Cabonargi v West Vil. Residences LLC
2018 NY Slip Op 31908(U)
August 10, 2018
Supreme Court, New York County
Docket Number: 161560/15
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CLEMENTINO CABONARGI and ROSETTA, CABONARGI,

Plaintiffs,

-against-

WEST VILLAGE RESIDENCES LLC, GLOBAL HOLDINGS INC., GLOBAL HOLDINGS VENTURES, LLC, RUDIN MANAGEMENT CO. INC., and TURNER CONSTRUCTION COMPANY,

Defendants.

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Index No. 161560/15
Motion Seq. No. 001

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants West Village Residences LLC (West Village) and Turner Construction Company (Turner) move for summary judgment dismissing the complaint as against them.

BACKGROUND

On October 26, 2015, plaintiff Clementino Cabonargi (Cabonargi, or plaintiff), a bricklayer, was injured when he tripped and fell while working on the construction project that replaced St. Vincent's Hospital with luxury condominiums in lower Manhattan. Plaintiff, along with his partner, was caulking doors on a seventh-floor terrace of the subject building when the accident happened.

Plaintiff's door-caulking required him to use a ladder. Directly before his accident, plaintiff, needing to replace the tube on his caulking, descended the ladder and walked along the terrace toward a box of caulking tubes that he had placed between where he and his partner were working (plaintiff's tr at 71). Another brick-laying subcontractor was doing work on the terrace

at the time (*id.* at 59), and plaintiff noticed that there "was some brick debris, some brick and cement debris between me and the box (*id.* at 71).

Plaintiff testified that he moved to avoid the brick debris, only to step in a hole and trip (*id.*). Plaintiff, who was injured by the ensuing fall, filed his complaint in this matter in November 2015, alleging that defendants are liable for his injuries under Labor Law §§ 240 (1) and 241 (6), as well as common-law negligence and Labor Law § 200. Additionally, plaintiff Rosetta Cabonargi brings a derivative claim for loss of her husband's services.

In opposition to West Village and Turner's motion for summary judgment, plaintiffs abandon their claims under Labor Law § 240 (1). In addition to abandoning their claims under Labor Law § 240 (1), plaintiffs also abandon all allegations of violations of the Industrial Code, except for those relating to 12 NYCRR 23 - 1.7 (e) (1) and 12 NYCRR 23 - 1.7 (e) (2).

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

I. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of

action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

12 NYCRR 23-1.7 (e), entitled, "Protection from general hazards; Tripping and other hazards," has two subdivisions. The first, "Passageways," provides that "[a]ll 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" (12 NYCRR 23-1.7 [e] [1]). The second subdivision, entitled "Working areas," provides: "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 NYC RR 23-1.7 [e] [2]).

West Village and Turner do not argue that either regulation is insufficiently specific to serve as basis of liability under section 241 (6), but instead argue that neither regulation is applicable to the circumstances of Cabonargi's accident. As to the former subdivision, West Village and Turner argue that "Passageways" is inapplicable, as Cabonargi was walking in a common, open area, rather than a passageway. Moreover, West Village and Turner argue that the drainage hole that plaintiff stepped into was not the kind of tripping hazard contemplated by the regulation. As to the latter subdivision, "Working areas," West Village and Turner again argue that Cabonargi did not trip as result of one of the tripping hazards contemplated by the

regulation.

Initially, both subdivisions of 12 NYCRR 23-1.7 (e) are sufficiently specific to serve as a basis for liability under section 241 (6) (*see e.g., Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513 [1st Dept 1995]). As to the applicability of the "Passageways" regulation, plaintiffs argue that there is as a question of fact as to whether Cabonargi's accident occurred in a passageway. More specifically, plaintiffs imply that, as Cabonargi was required to walk on a stretch of the terrace between his ladder and his caulking materials, that the area was passageway. Thus, plaintiffs suggest a tautological definition: a passageway is any area over which a worker passes over while working on the jobsite.

If the Legislature had intended such a broad effect, however, it is unlikely that it would have propounded separate regulations for passageways and open areas. Indeed, courts have articulated a narrower definition of passageway than plaintiffs suggest (*see e.g. Smith v Hines GS Props., Inc.*, 29 AD3d 433 [1st Dept 2006]). In *Smith*, the First Department held that "an open area between the building under construction and the materials storage trailers was not a 'passageway' or walkway covered by Industrial Code (12 NYCRR) § 23-1.7 (e) (1)," despite the fact that "the tradesmen at the site routinely traversed this physically defined area as their only access to equipment and materials, making it arguably an integral part of the work site" (*id.* at 433 [internal quotation marks and citation omitted]).[1]

