Hutzel v Turner Constr.
2019 NY Slip Op 31143(U)
April 16, 2019
Supreme Court, New York County
Docket Number: 159332/2016
Judge: David Benjamin Cohen

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

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EDWARD HUTZEL,

Plaintiff,

-against- Index No: 159332/2016

TURNER CONSTRUCTION, HILLARY GARDENS COMPANY, LLC, and NEW YORK UNIVERSITY,

Defendants.

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COHEN, J.

Defendants New York University (NYU) and Turner Construction (Turner), move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Edward Hutzel's (plaintiff) cause of action for common law negligence and violations of Labor Law §§ 240 (1), 200, and 241 (6).

Plaintiff cross-moves against defendants NYU and Turner, pursuant to CPLR 3212, for an order granting summary judgment as to his claims of violations of Labor Law §§ 240 (1), 200, and 241 (6).

FACTUAL ALLEGATIONS

Plaintiff maintains that he was injured on July 3, 2015, while descending a scaffold at a project at 707 Broadway in New York, New York. At the time, plaintiff was working for Combined Resources as a carpenter journeyman. Plaintiff's duties at Combined Resources included the installation of framing, drywall, and acoustical ceilings.

On the date of his accident, plaintiff was working at a project for NYU which was taking place in a corridor where a lab was being built. Plaintiff maintains that Combined Resources was

working on the carpentry and drywall for the project and was installing walls and ceilings. At the time of his accident, plaintiff was installing framing and soffits. He maintains that soffits are projections from the wall in which lights can be enclosed.

Plaintiff testified that he was working on a baker scaffold. He maintains that he was on the scaffold for 90 minutes before his accident took place. The scaffold was about four to five feet off the ground. When the accident occurred, plaintiff was getting off the scaffold, by stepping down the scaffold's ladder and descending to the ground.

Plaintiff testified:

> "I was just coming down facing the scaffold, like your walking down a ladder, and basically my boot slipped off the rung, my leg went into the scaffold and I went backwards and I got caught with the back of the knee in there and it pulled it apart."

Plaintiff's EBT, at 66.

Plaintiff maintains that both of his hands were still on the ladder when he slipped. He proceeded to catch the ground as he was low enough on the scaffold. Plaintiff maintains that he lost his footing on the left side. Plaintiff testified that his fall was a fluid motion in which he slipped, he held on, and then went down. He maintains that he fell backwards and injured his knee.

Plaintiff testified that he utilized the specific type of scaffold for several years. He maintains that there was nothing wrong with the scaffold, that it was functioning properly, and that it was locked and placed against a wall. He believes that the scaffold was the best equipment for the job, that it provided him with proper protection for the work in which he was conducting, and maintains that he did not complain to anyone about its condition.

Plaintiff testified that there was nothing on the scaffold which he could trip on as he was located on the second or third rung of the stairs. Plaintiff maintains that when he was descending the scaffold, he was not distracted and was not carrying anything.

When questioned about the cause of his accident, plaintiff testified:

"Q. So what exactly caused you to lose your footing?
MR. SEIDMAN: Note my objection, asked and answered. You can answer.
A. I believe my foot just slipped off of it, just a freak accident. "

Plaintiff's EBT, at 74.

Plaintiff maintains that what may have caused his accident was that there were "tapers" located on the job who were conducting spackle work and that there was spackle all throughout the subject building. He testified that "when I went to get material, I probably got spackle on the bottom of my boot and didn't realize it . . . ." Plaintiff's EBT, at 70. Plaintiff testified that the tapers were using spackle towards the east side of the building where all the materials were stored. He recalls seeing spackle on the treads of his boot, but did not see any located on the scaffold. Plaintiff testified that there was no way to avoid walking in the area where the spackle was being utilized and that there was no place to wipe his boots. He testified that he never saw spackle handled in a different or a safer way.

Plaintiff testified that no one from Turner or NYU directed his work. Plaintiff maintains that Arthur Lopizzo (Lopizzo), his foreman from Combined Resources, was the only person who gave him instructions. Plaintiff reported his accident to Lopizzo. After the accident, plaintiff continued to work for the day, but his knee became bruised and swollen. Plaintiff believes that there were 18 inches between each rung of the stairs, but later testified that he was uncertain about the distance as he had not measured the specific scaffold.

Karina Leon (Leon) testified on behalf of Turner. Leon has worked for Turner for sixteen years in various positions including as an engineer, field manager, a change order engineer, and as an assistant procurement officer. Leon maintains that in July of 2015, she was working as a project engineer for Turner at the 707 Broadway project. Leon was present at the site during the week plaintiff was injured.

Leon testified that Turner's superintendent was Dianna Barrella (Barrella), who was at the site every day with the exception of the week in which plaintiff was injured. Leon testified that Combined Resources was a subcontractor at the site and was responsible for drywall, the ceiling walls, and taping. Leon maintains that Turner hired a laborer who would clean up and move the garbage carts.

Leon testified that she would walk around the project to ensure that everyone was working in a safe manner. Leon did not see anything being conducted in an unsafe manner during the week she was at the site. If she did see anything unsafe, she would have brought it to the attention of the foreman. Leon maintains that there were safety personnel that worked for Turner who visited the job site to make sure everything was conducted in a safe manner.

Leon maintains that the subcontractors for this particular project conducted their own safety meetings. She believes that the site safety was performed by Turner. Leon had learned about plaintiff's accident from Barrella at a later time. She testified that if the scaffold was over six feet high, a worker was required to be tied in. Plaintiff maintains that neither the carpenters at the site, nor anyone from Combined Resources raised any issues regarding the scaffold to Turner. She also contends that no workers from the subcontractors raised any issues regarding tapers or spackle work.

DISCUSSION

"The proponent of a summary judgment motion 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 . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Defendants argue that plaintiff's cause of action alleging that they violated Labor Law § 240 (1) must be dismissed, while plaintiff argues that summary judgment must be granted in his favor as to this section of the Labor Law.

Labor Law § 240 (1) provides in part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site,

and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001) *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see also Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 (1999) (holding "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists").

Defendants contend that plaintiff's claim brought pursuant to Labor Law § 240 (1) must be dismissed because plaintiff was provided with a proper safety device. Defendants argue that plaintiff testified that the scaffold was safe and was the proper equipment for the task. Defendants maintain that plaintiff testified that the scaffold was free of defects and that there was nothing about the scaffold which caused his accident as it did not break, move, or collapse. Defendants also contend that because plaintiff testified that he was only working three to five feet off of the ground, there would be no additional safety equipment which could have been utilized to prevent the accident.

In support of their argument, defendants submit an affidavit from Howard Postel (Postel), President and Project Manager of Combined Resources, Inc. Postel states that Combined Resources supplies two models of baker scaffolding to job sites. He states that the baker scaffold which plaintiff utilized was OSHA complaint. Postel states that Turner did not supervise, direct,

or control the means and methods of Combined Resources or its employees, and that Turner did not provide any tools or equipment to plaintiff.

Plaintiff argues that defendants violated Labor Law § 240 (1) when they failed to provide plaintiff with adequate protection against a risk arising from an elevation and that the violation was the proximate cause of his injury. He maintains that the scaffold which he was utilizing had to comply with OSHA Regulation Part 1926 subsection 451 (e) (6) (vi) which requires that there be maximum spacing of 16 ¾ inches between each rung. Plaintiff contends that the space between each rung of the subject ladder was 18 inches. Plaintiff also argues that defendants allowed the scaffold to be placed in an area where there was a foreseeable slippery condition.

While plaintiff allegedly fell while descending the rungs, plaintiff fails to demonstrate that his injury was the result of a violation of Labor Law § 240 (1). *See Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 (1st Dept 2007) (holding that defendant would not be subject to statutory liability pursuant to Labor Law § 240 (1) if, as the incident report indicates, plaintiff lost his footing while climbing a properly erected, non-malfunctioning, non-defective ladder); *Canino v Electronic Tech. Co.*, 28 AD3d 932, 933 (3d Dept 2006) ("[t]hus, the mere fact that plaintiff fell from the ladder at issue here does not, in and of itself, establish that the ladder failed to provide proper protection, thereby bringing plaintiff's claim within the ambit of the statute"); *Briggs v Halterman*, 267 AD2d 753, 755 (3d Dept 1999) (holding "a mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker").

Here, plaintiff testified that he utilized the specific type of scaffold for several years, that there was nothing wrong with the subject scaffold, that it was functioning properly, and that it

was locked and placed against the wall. He also testified that the scaffold was the best equipment for the job, that it provided proper protection for his work, and that he did not complain to anyone about its condition. While plaintiff alleges that the spacing between the rungs was not compliant with OSHA regulations, it is unclear to the court how plaintiff calculated the measurements between each rung as plaintiff testified that he never measured the distance.

As defendants have met their burden and have demonstrated that the scaffold was an adequate safety device, and as plaintiff fails to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact, the part of defendants' motion seeking summary judgment as to Labor Law 240 § (1) must be granted.

Defendants argue that the part of plaintiff's complaint alleging that they were negligent and violated Labor Law § 200 must be dismissed. Plaintiff cross-moves, and argues that summary judgment must be granted in his favor as to this section of the Labor Law.

Labor Law § 200 (1) states, in pertinent part, as follows:

> "[a]ll 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. . . ."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor

Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

Defendants argue that they did not control the means or methods of the manner in which plaintiff performed his work, that they did not have actual or constructive notice of a dangerous condition at the site, and that they did not create a dangerous condition. Defendants argue that plaintiff's own testimony establishes that his work at the project was directed, supervised, and controlled by Combined Resources and by his foreman Lopizzo. Defendants contend that plaintiff's testimony that there was spackle on the scaffold is speculative because plaintiff testified as to what "may" have caused his accident. Defendants argue that plaintiff specifically testified that it was a "freak accident" and that he tripped.

In support of his cross motion, plaintiff argues that his injury was not caused by the manner in which he performed his work, but was caused by a dangerous condition. Plaintiff contends that his injury was caused by the slippery condition created by spackle on the floor in his work area and throughout the entire work site, including the location where Turner directed that his work materials should be stored.

Plaintiff argues that defendants had actual or constructive notice of the slippery condition which was a proximate cause of his accident. Plaintiff contends that Leon testified that only one

Turner employee was responsible for cleanup at the site, that Turner's safety officer conducted walk throughs of the site and sent daily reports, and that the walk throughs were also performed by the field superintendent who was at the site on a daily basis. Plaintiff maintains that defendants had ample opportunity to observe the condition. Plaintiff argues that despite knowing that tapers would be on the jobsite and that spackle would make the worksite more dangerous, defendants failed to provide any carpet or other material for plaintiff to wipe off his boots.

The testimony of plaintiff raises a question of fact as to whether or not the spackle was the cause of his accident. Plaintiff testified that he believed that his foot slipped through the scaffold's stair and claimed it was a "freak accident." However, plaintiff also testified that what "may" have caused his accident was that he saw spackle being utilized at the site, testified that spackle "probably" got on the bottom of his boot, recalls seeing spackle in the treads of his boot, and testified that there was no way to avoid walking into the spackle. Plaintiff's testimony also raises a question of fact as to whether either defendant had actual or constructive notice of the spackle as it was allegedly located where workers were traversing.

While defendants contend that they did not have control over the worksite, a question fact exists as to whether this is accurate. *See Keating v Nanuet Board of Educ.*, 40 AD3d 706, 709 (2d Dept 2007) (holding "the general contractor, failed to establish, prima facie, that it lacked control over the work site or notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent"). NYU submitted no deposition testimony or an affidavit from a witness with knowledge regarding its alleged lack of control over the work site. With regards to Turner, Leon testified that she was regularly at the site, that it was part of her job to ensure that everything was being conducted in a safe manner, and that Turner had hired

a laborer to clean.

Although the testimony of Leon states that no subcontractors raised any issues about the spackle work, the testimony is unclear as to whether NYU or Turner had actual notice of the use of spackle on the flooring. While Leon testified that she did not see anything being conducted in an unsafe manner, she was not questioned whether she saw spackle being utilized in the vicinity of where plaintiff was working.

Therefore, because it remains unclear to the court what caused plaintiff's slip and fall, and because it is disputed as to whether either defendant had actual or constructive notice of the alleged slippery condition, the parts of defendants motion and plaintiff's cross motion seeking summary judgment pursuant to Labor Law § 200 must be denied.

Defendants argue that plaintiff's cause of action alleging that they violated Labor Law § 241 (6) must be dismissed. In his cross motion, plaintiff argues that summary judgment must be granted as to Labor Law § 241 (6).

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

> "[a]ll 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, 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 . . . ."

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision

containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Plaintiff alleges in his supplemental verified bill of particulars that Industrial Code sections 23-1.7, 23-1.15, 23-1.22, 23-1.23, 23-2.1, and 23-2.4 were violated. However, in his cross motion and opposition, plaintiff only argues that section 23-1.7 (d) was violated and fails to discuss any of the other alleged sections of the Industrial Code. Therefore, with the exception of section 23-1.7 (d), the Industrial Code sections which plaintiff fails to discuss are hereby dismissed as they have been abandoned. *See Genovese v Gambino,* 309 AD2d 832, 833 (2d Dept 2003) (holding plaintiff "did not oppose that branch of the motion and, as the Supreme Court itself noted, he has abandoned his claim . . .").

Section 23-1.7 (d) of the Industrial Code provides:

> "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."

The Appellate Division, First Department, has held that section 23-1.7 (d) of the Labor Law is an applicable predicate for a claim made pursuant to Labor Law § 241 (6). *See Velasquez v 795 Columbus LLC*, 103 AD3 541, 541 (1st Dept 2013).

Defendants argue that this section of the Industrial Code should be dismissed because plaintiff did not fall as a result of ice, snow, water, grease, or other substances which defendants were responsible to remove from the job site.

Plaintiff maintains that the evidence clearly establishes that defendants failed to keep the floors, passageways, walkways and scaffolds from becoming slippery, and failed to remove the

spackle. Plaintiff argues that he testified that on the day of his accident there was spackle in the hallway area where he was working and throughout the jobsite.

Based upon plaintiff's testimony which suggests that spackle may have been a cause of his accident, a question of fact exists as to the applicability of this section. Therefore, the court declines to dismiss the alleged violation of Industrial Code section 23-1.7 (d). *See Kosc v King St. Condominium Corp.*, 2017 N.Y. Misc. LEXIS 4447, 2017 NY Slip Op 32427(U) (holding as questions of fact exist as to whether provisions of the Industrial Code apply to the facts of this case, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 241 (6) claim).

Finally, to the extent that plaintiff alleges that OSHA regulation 1926.451 (e)(6)(vi) was violated, it has been held that "violations of OSHA standards do not provide a basis for liability under Labor Law § 241 (6)." *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 313 (2d Dept 1997); *see also Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 (1st Dept 1999) (holding "[t]he alleged violations of OSHA standards cited by plaintiffs do not provide a basis for liability under Labor Law § 241 [6]"). Therefore, the OSHA violation alleged by plaintiff cannot serve as a predicate for a finding that a violation of Labor Law § 241 (6) took place.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendants New York University and Turner Construction's motion for summary judgment is granted only to the extent that the cause of action alleging a violation of Labor Law §240 (1) is dismissed, as well as the part of plaintiff's complaint alleging violations of Industrial Code sections 23-1.15, 23-1.22, 23-1.23, 23-2.1, and 23-2.4 which are also

dismissed; and it is further

ORDERED that plaintiff Edward Hutzel's cross motion for summary judgment is denied.

Dated: April 16, 2019

ENTER:

J.S.C.

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