SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JOSE PACHECO

INDEX NO. 152772/2016

MOT. DATE

- v -

MOT. SEQ. NO. 001

174 NORTH 11TH PARTNERS, LLC

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).____

Replying Affidavits NYSCEF DOC No(s).____

This action arises from an accident at a construction site. Defendant now moves for summary judgment. Plaintiff opposes the motion and cross-moves for an order granting him partial summary judgment on the issue of defendant's liability for violation of Labor Law §§ 241[6] and 200. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

As to the accident, plaintiff testified at his deposition that on February 5, 2016 at approximately 7:30am, he was injured when he "slipped, hyperextended [his] knee, and the plywood [he was carrying] collapsed on [his] arm and pulled it back and dislocated it." On the date of the accident, plaintiff was employed as a carpenter by non-party Titan Realty & Construction, LLC ("Titan"). which was the construction manager for the project.

Plaintiff testified that on the morning of his accident, the jobsite was muddy and wet. He stated that it had snowed the day before his accident and that there was approximately two inches of snow on the ground when he left his apartment that morning. Plaintiff further described the weather upon arrival at work at 6:45am as being "cold, icy and muddy."

At the time of his accident, plaintiff was carrying a 4x8 foot sheet of plywood over his head. The plywood was going to be used to build a retaining wall in the pit. Plaintiff explained:

> Q When you say you were throwing the pieces of plywood or 2x4s or 4x4s into the hole, how were you doing that, describe it physically, if you can?
>
> A Carrying it from where they were leaning against the wall of the building next door to the hole and then throwing them, because it was too unsafe to walk down that -- that ditch, basically. It's, like I said, a ten-foot drop to the bottom.

Dated: 12/5/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☒GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Plaintiff described his accident as follows:

> Q Okay. So can you just describe to me how your accident occurred?
>
> A Went to pick up the last piece to throw -- not the last piece, the fifth piece to throw it to the bottom, walked about, like I said, ten feet towards the hole when I slipped, hyperextended my knee, and the plywood collapsed on my arm and pulled it back and dislocated it.
>
> Q When you slipped, did you slip forward, backwards or something else?
>
> A I was walking forward and my foot got stuck in the mud, so my knee hyperextended backwards and then I lose control of my body, so the plywood collapsed on my arm, like I said, and pulled my arm back, all the way back and dislocated my shoulder.
>
> Q And was that your left knee or your right knee?
>
> A My right knee.
>
> Q And that was your right foot that got stuck in the mud?
>
> A Yes, sir.
>
> Q After your right knee hyperextended backwards as you've described it, what was the next body movement that you made?
>
> A Tried to stay up, 'cause I didn't want to fall into the hole or anything. I just didn't want to fall, that was my reaction, not to fall.
>
> Q Okay. But you did fall?
>
> A No.
> ...
>
> Q And were you still holding the piece of plywood with your right hand?
>
> A No, sir.
> ...
>
> Q. After you lost control of the plywood and stopped yourself from falling, what happened next?
>
> A Pushed the plywood towards the right, because it was leaning against me, then I walked to the office and I told Bobby what happened and I told him that I was going to the hospital.
> ...

Defendant argues that plaintiff testified that he slipped when he was attempting to throw the plywood into the pit. However, plaintiff actually testified:

> Q Did your accident occur as you were trying to throw the fifth piece of plywood into the hole or something else?

> A As I was walking towards I was -- I got it -- I slipped, right, I was getting close to where I needed to throw it, slipped, the plywood collapsed basically on my arm and pulled my arm back and dislocated it.

The parties dispute the location of plaintiff's accident. Plaintiff's counsel argues that plaintiff fell on an earthen ramp partway down into the pit. A photograph marked as Exhibit "E", which has been provided to the court, depicts the pit which has sloped sides. Plaintiff testified that the sloped sides were at a 40-45 degree angle/slant. Plaintiff's counsel represents that plaintiff testified that he "would walk part way down the pathway and throw the plywood and let it slide down to the bottom."

However, plaintiff actually testified:

> Q Can you just describe to me how you were carry[ing] them [plywood] to the area where you would throw them into the hole, was it over your shoulder or something else?
>
> A Well, I'll lift the plywood over my head with my right hand, right, and I'll get close to where I feel comfortable and I can throw it so I won't fall into the hole and throw it into the hole....
>
> Q ...So how far would you get from the hole before throwing them down into the hole?
>
> A: About six, seven feet before I get to the edge.

