Ambrose v City of New York
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January 17, 2013
Sup Ct, New York County
Docket Number: 150175/2009
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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DANE AMBROSE and MARIAMA AMBROSE,

Plaintiffs,

Index No. 150175/2009

- against -

THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY, and LONG ISLAND RAILROAD,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs allege that, on January 24, 2009, plaintiff Dane Ambrose, a miner, was injured when he slipped, tripped, and fell while performing construction work on a tunnel boring machine in connection with the East Side Access Project.

The complaint asserts four causes of action: three allege violations of Labor Law §§ 200 and 241 (6) and common-law negligence against defendants City of New York, the Metropolitan Transit Authority, and Long Island Railroad, respectively, and the fourth asserts a derivative cause of action on behalf of Mariama Ambrose.

Defendants move for summary judgment dismissing the complaint. Plaintiffs oppose the motion.

BACKGROUND

Plaintiff Dane Ambrose testified at his deposition that he is a miner, and that

on January 24, 2009, he was employed by Dragados Judlau, a joint venture (DJJV). (Loiacono Affirm., Ex F [Ambrose EBT], at 9-10.) Defendant Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority, allegedly hired DJJV as the general contractor on the East Side Access Project, a project designed to extend the Long Island Railroad to Grand Central Station.

On January 24, 2009, Ambrose and his co-workers, who were also employees of DJJV, were working the graveyard shift in an underground tunnel. (Ambrose EBT, at 15, 26.) Ambrose and his co-workers were allegedly on a tunnel boring machine (TBM), which had two drills on each side, and the drills work with water and air. (*Id.* at 16, 18, 36.) Ambrose was working on the drill on the right side (i.e., on the right when looking at the tunnel), on a platform that was closest to the heading of the tunnel, which was referred to as the "heading platform" at the deposition. (*Id.* at 19-20.) Ambrose described the platform "like metal mesh with holes you can see through." (*Id.* at 36.)

According to Ambrose, a rock bolt was being drilled into a hole in the wall of the tunnel where plaintiff was working, "to prevent bad rock from caving in." (*Id.* at 42.) Ambrose stated that he and his co-workers used a machine called a Swellex "to put air pressure on water into the rock bolts," and that a hose from the drill to the Swellex fed water to the Swellex (*Id.*, at 32-33.)

Ambrose testified at his statutory hearing that, as he was walking from one area of the TBM platform to another, his right foot tripped over the Swellex hose and metal wire cables lying on the TBM platform. (Loiacono Affirm., Ex E [Ambrose Tr.] at 33, 35, 37.) According to Ambrose, "After when I tripped on the hose, the pin hooked my clothes and pulled me across it, across by my arm. And it was locked under my ribs. And it just rotated while I'm locked on it." (*Id.* at 42.) At his deposition, Ambrose testified that the sleeve of his sweater became caught on the pin on the drill bit, which then pulled Ambrose onto the rock bolt attached to the drill. (Ambrose EBT at 32, 39-40.) At his statutory hearing, Ambrose stated that the sleeve of his right arm was caught. (Ambrose Tr. at 43.) His chest, ribs and neck allegedly then came into contact with the rock bolt. (Ambrose EBT, at 44.) Ambrose testified that a co-worker hit a "kill switch," and then Ambrose fell off the rock bolt and onto the TBM platform. (*Id.* at 40-41.)

Ambrose was asked at his deposition, "So other than the hose and the cables was there anything else that caused you to slip or trip?" (*Id.* at 36.) Ambrose answered, "Probably the water but I don't think I got anything else up there." (*Id.*) Ambrose was asked, "Was the platform of the TBM, was it wet or dry?" He testified:

> "A. Once you're working it is wet, always wet.
> Q. Why is it wet?
> A. The drills that we use, it works with water and air."

(*Id.* at 36.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

I. Labor Law § 200

> "Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. 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. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work."

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]

[internal citations omitted].)

