Daniel v 384 Bridge St. LLC
2016 NY Slip Op 31518(U)
August 10, 2016
Supreme Court, New York County
Docket Number: 151661/2013
Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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NOLAN DANIEL, FLORENCE DANIEL,

Plaintiffs,

DECISION/ORDER
Index No. 151661/2013

-against-

384 BRIDGE STREET LLC, CAULDWELL-WINGATE COMPANY, LLC, COMPONENT ASSEMBLY SYSTEMS, INC, PINNACLE INDUSTRIES II, LLC

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiffs commenced the instant action seeking to recover damages for personal injuries allegedly sustained by plaintiff Nolan Daniel while he was performing construction work. Defendants 384 Bridge Street LLC ("384 Bridge"), Cauldwell-Wingate Company, LLC ("Cauldwell"), Component Assembly Systems, Inc. ("Component") and Pinnacle Industries II, LLC ("Pinnacle") (hereinafter collectively referred to as the "defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' complaint. For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff alleges that on or about January 8, 2013, while he was employed by K&M Architectural Window Products, Inc. ("K&M"), he was injured while performing construction work at a construction project located at 388 Bridge Street, Brooklyn, New York (the "Project"). Specifically, plaintiff testified that he was walking with his supervisor and two other men on the 10th floor of the Project in order to get the tools and equipment he needed to perform his work for the day when the inside of his right foot stepped onto the edge of a three-quarter-inch piece of plywood which was covering a hole in the floor, causing him to twist his right knee (the "accident").

Defendant 384 Bridge, the owner of the Project, hired defendant Cauldwell as the construction manager for the Project. Cauldwell subsequently hired defendant Pinnacle as subcontractor to perform concrete work on the Project; defendant Component as subcontractor to perform carpentry work on the Project; and K&M, plaintiff's employer, as subcontractor to perform window work on the Project. After the accident, plaintiffs commenced the instant action asserting claims for common law negligence and violations of New York Labor Law ("Labor Law") §§ 200, 240(1) and 241(6) on behalf of plaintiff Nolan Daniel and loss of consortium on behalf of plaintiff Florence Daniel. Defendants now move for summary judgment dismissing plaintiff's complaint in its entirety.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim is granted on the ground that Labor Law § 240(1) does not apply in this case as there is no evidence or allegation of any elevation- or gravity-related risk that caused or contributed to plaintiff's injury.

The court next turns to defendants' motion for summary judgment dismissing plaintiffs' common law negligence and Labor Law § 200 claims. "Section 200 of the Labor Law 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 N.Y.2d 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." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 (1st Dept 2012).

"Where the alleged defect or dangerous condition arises from the contractor's methods and the owner [or general contractor] exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." *Comes*, 82 N.Y.2d at 877. However, "[w]here an existing defect or dangerous condition [on the premises] caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Cappabianca*, 99 A.D.3d at 144, citing *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 9 (1st Dept 2011).

Here, the court finds that the appropriate standard to apply in this case is the dangerous condition standard and not the means and methods standard on the ground that the cause of the accident, the unsecured piece of plywood, was not created by the way either plaintiff or plaintiff's employer performed the work but was rather a condition that already existed on the Project.

Defendants' reliance on *Dalanna v. City of New York*, 308 A.D.2d 400 (1st Dept 2003) for the proposition that the court should apply the means and methods standard is misplaced as *Dalanna* is distinguishable and in fact supports this court's decision to apply the dangerous condition standard. In *Dalanna*, the plaintiff was injured when he tripped on a bolt which was protruding from a concrete slab and it was undisputed that prior to the accident, plaintiff's employer was instructed to remove the bolt as part of its work but failed to do so. The First Department applied the means and methods standard and held that a showing of supervisory control was necessary to establish liability because plaintiff's accident was not caused by a defect already existing on the project but rather was caused by the manner in which plaintiff's employer performed its work, specifically, failing to remove the bolt which caused plaintiff's injury. However, in this case, it is undisputed that plaintiff's accident was caused by a defect already existing on the Project and not caused by the manner in which plaintiff or plaintiff's employer performed its work as neither plaintiff nor his employer played any role in installing the piece of plywood over the hole on the 10th floor of the Project. Thus, the court will apply the dangerous condition standard.

Based on this court's finding that the dangerous condition standard applies to this case, defendants' motion for summary judgment dismissing plaintiffs' common law negligence and Labor Law § 200 claims must be denied on the ground that defendants have failed to address, let alone establish, that they did not

create the allegedly unsecured plywood on which plaintiff twisted his knee and that they did not have actual or constructive notice of the allegedly unsecured plywood. Rather, defendants merely assert that they are entitled to summary judgment dismissing plaintiffs' common law negligence and Labor Law § 200 claims on the ground that they did not exercise supervisory control over plaintiff's work. However, as this court has already determined that the appropriate standard to apply in this case is the dangerous condition standard and not the means and methods standard, whether defendants exercised supervisory control over plaintiff's work is irrelevant to a determination of liability.

To the extent defendants assert that even if the accident was caused by a dangerous condition, namely, the allegedly unsecured piece of plywood, such condition was open and obvious, and thus, defendants cannot be held liable, such assertion is without merit as defendants have not established that the unsecured piece of plywood was an open and obvious condition as a matter of law.

Finally, the court turns to defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim. Pursuant to Labor Law § 241(6),

> All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) 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.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

As an initial matter, defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR §§ 23-1.5, 23-1.7(a), (b), (c), (d), (e)(2), (f), (g) and (h), 23-1.15, 23-2.1, 23-2.2 and 23-2.4 is granted without opposition.

Additionally, defendants have established their right to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.30. Pursuant to 12 NYCRR § 23-1.30,

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

The First Department has held that mere conclusory allegations, such as "that the area was 'dark' or 'a little dark,'" without more, are "insufficient to create an inference that the amount of lighting fell below the specific statutory standard." *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347 (1st Dept 2006).

Here, as in *Cahill,* plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.30 must be dismissed as all that plaintiff has offered in support of his claim that the above provision was violated are mere conclusory allegations that the lighting on the 10th floor was "poor that morning" and that the job had "a lighting problem" and it is well-settled that such allegations, without more, are insufficient to establish a violation of Labor Law § 241(6) predicated on 12 NYCRR § 23-1.30. *See Cahill*, 31 A.D.3d at 347. Moreover, the above allegations are contradicted by plaintiff's own testimony that temporary lighting and windows were installed on the 10th floor where the accident occurred.

Defendants have also established their right to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(e)(1). Pursuant to 12 NYCRR § 23-1.7(e)(1),

> (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.

While the term "passageway" is not defined in the Industrial Code, "courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area." *Steiger v. LPCiminelli, Inc.*, 104 A.D.3d 1246, 1250 (4th Dept 2013).

Here, plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(e)(1) must be dismissed as there is no evidence that plaintiff was walking through a passageway when his accident occurred. Although plaintiff asserts that his accident occurred while he was walking through a doorway, such assertion is without merit. The record establishes that on the date of the accident, the only walls that had been erected on the Project were the concrete exterior walls of the building so there could not have been a doorway or any passageways on the 10th floor for plaintiff to walk through and plaintiff has not offered any other evidence that the area in which his accident occurred was being used to traverse between discrete areas as opposed to an open area.

Accordingly, defendants' motion for summary judgment is granted solely to the extent that plaintiffs' Labor Law §§ 240(1) and 241(6) claims are dismissed. This constitutes the decision and order of the court.

DATE : 8/10/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN