

Jackson v Hibbert
2025 NY Slip Op 35642(U)
January 6, 2025
Supreme Court, Queens County
Docket Number: Index No. 718709/2018
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE **KARINA E. ALOMAR**
JUSTICE

IAS PART 23

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SHARON JACKSON,

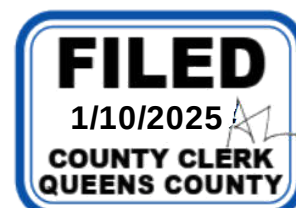
Plaintiffs,

Index No.: 718709/2018
Motion Date: 11/14/2022
Motion Seq. No.: 3

-against-

PAULINE A. HIBBERT, EILEEN E. HIBBERT, 18TH
HIGHLINE ASSOCIATES, LLC, and RELATED
CONSTRUCTION LLC,

Defendants.



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The following numbered papers 46 to 81 read on this: (1) motion by defendants 18th Highline Associates LLC (“18th LLC”) and Related Construction LLC’s (“RELATED”) (collectively, the “LLC” defendants) motion pursuant to CPLR §3212 dismissing plaintiff’s complaint and any cross-claims as against the LLC defendants; and (2)(a) plaintiff’s motion pursuant to CPLR §3212 granting plaintiff summary judgment on her Labor Law §§200 and 241[6] claims; (2)(b) dismissing the LLC defendants’ First, Fourth, Sixth, seventh, ninth, and tenth affirmative defense; and (2)(c) dismissing defendant Pauline A. Hibbert (“P.H.”) and Eileen E. Hibbert’s (“E.H.”) first affirmative defense of comparative negligence

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibits.....	EF No: 46 – 59
Notices of Cross-Motion, Affidavit, Exhibits...	EF No: 62 – 71
Affirmation in Opposition to Cross Motion.....	EF No: 73 – 79
Affirmation in Reply.....	EF No: 80 – 81

Upon the foregoing cited papers, it is hereby ordered that the LLC defendants’ motion pursuant to CPLR §3212 dismissing plaintiff’s complaint, and plaintiff’s cross-motion pursuant to CPLR §3212, are decided as follows:

Plaintiff commenced the instant Labor Law action on December 07, 2018, to recover for personal injuries allegedly sustained as the result of a work-related accident which occurred on November 20, 2018, at the construction site located at 515 West 18th Street, New York (the “premises”). It is alleged that plaintiff was struck by a vehicle operated by Pauline A. Hibbert, and owned by Eileen E. Hibbert (collectively the “Hibbert defendants”), while plaintiff was working and directing traffic at 18th Street which contains a single one-way lane. It is further alleged that 18th LLC owned, operated, maintained, and controlled the premises. Whereas defendant RELATED was the general contractor hired by 18th LLC for the construction, renovation, demolition, repair and/or alteration of the premises. Moreover, non-party ECD NY INC is plaintiff’s employer which was hired as a subcontractor at the premises.

Plaintiff's Depositions

On March 10, 2020, plaintiff's deposition transcript was conducted. Plaintiff averred that she had been working at the subject construction site at 515 West 18th Street, Manhattan, NY, for non-party ECD NY INC for approximately six months prior to the accident on December 07, 2018. ECD NY INC was in charge of excavation tasks and plaintiff was a "flag person." On the day of the accident plaintiff had on an orange vest, hard hat, gloves, glasses, and a flag. At the time of the accident plaintiff was on the right side of the moving lane (half a foot from the end of the road). Plaintiff had stopped traffic to allow a pedestrian to cross the street.

The Hibbert defendants' vehicle had been stopped approximately five feet behind plaintiff for approximately five to six minutes. Plaintiff further averred that at the time of the accident she had not indicated to any vehicle on 18th street to move. Plaintiff had not seen defendants' vehicle move prior to the impact. In fact, plaintiff averred that she turned her back from the vehicles and did not keep an eye on defendant's vehicle for approximately one minute prior to the accident. Plaintiff while facing away from traffic was then struck on the right foot by defendant P.H.'s vehicle.

Moreover, on November 22, 2021, plaintiff's second deposition was conducted. Plaintiff averred that she did not receive any kind of instruction or direction on how to flag at the work site and/or by RELATED. Plaintiff averred that she received daily work instruction, including on the day of the accident, from her supervisor Blaine from ECD NY LLC and from no other person.

Pauline A. Hibbert's Deposition

On March 10, 2020, defendant Pauline A. Hibbert's deposition transcript was conducted. Defendant P.H. averred that she was driving through 18th Street after arriving from Pennsylvania. Defendant P.H. was brought to a stop in traffic by plaintiff holding up a stop sign. Defendant averred that she was stopped for five minutes. Plaintiff walked from the left side of the road to the right side and had then put her stop sign down after she got to the right side of the road. Plaintiff began to talk to her co-worker and defendant began to move her car. However, defendant averred that as her car was moving forward, plaintiff began to walk backwards into defendants' vehicle. Defendant P.H. further averred that at no point prior to moving her vehicle did plaintiff signal to her to move forward. The Court note's that defendant P.H. has no relation with defendant RELATED or 18th LLC aside from being defendants in the same action.

Timothy McNamara's Deposition, and ECD NY LLC and RELATED Trade Contract

On July 20, 2022, Timothy McNamara's deposition was conducted on behalf of Related Construction LLC. Mr. McNamara averred that he was the site safety manager at the subject construction site. Mr. McNamara further averred that no one from RELATED had ever given any directions to the subcontractors regarding the re-routing or stopping of traffic. The contractors were responsible for their own workers, policies, and health and safety plans.

In further support of their motion defendants submit the ECD NY LLC trade contract agreement. Section 6.3 of the trade agreement reads in part as follows:

[ECD NY LLC], its Subcontractors... of all tiers and its suppliers shall be solely responsible for (a) construction means, methods and techniques; (b) establishment of a site safety program that adheres to the Project Safety Program (as defined in Section I 1.1(a) herein) and is subject to the review and approval of CM; (c) all procedures and precautions necessary to comply with the Project Safety Program, OSHA standards, and all applicable federal, state and local safety and health-related codes, rules and regulations, and (d) carrying out the Work in accordance with the Contract Documents

Whereas Section 11.1(g) reads in part as follows:

[ECD NY LLC] shall be responsible for initiating, maintaining and supervising safety precautions and programs in connection with the performance of its Work hereunder. Trade Contractor shall take all reasonable precautions for the safety of and shall provide all reasonable protection to prevent damage, injury or loss to: (i) all Trade Contractor's employees on the Project and all other persons on or near the Project Site that may be affected by Trade Contractor's operations; (ii) all the Work and all materials and equipment to be incorporated therein, whether in storage on or off-site, under the care, custody or control of Trade Contractor or any of Trade Contractor's Subcontractors; (iii) other property at the Site or adjacent thereto; and (iv) the Work of CM, Owner and/or all other separate trade contractors.

Moreover Section 11.1 (h) reads in part as follows:

[ECD NY LLC] shall designate a responsible member of Trade Contractor's organization at the Site (the "Trade Contractor's Project Safety Representative") whose duties shall be the prevention of accidents, enforcement of all federal, state and city safety and health related laws, rules, regulations, orders and codes, compliance with the Project Safety Program and who shall further be responsible for monitoring Trade Contractor's compliance with the site safety requirements of the Department of Buildings of the City of New York or other applicable Legal Requirements.

Discussion

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact.” (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]).

Plaintiff's Labor Law §200 Claim

Section § 200 of the Labor Law is not a strict liability statute but a “negligence statute” codifying the owner’s or general contractor’s common law duty to maintain a safe workplace (see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common law negligence when the injury complained of falls into one of two categories; 1) those involving the manner in which the work was performed, or 2) those where workers are injured as a result of a dangerous condition at the work site (see *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Unlike §§ 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under § 200 of the Labor Law where the worker’s injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (see *Rizzuto v L.A. Wenger Constr. Co., Inc.*, 91 NY2d 343, 352 [1998]).

Where, the injury arises out of a “dangerous condition on the site,” rather than “the methods or materials” used by the worker or his employer, it is “not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury producing work,” only that it “had notice of the condition” (see *Minorczyk v Dormitory Auth. of State of New York*, 74 AD3d 672 [1st Dept 2010]; *Seda v Epstein*, 72 AD3d 455 [1st Dept 2010]; *Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]). “General awareness” that a dangerous condition may be present is insufficient (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]). “The notice must call attention to the specific defect or hazardous condition and its specific location” (see *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). Furthermore, constructive notice of a defect requires that the “defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*id.*).

“Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises.” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404 [1st Dept 2018]).

Here, defendants submit, inter alia, the Trade Contract Agreement wherein ECD NY LLC (plaintiff’s employer) agreed to, inter alia, be solely responsible for initiating, maintaining and supervising safety precautions and programs in connection with the performance of the work of its employees’. Moreover, plaintiff testified that she did not receive any instructions or training from any person at the work site as to how to perform her task of controlling/directing traffic. Plaintiff also averred that it was her supervisor Blaine (from ECD NY LLC) that instructed her to flag traffic at 18th Street. Thus, defendants ECD NY LLC and 18th LLC have demonstrated that they did not “exercise” supervisory control over the manner of performance of the injury producing work.