As a threshold matter, the Court rejects plaintiff's argument that the accident arose from alleged defects or dangerous conditions of the premises. Plaintiff testified that he tripped over a Swellex hose and metal wire cables lying across the platform of the TBM. The hose and metal wire cables are not conditions of the premises, but rather part of the tool and machine brought onto the premises to perform tunnel boring. Plaintiff testified that the hose connected the TBM drill to the Swellex (Ambrose EBT, at 32-33.) Plaintiff also testified at his statutory hearing that the metal wire cables are part of the TBM:

> "Q. Could you explain what water cables are?
> A. The cables– there's a protective barrier on top of the TBA [*sic*] that protects you from falling, but when the drill goes at certain angles you got to move. You got to move that protective barrier. And it's made out of some pieces of steel with cables, with holes in it and cables run through them. So they protect you from falling, but when the drill has to go like a 45 degree angle, if those cables are in the way, so what they do is they pick them up and rest them on the side.
> Q. So the cables were resting on the side?
> A. Yes, they were resting right where the hose on the swellex, the same machine, the same tool that I said they use to put the rock bolts up . . . they were all resting in the middle there on the floor.
> Q. Do you know who was responsible for placing the cable on the floor?
> A. Four guys working up there. So depends on whose [*sic*] working on where and what position, what angle."

(Ambrose Tr., at 79-80.) The pin/rock bolt upon which Ambrose allegedly fell was

attached to the TBM drill. (Ambrose EBT at 32, 39-40.)

To the extent that plaintiff asserts that he slipped due to water on the platform, the platform is part of the TBM. (*Id.* at 20, 36.) Moreover, plaintiff testified that the platform was wet because "[t]he drills that we use, it works with water and air." (*Id.* at 36.) Therefore, the allegedly hazardous or dangerous conditions are attributable to the manner and means of the work, including the equipment.

Defendants have established that they did not exercise supervisory control over the injury-producing work. Plaintiff testified that he was never given any orders or instruction from any personnel from defendants. (Ambrose EBT, at 27, 69.) Plaintiff stated that he received daily instructions at the job site only from the foreman, Dan, and that Dragados provided him with the tools and equipment that he needed to perform his job. (*Id.* at 68, 70.) Contrary to plaintiff's argument, defendants have therefore met their prima facie burden of summary judgment as matter of law dismissing plaintiff's Labor Law § 200 claims. (*Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012].) Plaintiff failed to raise a triable issue of fact as to whether defendants exercised supervisory control over the injury-producing work. Therefore, plaintiff's Labor Law § 200 claims against defendants are dismissed.

II. Labor Law § 241 (6)

Labor Law § 241(6) requires contractors and owners to provide "reasonable and adequate protection and safety" to employees working in, and persons lawfully frequenting, "all areas in which construction, excavation or demolition work is being performed" (*Jock v Fien*, 80 NY2d 965, 965 [1992]) To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*Gasques v State of New York*, 15 NY3d 869, 870 [2010] [internal quotation marks and citation omitted]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury." (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271 [1st Dept 2007].)

Here, plaintiff's bill of particulars alleges that defendants violated the following Industrial Code provisions: 12 NYCRR 23-1.7 (d) & (e); 12 NYCRR 23-1.30; and 12NYCRR 23-2.1. (Loiacono Affirm., Ex C ¶ 7.) Defendants contend that the provisions are either inapplicable or were not violated.

A. 12 NYCRR 23-1.7 (d)

12 NYCRR 23-1.7 (d) states:

"(d) Slipping Hazards.

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition; ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Defendants argue that this provision is inapplicable because the accumulation of water on the platform was an integral part of plaintiff's work.

Under case law, if a substance is "an integral part" of the construction project, then it is does not constitute a "foreign substance" under 12 NYCRR 23-1.7 (d). (*See Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2d Dept 2008][collecting cases][wet asbestos fibers were not a "foreign substance" under 12 NYCRR 23-1.7 (d) because the plaintiff was engaged in asbestos removal, and safety regulations required fibers to be constantly wet so as to prevent them from filling the air].) A substance that is "'an integral part' of the construction project means a substance that is a product of the construction project itself, such as a substance used during the construction. (*See Stafford v Viacom, Inc.*, 32 AD3d 388 [2d Dept 2006] [12 NYCRR 23-1.7 (d) did not apply to electrician who slipped and fell on glue on the floor, which was an integral part of the installation of the carpeting or floor tiles].)

As discussed below, the "integral part of the work" test is also used to determine the applicability of 12 NYCRR 23-1.7 (e), which governs tripping hazards.

Here, at his deposition, Ambrose was asked, "Was the platform of the TBM, was it wet or dry?" He testified:

> "A. Once you're working it is wet, always wet.
> Q. Why is it wet?
> A. The drills that we use, it works with water and air."

(Ambrose EBT, at 36.)