About Exhibit "E", plaintiff testified:

> Q Okay. I recently asked you to describe the pathway that you were walking on with the plywood to get to the area of the hole where you would then throw the plywood into the hole, right?
>
> A Uh-huh, yes. I'm sorry.
>
> Q So the portion of the photograph on the bottom right hand of Exhibit E, is that similar to what the pathway looked like that you're describing to me?
>
> A All the way to the materials, yes.
>
> Q Okay. Was there any other type of debris on that pathway, other than what's shown in this photograph?
>
> A Yeah, pieces of concrete, old concrete, rocks, rebar, pieces of rebar.
>
> Q The rebar that you're describing, is that visible in that photograph, Defendant's Exhibit E?
>
> A No, sir.

Based on this testimony, there can be no dispute that plaintiff testified that he walked approximately to the edge of the pit to throw the plywood in, rather than continuing partway down the 40-45 degree downward-sloping sides of the pit. Plaintiff specifically testified that the pathway his accident occurred on was not depicted in Exhibit "E", but rather, was on a pathway between where the plywood was originally located and the pit in which plaintiff threw the plywood into. Moreover, plaintiff described the ground as "bumpy" and "lumps of dirt, [] mud and everything, and stone..."

Plaintiff claims that he was not provided proper footwear to perform his work. On this subject, plaintiff testified that prior to his accident, he told the onsite supervisor Bobby that the worksite was unsafe to work. Bobby allegedly said nothing and just walked away. Plaintiff repeated this complaint to his manager, Miguel Martinez, via telephone, adding that it was unsafe because it was muddy. Plaintiff allegedly asked for rubber rain boots when he showed up to work because "it's obvious that you can't work with your regular shoes on the water." Plaintiff claims that he was told by his manager that "we will get it to you", but he was not furnished with same prior to his accident. Plaintiff explained that he began working despite not having the boots because he didn't have to work at the bottom of the pit yet, which had "a lot of mud and water." A picture has been provided to the court which indisputably shows plaintiff's coworker wearing yellow rain boots.

Defendant maintains, based upon the affidavit of Bobby Koulouris, plaintiff's supervisor that such boots were not required for plaintiff's work. Koulouris states in pertinent part that:

> On February 5, 2016, the footing at the top of the berm was adequate to perform work carrying plywood to the berm where the plywood would be passed down to Javier, at the bottom of the berm. The path where the materials were stored to the area where they were passed to Javier was an open outdoor area. It was not a designated passage way.

Meanwhile, Plaintiff has provided an affidavit from Joseph C. Cannizzo, a professional engineer. Cannizzo's affidavit is based upon his review of, *inter alia*, documents, deposition transcripts and photographs. Cannizzo opines at length about the downward-sloping sides of the excavation pit.

Defendant produced Darren Anikstein for a deposition. Anikstein, defendant's managing director, testified that defendant hired Titan as a construction manager pursuant to a written contract which has been provided to the court. Anikstein maintains that Titan was responsible for the construction project and site safety at the project. Anikstein visited the worksite regularly. He represents, and there is no dispute, that the pit was built with pipes to suction water out.

Plaintiff points to defendant's response to his demand wherein defendant denied that it was in possession of any daily work logs, accident reports or any photographs of work progress.

Defendant argues that plaintiff's Labor Law §200 and of common law negligence should be dismissed because it did not control or direct plaintiff's work nor did it cause or create the alleged defective condition. As for the Labor Law § 241[6] claim, defendant contends that it should be dismissed since there are no triable issues of fact to support claimed violations of Industrial Code sections 12 NYCRR 23-§§ 1.5; 1.7(d); 1.7(e)(1); 1.7(e)(2); 1.8(c); 1.16; 1.2(3); 1.23; and 4.3. Finally, defendant maintains that the Labor Law §240(1) should be dismissed since the injury was not a gravity-related.

In turn, plaintiff's counsel points out that plaintiff has not asserted a violation of Labor Law § 240[1], nor violations of Industrial Code §§ 23-1.5, 23-1.2(3), 23-1.7(e)(1)(2) or 23- 1.16. Plaintiff maintains that he has demonstrated a *prima facie* Labor Law § 241[6] cause of action premised upon violations of Industrial Code §§ 23-4.3, 23-1.23[a] and [b]. 23-1.7[d] and 23-1.8[c]. Further, plaintiff argues that defendant did not meet its burden on this motion by coming forward with proof in admissible form that it did not have notice of the unsafe condition which caused his accident. Specifically, plaintiff asserts that defendant failed to show when they last inspected the jobsite or what the condition of the jobsite looked like on the day of the accident. Further, plaintiff maintains that "the installation of a dewatering system in the excavation pit evidences defendant's knowledge of a water/wetness problem on site."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New*

York, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that the defendants violated Industrial Code §§ 23-4.3, 23-1.23[a] and [b]. 23-1.7[d] and 23-1.8[c]. Further

Industrial Code § 23-4.3 entitled Access to Excavations provides:

> Ladders, stairways or ramps constructed in compliance with this Part (rule) shall be provided in every excavation more than three feet in depth for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel.

Industrial Code § 23-1.23 entitled Earth Ramps and runways reads:

> (a) Construction.
>
> Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive uneveness.
>
> (b) Slope.
>
> Earth ramps and runways shall have maximum slopes of one in four (equivalent to 25 percent maximum grades).

Defendant is entitled to summary judgment dismissing these plaintiff's claims predicated on these two Industrial Code provisions, since defendant has established that plaintiff's accident occurred not on a ramp or passageway into the pit, but rather, in an open area. Therefore, Industrial Code §§ 23-4.3

and 23-1.23[a] and [b] are inapplicable and plaintiff's claims predicated on these violations are severed and dismissed.

Industrial Code § 1.7 is also unavailing. This provision, entitled Protection from general hazards, subsection d entitled Slipping hazards, provides:

> 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.

Defendant has established that plaintiff's accident occurred on an open unpaved area which has been held to not be within the purview of 12 NYCRR 23-1.7 (d) (*Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]). In turn, plaintiff has failed to raise a triable issue of fact. Accordingly, this claim must also be severed and dismissed.

Finally, Industrial Code § 23-1.8, entitled Personal protective equipment, subsection c entitled Protective apparel, states in relevant part:

> (2) *Foot protection.* Every person required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes.

Defendant argues that this provision is not applicable because plaintiff testified that waterproof boots were not necessary. That is not what plaintiff testified to. Rather, plaintiff explained that he started working despite not being provided boots because he wasn't at the bottom of the pit. Indeed, the happening of plaintiff's accident as he described, as well as his description of the area in which it occurred as muddy and unsafe are sufficient to raise a triable issue of fact. As such, both defendant's motion to dismiss the labor law claim predicated on Industrial Code § 23-1.8[2], as well as plaintiff's motion for summary judgment on that provision, are denied. Defendant's motion for summary judgment dismissing the balance of plaintiff's Labor Law § 241[6] claim is, however, granted.

Labor Law § 200 and common law negligence

The court now turns to the balance of the motion. Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]).

Defendant argues that it is entitled to summary judgment dismissing the Labor Law § 200 and common law negligence claims because "there has been no evidence presented that [defendant] directed or controlled the work performed by the plaintiff. Furthermore, there has been no evidence presented that the [defendant] caused or created the alleged condition or had notice of same." There can be no dispute that defendant did not exercise supervisory control over plaintiff's work. Plaintiff's counsel, however, maintains that defendant has not demonstrated the absence of notice. The court agrees.

A premises owner will be charged with constructive notice of a defective condition if it is visible and apparent and existed for a sufficient length of time prior to the accident to permit the owner to discover and remedy it (*Briggs v. Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]). On a motion for sum-

mary judgment, it is the movant's *prima facie* burden to demonstrate that it did not have constructive notice of the defective condition (see i.e. *Stevens v. St. Charles Hospital and Rehabilitation Center*, 165 AD3d 729 [2d Dept Oct 3, 2018]).

Although he admitted that he visited the jobsite on a regular basis, Anikstein has no personal knowledge of the condition of the premises on the date of plaintiff's accident. Defendants have not provided any records or documentary evidence which would establish that there was no unsafe condition where plaintiff's accident occurred. The only person with such knowledge of the condition of the area where plaintiff's accident occurred that defendant has come forward with is Koulouris, whose affidavit is conclusory. Koulouris merely states that "the footing at the top of the berm was adequate to perform work carrying plywood to the berm..." Therefore, defendant has failed to meet its burden on this motion with respect to the Labor Law § 200 and common law negligence claim and that portion of the motion must be denied, irrespective of plaintiff's opposition.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion is granted only to the extent that plaintiff's Labor Law § 241[6] is severed and dismissed, except for the claim premised upon a violation of Industrial Code § 23-1.8, which remains; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/5/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.