

Russo v New York City Tr. Auth.
2024 NY Slip Op 35428(U)
April 3, 2024
Supreme Court, Richmond County
Docket Number: Index No. 150171/2021
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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CHRISTOPHER RUSSO,

Plaintiff,

PART 26

- against -

Present: Hon. Orlando Marrazzo, Jr.

DECISION and ORDER

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY
and PRISMATIC DEVELOPMENT CORP.,

Index No. 150171//2021
Motion Nos. 001, 002

Defendants.

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NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY
and PRISMATIC DEVELOPMENT CORP.,

Third-Party Plaintiffs,

-against-

PERMADUR INDUSTRIES, INC.,

Third-Party Defendants.

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The papers numbered NYSCEF Documents “54” to “95” were marked fully submitted on the 10th day of January, 2024.

Upon the foregoing papers, the motion (Seq. No. 001) of defendants/third-party plaintiffs New York City Transit Authority, Metropolitan Transportation Authority and Prismatic Development Corp. for summary judgment dismissing the complaint is granted as to the causes of action pursuant to Labor Law §240(1) and Labor Law §241(6). The branch of defendants/third-party plaintiffs’ motion for summary judgment dismissing the Labor Law §200 cause of action is granted; and summary judgment dismissing the cause of action for common law negligence

denied. The branch of defendants/third-party plaintiffs' motion for contractual indemnification as against third-party defendant Permadr Industries Inc. is denied. Plaintiff's cross motion (Seq. No. 002) for partial summary judgment on liability under §241(6) is denied.

BACKGROUND

Mr. Russo commenced this action on January 25, 2021 to recover damages for personal injuries he sustained on May 13, 2020, while performing construction work at the Staten Island railroad car repair shop. The property is located at 845 Bay Street, Staten Island New York and owned by defendants/third-party plaintiffs New York City Transit Authority (hereinafter, "NYCTA") and Metropolitan Transportation Authority (hereinafter, "MTA"). At the time of the incident, plaintiff was employed by third-party defendant Permadr Industries, Inc.¹ (hereinafter, "Permadr") as a millwright general foreman of a municipal project involving the construction of a maintenance facility, *i.e.*, a train barn, for servicing the trains. The so-called "Clifton Shop Project" entailed the removal of old tracks and paving. Mr. Russo's tasks were to supervise and assist the workers, review plans, specifications, and load capacities for setting up rigging. He was responsible for the overall preparation of site work. Defendant/third-party plaintiff Prismatic Development Corp. (hereinafter, "Prismatic") was retained as the general contractor for the project pursuant to a prime contract with NYCTA. The incident occurred at 8:50 a.m. on the first day of Mr. Russo's employment for Permadr.

Plaintiff's 50-h hearing was held on September 14, 2021. Mr. Russo testified that prior to the accident, he was standing on the bed of a pickup truck, handing equipment to his partner. Upon completion of that task, he proceeded to climb over the tailgate to step off the back of the truck. He placed his right foot on the bumper and used his left foot to step down. In the process, Mr.

¹ Permadr was in the business of installing overhead cranes and gantry cranes.

Russo's foot struck a "ledge" or "lip" on the ground causing his ankle to roll. He fell and sustained injuries including a nondisplaced traverse fracture of his left ankle, a fracture of his left foot and torn ligaments in his left ankle.

Defendants/third-party plaintiffs NYCTA, MTA and Prismatic move for summary judgment dismissing the complaint and any cross claims asserted against them; and awarding Prismatic common law and contractual indemnification against Permadrur. Plaintiff cross moves for partial summary judgment on the issue of liability under Labor Law §241(6) as codified in the Industrial Code, 12 NYCRR section 23-1.7(e)(1) and e(2). .

DISCUSSION

Mr. Russo alleges that on the day of the accident, an uneven and raised section of plywood covered the train rail at the location of his accident. He maintains the defective plywood created a one to two-inch height differential which he describes as a "ledge" or "lip" above the concrete abutting the train rail. When he stepped off the bumper of the pickup truck to place his foot on the ground, he allegedly tripped due to the raised section of the plywood. Plaintiff testified that the hazardous area was not painted or marked to warn the workers of the hazardous condition.

Labor Law 240(1)

The branch of the motion for summary judgment brought by defendants/third-party plaintiffs NYCTA, MTA and Prismatic which seeks dismissal of plaintiff's cause of action for the violation of Labor Law §240(1) is unopposed. In any event, dismissal of §240 is warranted. The injury-producing work was not performed at an elevated height, nor were safety devices of the kind enumerated in Labor Law §240(1) necessary to protect Mr. Russo from the risks inherent in elevated work sites. Furthermore, plaintiff's descent from the work truck did not cause his injuries. Stepping off the back of a work truck is not an activity that falls

within the purview of Labor Law §240(1). “As a matter of law, the risk of alighting from [a] construction vehicle [is] not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law §240(1)” (*Bond v. York Hunter Construction Inc.*, 95 NY2d 883, 884-885 [2000]).

Labor Law §241(1)

Liability under Labor Law §241(6) must be predicated on the violation of a specific provision of the Industrial Code. Movants are not liable under Labor Law §241(6) for noncompliance with various sections of the New York City Health Code; the Administrative Code of the City of New York’s Building Code; and section 34 of the Rules of the City of New York because a violation of the Industrial Code, as opposed to municipal codes, rules and regulations, is the only statutory basis to establish liability under section §241(6).

Nonetheless, plaintiff asserts a sufficient statutory basis under Labor Law §241(6) predicated on Industrial Code provisions relating to tripping and other construction site hazards set forth in 12 NYCRR 23-1.7 (e)(1) and (e)(2). Subsection (e)(1) requires that “[a]ll passageways shall be kept free from accumulations of dirt and debris and from other obstructions or conditions which could cause tripping”; subsection (e)(2) requires 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 material, and from sharp projections insofar as may be consistent with the work being performed.” Neither of these provisions apply to the facts in this case.

Mr. Russo identified several photographs marked for identification as “B” and “G” at his 50-h hearing. The images depict a large open facility bearing the resemblance of a barn. They clearly indicate that he fell in a work area as contemplated by 12 NYCRR 23-1.7(e)(2), rather than

in a passageway within the meaning of 12 NYCRR 23-1.7(e)(1). Subdivision (e)(1) does not apply in this case (*see Freyberg v Adelphi Univ.*, 221 AD3d 658, 659-660 [2d Dept 2023]).

The same can be said with respect to plaintiff's cause of action predicated on a violation of subdivision (e)(2) of section 23-1.7. There are no allegations that the alleged defective condition involved "accumulations of dirt and debris", "scattered tools and material", and/or "sharp projections" on the floor in the facility.

Defendants/third-party plaintiffs established their prima facie entitlement to summary judgment dismissing the cause of action predicated on violations of 12 NYCRR 23-1.7 (e)(1) and (e)(2). In opposition, plaintiff fails to raise a triable issue of fact to defeat summary judgment.

In light of this determination, plaintiff's cross motion for partial summary judgment on the issue of liability under Labor Law §241(6) as codified in the Industrial Code, 12 NYCRR section 23-1.7(e)(1) and e(2) is denied.

Labor Law §200 and Common Law Negligence

Labor Law §200 codifies the common law duty imposed upon an owner, contractor, and their agents to provide construction workers with a reasonably safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Common law negligence claims by injured §employees generally fall into two broad categories, *i.e.*, those involving injuries arising from an alleged dangerous or defective condition on the premises; and those involving injuries arising from the means and methods in which the injury-producing work is performed. The latter requires that the owner or general contractor exercised some degree of supervisory control over plaintiff's work, which movants fail to demonstrate in this case (*see Toussaint v. Port Auth. of N.Y. and N.J.*, 38 NY3d 89, 94 [2022]).

Mr. Russo testified that on the first day of his employment for Permatur, he arrived at the job site at 6:00 a.m., and met his partner, Frank, and the supervisor, Mark. They “basically took a tour of the job” and then proceeded to go over the “set plans and staging areas” for rigging up equipment. Mark did not give plaintiff any instructions regarding “what needed to happen that morning.” Plaintiff testified that, as the foreman, he was aware of what tasks were required and received no instructions or supervision. Absent sufficient evidence to the contrary, Mr. Russo’s testimony establishes that defendants/third-party plaintiffs did not direct or control the means and methods of the work he performed, therefore, his cause of action pursuant to Labor Law §200 must be dismissed (*see Toussaint v. Port Auth. of N.Y. and N.J.*, 38 NY3d 89, 94).

Plaintiff’s claim for common law negligence falls into the category of cases involving a worker who is injured due to a dangerous or defective condition on the premises. Liability may only be imposed if movants establish that they did not create the dangerous condition; lacked actual notice of the condition; or the defect was visible and apparent for a sufficient length of time prior to the accident to discover and remedy it (*see Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 [1986]).

Movants failed to meet this burden because they rely on conflicting deposition testimony which requires a determination of the witnesses’ credibility.

Mr. Russo testified that the edge of the section of plywood that caused him to trip was not marked or painted yellow. To the contrary, the general contractor’s safety manager (Mr. Oliveri), testified that the edge along the entire length was marked in yellow to caution workers of the alleged tripping hazard. Mr. Oliveri subsequently testified he was not certain, although marking the plywood was the usual practice. Mr. Russo’s partner, who did not witness the accident, testified there were no markings.

It is well-established on a motion for summary judgment “the court is not to determine [matters of] credibility but is to determine whether there exists a factual issue, or if arguably there is a genuine issue of fact” (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; see *DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013]). The conflicting deposition testimony of the witnesses is inconclusive or requires a determination of credibility as to whether, *inter alia*, the raised and uneven section of the plywood was properly marked to warn plaintiff of the latent defect. “Credibility, in short, if it is a key factor in the motion papers, will require a denial of the motion [and must be resolved at trial]” (*S.J. Capelin Assoc., Inc v Globe Mfg. Corp.*, 34 NY2d at 341; see *Crovato v. H & M Hennes & Mauritz, L.P.*, 176 AD3d 547, 547-548 [1st Dept 2019]; *St. Marks Assets, Inc. v. Sohayegh*, 167 AD3d 458, 459 [1st Dept 2018]).

Furthermore, movants fail to produce conclusive testimony or other admissible evidence to eliminate triable issues of fact as to whether they had actual notice of the condition, or whether the defect was visible and apparent for a sufficient length of time prior to the accident to discover and remedy it (see *Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 [1986]; see also *Samperi v. City Safety Compliance Corp.*, 2024 WL 1081275 [2d Dept] [conclusory assertions are insufficient to meet the movants’ burden on a summary judgment]).

Dismissal of plaintiff’s cause of action pursuant to section 200 of the Labor Law is warranted as addressed above. However, dismissal of the cause of action for common law negligence is not appropriate because issues of fact and credibility preclude summary judgment. .

Contractual Indemnification

Prismatic maintains that under the terms of the contract, Permadur agreed to indemnify third-party plaintiffs for claims and lawsuits brought against Prismatic for claims “arising out of the acts of the subcontractor.”

“A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Velasquez v Mosdos Meharam Brisk of Tashnad*, 189 AD3d 1655, 1657-1658 [2d Dept 2020] citing *Ventimiglio v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047-1048 [2d Dept 2012]; see General Obligations Law §5-322.1). In this case, Prismatic (the proposed indemnitee) failed to demonstrate its entitlement to summary judgment awarding contractual indemnification against Permador, (the proposed indemnitor) in view of the triable issues of fact with regard to its own negligence in connection with Mr. Russo’s accident (see *Roblero v Bais Ruchel High School, Inc.*, 175 AD3d 1446, 1448-1449 [2d Dept 2019]. An award of contractual indemnification in favor of Prismatic is premature.

Accordingly, it is

ORDERED, the unopposed motion of defendants/third-party plaintiffs New York City Transit Authority, Metropolitan Transportation Authority and Prismatic Development Corp. for summary judgment dismissing the cause of action pursuant to Labor Law §240(1) is granted; and it is further.

ORDERED, the branch of defendants/third-party plaintiffs’ motion for summary judgment dismissing the cause of action pursuant to Labor Law §241(6) as codified in the Industrial Code, 12 NYCRR section 23-1.7(e)(1) and (e)(2) is granted; and it is further

ORDERED, the branch of defendants/third-party plaintiffs’ motion for summary judgment dismissing the Labor Law §200 cause of action is granted, and denied as to the cause of action for common law negligence; and it is further

ORDERED, the branch of -defendants/third-party plaintiffs' motion for contractual indemnification as against third-party defendant Permadr Industries Inc. is denied; and it is further,

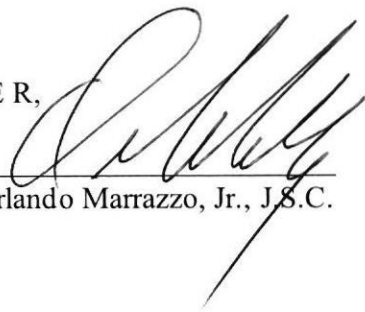
ORDERED, plaintiff's cross motion for partial summary judgment on liability under 12 NYCRR 23-1.7 (e)(1) and (e)(2) is denied; and it is further

ORDERED, the Clerk shall enter judgment accordingly.

Dated:

4/3/24

ENTER,


Hon. Orlando Marrazzo, Jr., J.S.C.