

Torres v BGY Cityview LLC
2023 NY Slip Op 35247(U)
October 3, 2023
Supreme Court, Queens County
Docket Number: Index No. 716050/19
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY

PART 35

Justice

-----X
CARLOS MAURICIO ZHICAY TORRES,

Plaintiff,

-against-

Index No. 716050/19

Mot Date: 9/19/23

Mot. Seq: 1

BGY CITYVIEW LLC, PARK PLACE
ESTATE LLC, UNITED CONSTRUCTION
& DEVELOPMENT GROUP, CORP., NEW
LINE STRUCTURES & DEVELOPMENT,
LLC, NEW LINE STRUCTURES INC.,Defendants,
-----X

The following papers were read on the motion by plaintiff for an order granting partial summary judgment on the issue of liability with respect to the cause of action for a violation of Labor Law § 241(6) premised on the violations of Industrial Code Sections 23-1.7(d), 23-1.7(e)(1), and 23-1.7(e)(2); and, the cross-motion by defendants for summary judgment dismissing plaintiff's cause of action for violation of Labor Law § 240(1).

PAPERS
NUMBERED

Notice of Motion - Affirmation - Exhibits.....	EF 23-25, 27-35
Memorandum of Law.....	EF 26
Notice of Cross-Motion-Affidavit.....	EF 38
Answering Affidavit - Exhibits.....	EF 45-47
Replying Affidavit-.....	EF 48

Upon the foregoing papers, plaintiff's motion for summary judgment is granted. Defendant's cross-motion for summary judgment dismissing the cause of action under Labor Law § 240(1) is granted, without opposition.

This action arises from a construction site accident, that occurred on August 8, 2019, at 23-15 44th Drive, Astoria, New York. Plaintiff, a concrete worker, alleges that he was injured while working on the 52nd floor of a building that was being constructed. The premises were owned by defendant BGY Cityview LLC (BGY), which hired defendant New Line Structures & Development, LLC to serve as the construction

manager. Plaintiff was an employee of non-party Highbury Concrete, Inc (Highbury).

Specifically, the plaintiff contends that prior to the accident, he had been pouring concrete on the 53rd floor and then went to the 52nd floor to clean a pipe that had been clogged by concrete from work on the 53rd floor. Plaintiff claims that he was walking in an area that was approximately eight to ten 8 to 10 feet wide to sixteen to seventeen feet long. The machine to pour the concrete was in that area. Plaintiff testified that he had to walk through this area multiple times prior to the accident in order to reach the machine used to pour the concrete.

According to the plaintiff: “I was walking with a heavy piece and there was a lot of debris on the floor and the floor was wet because it had rained all day and I slipped and fell on the garbage. Plaintiff testified that the “garbage consisted of pieces of wood, construction debris, pieces of concrete and empty food plates. It was raining at the time of the accident and the area was exposed to the elements.

Plaintiff asserts causes of action for violations of Labor Law Sections §§ 240(1), 241(6), 200 and common law negligence.

Plaintiff now moves for summary judgment on his cause of action for violations of Labor Law § 241(6). Defendants oppose and cross-move move for summary judgment dismissing plaintiff’s Labor Law § 240(1) claims. The cross-motion is unopposed by the plaintiff.

Labor Law §241(6)

Labor Law §241(6) provides, in pertinent part, that: “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 persons employed therein or lawfully frequenting such places.” Labor Law§ 241(6) imposes a non-delegable duty on owners, contractors, and their agents 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 (*White v Village of Port Chester*, 84 AD3d 946 [2d Dept. 2011]). “[T]o establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant’s violation of a specific rule or regulation was a proximate cause of the accident” (*Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2d Dept. 2012], quoting *Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept. 2009]; *see also*

Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513 [1985]; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 24 [2d Dept. 2016]).

In order to support a cause of action, 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 that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]; *Ares v State*, 80 NY2d 959, 960 [1992]).

In his Verified Bill of Particulars, plaintiff alleges violations of numerous Industrial Code Sections, including 23-1.7(d), 23-1.7(e)(1), and 23-1.7(e)(2).

Plaintiff moves for summary judgment on his Labor Law §241(6) claim predicated upon those code sections.

§ 23-1.7 “Protection from general hazards”, provides, in pertinent part:

d) Slipping hazards. Employers 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.

