Gilmore v Pavarini McGovern, LLC
2013 NY Slip Op 33168(U)
December 10, 2013
Supreme Court, New York County
Docket Number: 108524/10
Judge: Paul Wooten
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SCANNED ON 12/18/2013

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

LAWRENCE GILMORE,

Plaintiff,

INDEX NO. 108524/10

-against-

MOTION SEQ. NO. 004

PAVARINI McGOVERN, LLC and 400 FIFTH REALTY, LLC.,

Defendants.

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment dismissing plaintiff's Labor Law 200 and 241(6) and common law negligence claims.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

This is a personal injury action brought by Lawrence Gilmore (plaintiff) to recover damages for injuries allegedly sustained on November 12, 2008 at a work site located at 400 Fifth Avenue, New York, New York (work site). Plaintiff was a concrete carpenter and he was at the work site to erect elevator core walls. Plaintiff alleges that after he stepped down from the top of the scaffold and was in the basement, he was ordered by a "lower carpenter boss" to quickly hand him a three by four to shore something up. While moving to retrieve the wood, he either tripped or slipped on a burlap bag, with a banana or bullnose inside. Plaintiff fell backwards and landed on his left shoulder (plaintiff EBT, p. 44- 46, line 10 [NOM exhibit D]). A banana or bullnose is a half pound to pound devise made of steel (plaintiff EBT p. 46, line 7) that is used to erect a job site scaffold. Plaintiff, in describing the accident, stated that the bullnose was "like a frozen coke can, it is solid, the banana and when I stepped on it I rolled, I could feel it roll under my foot and I –my feet went up in the air" (plaintiff EBT deposition p. 45,

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DEC 13 2013

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line 25 to p. 46, line 6). Plaintiff commenced this action by the filing of the Summons and Verified Complaint on June 28, 2010 and asserts claims against defendants Pavarini McGovern, LLC (Pavarini), the general contractor at the work site, and 400 Fifth Avenue Realty, LLC (400) (collectively, defendants), the owner of the work site, for common law negligence and violations of Labor Law §§ 200 and 241(6). Specifically, in his second supplemental bill of particulars plaintiff alleges violations of New York State Industrial Code sections 23-1.7(d), 23-1.7(e)(1) and (e)(2), and 23-2.1(a).

Before the Court is a motion by defendants for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200 and 241(6). Plaintiff is in opposition to defendants' motion.

STANDARD

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of*

New York, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Labor Law § 241(6)

Labor Law § 241(6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> All areas in which construction, excavation or demolition work is being performed shall be so 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241(6), a plaintiff must establish a

violation of an applicable Industrial Code provision which sets forth a specific standard of conduct (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241(6), such proof does not establish liability, and is merely evidence of negligence (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Recovery under this section is dependent on plaintiff's ability to set forth the relevant and specific safety provisions of Part 23 of the New York State Industrial Code (12 NYCRR 23-1.1 et seq.), which were allegedly violated (*see Walker*, 11 AD3d at 340; *see also Ross*, 81 NY2d at 505). In addition, the provision must be applicable to the facts of the case (*see Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]). Moreover, an owner or general contractor may raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 161 [1982]; *Misicki*, 12 NY3d at 515; *Ross*, 81 NY2d at 502, n 4).

DISCUSSION

As a threshold matter, the Court notes that plaintiff does not address the portion of defendants' motion which seeks dismissal of plaintiff's Labor Law § 200 and common law negligence claims, and thus, those claims are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. Moreover, plaintiff does not oppose the portion of defendants' motion seeking dismissal of plaintiff's Labor Law § 241(6) claim regarding violations of Industrial Code sections 23-1.7(d), and 23-2.1(a), and these provisions are also deemed abandoned (*see Genovese*, 309 AD2d at 833). Accordingly,

defendants are granted summary judgment dismissing the portions of plaintiff's Labor Law § 241(6) claims regarding sections 23-2.1(a) and 23-1.7(d) of the Industrial Code. As a result of the foregoing, the only issue remaining before the Court is the portion of defendants' motion seeking dismissal of plaintiff's Labor Law § 241(6) claim predicated on Industrial Code sections 23-1.7(e)(1) and (e)(2).

