Supreme Court of the State of New York
County of Kings

Part LL1 M

JORGE O. VASCONEZ FIGUEROA,

Plaintiff,

against

EVERGREEN GARDENS I, LLC, BROOKLYN GC LLC, AND BUSHWICK GC LLC,

Defendants.

EVERGREEN GARDENS I LLC,

Third-Party Plaintiff,

against

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Defendant.

BROOKLYN GC LLC AND BUSHWICK GC LLC,

Second Third-Party Plaintiffs,

against

MAGELLAN CONCRETE STRUCTURES CORP.,

Second Third-Party Defendant.

Index Number 518916/2017
Seqs. 006–008

DECISION/ORDER

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	1–3
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	3–5
Replying Affidavits	6
Exhibits	
Other	

Upon the foregoing papers, defendant/third-party plaintiff Evergreen Gardens I LLC (Evergreen)'s and defendant/second third-party plaintiffs Brooklyn GC LLC (Brooklyn GC) and Bushwick GC LLC (Bushwick GC)'s motion for summary judgment (Seq. 006), plaintiff's cross-motion for partial summary judgment (Seq. 007), and third-party defendant/second third-

party defendant Magellan Concrete Structures Corp. (Magellan)'s cross-motion for summary judgment (Seq. 008) are decided as follows:

Procedural History and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on July 17, 2017 while working for Magellan (Figueroa EBT at 15). Plaintiff testified as follows: he was carrying pieces of rebar in the basement of the construction site when he tripped and fell (*id.* at 79). The rebar was carried from the pile deposited by a crane to the area on the floor where it would be laid down (Manuel Castro, Magellan foreman, EBT at 60–63). The object plaintiff tripped on was "a [loose] rebar on the floor . . . that was an additional bar. Like somebody . . . had just forgotten it there" (Figueroa EBT at 79). The rebar that plaintiff was tasked with carrying was twenty-five feet long, and the piece that he tripped on was noticeably smaller than those (eight to ten feet) (*id.* at 80). There is no evidence provided as to the creation or intended purpose of this smaller piece of rebar. Magellan employees, including the carriers, were responsible for cutting the rebar (*id.* at 80–81). Plaintiff had previously noticed pieces of rebar on the floor in the area, and had previously complained to his supervisor, "Miguel" (*id.* at 83). It is undisputed that Magellan was responsible for cleaning the deck prior to placing the rebar (*id.* at 90). Mr. Castro testified that on the day of the accident the working area was clean (Castro EBT at 116).

It is undisputed that Evergreen was the owner of the subject premises, a project known as "Evergreen Gardens" (Moshe Blum, superintendent of Brooklyn GC, EBT at 20), and that Brooklyn GC was the general contractor at the premises (*id.* at 40). Mr. Blum was Brooklyn GC's site-safety manager on the premises. Yoel Schwimmer, principal of Bushwick GC, stated in an affidavit that Bushwick GC was not involved in the subject construction project and had no

knowledge of the dangerous condition (Schwimmer Aff. at ¶¶ 4, 8). Both Bushwick GC and Brooklyn GC are signatories on the sub-contract with Magellan (*see* sub-contract at 3).

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]).

Labor Law § 241 (6)

In order to prevail on a cause of action pursuant to Labor Law § 241 (6), a plaintiff must show that 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]).

Plaintiff predicates his argument on 12 NYCRR §§ 23-1.5, 2.1 (a) (storage of material or equipment) and 2.1 (b) (disposal of debris). Rules 23-1.5 and 2.1 (b) are "[insufficiently] specific to support a cause of action under" Labor Law § 241 (6) (*see Spence v Is. Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 937 [2d Dept 2010]). Rule 23-2.1 (a) is inapplicable to the facts as plaintiff has alleged them. In any event, plaintiff does not oppose defendants' motion as to violations of these sections.

Plaintiff also alleges a violation of Rule 23-1.7 (e), which reads:

> (e) Tripping and other hazards.
>
> (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.

Defendants seek summary judgment on two grounds. First, defendants argue that there was no violation of this section. Plaintiff alleges he tripped on a single piece of rebar, which defendants contend is insufficient to constitute "an accumulation of debris," and the basement where he fell was an open area, not a passageway. Second, defendants argue that the piece of rebar was integral to the plaintiff's work. In opposition, the plaintiff argues that there was a clear path between the pile of rebar and the center of the basement where the rebar was being laid, which plaintiff and his partner had traversed many times that day. Even absent a finding that the plaintiff was on a passageway, plaintiff argues that defendants violated Rule 23-1.7 (e) (2), as he was indisputably in a "working area." As to whether or not the rebar was integral to plaintiff's work, the plaintiff contends that the piece of rebar on which he tripped was different from the rebar that he was carrying, and that he was not engaged in cutting rebar at the time of his accident. The shorter piece of rebar on which he tripped was, therefore, debris.

