

Violette v Cricket Val. Energy Ctr., LLC

2023 NY Slip Op 31156(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 151503/2021

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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RICHARD VIOLETTE,

Plaintiff,

- v -

CRICKET VALLEY ENERGY CENTER, LLC, BECHTEL
INFRASTRUCTURE AND POWER CORPORATION, and
BECHTEL CONSTRUCTION COMPANY,

Defendants.

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INDEX NO. 151503/2021

MOTION DATE 11/21/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for personal injuries arising from alleged common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6), the defendants Cricket Valley Energy Center (Cricket), Bechtel Infrastructure and Power Corporation, and Bechtel Construction Company (BCC) move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against each of them. The plaintiff opposes the motion. The motion is granted to the extent that the defendants are awarded summary judgment dismissing Labor Law §§ 240(1) and 241(6) causes of action, and the motion is otherwise denied.

On September 26, 2019, the plaintiff was employed by non-party F.P.I. Mechanical Contracting Company (F.P.I.) as a steam fitter in connection with the construction of the Cricket Valley power plant, located at 2241 Route 22, Dover, New York (the premises). Cricket owned the premises, BCC was the construction manager, and F.P.I was a plumbing and steam fitting subcontractor. The plaintiff's duties were to monitor the oil heating lines for leaks and temperature issues. The plaintiff received his daily work assignments from an F.P.I. foreman, named Derrick, and reported to him if he had any questions or issues. The plaintiff attended

weekly safety meetings and “toolbox” talks. On the day of the accident, the plaintiff attended a toolbox talk, where the general discussion involved advising workers to “be safe out there.” Thereafter, the plaintiff proceeded to work on his tasks for the day. The plaintiff was on a platform, approximately 20 feet above the ground, that was equipped with railings that extended horizontally roughly 75 to 100 feet. The plaintiff walked approximately 30 to 40 feet before reaching a job box on his right-hand side, which was 8 feet long, 4 feet wide, and 6 feet tall. On the opposite side of the job box was a permanently installed pipe extending up vertically from the floor, veering left at a level slightly above the platform, and continuing into another room. While walking between the job box and the pipe, the plaintiff caught his left foot on the pipe and fell forward onto the platform, suffering injuries to his right knee.

On February 11, 2021, plaintiff commenced this action by filing a summons and complaint (see CPLR 304[a]). The defendants served and filed their answer on March 11, 2021. On March 19, 2021, the plaintiff served an amended complaint discontinuing all claims against Bechtel Power Corporation and naming Bechtel Infrastructure and Power Corporation as a new defendant. On April 12, 2021, the defendants served an answer to the amended complaint. On April 27, 2021, the plaintiff served his bill of particulars. On December 22, 2021, the plaintiff served a supplemental bill of particulars. On July 29, 2022, the plaintiff filed the note of issue and certificate of compliance. On September 27, 2022, the defendants timely made the instant motion.

In his amended complaint, the plaintiff alleged that the defendants were negligent and violated Labor Law §§ 200, 240(1), and 241(6), as well as the New York State Building Code, inter alia, by failing to provide him with a safe place to work, causing and/or permitting him to trip and fall and be injured while working on the premises, failing properly to control and coordinate equipment and construction activities, failing to perform proper clean-up operations, and failing to provide a safe accessway. In his bill of particulars, the plaintiff alleged that the defendants

violated Industrial Code (12 NYCRR) § 23-1.7(d) and (e). The plaintiff also alleged that the defendants had both actual and constructive notice of the condition that caused his fall.

In support of their motion, the defendants submitted the pleadings and the deposition transcripts of the plaintiff and Bechtel Infrastructure and Power Corporation's Project Environmental Safety and Health Manager, Michael Corllier. In opposition, the plaintiff did not submit his own exhibits, or his own affidavit, but instead relied on the defendants' submissions.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

“Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results in injury regardless of whether they supervised or controlled the work” (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). It is well settled that, to succeed on a Labor Law § 240(1) cause of action, the plaintiff “must establish that the statute was violated and that such violation was a proximate cause of his [or her] injury” (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). The defendants established that the injury in the case at bar did not arise from an elevation-related risk and, hence, that Labor Law § 240(1) was inapplicable (see *Wendell v Sylvan Lawrence Co.*, 279 AD2d 383, 383 [1st Dept 2001] [plaintiff's fall over pipes was not a gravity-related accident within the ambit of Labor Law § 240(1)]; see also *Natale v City of NY*, 33 AD3d 772, 774 [2d Dept 2006]; *Vicari v Triangle Plaza II, LLC*, 16 AD3d 672, 673 [2d Dept 2005]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] *Fairchild v Servidone Constr. Corp.*, 288 AD2d 665, 666-667 [3d Dept 2001]; *Allen v Hodorowski & DeSantis Bldg. Contrs.*, 220 AD2d 959, 960-961 [3d Dept 1995]). Since the plaintiff failed to raise a triable issue of fact in opposition to the defendants showing in this regard, the defendants are entitled to summary judgment dismissing the Labor Law § 240(1) claim.

