Barbosa v City of New York
2017 NY Slip Op 30972(U)
May 1, 2017
Supreme Court, New York County
Docket Number: 156905/2013
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33
---X
ANTONIO BARBOSA
Plaintiff,

-against-

THE CITY OF NEW YORK,
Defendant.
---X

DECISION/ORDER
Index No. 156905/2013

MARGARET A. CHAN, J.:

Plaintiff, a construction worker, brings this action alleging violations of the Industrial Code for injuries stemming from his January 2, 2013, trip and fall over exposed rebar at his worksite on a pier south of the Robert F. Kennedy a/k/a Triborough Bridge, near 125th Street, in the City, State and County of New York. Before this court are plaintiff's motion for partial summary judgment on liability (motion sequence 002) and the City of New York's (the City) motion for summary judgment (motion sequence 003), which were opposed, respectively. The decisions and orders are as follows:

Plaintiff's complaint asserted claims pursuant to 46 U.S.C. § 688 (the Jones Act), Labor Law §§ 200, 241, and 241(6). To substantiate his claim under Labor law § 241(6), plaintiff claimed that the following Industrial Code sections were violated: §§ 23.1.2 (1); 23-1.5; 23-1.7; 23-1.15; 23-1.16(a-f); 23-1.17(a-f); 23-5; 23-5.1(a-k); 23- 5.2; 23- 5.3; 23- 5.4; 23-5.5; 23- 5.6; and 23-8.4. In his bill of particulars, plaintiff added these Industrial Code violations: §§ 23-1.2(c); 23-2.1(a), (b), and (d); 23-2.2(a), (b), and (c); 23-2.3(a) and (d); and 23-2.4. The City argues that all the violations claimed by plaintiff are inapplicable to the facts presented here or are overly broad as to constitute a violation of the Labor Law.

Plaintiff moves for partial summary judgment on liability specifically for violation of Industrial Code § 23-1.7(e) under Labor Law § 241(6). He withdrew all claims under 46 U.S.C. § 688 (the Jones Act), Labor Law § 240(1), and Industrial Code §§ 23-1.2, 23-1.16, 23-8.4 and 23-5 that were claimed under Labor Law § 241(6) in his opposition to the City's motion for summary judgment. The City moves for summary judgment as to plaintiff's remaining causes action: Industrial Code § 23-1.7(e) under Labor Law § 241(6), and Labor Law § 200.

Parties moving for summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1980]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that summary judgment may not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]), or where the existence of an issue is arguable (*see Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Summary judgment motions are viewed in the light most favorable to the party opposing the motion (*see Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

Pursuant to Labor Law § 241(6), owners and contractors are under a duty to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations promulgated by Commissioner of Department of Labor and their responsibility is nondelegable; thus, to the extent an injured worker asserts a viable claim under a statute, the worker need not show that owner or contractor exercised supervision or control over his worksite to establish right of recovery (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). To support a claim under § 241(6), plaintiff must point to a specific violation of particular code specifications and not simply claim non-compliance with general safety standards (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

Specifically, plaintiff argues that because he worked within an area that contained tripping hazards – the exposed rebar – the City violated Industrial Codes §§ 23-1.7(e)(1) and (2). Those sections state:

> (e) Tripping and other hazards.
> (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.

(12 NYCRR 23-1.7(e)).

The City, in support of their motion, showed that plaintiff was employed as a Labor Foreman for Pile Foundation Construction and worked on rebuilding a pedestrian walkway which later became part of the pedestrian esplanade along the East River (mot seq 003, City's Mot, exh D at 14). Plaintiff described his work on the date of the accident as drilling holes in a pile cap, which served as a "footing" to hold prefabricated concrete slab that went on top of it (*id.* at 19-20). The holes drilled by plaintiff would be filled by dowels connecting the concrete slab to the pile cap. The concrete slabs were composed of rebar which sticks out from the slab (*id.* at 20-21). The "second step" of the job was to pour concrete on top of the rebar. Plaintiff stated that his accident happened as he turned to get a hose and his foot got caught in the rebar, which was "all over the place" and he fell onto the rebar (*id.* at 21-23).

The City argued that § 23-1.7(e)(1) is inapplicable to this case because plaintiff did not fall within a passageway, and the exposed rebar was within the working area and was an integral part of the job site. According to photographic evidence and plaintiff's own testimony, plaintiff was not walking through a passageway, rather he was actively engaged in drilling work and retrieving a hose to continue his job drilling holes on top of the precast through the pile cap (mot seq 003, Pltf's Opp, exh 1). While the rebar might have been "all over the place", it was not strewn haphazardly, rather it was exposed in neat rows ready to connect to concrete (*id.*). Therefore, § 23-1.7(e)(1), which deals with passageways, is not applicable here. There is also no cause of action under the latter section, § 23-1.7(e)(2), which deals with scattered debris, materials, and/or sharp projections.

The City also submitted testimony from Mohamed Ayoub, the City's project construction manager (mot seq 003, City's Mot, exh E). Mr. Ayoub supervised the construction project along the East River esplanade. Mr. Ayoub mentioned that the rebar was

"not laid safely" on the site (*id.* at 36). He stated that the rebar was "pointy", a "tripping hazard," and was supposed to have a plastic cover on the end (*id.*). He testified that work stopped on the project a number of times due to safety concerns, but he clarified that the work was never stopped at the 125th Street location where plaintiff fell (*id.* at 38-39). As to the accident, Mr. Ayoub testified that plaintiff tripped on a precast that "comes with exposed steel" called a rebar (*id.* at 43). While Mr. Ayoub conceded that the exposed rebar is a tripping hazard, he testified that the hazard cannot be remedied because the rebar is necessary to connect the concrete and precast (*id.* at 45).