The plaintiff cites no authority to support his proposition that he was walking along a *de facto* passageway in the open basement, and therefore operating within the scope of Rule 23-1.7 (e) (1). Defendants are therefore granted summary judgment as to this Code section (*see Gancarz v Brooklyn Pier 1 Residential Owner, L.P.*, 190 AD3d 955 [2d Dept 2021]). However, with respect to Rule 23-1.7 (e) (2), whether the rebar on which plaintiff tripped was integral to his work or was "debris" is a triable issue of fact (*see e.g. Riley v J.A. Jones Contr., Inc.*, 54 AD3d 744, 745 [2d Dept 2008]). Rule 1.7 (e) (2) requires the removal of debris "insofar as it may be consistent with the work being performed." Here, there is inadequate evidence to

ascertain the nature of the piece of rebar on which plaintiff tripped. Therefore, whether the rebar was integral to the work plaintiff was performing is a question of fact—summary judgment as to Labor Law § 241 (6) is denied to all sides.

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. Figueroa alleges that the rebar on which he tripped was both a dangerous premises condition and the product of a deficient means and manner of performing the work. Accumulated debris may be sufficient to constitute a dangerous premises condition for the purposes of Labor Law § 200 (*Nankervis v Long Island University*, 78 AD3d 799 [2d Dept 2010]; *Lane v Fratello Const. Co.*, 52 AD3d 575 [2d Dept 2008]).

In seeking summary judgment, defendant Bushwick GC argues that it was not involved at the site and that there is no evidence it directed plaintiff's work; defendant Evergreen makes essentially the same argument. Brooklyn GC had an employee, Mr. Blum, present at the site, but contends that he did not direct, control, or observe plaintiff's work. While these contentions speak to actual notice, they do not alleviate these defendants of constructive notice. "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]). Plaintiff testified that there was always debris at the worksite and that, despite complaining multiple times to his supervisor, nothing was done (Figueroa EBT at 63–64, 82–84). In light of this testimony, there is a question of fact as to whether the defendants were on notice of a defective condition. Defendants' motion for summary judgment is therefore denied. The court need not reach the balance of the parties' arguments.

Third-Party Claims

To prevail on a claim for contractual indemnification, a general contractor must demonstrate that it is owed indemnification based on the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011] [quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 (2d Dept 2009)]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016] [internal citations omitted]).

Magellan argues that the contract does not contain indemnification terms and the sub-contract does not identify a specific job or site. Essentially, Magellan contends that, absent

evidence linking the contract and the sub-contract, contractual indemnification cannot attach. However, this issue is resolved by Mr. Blum's affidavit, which states that the contract and the sub-contract were part of the same agreement (Blum Aff. at ¶ 6).

In light of the foregoing determinations, questions of fact exist as to defendants' liability under Labor Law § 200, and therefore as to defendants' negligence. The contractual provisions upon which Evergreen, Bushwick GC, and Brooklyn GC predicate their contractual indemnification claims against Magellan require indemnification for claims "arising out of the work" performed at the site. Because there is an open question of fact as to whether any of the defendants are liable under Labor Law § 200, and because a party cannot be awarded summary judgment on a contractual indemnification unless it demonstrates that it is free from negligence (General Obligations Law § 5-322.1; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662), Evergreen, Brooklyn GC, and Bushwick GC's motion for contractual indemnification is denied. Additionally, Magellan's request for summary judgment on its counter-claims for contribution and common-law indemnification is also denied due to the questions of fact about movants' own negligence (*see Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013]). Evergreen, Brooklyn GC, and Bushwick GC's motion for summary judgment on Magellan's counter-claim is also denied due to the question of fact about their negligence.

Conclusion

Defendant Evergreen and defendant/second third-party plaintiffs Brooklyn GC and Bushwick GC's motion for summary judgment (Seq. 006) is granted to the extent of dismissing Industrial Code §§ 23-1.5, 1.7 (e) (1), and 2.1 (a–b) **only**. The motion is otherwise denied.

Plaintiff's cross-motion for partial summary judgment (Seq. 007) is denied.

Third-party defendant/second third-party defendant Magellan's cross-motion for summary judgment (Seq. 008) is denied.

This constitutes the decision of the court.

October 13, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court

[Order resolving motions sequences 006–008 in the action *Figueroa v Evergreen Gardens I, LLC, et al.*, 518916/2017.]