Lynch v City of New York
2013 NY Slip Op 32174(U)
September 12, 2013
Sup Ct, New York County
Docket Number: 150003/11
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice PART 12

Index Number : 150003/2011
LYNCH, JAMES
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS ACTION

INDEX NO. 150003/11
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 10-18
Answering Affidavits — Exhibits ____ No(s). 21
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/12/13

BJ, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

JAMES LYNCH,

Plaintiff,

- against -

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

Defendants.

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Index No. 150003/11

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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By notice of motion, defendants move for an order summarily dismissing the complaint. Plaintiff opposes. At oral argument, plaintiff asked that I search the record and grant him partial summary judgment on his claim pursuant to Labor Law 241(6).

I. PERTINENT BACKGROUND

On December 23, 2009, at approximately 11:30 am, plaintiff, an electrician working on the East Side Tunnel Access project (project), was allegedly injured when a pump or pumping mechanism within a tunnel malfunctioned, creating a "flooding condition" which caused him to slip and sustain injury. Defendants City, Metropolitan Transportation Authority (MTA), and the Long Island Railroad (LIRR) are the owners and/or contractors on the project. Plaintiff was employed by contractor Dragados USA/Judlau Contracting, Inc. (Judlau). (NYSCEF 11).

At a 50-h hearing held on August 27, 2010, plaintiff testified that he had been working on

the project for over two years before his accident, and that Judlau's role was to mine or dig the underground tunnels. There was always water on the ground in the tunnels from the time he had begun working on the project, anywhere from two inches to six feet deep, due to pump problems and the presence of muck on the ground, which made it difficult for the water to get through, creating a "soup bowl" effect. Judlau employees were solely responsible for maintaining the pumps, but plaintiff troubleshooted them with supervision or direction from the MTA, and a Judlau work gang would occasionally attempt to clean out the tunnels to remove the muck. Plaintiff complained to Judlau management about the muck. On the day of his accident, he was the foreman on the job. (NYSCEF 12, 13).

On the accident date, plaintiff was told that a pump had malfunctioned and was flooding a tunnel, leaving at least four feet of water. Plaintiff checked the pump, confirmed that it had malfunctioned, and decided to move the hose attached to the pump to another tunnel. As plaintiff picked up the front of the hose, he was standing in a foot of water and six inches of muck. With the hose in hand, his foot slipped, causing him to lurch forward and injure himself. (*Id.*).

At an examination before trial (EBT) held on August 3, 2011, plaintiff testified that before his accident, MTA inspectors were always in the tunnels and had seen the pumps malfunction and cause water to accumulate. (NYSCEF 14).

On March 2, 2012, Brian Hamilton, an employee of MTA's Capital Construction Management Office (MTACC), which oversaw the project, testified at an EBT that he oversees the project's underground construction and management. An outside firm, URS, was the prime management consultant for the project and the lead contractor to which the other contractors

reported, and was considered an agent of the MTA on the project. MTACC had safety representatives on the site, but each contractor was responsible for site safety for its own employees. Although URS was not responsible for enforcing safety on the site, Hamilton had the authority to stop unsafe work he observed. (*Id.*).

Field inspectors or engineers employed elsewhere were also present at the site, and some of them reported to Hamilton. The inspectors prepared shift reports of work performed which were given to the MTACC. Judlau employees also created daily activity reports, which were sent to MTACC on a monthly basis. Judlau was required to report any employee accidents to the MTA, and thereafter Judlau conducted its own investigation and submitted a safety or incident report to the MTA, but not to LIRR. There were also safety meetings held with contractors, and the issue of excessive muck or water may have been discussed. (*Id.*).

Tunnel-boring machines crushed rocks, which created muck, defined by Hamilton as rock and soil detritus. The muck was removed by a conveyor belt and put into muck cars. Despite the removal process, muck would remain on the bottom of the tunnel, and it was the contractor's responsibility to remove it. Hamilton did not consider excessive muck in the tunnel as an imminent safety hazard, but it would create difficult footing. Water sometimes collected in the tunnel, whether it was ground water that had entered the tunnel or water produced by contractors' equipment, and would remain there and cover the muck. The contractor was responsible for pumping out the water. Hamilton was aware that sometimes the pumps used to remove the water did not work properly. (*Id.*).

II. CONTENTIONS

Defendants argue that plaintiff's common law negligence and Labor Law 200 claims

must be dismissed as the alleged defective condition at issue arose from Judlau's work methods over which they had no supervisory control. They maintain that their retention of general supervisory authority is insufficient to impose liability. They contend that plaintiff's Labor Law 241(6) claim fails as the industrial code sections on which it is premised are inapplicable as the muck on which plaintiff slipped constituted an integral part of the work he performed and thus does not constitute debris or a foreign substance. (NYSCEF 18).

Plaintiff denies that the condition arose from Judlau's work methods but that it constituted a dangerous condition at the site itself, and argues that defendants thus may be held liable if they had actual or constructive notice of it. He also denies that the water and muck on which he slipped was an integral part of his job on the project or did not constitute debris or a foreign substance. (NYSCEF 21).

III. ANALYSIS

A. Labor Law 200 and common law negligence

Pursuant to Labor Law 200 and common law negligence, a contractor is not liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it had the authority to supervise or control that work. (*Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], *lv denied* 96 NY2d 705 [2001]).

Where it is alleged that a dangerous condition caused the employee's injury, an owner or contractor may be held liable if it created the condition or had actual or constructive notice of it. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). A defendant is charged

with constructive notice when the dangerous condition is visible, apparent, and exists for a sufficient length of time before an accident to permit the defendant to discover and remedy it. (*Lopez v Dagan*, 98 AD3d 436 [1st Dept 2012]).

Here, as plaintiff alleges that his accident was caused by a dangerous condition at the worksite, defendants were required to show that they did not cause the condition or have actual or constructive notice of it, which they failed to do. Indeed, Hamilton's testimony establishes that the existence of the muck and accumulated water was known to him and others working on the project.

B. Labor Law 241(6) claim

A claim advanced pursuant to Labor Law 241(6) may be based on a specific violation of the Industrial Code. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495 [1993]).

1. Section 23-1.7(d)

Pursuant to Industrial Code 23-1.7(d),

> [e]mployers 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.

As there are triable issues as to whether the muck and water were entirely an integral part of plaintiff's work (*see infra.*, III.B.3), defendants have not demonstrated that they did not constitute foreign substances. (*Compare Burnett v City of New York*, 104 AD3d 437 [1st Dept 2013] [plaintiff slipped on water in trough between rails and evidence showed that water not integral part of plaintiff's work; "indeed, measures were taken by defendant to eliminate the water from the work space using pumps and an absorbing compound"]; *Velasquez v 795*

Columbus LLC, 103 AD3d 541 [1st Dept 2013] [where plaintiff slipped on mud and water which covered floor due to water main break and rain, mud was not part of floor and not integral part of plaintiff's work, and thus constituted foreign substance that caused slippery condition], *with Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58 [1st Dept 2004] [defendants not liable as plaintiff slipped on snow, which was condition he was charged with removing from worksite]).

2. Section 23-17(e)(1)

Pursuant to section 23-1.7(e)(1) ("Tripping and Other Hazards"),

> 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.

As plaintiff slipped rather than tripped on the muck and water, and absent any indication that such a condition could constitute a tripping hazard, this section is inapplicable. (*See Velasquez,* 103 AD3d at 541 [as plaintiff slipped and fell on mud, rocks, and water at construction site which formed muddy condition, section 1.7(e) inapplicable as it protects workers from tripping hazards]; *see also Purcell v Metlife Inc.*, 108 AD3d 431 [1st Dept 2013] [plaintiff testified that he slipped on wet plywood and no evidence that he tripped]; *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178 [4th Dept 2004], *lv denied* 4 NY3d 708 [2005] [as plaintiff slipped on rain- and cement powder-covered surface of truck scale, fall not caused by tripping hazard]).

3. Section 23-17(e)(2)

Section 23-1.7(e)(2) of the Industrial Code provides:

> [t]he 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.

When the debris which causes an accident is an integral part of the work being performed, Industrial Code § 23-17(e)(2) is inapplicable. (*Appelbaum v 100 Church*, 6 AD3d 310 [1st Dept 2004]; *Sharrow v Dick Corp.*, 233 AD2d 858 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997]).

Here, as the parties disagree as to whether the muck was an integral part of plaintiff's work, triable issues remain as to the viability of this claim.

4. Remaining sections

As defendants did not address the other Industrial Code sections cited by plaintiff in his bill of particulars (section 23-1.30 and 23-2.1), there is no basis for dismissing them.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted solely to the extent of dismissing plaintiff's Labor Law 241(6) claim premised on a violation of Industrial Code section 23-17(e)(1) and is otherwise denied.

ENTER:

Barbara Jaffe, JSC

DATED: September 12, 2013
New York, New York