Brian Hamilton, a deputy construction manager employed by URS Corporation,[1] testified at his deposition that he went into the tunnel about once a week. (Hamilton EBT, at 10.) Hamilton described the Swellex as follows:

> "Q. The Swellex, is it a bolt or is it a machine?
>
> A. Yes. Well, we call it a bolt. It's – the – yes, it's basically the steel rod that's basically hollow that goes into the rock, the drilled hole, and it's expanded, so it is steel and so it has a load-carrying capacity that the engineer will design a pattern of these to account for certain ground conditions.
>
> * * *
>
> Q. The rock bolts are the Swellex bolts?
>
> A. Yes, there's different types of bolts, but the Swellex bolts are the most commonly used bolt we have.
>
> * * *
>
> Q. In order to install the Swellex, what's the process of installing a Swellex?

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[1] According to Hamilton, URS Corporation is a consulting organization that provides professional services, such as architectural work, planning work, environmental work, and engineering work. (Loiacono Affirm., Ex G [Hamilton EBT], at 9.) Hamilton testified that URS Corporation has a professional services contract with the MTA to the East Side Access Project. (*Id.*)

A. Well, one of the things we like about the Swellex is that's simpler. . . . It's just you drill a hole and you wash — clean out the hole, you know, with the rock drill and you insert the Swellex rod and then it's inflated. I believe it's inflated in a high pressure air. . .

* * *

Q. To insert the Swellex, is the hydraulic system needed?

A. The rock drill, yes.

Q. Is there water involved in that?

A. Yes. You have to – as the drill is cutting, they need to keep the hole open and clean, and so that the drill bit is hitting the rock, it creates little cuttings. And to efficiently and probably excavate that hole, those cuttings need to be removed. And they are typically — they can use air, but it's better to use water. The water keeps the bit cool as well.

Q. How does the water get in there?

A. . . . Different drills work differently, but the water is brought up to the bit, to the interior of the drill rod, I believe, and so it's injected there."

(*Id.* at 14, 30, 34-35.) Plaintiff's and Hamilton's testimony establishes that water was an integral part of the installation of the rock bolts.

Plaintiff argues that the requirement that water be used in drilling did not mean that water had to accumulate on the surface on which he was standing. Plaintiff also contends that water leaked from the hose. At his statutory hearing, plaintiff testified as follows:

"Q. On the date of the incident was there any leakage from the hose?
A. Yes.
Q. Water leakage?

> A. Yes, the drill was messed up that night before. But we were having problems using it.
> Q. What kind of problems were they having with the drill?
> A. It just wasn't working as it should. They had to service it like – they try to service it two times that same night. It was leaking from the hoses and wasn't . . .
> Q. So just to be more specific. When you say the drill wasn't working properly, the drill it did not rotate?"

(Ambrose Tr., at 29-30.) Plaintiff analogizes his case to *Cappabianca* (99 AD3d 139). In *Cappabianca*, the Appellate Division, First Department ruled that there was a triable issue of fact as to "whether, as [the plaintiff] alleges, the saw sprayed water onto the floor because it was malfunctioning or whether, as defendants claim, the water was not a foreign substance within the meaning of the regulation because wet saws always spray water onto the floor." (*Id.* at 147.) The plaintiff in *Cappabianca* asserted that, by design, the water from the saw should have been directed into an attached tray. (*Id.* at 143.)

It is not clear what plaintiff means by asserting that water used in drilling did not have to "accumulate" on the TBM platform. It does not appear that plaintiff testified at his statutory hearing or his deposition that a puddle or pool of water had actually formed on the TBM platform. Ambrose described the platform "like metal mesh with holes you can see through." (Ambrose EBT, at 36.) Rather, plaintiff testified at the statutory hearing that the whole platform was wet:

> "Once you are drilling you need water there. Any type of drilling you do, you need air and water. So from drilling the holes the water is there and if you are using the same swellex that the hose goes in, that's water to water and air to put in the rock bolts, because the metal rock bolts they're hollow. And you put them up. And then you put this swellex and then it compresses with the air and water. You fill it with air and water. So when you take out the swellex there's always water running back down on you. That whole area is a wet area.
>
> Q. For as long as you worked on that platform, the platform is wet?
>
> A. Yes. Once you work on that platform eventually you're going to get wet. You're going to be wet, because the whole surface is wet."

(Ambrose Tr. at 86.)

