

**White v Flushing**

2019 NY Slip Op 30314(U)

February 8, 2019

Supreme Court, New York County

Docket Number: 153706/16

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

White

-v-

Flushing

INDEX No. 153706/16

MOTION DATE

MOTION SEQ. No. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_ No(s). 1

Answering Affidavits - Exhibits \_\_\_\_\_ No(s). 2 + 3 (x-motion)

Replying Affidavits \_\_\_\_\_ No(s). 4

Plaintiff Robert White, and his wife, Jean White, commenced this action against defendants after Mr. White allegedly slipped and fell as he was entering the jobsite on the morning of September 11, 2015 at approximately 6:30 a.m. Mr. White alleges that he slipped and fell as he was walking on a piece of plywood on the ground which was covered in wet concrete. Plaintiffs allege that defendants violated Sections 200, 240 and 241(6) of the Labor Law. Defendants now move pursuant to CPLR 3212 for summary judgment on all of the plaintiffs' causes of action. Plaintiffs cross-move for summary judgment on the Labor Law §§ 200 and 241(6) claims.

As a preliminary matter, plaintiffs' cross-motion for summary judgment was filed after the April 30, 2018 court-ordered deadline for summary judgment motions and is therefore untimely. Plaintiffs do not acknowledge that their motion is untimely much less provide a reason for the delay. Therefore, they have failed to show "good cause" for the delay and the cross-motion must be denied. Doe v. Madison Third Bldg., 121 A.D.3d 631, 632 (1st Dep't 2014).

Turning to the defendants' motion, the cause of action under Labor Law § 240 must be dismissed as the piece of plywood on which the Mr. White slipped and fell does not present the type of elevation related risk encompassed by this statute. Kutza v. Bovis Lend Lease LMB, Inc., 95 A.D.3d 590, 592 (1st Dep't 2012).

CHECK ONE: \_\_\_\_\_  CASE DISPOSED  NON-FINAL DISPOSITION
CHECK AS APPROPRIATE: \_\_\_\_\_ MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER

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The plaintiffs' claims under Labor Law § 241(6) are predicated on violations of the following sections of the Industrial Code: 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.15, 23-1.30, 23-2.1 and Article 1926 of OSHA. Plaintiff's reliance on § 23-1.5 is unavailing as courts have held that all of the sections of this provision except for (c)(3) are too general to support a Labor Law § 241(6). Jackson v. Hunter Roberts Construction Group, 161 A.D.3d 666, 667 (1st Dep't 2018). Although § 23-1.5(c)(3) is sufficiently specific to support this claim, it is inapplicable to the circumstances in this case which does not involve the use of any "safety device", "safeguard, or "equipment." Id. Likewise, plaintiff's reliance on § 23-2.1 is unavailing as 23-2.1(a) is clearly inapplicable and 23-2.1(b) is too general to support a Labor Law § 241(6) cause of action. Quinlan v. City of New York, 293 A.D.2d 262, 263 (1st Dep't 2002). Plaintiff also cannot rely on alleged violations of OSHA regulations to establish liability under Labor Law § 241(6) against a non-supervising owner and general contractor. Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 351 (1998). Section 1.15 of the Industrial Code discusses "safety railings" and has no bearing on the circumstances of this case. Likewise, section 23-1.30, which specifies illumination requirements for job sites, is inapplicable as there is no evidence to support that plaintiff's accident occurred as a result of poor lighting conditions and in fact, plaintiff admitted at his deposition that the incident occurred when "the sun had just come out" and that he had no trouble seeing the plywood. Affirmation of Prachi Ajmera dated April 30, 2018, Exh. E., White Dep. Tr. 24:18, 27:13-18.

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With respect to plaintiffs' reliance on § 23-1.7, the only relevant sections which may apply to the circumstances here are 1.7(d) and (e), which discuss slipping and tripping hazards. The piece of plywood on which plaintiff fell was located in a roadway in front of a metal bucket and beside a yellow trailer. Ajmera Aff., Exh. F. Although arguably the narrow area on top of the curb between the trailer and the dumpster where plaintiff was walking to could be considered a "walkway", the area where the plywood was located was an open area and thus did not constitute a "passageway" or "walkway" covered by 1.7(d) and 1.7(e)(1). Smith v. Hines GS Properties, 29 A.D.3d 433, 433 (1st Dep't 2006); see also Quigley v. Port Authority of New York, 168 A.D.3d 65 (1st Dep't 2018) (discussing narrow definition of "passageway"). However, plaintiff testified that he and other workers routinely traversed this area and Thomas Curran, defendant Tishman's witness, admitted at his deposition that concrete workers working in this area regularly walked in the vicinity of where plaintiff allegedly fell. Ajmera Aff., Exh. E., White Dep. Tr., 37:5-12; Exh. G, Curran Dep. Tr. 53-54. A question of fact is thus presented as to whether the area where plaintiff fell was a "working area" within the meaning of 1.7(e)(2). Smith, 29 A.D.3d at 433-34. Thus, plaintiffs' claim under Labor Law § 241(6) will not dismissed only insofar as it is predicated on a violation of 12 NYCRR § 23-1.7(e)(2).

Defendants also seek dismissal of plaintiffs' Labor Law § 200 claim. Defendants argue that they cannot be held liable because the presence of the plywood was an open and obvious condition. However, the dangerous condition complained of was the wet concrete which allegedly caused plaintiff to slip, not the plywood. Plaintiff testified that he could not distinguish the wet concrete on the plywood from the dry concrete located in other areas of the worksite. Ajmera Aff., Exh. E, White Dep. Tr. 43:10-44:5. Thus, the claim will not be dismissed.

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Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 240 cause of action and plaintiffs' Labor Law § 241(6) cause of action to the extent it is predicated on any violation other than 22 NYCRR § 23-1.7(e)(2), and is otherwise denied; and it is further

ORDERED that plaintiffs' cross-motion is denied.

Dated: 2/8/19

  
Hon. Paul A. Goetz, JSC

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