

Hernandez v City of New York

2024 NY Slip Op 33124(U)

September 5, 2024

Supreme Court, New York County

Docket Number: Index No. 158153/2020

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

JULIO SALDANA HERNANDEZ,

Plaintiff,

INDEX NO. 158153/2020

MOTION DATE 12/15/2023

MOTION SEQ. NO. 003 004

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
INDUSTRIAL DEVELOPMENT AGENCY, 509 W 34, L.L.C.,
509 W 34 TRS, L.L.C., 509 W 34 MEZZ, L.L.C., 509 W 34
HOLDINGS, L.L.C., TISHMAN SPEYER PROPERTIES,
L.P., TISHMAN SPEYER DEVELOPMENT
CORPORATION, TURNER CONSTRUCTION COMPANY,
NYC CONSTRUCTORS, LLC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 139, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169, 185, 186, 187, 188, 189, 190, 191, 192

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 138, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action, defendants move (Seq. 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff moves (Seq. 004), pursuant to CPLR 3212, for summary judgment against defendants 509 W. 34, L.L.C. (509), Tishman Speyer Properties, L.P. (Tishman), and Turner Construction Company (Turner) (collectively, the subject defendants) on the issue of liability under Labor Law § 241(6).

I. Factual and Procedural Background

This case arises from an incident on November 6, 2019, in which plaintiff was allegedly injured after tripping over a piece of wood while working at a construction site located at 66

Hudson Boulevard East in Manhattan (the premises) (Doc No. 108), which was owned by 509. (Doc No. 114). Plaintiff commenced this action against defendants alleging, among other things, claims of common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (Doc Nos. 108 and 110). Defendants joined issue by their answers dated December 4, 2020 and December 14, 2020, respectively, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc Nos. 109 and 111).¹

II. Legal Analysis and Conclusions

A. Plaintiff's testimony (Doc No. 116)²

Plaintiff testified that he was employed by nonparty Roger & Sons as a laborer responsible for carrying rebar at the premises. He was given instructions by his supervisor, another Roger & Sons employee, and Roger & Sons was solely responsible for the means and methods of his work.

On the day of the incident, plaintiff and a coworker were instructed to carry rebar from one side of an unfinished floor of the premises to the other. There was a narrow wooden path laid over the metal subflooring that allowed them to cross the floor, with adequate lighting. The pair carried the rebar together by hand on their shoulders using no equipment, with plaintiff holding the rear end and his coworker holding the front end; carrying the rebar in this way was the only way to complete the work.

Prior to the accident, they had completed several successful trips taking the same path across the floor. As the pair attempted another trip, plaintiff tripped over a small piece of wood,

¹ Although defendants are all represented by the same attorney, they filed separate answers. Defendants The City of New York and The New York City Industrial Development Agency filed one answer (Doc No. 109, while the remaining defendants filed their own answer (Doc No. 111).

² At his deposition, plaintiff corroborated the testimony he gave at his 50-h hearing. There were no substantial differences between the two.

causing him to fall to the ground and be struck by the rebar. He did not notice the wood before tripping on it.

Plaintiff proceeded immediately to the medic station, where he signed a medical incident report without first reading it. When shown a copy of a typed, sworn statement bearing his signature, he disagreed with its contents despite acknowledging that it contained his signature.

B. Deposition Testimony of Skinske (Doc No. 123)

A project safety manager for Turner testified that Turner was hired by 509, and Turner hired Roger & Sons as a subcontractor. Roger & Sons was required to have its own full-time site safety manager at the premises, but Turner had the authority to stop any unsafe work and correct or remedy any tripping hazards.

The manager was at the premises on the date of plaintiff's accident, but he did not witness it and could not remember how he was informed of it. When shown a copy of the incident report he verified the authenticity of the report; while he initially stated that he did not remember creating it, he later stated that he created it after viewing a different report generated by the medic. He did not copy the contents of the medic's report into the incident report, but he did refer to it in creating the incident report.

C. Turner Incident Report and Medic's Report (Doc Nos. 118 and 124)

In the medic's report (Doc No. 118), there is a notation indicating that plaintiff stated he injured his shoulder while carrying rebar when his coworker put the rebar down before he did. The Turner incident report (Doc No. 124) contained an almost identical notation regarding plaintiff's statements describing how his injury occurred. Neither report contains any reference to plaintiff tripping.

D. Plaintiff's Sworn Statement (Doc No. 117)

In a sworn statement dated the same day as his incident, plaintiff averred that his injuries were not the result of any slip, trip, or fall. He and a coworker were carrying rebar together, and he injured his shoulder when his coworker put one end of the rebar down before plaintiff put his end down.

E. Affidavit of Plaintiff's Coworker (Doc No. 121)

In his affidavit, one of plaintiff's coworkers averred that he and plaintiff worked together carrying rebar the entire morning on the day of the incident. Plaintiff never slipped, tripped, fell, or otherwise had an accident that day. However, he complained that his right shoulder was "numb" and visited the medic. Roger & Sons controlled the means and methods of the work he and plaintiff performed, and carrying the rebar by hand was the only way to transport the material.

F. Affidavit of Plaintiff's Supervisor (Doc No. 122)

In his affidavit, plaintiff's supervisor stated that he and one other foreman controlled the work performed by Roger & Sons workers like plaintiff, and no other entity or individual "direct[ed], control[l]ed, or supervise[d] the means and methods" of such work. He did not witness plaintiff's accident, but was aware that plaintiff allegedly injured his shoulder on the day of the incident.

II. Legal Analysis & Conclusions

A. Plaintiff's Motion for Summary Judgment

Even assuming that plaintiff met his prima facie burden of showing that defendants violated Labor Law § 241(6), the conflicting accounts of whether or not an accident occurred in the manner in which plaintiff alleges it did, sufficiently raises a triable issue, thereby precluding summary judgment in plaintiff's favor (*see Hernandez v 46-24 28th St., LLC*, 214 AD3d 451 [1st Dept 2023])

[court properly denied plaintiff summary judgment as conflicting evidence raised factual questions as to manner in which accident, if any, occurred]; *Singh v New York City Hous. Auth.*, 211 AD3d 496 [1st Dept 2022] [summary judgment correctly denied as evidence raised questions as to whether accident occurred and whether defendant could be held liable under sections 240(1) or 241(6)]).

Whether or not plaintiff read or understood the statement(s) he signed is irrelevant, not only because he is bound by them by his signature (*Matter of Aoki v Aoki*, 117 AD3d 499 [1st Dept 2014]), but also because they are corroborated by other evidence in the record.

B. Defendants' Motion for Summary Judgment

First, plaintiff did not oppose, and therefore abandoned, any claims based on Labor Law §§ 240(1), 241-a, and 241(6) predicated on certain Industrial Code sections and OSHA regulations (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013]).

As to plaintiff's Labor Law § 200 and common-law negligence claims, to the extent that the accident occurred in the manner alleged by plaintiff and thereby arose from the means and methods of his work, defendants exercised no supervision or control thereover, and thus cannot be held liable (*Lourenco v City of New York*, 228 AD3d 577 [1st Dept 2024]; *Siegel v Delta Airlines, Inc.*, 227 AD3d 516 [1st Dept 2024]).

The only Industrial Code violations relied upon by plaintiff in asserting a claim under Labor Law § 241(6) are 12 NYCRR 23-1.7(d), (e)(1), and (e)(2).

12 NYCRR 23-1.7(d) applies to slippery conditions at a construction site, such as ice, snow, water, grease, or some other foreign substance (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]). It includes only “those substances that share a quality common to the enumerated items [of ice, snow, water, and grease],” i.e., “types of material that are slippery

when in contact with an area where someone walks” (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 320 [2024]). As plaintiff alleges that he tripped over a piece of wood, this section is inapplicable (*see Costello v Judlau Contr., Inc.*, 2021 WL 5920303 [Sup Ct, New York County 2021] [Industrial Code section did not apply as plaintiff tripped on sheetrock, wood, and pipe]).

12 NYCRR 23-1.7(e)(1) “requires that all passageways shall be kept free from accumulations of dirt and debris and from obstructions or conditions which could cause tripping.” As discussed below, plaintiff was not working in a passageway but rather an open work area, and thus this section is inapplicable (*Purcell v Metlife, Inc.*, 108 AD3d 431 [1st Dept 2013] [accident did not occur in passageway but rather open work area]). Moreover, a single piece of wood does not constitute an accumulation of debris (*Mooney v BP/CG Ctr. II, LLC*, 179 AD3d 490 [1st Dept 2020] [single screw at issue was not accumulation of debris]).

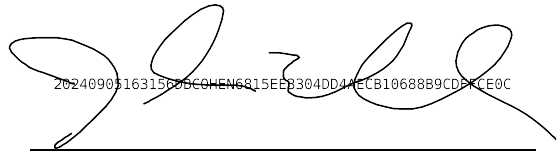
12 NYCRR 23-1.7(e)(2) “provides that the parts of floors, platforms[,] and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials.” While defendants claim that they may not be held liable for a violation of this subsection as they had no notice of the wood, their alleged lack of notice is irrelevant (*Gallina v MTA Cap. Constr. Co.*, 193 AD3d 414 [1st Dept 2021]). Absent any valid argument for dismissal of this claim, defendants have not met their burden on their motion.

Finally, to the extent that plaintiff argues that Industrial Code section 23-2.1 was also violated, that section pertains to the storage of “material piles” in a passageway, walkway, stairway or other thoroughfare. Here, plaintiff was walking through an open work area, not a thoroughfare, and, moreover, he allegedly tripped on a single piece of stray wood, not a pile of material. Thus, this Code section is inapplicable.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability (seq. 004) is denied; it is further

ORDERED, that defendants' motion for summary judgment (seq. 003) is granted to the extent of dismissing all of plaintiff's claims except his Labor Law § 241(6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7(e)(2), and those claims are severed and dismissed.



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9/5/2024
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: