Higgins v Legacy Yards Tenant, LLC
2019 NY Slip Op 31206(U)
April 30, 2019
Supreme Court, New York County
Docket Number: 152406/16
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

JOHN HIGGINS

INDEX NO. 152406/16

MOT. DATE

- v -

MOT. SEQ. NO. 005

LEGACY YARDS TENANT, LLC et al.

The following papers were read on this motion to/for summary judgment

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 is a labor law action arising from personal injuries sustained on a construction site. Plaintiff now moves for partial summary judgment on his Labor Law § 241[6] claim. Defendants oppose the motion and cross-move for summary judgment in their favor. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff's accident occurred on September 14, 2015 at a construction site located at 501 West 30th Street, New York, New York which is also known as "Tower C" of the Hudson Yards Project. On the date of the accident, plaintiff was working for non-party Five Star Electrical. Prior to his accident, plaintiff was in the basement measuring the interior of electrical closet D in the basement for layouts for permanent light and power that would be installed the next day.

The basement floor was comprised of concrete with rebar. Prior to his accident, plaintiff had walked into the electrical closet, and then exited the closet, intending to walk a different path. While he was walking, he reviewed the information on his clipboard and wrote additional notes, and then tripped and fell due to "construction debris and garbage" on the floor. Prior to his accident, plaintiff did not see the debris/garbage on the basement floor. Plaintiff was unaware if anyone observed his accident. According to his sworn affidavit, plaintiff claims that the debris which he tripped on "consisted of wood, empty cardboard boxes, string and paper."

The defendants are Legacy Yards Tenant, LLC ("Legacy"), Hudson Yards Construction, LLC ("Hudson") and Tutor Perini Building Corp. ("Tutor"). Legacy is the owner of Tower C. Hudson hired the construction manager and subcontractors to build Tower C and was known as the executive construction manager. Tutor was the general contractor for the project. Legacy and Hudson produced Geoffrey Butler for a deposition. Butler was employed as a senior project manager at the construction site. Butler had been in the basement in the month prior to plaintiff's accident and admitted that debris might be on the floor.

Dated: 4/30/19

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**

Tutor produced Lawrence Bradshaw for a deposition. Bradshaw was the general labor foreman at the construction site. He testified that his duties included "cleaning up debris and garbage." Bradshaw advised the subcontractors as to where to pile debris but admitted that he did not instruct as to how many piles to make, nor how high or wide those piles should be. Bradshaw did instruct the trades to locate the center piles of debris at the four outside corners of the elevator banks to prevent people from tripping over them. Bradshaw further testified:

> Q. If you observed a center pile that was not at one of the corners of the elevator shaft, is there anything that you would do in regards to it?
>
> A. I would call my foreman and have his crew come down and make a quick sweep.

Nonparty Thomas D'Angelo also appeared for a deposition. D'Angelo was a foreman employed by Five Star Electrical. He testified that plaintiff was a sub-foreman who reported to him. He admitted that Five Star Electrical would pile its debris in areas where it worked. He also testified that in September 2015, plaintiff told him that he tripped and fell on a pile of debris after he exited electrical closet D and took several steps. Thereafter, D'Angelo observed a pile of debris somewhere to the right of the door to the electrical closet.

Plaintiff has asserted causes of action for common law negligence and violations of Labor Law §§ 200 and 241[6]. Plaintiff now moves for partial summary judgment on liability for violation of Labor Law § 241[6] based upon Industrial Code § 23-1.7[e][2]. Defendants cross-move to dismiss plaintiff's claims.

The court will first consider plaintiff's motion. 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

Plaintiff seeks partial summary judgment on defendants' liability for violation of Industrial Code § 23-1.7[e][2], entitled Protection from general hazards, Tripping and other hazards, which provides:

> 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.