Plaintiff's Labor Law §241(6) Claim

Pursuant to Labor Law §241(6), all contractors, owners, and their agents are required to keep all areas in which construction work is being performed to be constructed, shored, equipped, guarded arranged operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The duty to comply with the commissioner's regulations under Labor Law §241(6) is nondelegable. (*see, Long v Forest-Fehlhaber*, 55 NY2d 154, 159 (1982); *Allen v Cloutier Constr. Corp.*, [1978].) To support a cause of action pursuant to Labor Law § 241(6), plaintiff must demonstrate that their injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards. (*Plass v Solotoff*, 5 AD3d 365 [2d Dept 2004]; *D'Elia v City of New York*, 81 AD3d 682 [2d Dept 2011]). Herein plaintiff alleges that defendants violated Industrial Codes §§23-1.29 (a) and (b).

Industrial Codes §23-1.29 (a) reads in part as follows:

Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.

Industrial Codes §23-1.29 (b) reads in part as follows:

Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary, extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand.

Here plaintiff's own testimony provides that defendants RELATED and 18th LCC complied with Industrial Code §23-1.29(a) in as much as plaintiff testified that she was the designated person authorized to control public vehicular traffic. Plaintiff's contention that defendants were required to provide a barricaded work area for plaintiff is undermined by the very language of the industrial code which provides that the construction area itself shall be barricaded to protect construction workers from public traffic "or" a person shall be so designated to control public traffic.

Moreover, plaintiff fails to provide that the alleged improper personal protective equipment and/or flagging equipment were the proximate cause of the accident. It is undisputed that defendant P.H.'s vehicle had been brought to a complete stop, approximately five feet from plaintiff, for approximately five minutes by plaintiff herself. However, it is alleged that defendant P.H.

negligently operated her vehicle by proceeding in traffic when she was not directed to do so and/or plaintiff allegedly put her stop signal down, walked out of the path of traffic, and then walked backwards into the path of an incoming vehicle. Thus, defendants alleged violation of Industrial Codes §23-1.29 (b) was not a proximate cause of plaintiff's injury.

CPLR §3212 as against the Hibbert defendants

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. (*Vainer v DiSalvo*, 79 AD3d 1023 [2d Dept 2010]; *Fratello v Cnty. of Suffolk*, 96 AD3d 798 [2d Dept 2012]). The unexcused failure to observe the statutory standard of care is negligence. (See *Martin v Herzog*, 228 NY 164 [1920]; *Dalal v City of New York*, 262 AD2d 596 [2d Dept 1999]).

Moreover, "to be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

As previously discussed, it is alleged that defendant P.H. negligently operated her vehicle by proceeding in traffic when she was not directed to do so and/or plaintiff allegedly put her stop signal down, walked out of the path of traffic, and then walked backwards into the path of an incoming vehicle.

Defendant P.H. testified that she moved her vehicle forward after observing plaintiff lower her traffic signal down and walk out of the path of traffic. However, defendant P.H. further testified that she did not observe plaintiff make any signal directing her to proceed in traffic. Moreover, plaintiff testified that at the time of the accident, and within five minutes prior to the time of the accident, she did not make any signals to any vehicles directing them to proceed in traffic. Thus, defendant P.H. was in violation of VTL §1102 by failing to remain stopped in traffic as directed by the designated person authorized to control public vehicular traffic (plaintiff).

With respect to plaintiff's alleged comparative fault. There are issues of fact as to whether plaintiff walked backwards into oncoming traffic after failing to keep her eye on the vehicles she was designated to direct/control. Issues of credibility are to be decided by a jury at the time of trial.

Accordingly, it is hereby

ORDERED, that plaintiff's branch of motion pursuant to CPLR §3212 for partial summary judgment on the issue of liability as against defendants Pauline A. Hibbert and Eileen E. Hibbert is granted, it is further

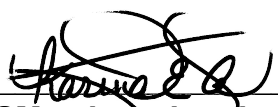
ORDERED, that plaintiff's branch of motion dismissing defendants Pauline A. Hibbert and Eileen E. Hibbert's affirmative defense based on comparative negligence is denied, it is further

ORDERED, that defendants Related Construction LLC and 18th Highline Associates LLC's cross-motion dismissing plaintiff's claims pursuant to Labor Law §§200 and 241(6) is granted, it is further

ORDERED, that plaintiff shall serve a copy of this order, with notice of entry, upon defendants within thirty days from the date of entry.

This constitutes the decision and order of the Court.

Dated: January 6, 2025



HON. KARINA E. ALOMAR, J.S.C.
Index No: 718709/2018
Sq No: 3