The evidence before the court suggests that the terrace where Cabonargi fell was not a passageway, but a working area where several contractors were working. Plaintiffs reliance on *Thomas v Goldman Sachs Headquarters, LLC* (109 AD3d 421 [1st Dept 2013]) is unavailing. *Thomas* held that, given that the subject defect, a gap, "was directly in front of the doorway,

[1] The Court held that

plaintiff raised an issue of fact as to whether the proximate cause of his injury was a tripping hazard within a passageway" (*id.* at 421-422). In *Thomas*, the subject gap was less than a foot away from the door (*id.* at 421). Here, there are no similar facts that would place the subject hole adjacent to an actual passageway. Thus, as Cabonargi did not fall in a passageway, his allegations relating to 12 NYCRR 23-1.7 (e) (1) must be dismissed.

As to the second subdivision, 12 NYCRR 23-1.7 (e) (2), plaintiffs argue first that the drainage hole was in a work area, as Cabonargi was required to traverse it to collect caulking tubes. This is plainly the case. Second, plaintiffs argue that the scattered bricks and cement that Cabonargi stepped around were accumulations of debris, as contemplated by 12 NYCRR 23-1.7 (e) (2). West Village and Turner do not contest this in their moving papers or in their reply. Instead, they argue again that the drainage hole that ultimately caused Cabonargi to trip was not one of the tripping hazards contemplated by 12 NYCRR 23-1.7 (e) (2).

Plaintiff's cite to *Licata v AB Green Gansevoort, LLC* (158 AD3d 487 [2018]) for the proposition that where debris that is involved in a plaintiff's accident, even if the ultimate fall is caused by a hole, rather than debris, may constitute a violation of 12 NYCRR 23-1.7 (e) (2). West Village and Turner argue that *Licata* is inapposite because debris, in that case, obscured the hole that ultimately caused plaintiff's accident. In *Licata*, the plaintiff could not say whether debris covered the hole he stepped into, but the First Department nevertheless held that the defendants were not entitled to summary judgment because the debris "may have contributed to plaintiff's accident" (*id.* at 489).

Here, Cabonargi's testimony that he altered his path to avoid brick and cement debris likewise indicates that such debris may have contributed to his accident. Thus, as plaintiffs raise a question of fact as to whether a violation of 12 NCYRR 23-1.7 (e) (2) proximately caused

Cabonargi's accident, the branch of West Village and Turner's motion seeking dismissal of the Labor Law § 241 (6) claim must be denied.

II. Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant]

controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Cabonargi's accident clearly involved a dangerous condition on the work site, rather than the means, methods, or materials of his work. Thus, West Village and Turner's argument that they lacked supervisory control over Cabonargi's work is inapposite. As to dangerous condition, West Village and Turner argue that the uncovered drain hole, surrounded by construction debris was not one. However, there is clearly a question of fact as to whether these conditions constituted a dangerous condition.

As to notice, Turner fails to make a showing that it did not have constructive notice of the alleged defect. "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Here, Turner's site safety manager, Frank Sceri (Sceri) testified that Turner did daily walkthroughs of the building and that, if Turner discovered an uncovered drain, it would direct the carpenters to cover the drain (Sceri tr at 32-33).

However, Turner provides no evidence as to when it last did a walkthrough of the terrace and whether the uncovered hole was present at that time (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]; *compare Ezzard v One East River Place Realty Co., LLC*, 129 AD3d [1st Dept 2015] [in a misleveled elevator case, defendants made *prima facie* showing as to constructive notice by providing evidence of when they had last inspected the elevator]). Thus, as Turner fails

to make a showing as to constructive notice, it fails to make a *prima facie* showing of entitlement to judgment as to its application for dismissal of the Labor Law § 200 and common-law negligence claims as against it.

However, West Village, unlike Turner, had no active role in overseeing safety on the jobsite. In these circumstances, West Village makes a *prima facie* showing as to constructive notice by providing plaintiff's testimony that he never saw any representatives for West Village on the jobsite (plaintiff's tr at 45). As West Village was not present at the jobsite no amount of time is sufficient for it to remedy the defect. As such, West Village, unlike Turner, is entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it.

CONCLUSION

Accordingly, it is

ORDERED that defendants West Village Residences LLC (West Village) and Turner Construction Company's (Turner) motion for summary judgment is resolved as follows:

- Plaintiffs Labor Law § 240 (1) claim, as well as all allegations of Industrial Code violations, except for those relating to 12 NYC RR 23-1.7 [e] [2], are dismissed;
- Plaintiff's Labor Law § 241 (6) is dismissed only as against West Village;
- The remainder of the motion is denied;

and it is further

ORDERED that counsel for West Village and Turner serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: August 10, 2018

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.