Schelmety v Skanska USA Inc.
2018 NY Slip Op 32087(U)
August 23, 2018
Supreme Court, New York County
Docket Number: 152838/2014
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

INDEX NO. 152838/2014

MOTION SEQ. NO. 001

DAVID SCHELMETY, NANCY SCHELMETY

Plaintiff,

- v -

SKANSKA USA INC., SKANSKA USA CIVIL NORTHEAST INC.,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

This is an action to recover damages for personal injuries sustained by a worker, David Schelmety, while he worked at a construction site located at 85 St. Nicholas Terrace, South campus, City College of New York in New York City (the premises) on November 4, 2013, at 7:15 a.m. Plaintiff was employed by non-party L. Martone & Sons, Inc. (Martone) as a Local 154 roofer/waterproofer. According to plaintiff, Dormitory Authority of the State of New York hired defendant Skanska to provide construction management services at the premises. Plaintiff alleges that Skanska was responsible for the initiation, maintenance, and supervision of site safety at the premises. Skanska hired Martone to perform roofing and plaza services at the premises.

Plaintiff was injured when he walked over a pile of debris (two foot high by 15 feet long) as he was trying to get into a trench and he tripped on a concrete block or brick.

Plaintiff's wife, Nancy Schelmety, seeks damages for her loss of her husband's support, services, love, companionship, affection, society, sexual relations, solace, and happiness.

Defendant, Skaska USA Building, Inc. (Skanska), moves for summary judgment on plaintiffs' claims for common-law negligence, Labor Law §§ 200, 240 (1) and 241 (6).

Plaintiffs cross-move on their claims for common-law negligence, Labor Law §§ 200, 240 (1) and 241 (6). Plaintiff's counsel, however, concedes that Labor Law § 240 (1) does not apply and withdraws this claim. (Plaintiffs' Notice of Cross-Motion, Attorney's Affirmation, at ¶ 2.) Given that plaintiffs have withdrawn their Labor Law § 240 (1) claim, the court need not address that aspect of defendant's motion.

To obtain summary judgment, a moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *accord DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].) If any doubt about whether triable facts exist, a court must deny summary judgment. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. Common-law negligence and Labor Law 200

Defendants move for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims. Plaintiff cross-moves for summary judgment on these claims.

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Two distinct standards applicable to section 200 cases exist depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *accord Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [emphasis in original]).

But where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be

liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

Here, the pile of dirt that plaintiff traversed was not a dangerous condition as a matter of law. (*See Haynie v New York City Hous. Auth.*, 95 AD3d 594, 595 [1st Dept 2012] ["The large chunks of concrete that plaintiff knowingly traversed while carrying a 28–foot, 40– to 50–pound ladder was not a dangerous condition as a matter of law."], citing *McGrath v Lake Tree Vill. Assoc.*, 216 AD2d 877, 877 [4th Dept 1995] [finding no liability on owner when plaintiff was injured when he walked on a pile of dirt while carrying a 24–foot scaffold pick on his shoulder].) The *McGrath* court found no dangerous condition. (216 AD2d at 877.)

The *McGrath* court held that "an owner or general contractor has no duty to protect workers against a condition that may be readily observed." (*Id.*)

Also, "'[a] defendant is not required to protect a plaintiff from his own folly.'" (*Haynie*, 95 AD3d at 594-595, quoting *Smith v Curtis Lbr. Co.*, 183 AD2d 1018, 1019 [3rd Dept 1992] [finding no dangerous condition where a lumberyard patron was injured when he fell from a wet stack of wood that he knowingly stood on].)

And plaintiff testified that he knew he had to step on the dirt pile in order to get inside the trench. (*See Haynie*, 95 AD3d at 595.)

Plaintiff testified as follows:

> "Okay. As I'm walking to direct my guys to the trench, there's debris, there's a mound of dirt from the excavation of the trench, and there was stuff inside, whatever. So as I'm walking, I'm watching where I'm going as I'm footing myself through. And as I'm taking a step over to get into the trench, I tripped on a block and I just slipped in and fell. And I just held myself onto the wall. But as I'm going down, I just twisted my knee. Somehow, I twisted my knee because of the trip down and I was just in pain."

Thus, defendant is entitled to summary judgment in its favor on the common-law negligence and Labor Law § 200 claims. Defendant's motion is granted on these claims; plaintiffs' cross-motion is denied.

II. Labor Law 241 (6)

Defendant's motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is granted and plaintiffs' cross-motion for summary judgment is denied.

Labor Law § 241 (6) provides as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

To prevail on a cause of action under Labor Law § 241 (6), plaintiffs must prove a violation of a provision of the Industrial Code that sets forth a specific safety standard. (*Id.* at 505.) In *Ross*, the Court of Appeals found that

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not." (*Id.*)

Contributory and comparative negligence are valid defenses to claims asserted under Labor Law § 241 (6). (*Id.* at 494, n 4.) Breaching a duty imposed by a regulation "promulgated under Labor Law § 241 (6) is merely some evidence of negligence," which is different from absolute liability under § 240 (1). (*Id.*)

Plaintiff must also prove that defendants' violation proximately caused plaintiff's injuries.

Although plaintiff alleges in his complaint and bill of particular numerous violations under the Industrial Code, the only violations addressed in his motion are the following violations: Industrial Code, 22 NYCRR §§ 23-1.7 (d), 1.7 (e)(1) and (2), and 4.2 (f).

Because plaintiff does not oppose defendant's motion with respect to the remaining code violations — asserted in plaintiff's complaint and bill of particulars — those claims are deemed admitted and dismissed.

The court will address only 22 NYCRR §§ 23-1.7 (d), 1.7 (e)(1) and (2), and 4.2 (f).

22 NYCRR 23-1.7 (d)

Section 23-1.7 (d) provides the following:

> (d) Slipping hazards. 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.

Section 23-1.7 (d) does not apply to a debris pile. (*See McGrath*, 216 AD2d at 877.)

Also, section 23-1.7 (7) applies to "floor[s], passageway[s], walkway[s], scaffold[s], platform[s] or other elevated working surface[s]." Plaintiff's incident occurred in a courtyard. (Exhibit 36 at page 60.)

And plaintiff's accident did not occur because of a slippery condition.

Defendant's summary-judgment motion to dismiss under Labor Law § 241 (6) predicated on violating section 23-1.7 (d) claim is granted; plaintiffs' cross-motion is denied.

22 NYCRR §§ 23-1.7 (e) (1) and (e) (2)

Defendant's motion under Labor Law § 241 (6) predicated on violating Labor Law §§ 23-1.7 (e) (1) and (e) (2) is granted. Plaintiffs' cross-motion is denied on this issue.

Sections 23-1.7 (e) (1) and (e) (2) are inapplicable.

Section 23-1.7 (e) provides the following:

> (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.

Section1.7 (e) (1) and (2) "apply to specified work areas, such as floors, roofs or platforms and to defined walkways, passageways or paths, not to common areas or an open yard in front of or between buildings." (*McGrath*, 216 AD2d at 877.)

That aspect of plaintiffs' Labor Law § 241 (6) claim predicated on §§ 23-1.7 (e) (1) and (e) (2) is dismissed. Defendant's motion is granted on this claim; plaintiffs' cross-motion is denied.

22 NYCRR 23-4.2 (f)

Section 23-4.2 (f) provides that

> (f) Excavated material and other superimposed loads shall be placed at least 24 inches back from the edges of any open excavation and shall be so placed or piled that no part thereof can slide, fall or roll into the excavation. Such 24-inch required clearance may be reduced if the employer installs a barrier or similar retaining device which is designed and constructed to prevent excavated material from falling into the excavation.

Section 23-4.2 (f) is inapplicable. Plaintiff was not inside a trench when he was injured. No debris fell on him. In any event, plaintiff testified that the debris was three to four feet away from the trench. (Exhibit 36, page 62, lns 9-25.)

That aspect of plaintiffs' Labor Law § 241 (6) claim predicated on § 23-4.2 (f) is dismissed. Defendant's motion is granted on this claim; plaintiffs' cross-motion is denied.

Accordingly, it is hereby

ORDERED that defendant's summary-judgment motion is granted and plaintiffs' claims are dismissed; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied on their Labor Law § 200, common law negligence, and § 241(6) claims; plaintiffs have withdrawn their Labor Law § 240 (1) claim; and it is further

ORDERED that defendant serve a copy of this order on plaintiffs and on the County Clerk's Office, which is directed to enter judgment accordingly.

8/23/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
APPLICATION:		GRANTED		DENIED	GRANTED IN PART	X	OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE