3d 1075, 2022 NY Slip Op 05144 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Neither common law negligence nor Labor Law § 200 makes an owner, a general contractor or their statutory agent vicariously

liable for the negligence of a downstream subcontractor (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015], citing *Burkoski v. Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]).

“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.”

(*Cappabianca* at 144 [internal citations omitted]; *see also Toussaint v Port Auth. of N.Y. & NY*, 38 NY3d at 94)

Further, “the mere fact that a party had the authority to stop unsafe work does not show that it had the requisite degree of control and actually exercised that control” (*see Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531-532 [1st Dept 2018], citing *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). Here, triable issues of fact exist as to whether the Richards controlled the means and methods of the working being done that lead to plaintiff’s injury by the unsecured trench. Accordingly, summary judgment is denied to all parties on the Labor Law § claim.

***Plaintiff’s Labor Law § 241 (6) claims***

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]).

In opposition to the cross movants motion to dismiss, the plaintiff only relies on 12 NYCRR 23-1.7(b)(1) and 23-3.3(c). Accordingly, plaintiff has abandoned reliance on the remaining Industrial Code provisions cited (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

Industrial Code 12 NYCRR 23-1.7 (b)

Industrial Code 12 NYCRR 23-1.7 (b) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241(6) (*see Olsen v James Miller Marine Service, Inc.*, 16 AD3d 169 [1st Dept 2005]) and reads in relevant part as follows:

Falling Hazards.

1. Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place of by a safety railing constructed and installed in compliance with this Part (rule).

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(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

(a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, which is less, beneath the opening

Here, as was the case with the claim pursuant to Labor Law § 240(1), the plaintiff's fall into the unprotected trench is a violation of this code (*see Reavely* 88 AD3d 561). Whether plaintiff may be comparatively at fault is an issue of fact that pertains to the appropriate amount of damages (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Industrial Code 12 NYCRR 23-3.3 (c)

Industrial Code 12 NYCRR 23-3.3(c) is sufficiently specific to form a basis for liability pursuant to Labor Law 241(6) (*see Gawel v Consolidated Edison Co. of NY*, 237 AD2d 138 [1st Dept 1997]) and reads in relevant part:

Demolition by Hand. Inspection.

During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Here, the excavation that took place was undertaken without the use of heavy machinery and thus, continued inspections were required. In the instant case, that inspection did not take place as no one knew that the trench was open.

Therefore, plaintiff is entitled to summary judgment from the City and DHS as the clear Labor Law defendants for violations of Industrial Code 12 NYCRR 23-17.(b) and 23-3.3(c).

Accordingly, plaintiff’s motion for summary judgment is granted to the extent that plaintiff is entitled to summary judgment on its Labor Law §§ 240(1) claim and 241(6) claim as predicated on Industrial Codes 12 NYCRR 23-17.(b) and 23-3.3(c) as to defendants the City and DHS; and it is further


ORDERED that the remainder of plaintiff’s motion is denied in all other respects; and it is further

ORDERED that defendants’ cross motion is granted solely to the extent that plaintiff’s 241(6) claims predicated on Industrial Code provisions 23-1.7(e)(1), (2), and 23-4.2(i) are dismissed; and it is further

ORDERED that the remainder of defendants’ cross motion is denied in all other respects; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties within 30 days of entry onto NYSCEF.

This constitutes the decision and order of the Court.

<u>3/8/2023</u> DATE	 RICHARD LATIN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE