Supreme Court of the State of New York
County of Kings

Index Number 507094/2022
Seqs. 004

Part LL1M

OGBUJI MONDAY,

Plaintiff,

against

DECISION/ORDER

TERMINAL FEE OWNER LP, NEW LINE STRUCTURES & DEVELOPMENT LLC, AND ALMEIDA CONCRETE PUMPING & EQUIPMENT, INC.,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this motion, by reference to NYSCEF: 72–87, 90–123, 135.

Upon review of the foregoing papers, defendants Terminal Fee Owner LP (Terminal), New Line Structures & Development LLC (New Line), and Almeida Concrete Pumping and Equipment Inc. (Almeida)'s motion for summary judgment (Seq. 004) is decided as follows:

Procedural Posture and Factual Background

In an action to recover damages for personal injuries plaintiff claims he sustained on February 3, 2022, all defendants seek summary judgment on plaintiff's complaint. Plaintiff opposed the motion. Defendants failed to appear at the originally scheduled oral argument date, and their motion was denied. Defendants sought vacatur and restoration, which was granted on July 21, 2025 and the motion was returned to the oral argument calendar. This decision is issued after oral argument and on the merits.

Terminal Fee Owner LP (Terminal) was the undisputed owner of the premises located at 610 West 28th Street, New York, NY. New Line Structures & Development LLC (New Line)

was the construction manager. New Line sub-contracted with non-party Structure Tech, plaintiff's employer, to perform concrete work at the premises. Plaintiff was employed as a fire guard by Structure Tech. Structure Tech sub-sub-contracted with Almeida Concrete Pumping Equipment, Inc. (Almeida) to pump concrete at the site. The concrete mix used at the site was purchased from non-party Gotham Ready Mix (*see* Almeida/Gotham contract).

Eric Almeida, representative of Almeida, testified that there was a combination of equipment on the site owned by both Almeida and Structure Tech, and that he could not tell who owned the subject equipment based on the photographs in the record (Almeida EBT at 25, 28). Mr. Almeida saw employees he believed worked for Almeida reconnecting the system after the explosion (*id.* at 31–32).

Plaintiff testified that his incident happened as follows, and this is undisputed: Plaintiff was walking in a hallway on the premises after being assigned to a fire watch post (Monday EBT at 62–73). While walking, a pipe containing fluid concrete burst and sprayed plaintiff in the face (*id.* at 77, 88). The plaintiff's hardhat was equipped with a face shield that blocked "some" of the cement; plaintiff was not wearing safety glasses (*id.* at 50–52; 83–84). Plaintiff testified that he did not observe any defects in the pipe and did not hear any unusual sounds coming from the pipe prior to the incident (*id.* at 76–77). Both plaintiff and Mr. Almeida testified that the hoses were run along the walls, and that they should have been run along the floor (Monday EBT at 126; Almeida EBT at 47).

The New Line accident report was prepared by New Line superintendent Bill Klingener and authenticated as a business record by New Line's superintendent Caimin Clansy at his deposition (Clansy EBT at 23, 51). The report corroborates plaintiff's account that he was sprayed in the eyes with concrete when the "pump line . . . slit [sic] open." Mr. Clansy testified

that New Line required employees to wear safety eyeglasses and that a site safety manager would direct workers to wear glasses if they observed workers without them (*id.* at 38–39). However, Mr. Clansy also testified that New Line did not provide any safety equipment, and that "different contractors supplied their workers with safety equipment" (*id.* at 38).

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 § 240 (1)

The plaintiff concedes dismissal of his Labor Law § 240 (1) claim; therefore, defendants' motion is granted without opposition on this claim.

Labor Law § 241 (6)

Statutory liability under Labor Law § 241 (6) attaches to owners and contractors irrespective of what labels parties elect to use about themselves (*Walls v Turner Construction Company*, 4 NY3d 861 [2005]). Defendants Almeida and New Line both argue that they are not properly Labor Law defendants. Almeida predicates its argument on the fact that it is a sub-contractor, and therefore not properly subject to statutory liability under the Labor Law. The plaintiff does not advance a substantive argument with respect to Almeida's liability, and the caselaw plaintiff cites does not involve the applicability of Labor Law § 241 (6) to sub-contractors. Therefore, Almeida's motion is granted as to plaintiff's Labor Law § 241 (6) claim.

New Line contends that it is not a proper Labor Law defendant because it is a construction manager. "The label of construction manager is not . . . necessarily determinative" of liability under the Labor Law (*Walls*, 4 NY3d 861 [2005]). Like *Walls*, the contract here created an agency relationship between Terminal and New Line, there was no other general contractor at the site, and New Line had a duty to oversee the work and the sub-contractors (contract at §§ 2.1.1, 4.1.1, 4.7.5). Therefore, New Line is not entitled to summary judgment on the basis that it is not a proper Labor Law defendant (*see Martinez*, 235 AD3d 959 [2d Dept 2025]).

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered harm, (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 only advances arguments as to the alleged violations of 12 NYCRR 23-1.8 (a) and (c) (4), 1.5 (c) (3), and 9.2 (a). Therefore, the remaining alleged code violations are deemed abandoned (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Rule 1.8 (a) requires employers to provide adequate eye protection for employees engaged in "welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes." Here, Mr. Clansy admitted that all workers were required to wear safety glasses on site for safety, which minimally raises a question of fact as to whether the work at the site was of the type that would "endanger the eyes," making Rule 1.8 (a) applicable. Although plaintiff had a face shield, his testimony raises questions of fact about whether this constituted

"adequate eye protection." Therefore, defendants' motion is denied with respect to plaintiff's claim as predicated on Rule 1.8 (a).

Plaintiff also opposes defendants' motion based on several Industrial Code violations that were alleged for the first time in opposition. Previously unpleaded Industrial Code violations can be raised for the first time in opposition if they involve "no new factual allegations . . ., no new theories of liability . . ., and no prejudice [is] caused to the defendant]" (*Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 800 [2d Dept 2013]).

First, plaintiff alleges that defendants violated Rule 1.8 (c) (4), which requires that "every employee required to use or handle corrosive substances or chemicals" be provided eye protection. However, the plaintiff did not testify about and does not otherwise provide evidence as to what concrete mix was being used. Plaintiff's affirmation and memorandum of law in opposition do not even contain a clear allegation that this concrete mix was a corrosive substance, let alone demonstrate that this allegation does not raise a new factual allegation. Therefore, plaintiff may not rely on this alleged violation. Similarly, the plaintiff does not identify or provide an evidentiary basis for his allegation that the failure to properly maintain power-operated equipment, as required by Rule 9.2 (a), was a proximate cause of his accident. Although a power-operated pump *may* have been involved in plaintiff's accident, plaintiff's allegations are based on the location and condition of the hose and braces. The plaintiff did not mention the power-operated pump in his deposition, let alone allege that the failure to maintain the pump was a proximate cause of his accident. Therefore, this unpleaded allegation also cannot be raised here, for the first time in opposition.

However, plaintiff's allegation that defendants' violated Rule 1.5 (c) (3), which requires that all safety equipment be kept sound and operable, conforms with the evidence. Plaintiff

testified the hose failed and was improperly positioned because it ran along the wall instead of along the floor. This testimony is sufficient to raise a question of fact as to whether Rule 1.5 (c) (3) was violated; therefore, defendants' motion is also denied with respect to this alleged code violation

Labor Law § 200

"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]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*Ramos v Kent & Wythe Owners, LLC*, 236 AD3d 693, 697 [2d Dept 2025]).

New Line contends that it neither directed nor controlled the means and methods of the plaintiff's work, and that it did not have notice of any dangerous condition. However, Mr. Clansy admitted that if he saw workers not wearing safety glasses on site he would tell them to put them on, which minimally raises questions about whether New Line had the *authority* to direct and control the means and methods of the plaintiff's work (Clansy EBT at 38; *see Ortega*, 57 AD3d 54, 61 [2d Dept 2008]). Additionally, since Mr. Clansy was present on site, there are questions of fact as to whether New Line had notice that the hoses were run along the walls instead of the along the floor, which may have constituted a dangerous condition. Therefore, New Line's motion is denied.

Almeida also contends that it did not have authority over plaintiff's work and did not have notice of the dangerous condition. However, there is testimony in the record that indicates the hoses and concrete lines belonged to Almeida or had been operated by Almeida. This raises a question of fact as to whether Almeida caused or created the defect which led to plaintiff's accident, as well as whether it had notice of a defect. Accordingly, Almeida's motion on this claim is also denied.

Conclusion

Defendants' motion for summary judgment (Seq. 004) is granted to the extent of dismissing plaintiff's Labor Law § 240 (1) claim against all defendants, plaintiff's Labor Law § 241 (6) claim against Almeida in its entirety, and plaintiff's Labor Law § 241 (6) claim against all defendants as predicted on all alleged Industrial Code violations except Rule 1.8 (a) and Rule 1.5 (c) (3); the motion is otherwise denied.

This constitutes the decision and order of the court.

December 11, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court