This section has been held sufficiently specific to support a Labor Law § 241(6) claim (see *Rizzuto v LA Wenger*, 91 NY2d 343 1998]).

Plaintiff has established that established, *prima facie*, that the garbage and construction debris on a wet floor was a slippery condition within the meaning of 12 NYCRR 23.1.7(d) and that this violation was a proximate cause of his injuries (see *Ennis v Noble Constr. Group LLC*, 207 AD3d 703 [2d Dept. 2022]; *Melchor v Singh*, 90 AD3d 866 [2d Dept. 2011]).

In opposition, the defendants fail to raise an issue of fact. The testimony of Johnny Ulman of Highbury is speculative and contradicted by the work logs. The arguments regarding lack of notice are unavailing as actual or constructive notice is not necessary to impose vicarious liability against owners and general contractors (see *Rizzuto v LA Wenger*, 91 NY2d 343 [1998]). Thus, plaintiff’s motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (d) is granted.

§ 23-1.7(e) “Tripping and other hazards.” provides:

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.

This section has been held sufficiently specific to support a Labor Law § 241(6) claim (*see Mugavero v Windows By Hart, Inc.*). Furthermore, “[w]hether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of [12 NYCRR 23-1.7(e)(1)],” (*Milligan v 606 W. 57 LLC*, 2022 N.Y. Misc Lexis 3847 [Sup Ct. Kings Cty 2023] citing *Lois v. Flintlock Const. Servs., LLC*, 137 AD3d 446, 447-48 (1st Dept. 2016), see also *Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 459 [1st Dept. 2017]).

Plaintiff has established that the defendants violated § 23-1.7(e)(1) and that this violation was a proximate cause of his injuries. “Although the regulations do not define the term ‘passageway’ . . . courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65 [1st Dept. 2018]; *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept. 2013]; see *Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]). “A ‘passageway’ is commonly defined and understood to be ‘a typically long narrow way connecting parts of a building’ and synonyms include the words corridor or hallway In other words, it pertains to an interior or internal way of passage inside a building.” (*Quigley v Port Auth. of N.Y. & N.J.*, *supra*, 168 AD3d at 67 [internal citations omitted]).

Here, the accident location was a “passageway”; and, there was “debris” and “other obstructions” that caused the plaintiff to slip or trip. Defendants fail to raise an issue of fact, as Mr. Ullman has admitted that he was not on the 52nd floor on the day of the accident and thus can only speculate as to its condition. As such, plaintiff’s motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (e)(1) is granted.

Finally, plaintiff’s motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (e)(2) is also granted. This section is also

sufficiently specific to be actionable (*see Lopez v New York City Dept. of Env'tl. Protection* 123 AD3d 982 [2d Dept. 2014]) and provides:

[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.

Plaintiff has shown that there was a violation of § 23-1.7 (e)(2) and that such a violation was a proximate cause of his injuries. (*Lopez v. New York City Dept. of Env'tl. Protection, supra*, 123 AD3d at 984). Defendants fail to raise a triable issue of fact., because “that plaintiff 'slipped,' rather than 'tripped' . . . does not render 12 NYCRR 23-1.7 (e) (2) . . . inapplicable to his case” (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept. 2015]; accord *Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446 [1st Dept. 2016]. The accident location qualifies as a “work area” as the plaintiff had to use it to access the concrete pouring machine in the course of his work (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept. 2019]; *Canning v. Barneys N.Y.*, 289 AD2d 32 [2d Dept. 2001]).

Labor Law § 240 (1)

“Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374[2011]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512 [1991]). To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation proximately caused his or her injuries (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39[2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

Defendants have established a *prima facie* entitlement to summary judgment that Labor Law § 240 (1) is inapplicable as the accident did not arise out of an elevation related risk. Plaintiff fails to raise an issue of fact as the cross-motion is unopposed. Thus, defendants cross-motion for summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted, in that: it is

ORDERED that thje branch of the motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (d) is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (e)(1) is granted; and it is further

ORDERED that the plaintiff's motion for summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code § 23-1.7 (e)(2) is granted; and it is further

ORDERED that the cross-motion by defendants for summary judgment dismissing plaintiff's cause of action for violation of Labor Law § 240(1) claim is granted, without opposition; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

Dated: October 3, 2023



A handwritten signature in black ink, appearing to read "Timothy J. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.