SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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PETER SICOLI and MARLENE SICOLI,

Index No. 152480/2015

Plaintiffs,

Motion Sequence No. 004

- against -

RIVERSIDE CENTER PARCEL 2 BIT ASSOCIATES, LLC, and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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COHEN, J.:

Plaintiffs Peter Sicoli (Mr. Sicoli) and Marlene Sicoli bring this action against defendants Riverside Center Parcel 2 Bit Associate, LLC (Riverside) and Tishman Construction Corporation (Tishman), seeking damages following Peter Sicoli's alleged slip and fall, while working at defendants' construction site. Plaintiffs seek damages based on defendants' alleged negligence in maintaining the site (first cause of action) and loss of consortium (second cause of action). As amplified by the bill of particulars, the first cause of action includes allegations that defendants "violated Sections 200, 240, 241(6) of the Labor Law of the State of New York, Rule 23 of the Industrial Code of the State of New York [12 NYCRR], specifically but not limited to 23-1.5, 23-1.7, 23-1.22, 23-1.23, 23-2.1, Article 1926 of O.S.H.A and [were] otherwise negligent, careless and reckless causing plaintiff to sustain serious and severe injuries." NYSCEF document number 16, ¶ 7.

Plaintiffs filed a summons and complaint on March 13, 2015. Defendants served an answer on April 21, 2015. Plaintiffs filed their note of issue on February 16, 2017.

Defendants now move for partial summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims. Plaintiffs do not oppose the portion of defendants' motion that is directed at their Labor Law § 240 (1) claim and withdraw that claim only.

Background

Defendant Riverside is the owner of the premises located at 59th and 60th Streets and Eleventh Avenue, in New York, New York, which were under construction (Riverside Project) at the time of Mr. Sicoli's alleged accident. Riverside hired Tishman as the project's construction manager. Tishman hired Federated Fire Protection to perform sprinkler work. WDF then allegedly bought out Federated Fire Protection.

On March 4, 2015, Mr. Sicoli was working as a steamfitter foreman for WDF on the Riverside Project. On that day, Mr. Sicoli received delivery of steel stongbacks. He met the delivery truck at a gate, which was used for deliveries of materials to the basement. The gate was located at the top of an outdoor, gravel ramp that led down to the basement. Mr. Sicoli backed the truck down the ramp and began unloading it, carrying the strongbacks on his shoulder, one at a time, into the basement. Mr. Sicoli allegedly slipped at the base of the ramp, approximately 10 feet from the building, while carrying a strongback. He states that he slipped on the snow and ice that were covering the entire ramp.

The ramp was approximately 40-50 feet long and 10-12 feet wide, sloped 6-10 feet and provided the only direct access to the basement. The basement was also accessible by stairs located in another part of the building. In his affidavit, Mr. Sicoli describes how workers used the ramp at the construction site, stating, in pertinent part, as follows:

> "The area where the accident occurred was an active area on the project that I had used for deliveries on many prior occasions. The area where the accident occurred was also an area in which myself, coworkers, and numerous other tradesmen would use to gain

> access to the basement of this project as well. This active area was certainly used as a walkway and passageway to go to and from different portions of the project. This area was also used as a staging area for multiple trades, not only just to unload, but to also stage materials as well."

NYSCEF document number 88.

Analysis

Defendants contend that the Industrial Code provisions that plaintiffs rely on (12 NYCRR 23-1.5, 23-1.7, 23-1.22, 23-1.23, 23-2.1) are inapplicable to the facts of the instant case and, as such, may not form the basis of plaintiffs' Labor Law § 241(6) claim. Plaintiffs address defendants' arguments regarding the applicability of Industrial Code § 23-1.7 (d) only. The parties dispute whether the gravel ramp where Mr. Sicoli fell constitutes a "walkway or passageway" within the meaning of the provision.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.* at 607 (internal quotation marks and citation omitted).

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed." *Capuano v Tishman Const. Corp.*, 98 AD3d 848, 850 (1st Dept 2012). In order to state a claim under Labor Law § 241(6), "a plaintiff must identify a specific Industrial Code provision

'mandating compliance with concrete specifications.'" *Id.*, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 (1993). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury." *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Industrial Code § 23-1.7 (d) provides as follows:

> "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."

12 NYCRR 23-1.7 (d). Generally, "open, unpaved area[s]" do not constitute "'a floor, passageway, walkway, scaffold, platform or other elevated working surface,' within the purview of 12 NYCRR 23-1.7 (d)." *Raffa v City of New York*, 100 AD3d 558, 559 (1st Dept 2012); *see also Porazzo v City of New York*, 39 AD3d 731, 731 (2d Dept 2007) (finding that "the open, ground level of the work site where the injured plaintiff fell did not constitute a passageway, walkway, or other elevated working surface contemplated by 12 NYCRR 23-1.7 [d]"); *Gavigan v Bunkoff Gen. Contrs* , 247 AD2d 750, 751 (3d Dept 1998) (stating that "an out-of-doors worn dirt pathway [was] not a floor, platform, passageway or similar working surface. . .").