To the extent that plaintiff is arguing that the spray of water could have been directed away from the TBM platform, this would not be required under 12 NYCRR 23-1.7 (d). Unlike *Cappabianca*, plaintiff himself testified that the TBM platform was wet when the drills are in use, and plaintiff does not assert that the water from the drilling process was designed to be directed to a specific area, as in *Cappabianca*. Finally, the testimony from Ambrose's statutory hearing does not indicate whether or not the water leaking from the hoses came onto the platform where he was working.

Plaintiff appears to suggest that, based on three appellate cases from other judicial departments, it is not settled law that a substance that is "an integral part" of the construction project does not constitute a "foreign substance" under 12 NYCRR

23-1.7 (d). (*Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435[4th Dept 2011]; *Hageman v Home Depot USA*, 45 AD3d 730 [2d Dept 2007]; *Ventura v Lancet Arch*, 5 AD3d 1053 [4th Dept 2004].) However, the "integral part of the work" test remains good law in the Appellate Division, First Department. (*See Zieris v City of New York*, 93 AD3d 479 [1st Dept 2012].)

Therefore, so much of plaintiff's claims under Labor Law § 241 (6) that are based on violations of 12 NYCRR 23-1.7 (d) are dismissed.

B. 12 NYCRR 23-1.7 (e)

12 NYCRR 23-1.7 (e) requires owners and general contractors to keep certain areas free of tripping hazards. It states, in pertinent part:

> "(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."

The Court agrees with defendants that 12 NYCRR 23-1.7 (e) (1) does not apply because plaintiff's accident did not occur within a "passageway."

12 NYCRR 23–1.7(e) (2) requires that areas where persons work or pass be kept "free from accumulations of . . . debris and from scattered tools and materials .

. . insofar as may be consistent with the work being performed." (emphasis supplied.) Like 12 NYCRR 23-1.7 (d), this provision is inapplicable if the materials or the debris over which the claimant alleges he tripped "was an integral part of the construction." (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007]; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2d Dept 2008]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003]; *Harvey v Morse Diesel Intl.*, 299 AD2d 451, 453 [2d Dept 2002].)

With respect to materials, the provision does not apply to materials intended to be used as part of the construction. (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dept 2007][worker tripped over electrical pipe and conduits]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007][worker tripped over stack of floor tiles]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417 [1st Dept 2007][worker tripped over rebar steel].)

Here, as discussed above, plaintiff testified that he tripped over the Swellex hose and metal wire cables lying across the platform of the TBM, which are part of protective barrier on top of the TBM. The Swellex hose and cables are neither debris, scattered tools, nor construction materials under 12 NYCRR 23-1.7 (e) (2).

Plaintiff did not address defendants' argument that 12 NYCRR 23-1.7 (e) (1)

and (2) are inapplicable.

Therefore, so much of plaintiff's claims under Labor Law § 241 (6) that are based on violations of 12 NYCRR 23-1.7 (e) are dismissed.

C. 12 NYCRR 23-1.30

12 NYCRR 23-1.30 states,

> "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."

At his statutory hearing, plaintiff was asked, "How was the lighting down in the tunnel in the area where the incident occurred?" (Ambrose Tr. at 85.) Plaintiff answer, "It was all right. It was good." (*Id.*)

Plaintiff did not address defendants' argument that 12 NYCRR 23-1.30 was not violated. Therefore, so much of plaintiff's claims under Labor Law § 241 (6) that are based on violations of 12 NYCRR 23-1.30 are dismissed.

D. 12 NYCRR 23-2.1

12 NYCRR 23-2.1, which governs the storage of material or equipment or disposal of debris, states:

"(a) Storage of material or equipment.

> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
>
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.
>
> (b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area."

Neither the Swellex hose nor metal wire cables upon which plaintiff allegedly tripped constitute building materials or debris. Plaintiff did not address defendants' argument that 12 NYCRR 23-2.1 is inapplicable. Therefore, so much of plaintiff's claims under Labor Law § 241 (6) that are based on violations of 12 NYCRR 23-1.30 are dismissed.

III. Mariama Ambrose's derivative cause of action

Plaintiff Dane Ambrose's claims for violations of Labor Law § 200 have been dismissed, and his claims for violations of Labor Law § 241 (6) based on the Industrial Code provisions alleged have been dismissed as well. Because the derivative cause of action is dependent upon Dane Ambrose's claims, defendants are granted summary judgment dismissing this cause of action. (*Shaw v RPA Assocs.*,

LLC, 75 AD3d 634, 637 [2d Dept 2010].)

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 17, 2013
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN