Forrest v Tutor Perini Corp.
2024 NY Slip Op 35011(U)
March 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 713183/2020
Judge: Cassandra A. Johnson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CASSANDRA A. JOHNSON IA Part 2
Justice

x

TROY L. FORREST,

Plaintiff,

-against-

TUTOR PERINI CORPORATION, MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, and LONG ISLAND RAIL ROAD,

Defendants.

x

Index Number 713183 /2020

Motion Date December 13, 2023

Motion Seq. Nos. 2 & 3

The following numbered papers read on the motion (Mot. Seq. No. 2) by plaintiff for summary judgment on his clams made pursuant to Labor Law § 240 (1) and 241 (6); and on the motion (Mot. Seq. No. 3) by defendants Tutor Perini Corporation, MTA Capital Construction Company, Metropolitan Transportation Authority, New York City Transit Authority, The City of New York, and The Long Island Rail Road Company i/s/h/a Long Island Rail Road for summary judgment dismissing plaintiffs' claims made pursuant to Labor Law §§ 200, 240 (1) , 241 (a) and 241 (1-6).

Mot. Seq. No. 2	Papers Numbered
Notice of Motion – Affs – Exhs…….....	E46 -E58
Affs. In Opp……..…….....	E60-E66
Reply Aff. ……	E67

Mot Seq. No. 3	Papers Numbered
Notice of Motion – Affs – Exhs…….....	E69 -E89
Affs. In Opp……..…….....	E90-E91
Reply Aff. ……	E92

On the foregoing papers, it is ordered that motion sequence numbers 2 and 3 are determined together for one decision and order.

Before addressing the merits of these motions, the court notes that, by stipulation dated January 7, 2021, it was agreed that the action would be discontinued, without prejudice, against defendants Metropolitan Transportation Authority, New York City Transit Authority, The City of New York, and The Long Island Rail Road Company i/s/h/a Long Island Rail Road. The remaining defendants are Tutor Perini Corporation, MTA Capital Construction Company.

In light thereof, the branch of Motion Seq. No. 2, requesting amendment of the caption, is granted and the caption is hereby amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
_____x
TROY L. FORREST,

Plaintiff, Index No.: 713183/2020

-against –

TUTOR PERINI CORPORATION and
MTA CAPITAL CONSTRUCTION
COMPANY,

Defendants
_____x

Plaintiff alleges that he was caused to suffer injuries on January 2, 2020, while he was working on a construction site for the "East Side Access Tunnel Project" in Long Island City, New York. Defendant MTA Capital Construction Company (MTA Capital) was the owner of the premises and defendant Tutor Perini Corp. (Tutor Perini) was the general contractor. Plaintiff was employed by a non-party entity identified as Railworks.

On the date in question, plaintiff claims that he was working as a carpenter in a railway tunnel, and was in the process of installing forms for a 1000-foot concrete pour. He took a bathroom break and alleges that, upon returning, he had to walk on a three-inch wide rail in order to return to his work. Plaintiff alleges that this was the only means of access available because the floor of the site was covered with debris. Plaintiff claims that in so walking on the rail, which was approximately three feet above the floor, he slipped

on water on the rail and fell, whereupon his foot landed into a gap approximately two inches deep, causing injury to his ankle.

Plaintiff now seeks summary judgment in his favor pursuant to Labor Law §§ 240 (1) and 241 (6) predicated upon an alleged violation of Industrial Code § 23-1.7 (d), which pertains to slipping hazards on passageways,

Turning first to plaintiff's claims brought pursuant to Labor Law 240 (1), "Labor Law § 240 (1) requires property owners and contractors to provide workers with 'scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection" to the workers' " (Labor Law § 240 [1]; *Mendez v Jackson Dev. Group*, 99 AD3d 677 [2d Dept 2012]). The purpose of the statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*id*. at 678; *citing Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d 494 [1993]). The protections of the statute extend to whether a scaffold, hoist, stay ladder or protective device proved inadequate to "shield" the injured worker (*Castro v Wythe Gardens, LLC*, 217 AD3d 822 [2d Dept 2023]; also *citing Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d at 501).