Labor Law § 241(6) imposes a nondelegable duty upon owners and general contractors “to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation and internal quotation marks omitted]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). To sustain a

Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than generalized regulations for worker safety (see *id.* at 505). Labor Law § 241(6) also requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate, that the violation of the Industrial Code constituted negligence (see *Baptiste v RLP-East, LLC*, 182 AD3d 444, 445 [1st Dept 2020] [“violation of a provision of the Industrial Code is only evidence of negligence, and Labor Law § 241(6) requires the additional finding that the violation showed a lack of reasonable care”]), and that the violation was a proximate cause of his or her injuries (see *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Here, the plaintiffs asserted that the defendants violated 12 NYCRR 23-1.7(d) and (e). 12 NYCRR 23-1.7(d) pertains to “[s]lipping hazards,” and provides that

“[e]mployers 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.”

The defendants have established, *prima facie*, that the platform the on which plaintiff was working was not in a slippery condition. In opposition, the plaintiff failed to raise a triable issue of fact. Thus, the Labor Law § 241(6) cause of action must be dismissed insofar as it was premised upon violation of this Industrial Code provision.

12 NYCRR 23-1.7(e) pertains to “[t]ripping and other hazards,” and provides 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.”

A passageway has been interpreted to mean “a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Skolnik v 330 Hudson St. LLC*, 2019 NY

Slip Op 32788[U], *8, 2019 NY Misc LEXIS 5137, *6 [Sup Ct, N.Y. County, Sep. 19, 2019], quoting *Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017]). The plaintiff testified that he climbed up onto the platform in order to walk across it to get to his work post. Thus, by definition, the area where the plaintiff fell was a passageway (see *Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668, 668 [1st Dept 2019] [finding that the area at issue was a passageway since it was the only route that the plaintiff could take to return to his work area]; *Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016] [holding that accident occurred in a passageway where the plaintiff was required to pass through the area in order to access the window being repaired]). The area where the plaintiff fell also constitutes a platform within the meaning of 12 NYCRR 23-1.7(e)(2). Thus, 12 NYCRR 23-1.7(e) is applicable in its entirety to the case at bar.

Under Labor Law § 241(6), however, there is no liability where the injury-producing object is an integral part of what is being constructed (see *Bazdaric v Almah Partners, LLC*, 203 AD3d 643, 644-645 [1st Dept 2022]; *Saginer v Friars 50th St. Garage, Inc.*, 166 AD3d 529, 529 [1st Dept 2018]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006]; *Isola v JWP Forest Elec. Corp.*, 267 AD2d 157, 158 [1st Dept 1999]). The “integral to the work” doctrine applies to the overall construction work at the site, and not solely to the specific work being performed by the plaintiff at the time of the accident (see *Bazdaric v Almah Partners, LLC*, 203 AD3d at 645; *Krzyzanowski v City of NY*, 179 AD3d 479, 481 [1st Dept 2020]; *Velasquez v RS JZ Driggs LLC*, 2023 NY Slip Op 30114[U], *21, 2023 NY Misc LEXIS 187, *17 [Sup Ct, Kings County, Jan. 12, 2023]; *Maldonado v Hines 1045 Ave. of the Ams.*, 2022 NYLJ LEXIS 2593, *14 [Sup Ct, N.Y. County, Dec. 27, 2022]).

The defendants have established, prima facie, that the pipe upon which the plaintiff tripped was integral to the overall construction work being performed at the site. Corllier testified that the accident occurred in an area known as STG-2. He explained that STG stood for “steam turbine generator,” which was “one of the major pieces of equipment or components

that make up a combined facility,” such as the power plant being constructed. Moreover, Corllier explained that STG-2 was a very large structure, consisting of a large quantity of process piping such as pipe fitter, boiler maker work, and structural steel, among other things. Finally, Corllier testified that the plaintiff’s employer, F.P.I., not only performed mechanical installation of piping throughout the facility, but was one of the prime mechanical subcontractors responsible for “piping and ancillary equipment related to equipment pumps, vessels, [and] other components for the process throughout the entire plant.”