First, defendant contends that this provision is inapplicable because plaintiff did not trip and fall in a "working area". The court rejects this argument. The court finds that plaintiff has established that he tripped on a floor where persons work or pass. Indeed, before his accident, plaintiff was walking from the electrical closet in the context of performing his regular job functions. Defendants have failed to raise a triable issue of fact on this point. Defendants' arguments which center on the entirety of the basement raises issues this court need not address, since plaintiff's accident only occurred outside the electrical closet where he clearly performed work and then passed from. Defendants cite *Meslin v. New York Post* (30 AD3d 309), which this court finds distinguishable given the nature of the subject employees' work. Rather, the case which *Meslin* cites, *Muscarella v. Herbert Constr. Co.* (265 AD2d 264 [1st Dept 1999]) provides analysis which is instructive. In *Muscarella*, § 23-1.7[e] did not apply to a plaintiff who tripped while walking from the job site to a construction trailer. Here, plaintiff tripped at the location of his particular work area. Therefore, defendants' first argument fails.

The court further rejects defense counsel's contention that plaintiff could only recover if he actually tripped in the electrical closet, since by its own language § 23-1.7[e][2] was meant to apply to floors where persons work or pass.

Defendants next argue that this provision is inapplicable because the debris upon which plaintiff tripped "was not an accumulation of dirt and debris, haphazardly strewn or dropped, left or overlooked ... but an intentionally placed depository of debris created incidental to the construction work being performed." On this point, the court finds that defendants have raised a triable issue of fact (see i.e. *Riley v. J.A. Jones Constr., Inc.*, 54 AD3d 744 [2d Dept 2008]). Indeed, a reasonable fact-finder could conclude that the wood, boxes, string and paper were an reasonable accumulation of debris consistent with the work being performed and therefore § 23-1.7[e][2] was not violated. The court, however, cannot make such a determination as a matter of law on this record. Therefore, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 241[6] claim.

Plaintiff's counsel's argument that "debris that is center piled" is necessarily a violation of § 23-1.7[e][2] is rejected, since this provision clearly contains a proviso that floors should be kept free from accumulations of debris as is consistent with the work being performed. Indeed, plaintiff fails to cite any case which holds that debris piled on a floor at a construction site violates § 23-1.7[e][2] "regardless of how and why it was there." Rather, plaintiff cites cases which are distinguishable (see i.e. *Serrano v. Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405 [1st Dept 2017] [plaintiff slipped on "'accumulations of debris' on the scaffold platform"]).

Plaintiff's counsel also argues that defendants cannot establish through admissible evidence that the debris upon which he tripped was center-piled. However, D"Angelo clearly states in his affidavit that after plaintiff's accident he saw a pile of debris somewhere to the right of the electrical closet from the viewpoint of facing the closet. This testimony is sufficient to raise a triable issue of fact as to whether the pile of debris was consistent with the work being performed in light of Bradshaw's testimony. Otherwise, missing from plaintiff's motion-in-chief is a showing that the pile upon which he tripped was not consistent with the work being performed.

Plaintiff's reliance on Bradshaw's testimony that a center pile not at one of the corners of the elevator shaft is a tripping hazard. Whether a person could trip over a pile of debris does not necessarily mean that the § 23-1.7[e][2] has been violated. Absent such a showing, plaintiff has not demonstrated *prima facie* entitlement to judgment as a matter of law.

Accordingly, plaintiff's motion for summary judgment is denied and relatedly, defendant's cross-motion to dismiss the Labor Law § 241[6] claim predicated upon a violation of Industrial Code § 23-1.7[e][2] is also denied.

Labor Law § 200 and common law negligence

The court now turns to the balance of the defendants' cross-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]).

Defendants' arguments on this point are based on the claim that the pile of debris which plaintiff tripped on was center-piled and that plaintiff was the sole proximate cause of his accident. Plaintiff offers no opposition to these arguments. Since the pile of debris was a workplace condition and defendant has come forward with sufficient proof that it did not have notice of said condition, defendants are entitled to summary judgment dismissing these claims.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted to the extent that plaintiff's Labor Law § 200 claim, common law negligence claim and Labor Law §241[6] claim premised on all Industrial Code violations except Industrial Code §23-1.7[e][2] are severed and dismissed; and it is further

ORDERED that the cross-motion is otherwise 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: 4/30/19
New York, New York

So Ordered:

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