Industrial Code 12 NYCRR 23-1.7(e) provides as follows:

> (e) Tripping and other hazards.
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. 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 and from sharp projections insofar as may be consistent with the work being performed.

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7(e)(1) and (2) are sufficiently specific enough to support a Labor Law § 241(6) claim (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]; *Corbi v Avenue Woodward Corp.*, 260 AD2d 255 [1st Dept 1999]). Liability under 12 NYCRR 23-1.7(e) depends upon a showing by plaintiff that he was injured in a passageway, as required by section (e)(1), or in a working area, as required by section (e)(2). The "passageway" section of the regulation does not apply to an accident that occurs in an open area of the construction site, and not within a defined walkway or passageway" (*Morra v White*, 276 AD2d 536, 537 [2d Dept 2000]; *see also Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 392 [1st Dept 1997] [plaintiff was injured in an open area rather than in a passageway]).

Defendants fail to meet their prima facie burden establishing their entitlement to summary judgment dismissing the portion of plaintiff's Labor Law § 241(6) claim predicated on Industrial Code sections 23-1.7(e)(1) and (2) as a triable issue of fact exists as to whether plaintiff tripped in a "passageway" or "work area" (*see Costabile v Damon G. Douglas Co.*, 66

AD3d 436 [1st Dept 2009] ["A question of fact is presented as to whether the spot where plaintiff fell was covered by either paragraph of 12 NYCRR § 23-1.7(e), the Industrial Code provision invoked in the supplemental bill"]; *Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 935 [2d Dept 2012] [defendant failed to demonstrate the absence of a triable issue of fact as to whether the plaintiff tripped in a passageway]; *Torres v Forest City Ratner Cos., LLC*, 89 AD3d 928 [2d Dept 2011]; *Harkin v City of New York*, 69 AD3d 901, 902 [2d Dept 2010] ["there is an issue of fact as to whether the plaintiff was injured in a 'working area' as defined by 12 NYCRR 23-1.7(e)(2)"]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [2d Dept 2005]; *Rosenberg v Krupinski Gen. Contrs.*, 284 AD2d 523 [2d Dept 2001]; *Kerins v Vassar Coll.*, 293 AD2d 514 [2d Dept 2002]).

Moreover, defendants fail to demonstrate that the bullnose or banana upon which plaintiff tripped was an integral or inherent part of the work being performed at the site at the time of his fall and did not constitute "debris" or "scattered tools and materials" (*see Rodriguez v DRLD Dev. Corp.*, 109 AD3d 409 [1st Dept 2013]; *Rodriguez*, 91 AD3d at 935; *Torres*, 89 AD3d at 929 ["defendants failed to establish the absence of triable issues of fact regarding whether the door and loose pipes represented a "tripping [or] other hazard" as contemplated by Industrial Code"]; *cf. Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013] ["protective covering had been purposefully installed on the floor as an integral part of the renovation project. As such, it cannot be construed as accumulated debris or scattered materials"]). In light of the above, the Court need not address plaintiff's papers in opposition (*see Smalls*, 10 NY3d at 735).

CONCLUSION

Accordingly, it is

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claims pursuant to common law negligence is granted, without opposition; and it is further,

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claims pursuant to Labor Law § 200 is granted, without opposition, and said claim is hereby dismissed; and it is further,

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claim pursuant to section 241(6) of the New York Labor Law, for violations of the New York State Industrial Code provisions, 12 NYCRR 23-1.7(d) and 12 NYCRR 23-2.1(a) is granted, without opposition, and said claim is hereby dismissed; and it is further;

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claim pursuant to section 241(6) of the New York Labor Law, for violations of the New York State Industrial Code provisions 12 NYCRR 23-1.7(e)(1) and (2) is denied; and it is further,

ORDERED that defendants are directed to serve a copy of this Order with Notice of Entry upon the plaintiff, and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/10/13

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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