

Kirby v WFP Tower D Co. L.P.

2023 NY Slip Op 32326(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 154488/2018

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

Justice

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ROBERT KIRBY, YVONNE KIRBY,

Plaintiff,

INDEX NO. 154488/2018

MOTION DATE 06/23/2023

MOTION SEQ. NO. 001

- v -

WFP TOWER D CO. L.P., WFP RETAIL CO. LP,
STARBUCKS CORPORATION,
STARBUCKS MANUFACTURING CORPORATION and
STARBUCKS COFFEE COMPANY

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for SUMMARY JUDGMENT.

Defendants’ motion for summary judgment is granted in part and denied in part.

Background

In this Labor Law case, plaintiff Robert Kirby contends that he was working for non-party Vericon Construction when he tripped and fell over a steel beam that protruded out of the floor. Plaintiff testified that he had been working at the job site for two or three months prior the accident (NYSCEF Doc. No. 51 at 40). He explained that he was picking up the hood of the ice machine with a coworker, was “going to come cross over the beam and get it over by the doorway where we had a dolly up by the doorway on wheels” (*id.* at 145). Plaintiff testified that “when I was going across I just couldn’t clear that friggen thing and I caught my foot on it. Man, I went over, I just landed on top of it. I hit the side of the machine there and I went down hard” (*id.* at 145-46).

Defendants move for summary judgment to dismiss plaintiff's claims under Labor Law §§ 240(1), 241(6) and 200. They insist that section 240(1) is not applicable, that the Industrial Code sections cited by plaintiff related to the 241(6) claim are irrelevant and that the steel beam protruding up out of the floor was not a dangerous condition.

Defendants observe that plaintiff was a laborer with wide responsibilities, including cleaning the job site as well as moving equipment. They insist that the accident happened in a storeroom, which was an empty retail space used by various contractors to store equipment, sheetrock, and other materials. Defendants admit that the beam was raised off the floor two to three inches and that plaintiff was well aware of this exposed beam prior to the accident. They argue that plaintiff stepped over the beam on many prior occasions before the accident.

Labor Law § 240(1)

The Court observes that plaintiff withdrew this claim in opposition and so this claim is severed and dismissed.

Labor Law § 241(6)

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff only addresses two Industrial Code sections in his opposition, 12 NYCRR 23-1.7(e)(1) and (2). Therefore, the remaining sections initially asserted by plaintiff are severed and dismissed.

The two preserved sections provide that:

“(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” (12 NYCRR 23-1.7[e]).

The Court grants the branch of the motion that seeks to dismiss this claim under both of the sections. It is undisputed that the accident happened in a storeroom as opposed to a passageway (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382, 836 NYS2d 130 [1st Dept 2007] [dismissing a claim under section 23-1.7(e)(1) where “plaintiff testified at his deposition that he was injured while walking across a room that measured 18 feet by 20 feet”]). Plaintiff estimated that this room measured about five to fifteen feet by 20 feet (NYSCEF Doc. No. 51 at 131). Moreover, the photo of this room clearly shows it was not a passageway. Simply put, the Court is unable to find that a storeroom used to house equipment and other items constitutes a passageway under any definition of that term.

The Court also severs and dismisses the claim under section 23-1.7(e)(2) as plaintiff did not contend that he tripped over dirt, debris, scattered tools and materials or from sharp projections. He claims he tripped over an exposed steel beam.

Labor Law § 200

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

“Claims for personal injury under this statute and the common law fall under two broad categories: 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” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). “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” (*id.* at 144).

“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Defendants assert that there was no dangerous condition because the steel beam protruded only two to three inches above the floor. They also argue that the beam was an open and obvious condition and that plaintiff should not have tried to walk backwards over the beam while helping to carry the ice machine. Defendants argue that they lacked the requisite control and supervision over plaintiff’s work in order to sustain this negligence claim. They emphasize

that plaintiff was working under the direction of non-party Vericon, the general contractor for the site.

The Court denies this branch of the motion as it is unable to conclude that a large steel beam that protruded two to three inches above the floor is not, as a matter of law, a dangerous condition. To the extent that defendants are attempting to argue that this beam is trivial and nonactionable, the Court disagrees with that argument (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802 [2015] [observing that a Court must consider the facts and circumstances when evaluating if an alleged condition is actionable]). Here, plaintiff was in a storeroom helping to move an ice machine from a room where this type of equipment was stored. A fact finder must consider whether a beam that raised two to three inches above the ground constituted a dangerous condition on a jobsite where plaintiff was moving large and heavy equipment. Of course, moving large and heavy equipment sometimes means a person is not always able to focus solely on his surroundings or the ground.

Defendants' claims that plaintiff was well aware of this beam or that it was open and obvious "go[es] to plaintiff's comparative negligence" (*Maza v Univ. Ave. Dev. Corp.*, 13 AD3d 65, 65, 786 NYS2d 149 [1st Dept 2004]). This also applies to defendants' claim that plaintiff should not have been walking backwards while attempting to traverse the beam. It is not a basis upon which this Court can grant defendants' summary judgment motion on this claim. In other words, a jury must assess whether or not it thinks this beam was a dangerous condition/tripping hazard and to what extent plaintiff's awareness of the beam's existence might reduce his recovery when he was tasked with moving large machinery.

The Court also emphasizes that plaintiff testified that "anybody else that came to the job [site]" would see the beam, including the superintendent on the site (NYSCEF Doc. No. 51 at

95). That raises a question of fact about defendants’ constructive notice about the alleged danger of this beam.

Accordingly, it is hereby

ORDERED that defendants’ motion for summary judgment is granted to the extent that plaintiff’s claims under Labor Law §§ 240(1) and 241(6) are severed and dismissed and denied with respect to the remaining requests for relief.

7/12/2023
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE