SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
KEVIN COLEMAN,

Plaintiff(s), Index No: 522181/17

-against-

DECISION AND ORDER

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE CIT OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant(s)

x

Recitation as required by CPLR 2219(a), of the papers considered in the plaintiff and defendants' motions for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	108-136
Cross-motion and supporting papers…….	
Answering Affidavits.....	138-156
Reply papers……...	159-162
Memoranda of law……..	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for personal injuries, the plaintiff Kevin Coleman [Coleman] moves [seq. no. 6] pursuant to CPLR 3212 for partial summary judgment on the issue of liability on his causes of action alleging violations of Labor Law §§ 241(6) and 200. Defendants, New York City School Construction Authority [SCA], the City of New York [CNY], New York City Department of Education and Board of Education of the City of New York [collectively BOE], move [seq. no. 7] for summary judgment dismissing the plaintiff's complaint.

Coleman, a Union Local 1 bricklayer's apprentice, employed by non-party Nehal Contracting, Inc. [Nehal], alleges that he sustained injuries as a result of an accident that occurred on March 27, 2017, at a construction site at a public school in Brooklyn. Coleman claims that while standing on a plywood pathway dumping debris into a dumpster on the northeast side of the construction site, his feet slipped on mud on the plywood causing him to partially fall into the dumpster, and then to the floor. Coleman's testimony indicates that on the day of his accident he was cutting bricks, placing the unused portions of the bricks into a crate for disposal. Once the crate was filled, he

would take the bricks to a small dumpster, which his supervisor directed him to use, by way of a plywood path. The plywood path was one of three paths that his employer had laid at the construction site, and this particular path, which he had used regularly since it was placed in November 2016, allowed him to walk from his work station to the small dumpster without stepping on any part of the ground. At the time of his accident, Coleman was standing on the plywood pathway, and while dumping the bricks from the crate into the dumpster, his feet slipped on the mud, causing the upper half of his body to fall into the dumpster with the crate, and then after regaining some footing, to fall to the ground. Coleman's testimony reflects that it had rained the day before the accident, and earlier on the day of the accident, and that the mud on the plywood pathway was partly wet, and slippery.

Coleman commenced this action against CNY and BOE, the owners of the premises, and SCA, who awarded the contract to Nehal to perform the masonry work at the premises, alleging violations of Labor Law §§200, 240(1), and 241(6), federal OSHA rules and regulations, and common-law negligence.

Labor Law § 241(6) imposes on owners, contractors and their agents a nondelegable duty 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" (*Lopez v. New York City Dept. of Envtl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]; *see also Kavouras v Steel-More Contracting Corp.*, 192 AD3d 782 [2d Dept 2021]). In order to establish liability under Labor Law §241(6), "a plaintiff or claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). Here, Coleman moves for partial summary judgment on his Labor Law § 241(6) cause of action based on alleged violations of Industrial Codes [12 NYCRR] 23-1.7(d) and 23-1.22(b)(3). Defendants move for summary judgment dismissing this cause of action on the grounds that Coleman did not comply with GML § 50-e(2) in that his Notice of Claim did not allege any specific Industrial Code sections, and further that the Industrial Code sections set forth in the supplemental bill of particulars[1] [23-1.7(d); 23-1.7(e); 23-1.22(b)(1)(2) and (3); and 23-1.30] are not applicable to the facts and/or were not violated.

Initially, it is noted that Coleman's failure to identify specific Industrial Code provisions in his notice of claim is not fatal to his cause of action under Labor Law § 241(6). The defendants were put on sufficient notice that the cause of action alleging violations of Labor Law § 241(6) related to slippery plywood planking, and also stated that poor illumination was a factor. Therefore, they cannot reasonably claim prejudice or surprise (*see Klimowicz v Powell Cove Assocs, LLC*, 111 AD3d 605 [2d Dept 2013]).

[1] Coleman has voluntarily withdrawn Industrial Code §§ 23-1.22(c)(1) and 23-1.33.

Plaintiff demonstrates, prima facie, that §23–1.7(d), entitled slipping hazards, which provides, in pertinent part, that no employee shall be permitted "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires the removal of any "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing," is applicable to these facts and that the violation was a proximate cause of his injuries. Here, the plywood path that Coleman slipped on was a walkway within the meaning of 12 NYCRR 23-1.7(d) (*see Potenzo v City of New York*, 189 AD3d 705 [1st Dept 2020]). Moreover, the mud covering the plywood, which was not integral to plaintiff's work cutting bricks, constituted a "foreign substance that caused slippering footing (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541 [1st Dept 2013]).

The arguments made by defendants in opposition to this portion of Coleman's motion and in support of their own motion are without merit. First, although defendants argue that the plywood was not intended to be used as a path for pedestrians, and that it was laid down to cover the soft ground to provide traction for heavy machinery at the site, their witness, Ted-Alaine Theodule, a project officer for SCA, acknowledged that the plywood was used also a path by workers. Mr. Theodule testified that if the ground was muddy and wet, workers, would walk over the plywood path towards the dumpsters. Mr. Theodule also testified that while most of the construction debris was loaded into a hopper and then picked up by a boom and placed into a dumpster, he acknowledged that Coleman was working in the northeast staging area at the time of his accident and that he had access to the path to reach the small dumpster. Moreover, the fact that the path was outdoors does not prevent it from coming within the ambit of § 23-1.7(d) (*see Potenzo* at 707). Furthermore, although it is argued that the § 23-1.7(d) does not apply as the mud that Coleman slipped on was the condition that he had been tasked to clean, Coleman's testimony clearly indicates that at the time of his accident he was tasked with cutting bricks, and not cleaning the plywood pathway of mud and debris (*see Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456 [1st Dept 2014]).

Defendants demonstrate, however, that § 23-1.7(e)(1), which protects workers from tripping hazards in passageways, is inapplicable to the facts of this case. As the accident occurred outdoors, and not in the interior of a building, the area where Coleman fell cannot be considered a "passageway" under this section (*see Potenzo* at 707). Nevertheless, as Coleman testified that he slipped on mud right in front of the dumpster that was used by him and others to regularly dispose of construction debris, he raises a triable issue of fact as to whether the spot was a "working area" within the meaning of § 23-1.7(e)(2), which pertains to slipping as well as tripping hazards in work areas (*see Serrano v Consolidated Edison Co. of New York Inc.*, 146 AD3d 405 [1st Dept 2017]).

Defendants also demonstrate that §§ 23-1.22(b)(1), (2) and (3), which apply to ramps and runways is also not applicable to the facts of this case. Although Coleman, and his expert engineer, argue that the defendants use of unsecured plywood less than

three-quarters of an inch thick was in violation of this section and a proximate cause of this accident, it is clear from the submitted testimony that the plywood planking, which was level to the ground, did not constitute a ramp or runway as contemplated by this section, and that any violation of this section was not a proximate cause of his slipping and falling on mud.

Section 23-1.30 provides that "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction ... but in no case shall such illumination be less than 10 foot candles in any area where persons are required to [do] work." Defendants' contend that this section is inapplicable to Coleman's claims and was not violated based on Coleman's testimony that he could see at the time of his accident. In opposition, Coleman raises triable issues of fact barring dismissal. Coleman testified that there was no lighting by the dumpster area, and the area was dark after the sun set on the night of his accident. Coleman also testified that while he was able to see the dumpster, though somewhat vaguely, from his work area, which had one hanging light, when walking from his work area to the dumpster in the dark, it became harder to see, and that he did not see the mud before his accident (*see Devita v NYY Steak Manhattan, LLC*, 214 AD3d 477 [1st Dept 2023]).

Labor Law § 200 codifies the common-law duty of owners, contractors and their agents to provide workers with a reasonably safe place to work (*see Pacheco v Smith*, 128 AD3d 926 [2d Dept 2015]; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept 2001). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where, as here, it is alleged that a plaintiff's injuries arise from a dangerous condition on the premises, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Chowdhury v. Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, Coleman's submissions fails to demonstrate, prima facie, that the City or BOE either created or had actual or constructive notice of the allegedly slippery mud condition constituting a proximate cause of the subject accident (*see Abelleira v City of New York*, 120 AD3d 1163 [2d Dept 2014]). On the other hand, the City and BOE demonstrate their entitlement to summary judgment dismissing Coleman's Labor Law § 200 and common-law negligence causes of action as asserted against them. The City and BOE demonstrate, prima facie, through the relevant deposition testimonies and the affidavit of its senior insurance claims specialist, Christopher Dickerson, that it did not create or have notice of the allegedly dangerous condition causing the injury. In opposition, Coleman fails to raise a triable issue of fact.

Moreover, to the extent it can be argued that the methods or materials of the work are at issue, there is nothing in the record suggesting that the City or BOE exercised any supervisory control over the work that caused the accident (*see Ross v Curtis-Palmer Hydro-Electric Co*., 81 NY2d 494 [1993]; *Campuzano v Board of Educ. of City of New York*, 54 AD3d 268 [1st Dept 2008]). Further, neither common-law negligence nor Labor Law §200 impose vicarious liability on an owner for any negligence of a third-party contractor for the condition that allegedly caused the accident (*see Burkoski v StructureTone, Inc*., 40 AD3d 378 [1st Dept 2007]).

Similarly, Coleman fails to demonstrate, prima facie, that SCA, created the allegedly dangerous condition or that it exercised sufficient control over the work site and the work that brought about the injury (*see Navarro v City of New York*, 75 AD3d 590 [2d Dept 2010]). Conversely, SCA establishes its entitlement to summary judgment dismissing the cause of action alleging a violation of Labor Law § 200 and common-law negligence, as it demonstrates that it did not have control over the work site and did not create the alleged dangerous condition. SCA also establishes through the relevant deposition testimonies, as well as the affidavit of Mr. Theodule, that SCA's role at the site was that of general supervision, and that it lacked supervision or control over the work performed (*id*.). "General supervisory authority at a work site, the right to stop a contractor's work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract, is insufficient to impose liability under Labor Law § 200" (*Messina v City of New York*, 147 AD3d 748, 749 [2d Dept 2012]). In opposition, Coleman fails to raise a triable issue of act.

"Labor Law § 240(1) was designed to prevent those types of accidents in which the [safety devices enumerated in the statute] proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Runner v New York Stock Exchange, Inc*., 13 NY3d 599, 604 [2009] quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]). Here, the City, BOE, and SCA make a prima facie showing that Coleman's injuries were not the result of any height or gravity related risk within the ambit of Labor Law § 240(1) (s*ee Madero v. Pizzagalli Constr. Co.*, 62 AD3d 670 [2d Dept 2009]). In opposition, Coleman fails to address this portion of the defendants' motion and, as a result, has abandoned this causes of action (*see Elam v Ryder Systems, Inc*., 176 AD3d 675 [2d Dept 2019]).

Finally, as the City, BOE and SCA were not Coleman's employer, they establish their prima facie entitlement to summary judgment dismissing the causes of action based on alleged violations of OSHA regulations (*see Ramos v Baker*, 91 AD3d 930 [2d Dept 2012]).

Accordingly, it is hereby

Ordered, that the portion of Coleman's motion for partial summary judgment on his cause of action alleging a violation of Labor Law § 200 is denied; and it is further

Ordered, that the portion of defendants' motion for summary judgment dismissing Coleman's causes of action alleging common-law negligence and Labor Law § 200 is granted; and it is further

Ordered, that the portion of Coleman's motion for partial summary judgment on his cause of action alleging a violation of Labor Law § 241(6) is granted insofar as it is predicated on Industrial Code § 23-1.7(d) and denied insofar as predicated on § 23-1.22(b)(3); and it is further

Ordered, that the portion of defendants' motion for summary judgment dismissing Coleman's cause of action alleging a violation of Labor Law § 241(6) is granted insofar as predicated on §§ 23-1.7(e)(1) and 23-1.22(b)(1),(2), and (3), and denied insofar as predicated on §§ 23-1.7(d), 23-1.7(e)(2), and 23-1.30; and it is further

Ordered, that the portion of defendants' motion for summary judgment dismissing Coleman's cause of action alleging a violation of Labor Law §240(1) is granted; and it is further

Ordered, that the portion of defendants' motion for summary judgment dismissing Coleman's causes of action based on alleged violations of OSHA regulations is granted.

Any relief not specifically addressed has nonetheless been considered and is denied.

This constitutes the decision/order of the Court

Dated: July 7, 2023

Enter,

Karen B. Rothenberg, J.S.C.