Jacinto v LSG 365 Bond St., LLC
2019 NY Slip Op 32113(U)
July 7, 2019
Supreme Court, New York County
Docket Number: 156440/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESEN **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 156440/2015

LUIS JACINTO,

Plaintiff,

MOTION SEQ. NO. 002

- v -

LSG 365 BOND STREET, LLC and LETTIRE CONSTRUCTION CORP.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Luis Jacinto, defendants LSG 365 Bond Street ("Bond Street"), LLC and Lettire Construction Corp. ("Lettire") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted and the complaint is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND:

In this Labor Law action, plaintiff claims that he was injured on January 20, 2015 at a construction site located at 363-365 Bond Street in Brooklyn, New York ("the site" or "the premises"), where an apartment building was being built. The premises were owned by Bond Street and Lettire was the construction manager on the project. Plaintiff claims that, as he and a coworker were carrying rebar, his co-worker fell, causing the rebar to injure him.

Plaintiff commenced this action by filing a summons and verified complaint on June 26, 2015. Docs 1 and 34. Defendants joined issue by their verified answer filed August 28, 2015. Docs. 6 and 35.

In his bill of particulars, plaintiff alleged that he was employed as a metal lather for nonparty Rapid Tied Rebar, LLC ("RTR") and that he was injured on January 20, 2015 on the fifth floor of the site. Doc. 36 at pars. 1-2, 5. He further claimed that defendants created and had actual and/or constructive notice of dangerous conditions at the work site, although he did not specify the nature thereof. Doc. 36 at pars. 11-12. Plaintiff alleged that defendants violated Labor Law §§ 200(1), 240(1)-(3), 241(1-6) and 241-a; New York City Administrative Code section § C26-1907.1-9; and numerous sections of the New York State Industrial Code ("the Industrial Code"); 29 CFR § 1910; and the OSHA rules and regulations pertaining to construction, demolition, and alteration. Doc. 36 at par. 14. He claimed the accident occurred due to the negligence of the defendants, including, inter alia, their failure to provide plaintiff with hoisting equipment to lift the rebar which injured plaintiff. Doc. 36 at par. 15. Plaintiff did not allege that the coworker slipped on ice.

At his deposition, plaintiff testified that he was an employee of RTR and that he worked at the premises on the day of the incident. Doc. 38 at 77-78, 83. His job duties included carrying rebar and, on the day of the alleged incident, he was carrying rebar with a coworker whose name he did not know. Doc. 38 at 82, 90, 123, 134.

Plaintiff took all of his direction at the site from his foreman, Marcial, the owner of RTR, Gabriel, and another foreman employed by RTR. Doc. 38 at 83-84. He was not supervised or directed by anyone from Bond Street or Lettire. Doc. 38 at 103.

On the day of the alleged incident, Marcial directed plaintiff to carry some rebar from the fifth floor to the sixth floor so that the decking where concrete would be poured could be formed on the sixth floor. Doc. 38 at 119, 128. The concrete on the fifth floor had been poured by that time. Doc. 38 at 128. Plaintiff and his coworker lifted four 28-foot rods weighing a total of approximately 160 pounds, placed them on their right shoulders with the coworker in front and plaintiff in back, and began to walk. Doc. 38 at 137-141, 169. As the men were walking on the fifth floor, moving towards the stairway so that they could carry the rods to the sixth floor, plaintiff's coworker fell and dropped the end of the rebar he was holding. Doc. 38 at 122, 141-142, 147. The rebar "started to bounce" and "jump over" on plaintiff's shoulder, causing him to fall as well, and the rebar then struck his right hand. Doc. 38 at 147-150.

Although plaintiff had seen patches of ice or snow on the fifth floor prior to his accident, and believed that ice may have played a role in the accident, he did not see his coworker fall on ice, he did not know whether the coworker slipped on ice, the coworker did not tell him that he (the coworker) slipped on ice, he did not see any ice in the area of the incident before the accident, did not see any ice on which his coworker may have slipped, and did not slip on ice, but he did hear his coworker tell Marcial that he (the coworker) slipped on ice. Doc. 38 at 118, 142-147, 175-177. Plaintiff's coworkers also told him prior to the occurrence that there was ice in the area where the alleged incident took place. Doc. 38 at 143.

The alleged incident occurred on the fifth floor of the premises, at which a building was being constructed. Doc. 38 at 114, 116. The rebar was lifted to each individual floor by crane. Doc. 38 at 106-107. The workers at the site would then carry the rebar to the locations where it was supposed to be placed in the decking. Doc. 38 at 107.

Michael Addesa, a superintendent of interior work for Lettire, the construction manager at the site, testified, inter alia, that RTR was hired to perform rebar work at the site, where an apartment building was being constructed. Doc. 39 at 8-9, 17-18, 20, 27-28. The premises were owned by defendant Bond Street. Doc. 39 at 19. Addesa did not direct RTR's work. Doc. 39 at 40, 43-44. As of the date of the incident, Sebastian Wisniewski was the site safety manager. Doc. 39 at 33-35.