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff, based solely on his attorney’s affirmation, argued that the pipe was a permanent fixture, that the defendants adduced no evidence that the pipe was integral to the work being performed at the jobsite, and that the subject pipe was not, in fact, integral to the work being performed. The plaintiff further argued that there was no evidence of what the pipe carried and when it was installed. Contrary to the plaintiff’s contentions, there was evidence that the pipe was an element of a larger structure, STG-2, that, in turn, constituted a part of the power plant, and Corllier clearly testified to facts demonstrating that the pipe was integral to the work. Finally, what the pipe carried and when it was installed are not the relevant inquiries under a “integral to the work analysis” (*compare Maldonado v Hines 1045 Ave. of the Ams*, 2022 NYLJ LEXIS 2593, *15 [finding that the relevant inquiry was whether the conduit pipe was a part of any ongoing work at the construction project, not whether it would become “useless” at some point in the project]). The plaintiff failed to raise triable issues of fact in opposition to the defendants’ showing that the pipe was an element of the STG-2 generator, and that it thus was integral to construction of the power plant. Thus, the defendants are entitled to summary judgment dismissing the Labor Law § 241(6) cause of action.

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]; *see also Comes v NY State Elec. & Gas*

Corp., 82 NY2d 876 [1993]; *Kennedy v McKay*, 86 AD2d 597 [2d Dept 1982]). There are two distinct standards applicable to section 200 cases, depending on the situation involved---where the accident is the result of the means and methods used by the owner or general contractor to do its work, and where the accident is the result of a dangerous premises condition (see *Jackson v Hunter Roberts Constr., LLC*, 205 AD3d 542, 543 [1st Dept 2022]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]). Where, as here, the allegation is that the accident occurred when the plaintiff tripped over a pipe, the plaintiff is thus claiming an injury due to a dangerous premises condition, rather than one arising from the means and methods of work (see *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 406-407 [1st Dept 2020] [finding that the cause of the plaintiff's accident was not the manner in which his work was performed, but was instead a dangerous condition, because loose pipes had been laid on floor directly in front of a doorway]; *Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017] [holding that the dangerous condition standard applied where the piece of loose pipe was an already existing condition and not a condition created by the manner in which the work was performed]).

To sustain a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner or other responsible entity either created the allegedly dangerous condition or had actual or constructive notice of it (see *Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]). Generally, a defendant moving for summary

judgment on the ground that it did not have constructive notice of a dangerous condition must show that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident (*see Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505-1506 [4th Dept 2015]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014]).

Moreover, the “integral to the work” defense, applicable to Labor Law § 241(6) causes of action, does not necessarily immunize a defendant from common-law/Labor Law § 200 liability for creating or permitting the existence of a tripping hazard (*see Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1314-1315 [4th Dept 2009] [dismissing Labor Law § 241(6) cause of action because alleged tripping hazard was integral to the work, but sustaining common-law negligence/Labor Law § 200 claim based on same hazard]; *Saginer v OSIB-BCRE 50th St. Holdings, LLC*, 2019 NY Slip Op 33425[U], *17, 2019 NY Misc LEXIS 6190, *28 [Sup Ct, N.Y. County, Nov. 18, 2019] [Kelley, J.]; *cf. Sanders v St. Vincent Hosp.*, 95 AD3d 1195 [2d Dept 2012] [dismissing a Labor Law § 200 cause of action solely on the ground of lack of notice, while dismissing a Labor Law § 241(6) cause of action based on the same condition because it was integral to the work]). Furthermore, it is a “well-established principle that a finding of ‘open and obvious’ as to a hazardous condition is never fatal to a plaintiff’s negligence claim. It is relevant only to plaintiff’s comparative fault” (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 90 [1st Dept 2011]). Rather, a defendant moving for summary judgment dismissing a claim based on the existence of a dangerous condition may only succeed by establishing that the alleged condition was “open and obvious *and not inherently dangerous*” as a matter of law (*Cardinale v Avalon W. Chelsea*, 209 AD3d 483, 484 [1st Dept 2022] [emphasis added]).

The defendants failed to establish, prima facie, either that the placement or location of the pipe over which the plaintiff tripped was not inherently dangerous, or that they lacked actual or constructive notice of that dangerous condition. The defendants did not submit evidence of their maintenance activities or show that the area in question was recently inspected. Rather,


the defendants claimed that there was no proof that they had notice of the location of the job box, and hence no notice that the placement of the job box compelled the plaintiff to walk around the box and over the pipe, or that its on-site safety representative had complaints about an alleged dangerous condition at the accident site. Nevertheless, these conclusory statements alone do not affirmatively establish entitlement to judgement as a matter of law with respect to a common-law negligence cause of action. Thus, that branch of the defendants' motion seeking summary judgement dismissing the common-law negligence/Labor Law § 200 cause of action must be denied.

In light of the foregoing, it is

ORDERED that the motion of the defendants Cricket Valley Energy Center, Bechtel Infrastructure and Power Corporation, and Bechtel Construction Company for summary judgment dismissing the complaint insofar as asserted against them is granted to the extent that they are awarded summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action, those causes of action are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a pretrial conference on May 4, 2023, at 11:30 a.m.

This constitutes the Decision and Order of the court.

4/11/2023 DATE	 JOHN J. KELLEY, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			