Halsey v Isidore 46 Realty Corp.
2015 NY Slip Op 32411(U)
November 24, 2015
Supreme Court, Queens County
Docket Number: 701583/13
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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LAWRENCE HALSEY,

Plaintiff(s),

- against -

ISIDORE 46 REALTY CORP., ISIDORE 46 REALTY CORP. d/b/a/ and/or a/k/a ISADORE 46 REALTY CORP., ISADORE 46 REALTY CORP., ANGELO'S AL DENTE PIZZERIA & RESTAURANT, and BLAZIN' USA INC. d/b/a BLAZIN' PIZZA,

Defendant(s).
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Index No.:701583/13
Motion Date: 9/1/15
Motion Cal. No.:60
Motion Seq. No: 3

The following papers numbered 1 - 13 read on this motion by defendants Blazin' USA Inc. d/b/a Blazin' Pizza and Isidore Reality Corp., Isidore Reality Corp. d/b/a or a/k/a Isidore 46 Reality Corp. for summary judgment, pursuant to CPLR § 3212, dismissing the complaint; and on the cross-motion by plaintiff for summary judgment, pursuant to CPLR § 3212, against Blazin' USA Inc. d/b/a Blazin' Pizza and Isidore Reality Corp., Isidore Reality Corp. d/b/a or a/k/a Isidore 46 Reality Corp. on the issue of liability under Labor Law §§ 240(1) and 241(6) and against defendant Blazin' USA Inc. d/b/a Blazin' Pizza on the issue of liability under Labor Law § 200.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Affirmation in Opposition-Exhibit-Service.....	9 - 11
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Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are decided as follows:

This is an action to recover money damages for injuries allegedly suffered as a result of a construction site accident. The accident occurred on March 28, 2012 at premises located at 172-14 46th Avenue, Flushing, New York. The premises were leased by defendant Blazin' USA Inc. d/b/a Blazin' Pizza. The premises were owned by defendants Isidore Reality Corp., Isidore Reality Corp.

d/b/a or a/k/a Isidore 46 Reality Corp.

The plaintiff testified that he was an employee of Verizon and worked as a fiber optic technician. He testified that on the day of the accident he was working at a restaurant in Queens, where he was scheduled to install FiOS wiring at the premises. When he arrived at the premises the plaintiff spoke with the restaurant owner who told the plaintiff where he wanted the FiOS wires to run. The plaintiff's co-worker was running the wires from the poles outside of the premises into the premises. The plaintiff went inside the premises to begin his work. The plaintiff removed a panel from the drop ceiling and then went into the drop ceiling on the ladder and drilled a hole through the wall and waited for his co-worker to push the wire through the hole from the outside. The plaintiff testified that the accident occurred as he was pulling the wires through the hole. He testified that after he had pulled several feet of wire the ladder slipped from underneath him causing the plaintiff to fall to ground. The plaintiff further testified that he placed the ladder in the area that he had just cleared of debris. He also stated that after the accident he noticed that there was dust and debris on the ground where the ladder slipped.

A representative of the defendant Blazin' USA Inc. d/b/a Blazin' Pizza testified at an examination before trial. He testified that Verizon workers provided their own tools to install the FiOS equipment. He testified that the tiles inside the restaurant had been swept two days prior to the accident. He further testified that the tiles were not wet and that there was nothing on the floor in the area that the plaintiff was working when the accident occurred. He testified the workers were not instructed on how to do their work.

On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Here, the plaintiff has established his *prima facie* entitlement to summary judgment. The plaintiff's injuries were caused by a fall from a height while performing a protected activity under Labor Law § 240(1) (*see Ford v HRH Constr.*, 41 AD3d 639 [2d Dept 2007]). The defendants' argument that the plaintiff was not engaged in protected activity is without merit. The plaintiff's action of drilling a hole in the premises to install wiring constitutes altering and, therefore, is a protected activity (*Bedasse v 3500 Snyder Ave. Owners Corp.*, 266 AD2d 250 [2d Dept 1999]).

Whether a device provides proper protection is an issue of fact except in cases were the device collapses, moves, falls or otherwise fails to protect the plaintiff. Here, the deposition testimony of the plaintiff that the ladder slid from underneath him established that the ladder was defective and that the ladder moved causing him to fall. The plaintiff therefore, established *prima facie*, that the ladder did not provide him with proper protection (*Melchor v Singh*, 90 AD3d 866 [2d Dept 2011]; *see Hai-Zhong Pang v LNK Best Group, Inc.*, 111 AD3d 889 [2d Dept 2013]; *Grant v City of New York*, 109 AD3d 961 [2d Dept 2013]; *Argueta v Pomona Panorama Estates, Ltd.*, 39 AD3d 785 [2d Dept 2007]).

In opposition the defendants failed to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The defendants' argument that the motion should be denied because the plaintiff's own actions were the sole proximate cause of the accident is not supported by the evidence (*see Cordova v 360 Park Ave. S. Assoc.*, 33 AD3d 750 [2d Dept 2006]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693 [2d Dept 2006]).

Under Labor Law § 241(6) liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the owner or contractor did not supervise or control the worksite. To support their claim under Labor Law § 241(6) the plaintiff has alleged violations of 12 NYCRR §§ 23-1.7(e)(2), 23-1.7(d) and 23-1.21(b)(4)(ii). Here, there is an issue of fact as to the condition of the floor at the time of the accident and as to whether such condition was the proximate cause of the accident. Therefore, summary judgment on the issue of liability under Labor Law § 241(6) is not appropriate.

Labor Law § 200 codifies the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work (*see Russin v Louis N. Picciano & Sons*, 54 NY 2d 311 [1981]). For an owner or general contractor to be liable under Labor Law § 200 and common law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. On this issue, there is an issue of fact as to whether the defendant Blazin' USA Inc. d/b/a Blazin' Pizza had actual or constructive notice of the allegedly unsafe condition, namely debris on the floor that made the floor surface slippery. The defendant Blazin' USA Inc. d/b/a Blazin' Pizza failed to establish that the dangerous condition would not have been discovered upon a reasonable inspection and, thus, they did not establish that they did not have constructive notice of the allegedly dangerous condition (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012]; *Colon v Bet Torah*, 66 AD3d 731 [2d Dept 2009]). Furthermore, there is an issue of fact as to whether the condition of the floor was the proximate cause of the accident. The owner defendants, however, have established that as an out-of-

possession landlord they did not have actual or constructive notice of any alleged defective condition and did not supervise or control the work of the plaintiff. Therefore, the common law negligence and Labor Law § 200 causes of action must be dismissed against defendants Isidore Reality Corp., Isidore Reality Corp. d/b/a or a/k/a Isidore 46 Reality Corp.

Accordingly, the motion by defendant Blazin' USA Inc. d/b/a Blazin' Pizza for summary judgment is denied. The branches of the motion by defendants Isidore Reality Corp., Isidore Reality Corp. d/b/a or a/k/a Isidore 46 Reality Corp. for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action are denied. The branches of the motion by defendants Isidore Reality Corp., Isidore Reality Corp. d/b/a or a/k/a Isidore 46 Reality Corp. for summary judgment dismissing the Labor Law § 200 and common law negligence causes of action are granted and those causes of action are dismissed. The branch of the cross-motion by plaintiff for summary judgment on the issue of liability under Labor Law § 240(1) is granted. The branches of the cross-motion by plaintiff for summary judgment on the issue of liability under Labor Law §§ 241(6), 200 and common law negligence are denied.

Dated: November 24, 2015

JANICE A. TAYLOR, J.S.C.