Here, plaintiff maintains that his fall was gravity-related in that he fell approximately three feet from a rail that ran along the floor Defendants argue that the rail was a "permanent structure" and not a "safety device" within the meaning of Labor Law § 240 (1) (*see Pope v Safety & Quality Plus*, 74 AD3d 1040 [2d Dept 2010]; *Parsuram v I.T.C. Bargain Stores, Inc.*, 16 AD3d 471 [2d Dept 2006). However, plaintiff argues that, due to the debris on the floor, the rail was a "functional safety device" within the protections and meaning of Labor Law § 241 (1) (*see Esqivel v 2707 Creston Realty, LLC* 149 AD3d 1040 [2d Dept 2017]; *Ramirez v Metropolitan Transp. Auth*, 106 AD3d 799 [2d Dept 2013] and *see, Royland v McGovern and Co., LLC*, 203 AD3d 677 [1st Dept 2022]). Defendants refute this assertion and maintain that plaintiff was able to walk on a platform adjacent to the rail, and they also contest the allegation that there was impassible debris on the floor. These conflicting accounts of the condition of the worksite raise issues of fact as to whether the rail was in fact a "functional safety device," providing the only means of access to the worksite, or whether it was "mere passageway" or shortcut, which is not within the purview of Labor Law § 240 (1) (*compare Esqivel v 2707 Creston Realty*, LLC 149 AD3d 1040; *Ramirez v Metropolit1itan Transp. Auth*, 106 AD3d 799 [2d Dept 2013] and *Palacios v 29th St. Apts.*, 110 AD3d 698 [2d Dept 2013]). Accordingly, the disparate accounts of the conditions in the tunnel warrant denial of those branches of motion sequence numbers 2 and 3 for summary judgment pursuant to Labor Law § 240 (1).

In Motion Seq. No. 3, defendants seek summary judgment in their favor dismissing plaintiff's claims premised upon Labor Law § 200. This statute "is a codification of the

common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v New York State Elec. & Gas Corp*., 82 NY2d 876, 877 [1993]).

"Claims for personal injury under the statute and the common law fall into 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. 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. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg*., 99 AD3d 139, 143, 144 [1st Dept 2012]).

Here, plaintiff makes no claim that defendants supervised or controlled his work. Rather, plaintiff alleges that defendants bear liability under Labor Law § 200 for having actual or constructive notice of the alleged dangerous condition created by water on the rail. In his affidavit, plaintiff averred that the accident occurred in a tunnel, and "that there was ground water dripping from the tunnel roof, pools of water on the floor, and water splashed and tracked onto all of the surfaces by the ongoing work." As such, plaintiff alleges that the presence of water was an ongoing condition. "Where a [landowner] has actual knowledge of a recurrent dangerous condition in a specific area, it may be charged with constructive notice of each specific recurrence of it" (*Agosto v City of New Rochelle*, 114 AD3d 625, 626 [2d Dept 2014]; *D'Amato v Vitale*, 187 AD3d 983 [2d Dept 2020]). When an accident arises from a dangerous condition on the premises, "liability under Labor Law § 200 may arise if no effort was made to remedy it despite there being actual or constructive notice of it" (*Colon v Bet Torah, Inc*., 66 AD3d 731, 732 [2d Dept 2009]). "Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition" (*id.*; *White v Village of Port Chester*, 92 AD3d 872 [2d Dept 2012]). Here, issues of fact exist as to the existence of the allegedly dangerous recurrent condition created by water, and as to whether defendant consequently had a duty to make reasonable inspection thereof (*id*.) In their papers, defendants do not address whether they conducted inspections of the site. It follows that that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 200 claims is denied.

Labor Law § 241 (6) imposes a non-delegable duty on premises owners and contractors at construction sites to provide reasonable and adequate safety to workers (*Cappabianca v Skanska USA Bldg*., 99 AD3d 139). To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated, and that the violation caused the complained-of injury (*id.* at 146). "Section 23–1.7(d) of

the Industrial Code, prohibits owners and employers from letting workers "use a floor, ... scaffold, platform or other elevated working surface which is in a slippery condition' " (*id.* at 146-147). This provision of the Industrial code, relating to slipping hazards, is sufficiently sufficient to support a cause of action (*Whalen v City of New York*, 270 AD2d 340 [2d Dept 2000]). With regard to plaintiff's claim predicated Industrial Code § 23-1.7 (d), defendants urge this court to adopt the reasoning of the court in *Knell v The City of New York* (Sup Ct., Queens County, March 4, 2013, , Kerrigan, J., Index No. 5350/2011). However, this court finds that determination to be factually distinguishable, inasmuch as the instant accident occurred within a closed location that was not subject to "the elements," such as a" torrential rainstorm" (*id*.). Industrial Code § 2-1.7 (d) is applicable to the extent that plaintiff alleges that he slipped on water on the rail. However, the court finds the existence of issues of fact as to whether the claimed water was what caused plaintiff to slip and fall (*Cappabianca v Skanska USA Bldg.*, 99 AD3d at 147; *Wrighten v ZHN Contr. Corp*., 32 AD3d 1019 [2d Dept 2006]). Accordingly, those branches of Motion Sequences No. 2 and No. 3, with regard to summary judgment pursuant to Labor Law § 241 (6) are denied.

Insofar as plaintiff has failed oppose those branches of motion Sequence No. 3 which seeks summary judgment dismissing plaintiff's claims under Labor Law sections §§ 241-a, 241(1), 241(2), 241(3), 241(5) and the Labor Law § 241(6) claim predicated on alleged Industrial Code sections 23-1.2, 23-1.2(a), 23-1.2(b), 23-1.3, 23-1.4(13), 23-1.4(26), 23-1.4(29), 23-1.4(44), 23-1.5, 23-1.7(b)(1)(i)(ii)(iii), 23-1.7(e), 23-1.8, 23-1.8(c), 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23- 1.22, 23-1.23, 23-1.30, 23-1.32, 23-2.1, 23-2.2, 23-2.4, 23-2.6, 23-2.7, 23-4.2, the claims are deemed abandoned and are dismissed (*Elam v Ryder Sys., Inc*., 176 AD3d 675 [2d Dept 2019]; P*alomeque v Capital Improvement Servs., LLC*, 145 AD3d 912 [2d Dept 2016]).

Finally, defendants maintain that plaintiff's testimony was inconclusive on the question as to whether the rail was wet and as to the condition of the worksite. Plaintiff testified alternately that he was caused to fall due to an elevation risk at his General Municipal Law § 50-h hearing, at his deposition, he testified that he slipped on a wet spot on the rail, and in his affidavit, plaintiff averred that there was dripping and splashing water on the rail. However, determinations of credibility are not the be made on summary judgment and properly left to the finder fact. (*Carver v Artiles*, 220 AD3d 441 [1st Dept 2023]; *Hirsch v Greenridge Assocs*., 26 AD3d 411 [2d Dept 2006]).

The motions are granted in part and denied in part as follows:

Motion sequence number 2 is granted to the extent that the caption is amended as set forth herein, and the remainder of the motion for summary judgment is denied.

Motion sequence number 3 is granted to the extent that plaintiff's claims under Labor Law sections §§ 241-a, 241(1), 241(2), 241(3), 241(5) and the Labor Law § 241(6) claim

predicated on alleged Industrial Code sections 23-1.2, 23-1.2(a), 23-1.2(b), 23-1.3, 23-1.4(13), 23-1.4(26), 23-1.4(29), 23-1.4(44), 23-1.5, 23-1.7(b)(1)(i)(ii)(iii), 23-1.7(e), 23-1.8, 23-1.8(c), 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23- 1.22, 23-1.23, 23-1.30, 23-1.32, 23-2.1, 23-2.2, 23-2.4, 23-2.6, 23-2.7, 23-4.2, are dismissed as unopposed. The remainder of defendants' motion for summary judgment in their favor is denied.

Dated: March 25, 2024

J.S.C.