Brown v 30 Park Place Residential LLC

2016 NY Slip Op 32385(U)

December 2, 2016

Supreme Court, New York County

Docket Number: 159306/2014

Judge: Cynthia S. Kern

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

--X
ROBERT BROWN,

Plaintiff,

DECISION/ORDER
Index No. 159306/2014

-against-

30 PARK PLACE RESIDENTIAL LLC, SORBARA CONSTRUCTION CORP., TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, 30 PARK PLACE RETAIL LLC, 30 PARK PLACE HOTEL LLC, 30 PARK PLACE GARAGE LLC and SILVERSTEIN PROPERTIES, INC.,

Defendants.

--X
HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action seeking to recover damages for personal injuries he allegedly sustained while he was performing construction work. Defendants 30 Park Place Residential LLC, Sorbara Construction Corp., Tishman Construction Corporation and Tishman Construction Corporation of New York (collectively the "moving defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint. For the reasons set forth below, the moving defendants' motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff alleges that on or about August 6, 2014, while he was employed by Nets That Work Co. ("NTW") as a carpenter, he was injured while performing construction work at a construction project located at 99 Church Street, New York, New York (the "Project"). Defendant 30 Park Place Residential LLC ("30 Park Place") is the owner of the premises and defendants Tishman Construction Corporation and Tishman Construction Corporation of New York ("Tishman") are the general contractors on the Project. Plaintiff specifically testified that he was carrying a 50 lb. plate that was to be bolted into the concrete decking on the 27th floor of the Project when he tripped over a piece of

rebar that had been embedded in the concrete floor by defendant Sorbara Construction Corp. ("Sorbara") and bent over, causing him to sustain injuries (the "accident"). Sorbara, a subcontractor on the Project, had installed multiple rebar loops to set up temporary platforms and had already completed its work on the 27th floor of the Project by the time of the accident.

After the accident, plaintiff 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) premised on Industrial Code §§ 23-1.7(e)(1) and (2), 23-1.32, 23-2.1 and 23-2.2. The moving 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, the portion of the moving defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is granted without opposition.

The court next turns to the portion of the moving defendants' motion for summary judgment dismissing plaintiff's 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 a contractor's means or methods, "[l]iability under section 200 only attaches where the owner or contractor

had the 'authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.'" *Id.* at 145. 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." *Id.* 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 piece of rebar, was not created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed on the Project before plaintiff began his work on the 27th floor.

The moving defendants' reliance on *Singh v. 1221 Ave. Holdings, LLC*, 127 A.D.3d 607 (1st Dept 2015) for the proposition that the court should apply the means and methods standard is misplaced as *Singh* is distinguishable. In *Singh*, the plaintiff was involved in the work that created the dangerous condition, an improperly secured screw, that caused his injuries. *Id.* at 608. Here, in contrast, there is no evidence that the work of plaintiff or his employer created the dangerous condition, the piece of rebar that had been purposely embedded in the concrete floor by Sorbara. Thus, the court will apply the dangerous condition standard.

Based on this court's finding that the dangerous condition standard applies to this case, the portion of the motion by 30 Park Place and Tishman for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against them must be denied on the ground that there is an issue of fact as to whether they had actual or constructive notice of the piece of rebar. Plaintiff submitted evidence that the piece of rebar had been in place for approximately 20 days and Thane Szilagyi, Tishman's senior safety manager, testified during his deposition that he regularly inspected the Project, including the 27th floor.

The argument by 30 Park Place and Tishman that the piece of rebar was a dangerous condition only because it was bent over and that they did not have actual or constructive notice of the alleged dangerous condition as there is no evidence as to when the piece of rebar in question was bent over is without merit.

Initially, since 30 Park Place and Tishman have failed to present any evidence as to when the rebar was bent over, specifically whether it existed in that condition for a significant length of time or had only recently been bent, they cannot make a *prima facie* showing of lack of notice that it had been bent. Moreover, they have failed to establish as a matter of law that it was only the bending over of the rebar that made the rebar a dangerous condition. Thus, the court cannot grant summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims as against 30 Park Place and Tishman on the ground that they did not have actual or constructive notice that the piece of rebar had been bent over.

The portion of the motion by Sorbara for summary judgment dismissing plaintiff's common law negligence claim against it is also denied. "Where a subcontractor creates a condition on the premises that results in an unreasonable risk of harm and that condition is a proximate cause of a worker's injuries, then common-law negligence may be implicated." *Frisbee v. 156 R.R. Ave. Corp.*, 85 A.D.3d 1258, 1259 (3rd Dept 2011).

In the present case, Sorbara has failed to make a *prima facie* showing that it did not create the allegedly dangerous condition as it is undisputed that Sorbara installed the piece of rebar in the concrete floor and did not remove it before the accident. Moreover, Sorbara's argument that the piece of rebar was a dangerous condition only because it was bent over and that it did not create the alleged dangerous condition by bending over the piece of rebar is without merit as it has failed to establish as a matter of law that it was only the bending over of the rebar that made the rebar a dangerous condition.

Further, the moving defendants' argument that the piece of rebar was open and obvious and not inherently dangerous and was readily observable by reasonable use of plaintiff's senses in light of his age, intelligence and experience is without merit. "[A] court may… afford summary judgment to a landowner or licensed occupier on the ground that the condition complained of by a visitor was both open and obvious and, as a matter of law, not inherently dangerous." *Broodie v. Gibco Enters., Ltd.*, 67 A.D.3d 418 (1st Dept 2009); *see also Johnson v. 301 Holdings*, LLC, 89 A.D.3d 550 (1st Dept 2011)*; see also Remes v. 513 West 26th Realty, LLC*, 73 A.D.3d 665 (1st Dept 2010); *see also Schwartz v. Hersh*, 50 A.D.3d 1011 (2nd Dept 2008). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court

should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 (1st Dept 2004). To establish that a condition is open and obvious, a defendant must show that the hazard "could not reasonably be overlooked by anyone in the area whose eyes were open." *Westbrook*, 5 A.D.3d at 72. Specifically in the Labor Law context, the First Department has held that "[t]he duty of an employer or owner to provide workers with a safe place to work 'does not extend...to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience.'" *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434, 434-35 (1st Dept 2013) (internal citations omitted) (holding that the plaintiff, who chose to walk on the smooth rather than the corrugated portion of a metal roof and who had experience in working on roofs, should have perceived the danger of walking on the smooth portion).

In the present case, there is an issue of fact as to whether the piece of rebar was open and obvious and not inherently dangerous and whether the piece of rebar was readily observable by reasonable use of plaintiff's senses in light of his age, intelligence and experience as plaintiff has submitted evidence that the piece of rebar was embedded in and protruding from the concrete floor below plaintiff's line of sight and cast in shadow.

To the extent that the moving defendants rely on *Schulman v. Old Navy/The Gap, Inc.*, 45 A.D.3d 475 (1st Dept 2007) wherein the First Department found that a metal bracket covered with clothing in a clothing store was open and obvious and not inherently dangerous as the plaintiff knew that the bracket was there and it was part of a series of racks equidistant from each other, the court finds *Schulman* inapposite as, in contrast to *Schulman*, plaintiff has submitted evidence that he did not see the piece of rebar at issue before the accident and that the piece of rebar was not open and obvious as it was below his line of sight and cast in shadow.

Finally, the court turns to the portion of the motion by 30 Park Place and Tishman for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against them. 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, the portion of the motion by 30 Park Place and Tishman for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR §§ 23-1.7(e)(1), 23-1.32, 23-2.1 and 23-2.2 is granted without opposition.

However, 30 Park Place and Tishman have failed to establish their entitlement to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(e)(2). Pursuant to 12 NYCRR § 23-1.7(e)(2),

> 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.

The First Department has held that 12 NYCRR § 23-1.7(e)(2) is not applicable where the plaintiff trips over an object that is "an integral part of what is being constructed," as with a permanently placed electrical pipe, rather than "an accumulation of dirt, debris, scattered tools or materials" or sharp projections. *O'Sullivan v. IDI Constr. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept 2006).

In the present case, there is an issue of fact as to whether 12 NYCRR § 23-1.7(e)(2) is applicable as the parties have submitted conflicting evidence with regard to whether the piece of rebar could have and should have been removed by the date of the accident. Specifically, 30 Park Place and Tishman have provided the affidavit of Albert DeRoss, a General Superintendent for Sorbara, stating that, pursuant to

industry standard and the New York City Building Code, "[t]he floor is not ready to be prepped and the hat bar [the rebar loops] does not get removed until the concrete reaches its full strength and the reshore [vertical posts in the concrete] is permitted to be removed," which had allegedly not occurred as of the date of the accident. However, Herbert Heller, Jr., P.E., plaintiff's expert, stated in his affidavit that the piece of rebar could have and should have been removed "as per industry standard and basic safety protocol" prior to the date of the accident. If Sorbara could not have and should not have removed the piece of rebar by the date of the accident, the court may find that it was an integral part of what was being constructed, similar to an electrical pipe. However, if the piece of rebar could have and should have been removed by the date of the accident, the court may find that its presence was inconsistent with the work being performed as the piece of rebar was not used for any work conducted by plaintiff. Thus, as the court cannot determine whether 12 NYCRR § 23-1.7(e)(2) is applicable in the present case without first determining whether the piece of rebar could have and should have been removed by the date of the accident, the portion of the motion by 30 Park Place and Tishman to dismiss plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(e)(2) is denied.

The argument by 30 Park Place and Tishman that the piece of rebar was not a sharp projection is without merit. The First Department has held that a "sharp projection" includes "any projection that is 'sharp' in the sense that it is clearly defined or distinct." *Lenard v. 1251 Ams. Assoc.*, 241 A.D.2d 391, 393 (1st Dept 1997) (holding that a concrete door stop was a sharp projection within the meaning of 12 NYCRR § 23-1.7(e)(2)). Here, the piece of rebar was a clearly defined or distinct object protruding from the concrete floor.

Accordingly, the moving defendants' motion for summary judgment is granted solely to the extent that plaintiff's Labor Law §§ 240(1) and 241(6) claims predicated on 12 NYCRR §§ 23-1.7(e)(1), 23-1.32, 23-2.1 and 23-2.2 are dismissed. This constitutes the decision and order of the court.

DATE : 12/2/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.