Owens v Coxall
2015 NY Slip Op 31738(U)
August 10, 2015
Supreme Court, Queens County
Docket Number: 700180/12
Judge: Timothy J. Dufficy
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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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RICHARD OWENS,
Plaintiff,

-against-

MARILYN COXALL,
Defendant.

----------x

Index No. 700180/12
Mot. Date: 6/12/15
Mot. Cal. No.: 88
Mot. Seq. 3

FILED & RECORDED
AUG 17 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF 25 to EF 45 read on this motion by defendant for an order granting summary judgment in her favor pursuant to CPLR 3212(b) and dismissing the complaint in its entirety; and the cross-motion by plaintiff for an order granting summary judgment in his favor on his claims pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 25-34
Notice of Cross Motion - Affidavits - Exhibits	EF 36-39
Answering Affidavits - Exhibits.....	EF 40-43
Reply Affidavits.....	EF 44-45

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

In this negligence/labor law action, the plaintiff seeks damages for personal injuries sustained while performing construction work for the defendant at 109-75 Francis Lewis Boulevard, Hollis, New York (building). The building is a two-story mixed-use building with a residence on the top and a commercial store-front space at the bottom. The commercial establishment on the ground floor was a barber shop. In addition to the two stories, there was a basement. Defendant Marilyn Coxall moves for summary judgment in her favor dismissing the complaint on various grounds as discussed below. Plaintiff

Richard Owens opposes the motion and cross-moves for summary judgment in his favor on his claims pursuant to Labor Law sections 200 and 241(6). Defendant opposes the cross-motion.

The plaintiff testified that he was hired by the manager of the barber shop in late December 2011, to install flooring in the first floor commercial store front. On the date of the accident, the plaintiff was directed to go to the basement cutting area to use a table saw to cut a saddle for the door, to be installed on the first floor. Although the plaintiff had been working on the premises for several days before his accident, he had not done any cutting in the basement with the table saw on those days. He did not own the table saw that he was using at the time of the subject accident. The table saw did not have any safety shields or guards on it. The plaintiff was familiar with how to use a table saw, having used one hundreds of times in the past and had received training in the use of such saws.

The basement was not a finished basement. There were no windows and the only lighting was from "pigtails," which are temporary electrical wiring that hang from the ceiling. When the plaintiff went down to the basement to use the table saw, the pigtail lights were on and the "medium bright light" it created was sufficient for him to work. He had used the table saw three times that day before the subject accident. He did not experience any problems with the saw during those times. During the fourth time, the lights suddenly went out, but the saw remained on as it was plugged in upstairs on the first floor, and the plaintiff cut his left hand, severing several fingers. The lights in the basement remained off until the time the plaintiff was removed from the premises by ambulance. The plaintiff had observed problems with the lights going off at the premises during the ten days that he worked there prior to his accident and had observed the pigtails go out at least two other times prior to the day of his accident. Finally, the plaintiff had informed the defendant about the improper lighting and electrical work on the premises prior to the subject accident.

The defendant submitted an affidavit acknowledging that she owns the building where the plaintiff was working at the time of the subject accident. She avers further that at all times during her ownership of the premises, she has never observed nor been made aware of any electrical problems at the building. She also avers that she did not hire the plaintiff to perform repairs at the building. She testified that her tenant, "Case" rented the commercial space on the first floor. She further testified that she never had a conversation with the plaintiff regarding electrical problems at the building.

The branches of defendant's motion to dismiss the plaintiff's claims pursuant to Labor Law Sections 240(1), 241(1-5) and 242, are granted, as those provisions do not apply to the facts at hand.

The branch of defendant's motion to dismiss the plaintiff's claims for lost earnings is also granted (*see Morgan v Rosselli*, 23 AD3d 356 [2005]; *Gomez v City of New York*, 260 AD2d 598, 599 [1999]; *Bacigalupo v Healthshield, Inc.*, 231 AD2d 538, 539 [1996]).

The branches of defendant's motion to dismiss the plaintiff's claims pursuant to Labor Law §200, and common law negligence are denied.

Labor Law §200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501–502). To be held liable under Labor Law §200 for injuries arising from the manner in which work is performed, a defendant must have authority to supervise or control the methods or materials of the injured plaintiff's work (*see Rojas v Schwartz*, 74 AD3d 1046, 1046; *Chowdhury v Rodriguez*, 57 AD3d 121, 127–128). Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it " 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition' " (*Rojas v Schwartz*, 74 AD3d at 1047, quoting *Ortega v Puccia*, 57 AD3d 54, 61). Here, plaintiff's injures are alleged to have been caused by defects in both the premises and the equipment used at the work site. A defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law §200 is obligated to address the proof applicable to both of the foregoing liability standards (*see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52). A defendant moving for summary judgment in such a case may prevail "only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" (*id.* at 52).

Applying the above standards, the defendant failed to establish her *prima facie* entitlement to judgment as a matter of law. In support of her motion, the defendant submitted a copy of the injured plaintiff's deposition testimony, wherein the injured plaintiff testified that the defendant was made aware of the problems with the lighting before the subject accident. Thus, the defendant failed to eliminate triable issues of fact as to whether she had

actual or constructive notice of the alleged dangerous condition (*see Reilly–Geiger v Dougherty,* 85 AD3d 1000, 1001; *see also Carrasco v Weissman,* 120 AD3d 531, 533; *Eversfield v Brush Hollow Realty, LLC,* 91 AD3d 814, 816). The failure to make a *prima facie* showing requires the denial of the defendant's motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324).

In the verified bill of particulars, the plaintiff alleges that his Labor Law §241(6) claim is premised on violations of sections 23-1.5, 23-1.10, 23-1.12, 23-1.13 and 23-1.30, of the Industrial Code (12 NYCRR). Section 23–1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241(6)" (*Kochman v City of New York,* 110 AD3d 477, 478 [2013]), and the plaintiff failed to raise a triable issue of fact as to whether a violation of Industrial Code §23–1.10 proximately caused his injuries (*see generally Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Thus, the plaintiff's claims under those sections must be dismissed.

As to Section 23-1.13, the plain language of 12 NYCRR § 23–1.13, which is entitled "Electrical Hazards," indicates that it only applies to hazards and injuries sustained as a result of circumstances that are electrical in nature (*see Zak v United Parcel Service,* 262 AD2d 252 [1999] [holding that the purpose of 12 NYCRR § 23–1.13(b)(5) is to protect against electrical shock, and that this section did not apply to plaintiff's injuries when electrical power was accidentally restored to the conveyor belt on which plaintiff was working; *see also Rice v City of Cortland,* 262 AD2d 770, 776[1999] [stating that 12 NYCRR §23–1.13 provides specific guidelines to protect workers against electrocution]). Here, the record fails to indicate that the plaintiff was exposed to any electrical hazard at the time of the injury. Thus, Section 23–1.13 of the Industrial Code is plainly inapplicable, and cannot support plaintiff's Labor Law §241(6) claim (*cf.*, *Hernandez v Ten Ten Co.,* 31 AD3d 333 [2006]; *Snowden v New York City Tr. Auth.,* 248 AD2d 235 [1998]). Thus, the plaintiff's claim under that section is dismissed.

As to the remaining provisions, Section 23-1.12 provides that every power-driven saw shall be equipped with a guard which covers the saw blade), and Section 23-1.30 provides that proper illumination for safe working conditions shall be provided wherever persons are required to work or pass in construction. The branch of defendant's motion

which seeks summary judgment dismissing the plaintiff's Labor Law §241(6) claim, premised upon these provisions, is denied.

The undisputed record indicates that the plaintiff was injured while using a saw that was not equipped with a blade guard or spreader (*see* 12 NYCRR 23-1.12 [c] [2], [3]; *Cabrera v Noble Elec. Contracting Co., Inc.*, 117 AD3d 484 [2014]). It cannot be held, as a matter of law, that the absence of a protective guard on the saw, in violation of 12 NYCRR 23–1.12(c), was not a proximate cause of plaintiff's accident (*see Keneally v 400 Fifth Realty LLC,* 110 AD3d 624 [2013]; *Once v Service Ctr. of N.Y.,* 96 AD3d 483 [2012], *lv. dismissed* 20 NY3d 1075 [2013]).

With regards to Section 23-1.30, the defendant failed to establish, *prima facie*, that she had no notice of the inadequate lighting in the area where the plaintiff was injured. Further, on this record, an issue of fact exists as to whether inadequate illumination contributed to causing the accident (*see DeMaria v. RBNB 20 Owner, LLC*, 129 AD3d 623 [2015]).

In opposition, the defendant failed to raise an issue of fact. Her challenges to the plaintiff's credibility are unpersuasive and although comparative negligence is a viable defense to a Labor Law §241(6) claim, no evidence of culpable conduct on the part of plaintiff was presented by defendant (*see Once v Service Ctr. of N.Y.*, 96 AD3d 483 [2012], *lv dismissed* 20 NY3d 1075 [2013]).

Finally, the defendant's contention that the plaintiff was not engaged in "construction work" at the time of the subject accident is without merit. She failed to demonstrate that the plaintiff, who was injured while cutting a saddle for the installation of wood flooring, was not engaged in "construction work" under 12 NYCRR 23–1.4(b) (13). Section 23–1.4(b)(13) of the Industrial Code defines "construction work" as including *all* work "performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (12 NYCRR 23–1.4[b][13] [emphasis added]; *see Joblon v Solow,* 91 NY2d 457, 466 [1998]; *Martinez v City of New York,* 73 AD3d 993, 997 [2010]).

The cross-motion by plaintiff is granted in part and denied in part.

The branch of the cross-motion seeking summary judgment on the plaintiff's claims, pursuant to Labor Law §200, is denied. There are issues of fact as to whether the defendant had notice of the dangerous conditions on the premises (*see Pacheco v Smith*, 128 AD3d 926 [2015]).

The branch of the cross-motion seeking summary judgment on the plaintiff's claim, pursuant to Labor Law §241(6), is granted. The plaintiff established entitlement to judgment as a matter of law, on the issue of liability, pursuant to Labor Law §241(6), where the undisputed evidence indicates that the plaintiff was injured while using a saw that was not equipped with a blade guard (*see* 12 NYCRR 23-1.12 [c] [2], [3]; *Cabrera v Noble Elec. Contracting Co., Inc., supra*).

Based upon the foregoing, it is

ORDERED, that defendant's motion to dismiss the plaintiff's claims, pursuant to Labor Law Sections 240(1), 241(1-5) and 242, are granted; and it is further,

ORDERED, that the defendant's to dismiss the plaintiff's claims for lost earnings is also granted; and it is further,

ORDERED, that defendant's motion to dismiss the plaintiff's claims, pursuant to Labor Law Section 200 and common law negligence, are denied; and it is further,

ORDERED, that the defendant's motion to dismiss plaintiff's Labor Law §241(6) claims, premised upon Sections 23-1.5, 23-1.10 and 23-1.13 of the Industrial Code (12 NYCRR), are granted; and it is further,

ORDERED, that defendant's motion to dismiss plaintiff's claims, premised upon sections 23-1.12 and 23-1.30 of the Industrial Code, are denied; and it is further,

ORDERED, that the branch of plaintiff's cross-motion for summary judgment on his claims, pursuant to Labor Law Section 200, is denied; and it is further,

ORDERED, that the branch of plaintiff's cross-motion for summary judgment on his claim, pursuant to Labor Law Section 241(6), is granted; and it is further,

The foregoing constitutes the decision and order of this Court.

Dated: August 10, 2015

TIMOTHY J. DUFFICY,J.S.C.

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9:12 AM/PM
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