Here, defendants demonstrate their entitlement to summary judgment by pointing out that Mr. Sicoli fell on an outdoor, gravel ramp, which is not a "a floor, passageway, walkway, scaffold, platform or other elevated working surface" within the meaning of Industrial Code § 23-1.7 (d). *See O'Gara v Humphreys & Harding*, 282 AD2d 209, 209 (1st Dept 2001) (finding that "plaintiff's accident did not occur on a floor, platform, passageway or similar work area or surface within the protective purview of the [Industrial Code § 23-1.7 (d) and (e)], but rather on muddy ground in an open area exposed to the elements"); *see also Roberts v Worth Const., Inc.*,

21 AD3d 1074, 1077 (2d Dept 2005) (finding that a temporary, dirt roadway, "located in an open area at ground level[,] . . . did not constitute a passageway, walkway. . . contemplated by [Industrial Code 23-1.7 (d)]"); *Lawyer v Hoffman*, 275 AD2d 541, 542 (3d Dept 2000) (finding that Industrial Code 23-1.7 [d] "[was] inapplicable . . . because the temporary [gravel] roadbed upon which plaintiff fell [did] not constitute a passageway, walkway or other elevated working surface contemplated by the regulation").

In opposition, plaintiffs fail to raise an issue of fact. Mr. Sicoli states that numerous workers on the site used the ramp to access the basement and that various trades used the ramp as a staging area for materials. However, that workers regularly traverse a path or use it to stage materials does not convert it into a passageway or a walkway covered by Industrial Code § 23-1.7 (d). *Cf. Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 (1st Dept 2013) (finding that "[t]he area of the sidewalk where plaintiff was unloading materials was not a 'passageway' within the meaning of 12 NYCRR 23-1.7 (e) (1)"); *Smith v Hines GS Props, Inc.*, 29 AD3d 433, 433 (1st Dept 2006) (finding that an "open area between the building under construction and the materials storage trailers," which was the "only access to equipment and materials" and which "the tradesmen at the site routinely traversed," was not "'passageway' or walkway" covered by Industrial Code § 23-1.7 [e] [1]); *see also Dalanna v City of New York*, 308 AD2d 400, 401 (1st Dept 2003) (finding that an outdoor 50-foot-long concrete slab, "although regularly traversed . . ., remained a common, open area between the job site and the street, and thus was not [a] 'passageway 'covered by 12 NYCRR 23-1.7 [e] [1] . . .").

Therefore, to the extent that plaintiffs' Labor Law § 241 (6) claim is premised on Industrial Code § 23-1.7(d), the claim is dismissed.

To the extent that the Labor Law § 241 (6) claim is premised on Industrial Code §§ 23-1.5, 23-1.7, 23-1.22, 23-1.23, 23-2.1, defendants adequately demonstrate that these sections are either not sufficiently specific to give rise to a claim or are not applicable to the facts of this case. Industrial Code 23-1.5 "merely establishes a general safety standard that does not give rise to the nondelegable duty imposed by Labor Law § 241 (6)." *Sparkes v Berger*, 11 AD3d 601, 602 (2d Dept 2004); *see also Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 (1st Dept 2015). The remaining subsections of Industrial Code § 23-1.7 address overhead hazards, falling hazards, drowning hazards, tripping hazards and sharp projections, vertical passages, air-contamination, oxygen deficiency and corrosive substances (*see* 12 NYCRR 23-1.7 [a]-[c], [e]-[h]), none of which are alleged to have caused Mr. Sicoli's injury. Industrial Code § 23-1.22 addresses structural runways, ramps and platforms, and expressly "does not apply to ramps constructed of earth, gravel, stone or similar embankment material," such as the one involved here. 12 NYCRR 23-1.22 (a). Industrial Code § 23-1.23 sets forth various construction specifications for earth ramps and runways. However, plaintiffs allege that the presence of snow and ice on the gravel ramp, rather than a construction defect, was the cause of the accident. Lastly, Industrial Code § 23-2.1 provides for safe storage of materials and equipment and proper disposal of debris. Again, this provision has no application to the facts of this case. Therefore, to the extent that the Labor Law § 241 (6) claim is premised on these provisions, it is dismissed. *See Martinez*, 128 AD3d at 409.

Moreover, as plaintiffs have failed to respond to defendants' showing that these provisions are inapplicable, plaintiffs are "deemed to [have] abandon[ed] reliance on [these] Industrial Code section[s]." *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 (1st Dept 2012).

For the foregoing reasons, the Labor Law 241 § (6) claim is dismissed in its entirety.

Accordingly, it is hereby

ORDERED that the motion for partial summary judgment is granted in favor of defendants Riverside Center Parcel 2 Bit Associate, LLC and Tishman Construction Corporation and against plaintiffs Peter Sicoli and Marlene Sicoli and those portions of the first cause of action which seek recovery based on Labor Law §§ 240 (1) and 241 (6) are dismissed; and it is further

ORDERED that the action shall continue as to the remaining causes of action.

Dated: 7-31-2018

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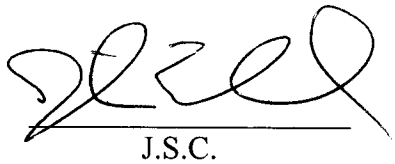

J.S.C.

HON. DAVID B. COHEN
J.S.C.