Plaintiff, in support of his motion, submitted his expert, Tony Raimo's opinion. Raimo asserted that the City is liable for permitting plaintiff to work within an area that had obstructions – the exposed rebar. He suggested that a wooden cover should have been secured over the rebar which would have permitted plaintiff to perform his duties without the risk of falling over it (mot seq 003, Pltf's Opp, exh 5). In contrast, Mr. Ayoub, the City's construction manager, when asked about the possibility of making the area safer by applying a wood cover, responded that the walking area, despite the exposed rebar, was "the safest it can be" (mot seq 003, City's Mot, exh E, at 48). The placement of a wood cover would be less safe because the covers would not be balanced, could move, and potentially would result in workers falling (*id.*).

When a plaintiff trips on rebar steel that is an integral part of the ongoing work being performed, no liability can be imposed under Labor Law § 241(6). The First Department affirmed the dismissal of a Labor Law § 241(6) claim in *Tucker v. Tishman Construction Corp. of New York* (36 AD3d 417 [1st Dept, 2007]) because plaintiff tripped on rebar steel that was an integral part of the work. The evidence in *Tucker* indicated that plaintiff tripped on a rebar that was part of a concrete area composed of layers of plywood, steel and rebar (*see Tucker v Tishman Const. Corp. of New York*, 2005 WL 6214653, [Sup Ct, NY Cty 2005] affd 36 AD3d 417). Since the plaintiff in *Tucker* tripped "over a 'condition' that was part of the work he was hired to perform", no liability was imposed (*Tucker,* 36 AD3d 417). Likewise, the First Department dismissed a Labor Law § 241(6) claim in *Flynn v. 835 6th Avenue Master L.P.* (107 AD3d 614 [1st Dept, 2013]) based on plaintiff's testimony that the rebar which caused him to fall was in the process of being installed. As the rebar was integral to the ongoing work, his claim of a violation of the Industrial Code failed. In the instant case, the exposed rebar was intrinsic to the work being performed. Therefore, plaintiff's claim under Labor Law § 241(6) as a violation of Industrial Code § 23-1.7(e)(2) fails and must be dismissed.

As to the remainder of plaintiff's alleged Industrial Code violations, the sections cited by plaintiff in the complaint are not relevant to the facts here. As to §23-1.5(c)(3), it states that "all safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Section 23-1.7(a) deals with overhead hazards, and subsection (d) discusses slipping hazards. Section 23-1.15 deals with safety railings. Section 23-1.17 (a-f) concerns life nets. Section 23-5.2 through Section 23-5.6 deals with scaffolding. The only Industrial Code violation alleged by plaintiff in his complaint that is relevant is § 23-1.7(e), which as discussed above, was not violated by defendant as a matter of law.

The City's motion did not address the Industrial Code violations that were asserted in plaintiff's bill of particulars, to wit: §§ 23-1.2(c); 23-2.1(a), (b), and (d); 23-2.2(a), (b), and (c); 23-2.3(a) and (d); and 23-2.4. However, those sections are also not relevant to this case. Section 23-1.2(c) deals with the hazards of fire, explosion and electricity. Section 23-2.1(a) and (b) relate to the storage of building materials and equipment. While plaintiff also sought relief under 23-2.1(d), there is no section (d) in Code. Section 23-2.2(a),(b), and (c) address forms, shores and reshores that must be braced appropriately for the pouring of concrete. Section 23-2.3(a) and (d) deal with structural steel assembly, and, finally, section 23-2.4 discusses permanent, temporary or other wood or rough flooring requirements. As these sections are not relevant, plaintiff's claims pursuant to these Code provisions are dismissed.

Turning to the branch of the City's motion seeking dismissal of plaintiff's claim pursuant to Labor Law § 200, that section codifies the common-law duty of an owner or contractor to provide employees with a safe place to work. Plaintiff argues that the City acknowledged that the rebar is a tripping hazard and thus, the workplace was not safe. Plaintiff contends that an issue of fact exists as to the City's failure to provide any protection for the hazardous condition or for its failure to make the area safe despite having actual knowledge about the dangerous exposed rebar.

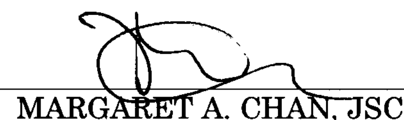
A property owner is liable under Labor Law § 200 where a plaintiff's injuries stem from a dangerous condition on the premises and the owner created the dangerous condition that causes an injury or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). "The Court of Appeals has held, however, that this duty does not extend to hazards which are 'part of or inherent in' the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience (*Bombero v NAB Const. Corp.*, 10 AD3d 170, 171 [1st Dept 2004] quoting *Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963]).

Plaintiff testified that he was drilling on top of the precast which was composed of concrete and rebar (mot seq 003, City's Mot, exh D, pp 20-23). He was aware of the rebar sticking out from the precast concrete pieces because it was his working surface (*id.*). Moreover, plaintiff's testimony indicated that as he reached for a hose, he turned and tripped on the rebar (*id.*). He was not walking along the precast, nor was he traversing the area. As the area on which plaintiff was working contained exposed rebar, the hazard was one which was inherent in the very work being performed and, in fact, observed by plaintiff as he performed his duties. Therefore, under these facts, plaintiff cannot sustain a claim under Labor Law § 200 because the hazard was inherent in his duties.

Accordingly, defendant the City of New York's motion for summary judgment is granted (motion sequence 003), and plaintiff's motion for partial summary judgment (motion sequence 002) is denied. The complaint is dismissed. The clerk of the court is directed to enter judgment in favor of City of New York as written.

This constitutes the decision and order of the court.

DATE : **5/1/2017**



MARGARET A. CHAN, JSC