Plaintiff filed a note of issue on January 25, 2019. Doc. 37.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, they submit, inter alia, the pleadings (Docs. 34-35); the bill of particulars (Doc. 36); the deposition transcripts of plaintiff and Addesa (Docs. 38-39); an affidavit by Wisniewski attesting to the fact that he did not see any ice in the area where the alleged incident occurred (Doc. 41); and the affidavit of expert engineer Preston R. Quick (Doc. 42). In his affidavit in support, Quick states that it is "industry standard custom and practice for construction workers engaged in the construction of concrete reinforcing steel to manually separate and carry on their shoulders bundled reinforcing steel . . ." (emphasis provided). Doc. 42. Defendants argue that the complaint is subject to dismissal on numerous grounds.

Plaintiff opposes the motion arguing, inter alia, that the accident occurred because defendants failed to provide him with a hoist to lift the rebar. In opposition to the motion, plaintiff submits, inter alia, his own affidavit, as well as an affidavit from Stanley Fein, P.E., an engineer, who opines that the incident occurred because plaintiff was not provided with a hoist, in violation of Labor Law § 240(1), and also that defendants' failure to keep plaintiff's work area free of debris constituted a violation of Labor Law § 241(6).

In reply, defendants substantially reiterate their arguments regarding their entitlement to dismissal. Additionally, defendants assert that Fein's expert affidavit must be disregarded since he failed to rely on any industry standards in support of his opinion that a hoist should have been provided to plaintiff.

LEGAL CONCLUSIONS:

Labor Law § 200

"Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work." *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 143, 950 N.Y.S.2d 35 (1st Dept 2012). Where a plaintiff alleges that a dangerous condition caused his or her accident, an owner or contractor may be held liable under Labor Law section 200 if it created or had actual and/or constructive notice of the condition which allegedly caused plaintiff's injury. *See Cappabianca*, 99 AD3d, at 144, *citing Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9, 919 N.Y.S.2d 129 (2011); *see also Maggio v 24 W. 57 APF, LLC*, 134 A.D.3d 621, 626, 24 N.Y.S.3d 1 (1st Dept 2015). Where a plaintiff claims that his or her accident was caused by the means and methods of the work, a defendant cannot be liable pursuant to Labor Law § 200(1) unless it directed, supervised or controlled the work. *See Cappabianca*, 99 AD3d, at 144.

Here, since plaintiff is unable to identify precisely what caused his coworker to fall, he cannot establish that defendants created or had actual and/or constructive notice of a particular dangerous condition. *See Vazquez v Takara Condominium*, 145 AD3d 627, 628 (1st Dept 2016). Additionally, since it is undisputed that plaintiff was supervised only by RTR, defendants cannot be liable for any injury arising from the means and/or methods of his work. *See Ocampo v Bovis*

Lend Lease LMB, Inc., 123 AD3d 456 (1st Dept 2014). Further, as defendants assert, although plaintiff's coworker told Marcial that he fell on ice, such speculation is fatal to his claim where, as here, there could have been other causes of the accident, and plaintiff cannot prove that ice was the cause of the co-worker's fall "without relying on speculative or inadmissible hearsay evidence." *Steinsvaag v City of New York*, 96 AD3d 932, 933 (2d Dept 2012); *see also Tompa v 767 Fifth Partners, LLC*, 113 AD3d 466, 468 (1st Dept 2014) *citing Acevedo v York Intl. Corp.*, 31 AD3d 255, 257 (1st Dept 2006), *lv denied* 8 NY3d 803 (2007) (plaintiff's speculation insufficient to defeat defendant's entitlement to summary judgment). Plaintiff's counsel even concedes that "it is conjecture that ice was involved in [plaintiff's] accident" (Doc. 44 at par. 23); plaintiff admitted at his deposition that "[m]aybe" ice had a role in the accident (Doc. 38 at 118); and plaintiff conceded in his affidavit in opposition to the motion that "I do not know if my [coworker] fell on ice because he was 28 feet in front of me at the time that he fell, and I did not see what he fell on." Doc. 49 at par. 9. Since plaintiff's claim pursuant to § 200(1) is based on nothing more than the coworker's alleged self-serving hearsay statement, it must be dismissed.

In reaching this conclusion, this Court notes that plaintiff does not specify his efforts, if any, to identify his coworker, or explain why any such efforts were unsuccessful. Obviously, the testimony of the coworker would have provided, most likely, necessary information about what caused him to trip. Since the note of issue has been filed, plaintiff can no longer conduct the deposition of this individual, who may have been able to provide testimony sufficient to raise an issue of fact.

Labor Law § 240(1)

"Labor Law section 240(1) is inapplicable to this case, because plaintiff's injuries were not 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009)." *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 984 N.Y.S.2d 339 (1st Dept 2014) (Labor Law § 240[1] claim dismissed where plaintiff who, along with two co-workers, was carrying a pipe on his shoulder, slipped on a muddy surface and tripped on what he believed was a rock and the pipe struck him); *see also Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666 (1st Dept 2018) (Labor Law § 240[1] claim dismissed where plaintiff and co-worker were carrying a pipe when plaintiff lost his balance upon stepping on a makeshift ramp which bowed, causing both men to fall and causing plaintiff to be struck in the leg by the pipe); *Parker v Ariel Assocs. Corp.*, 19 AD3d 670 (2d Dept 2005) (Labor Law § 240[1] dismissed where plaintiff and four coworkers were carrying a steel I-beam weighing 300-400 pounds when a coworker tripped, injuring plaintiff, who had been holding the beam above his head).

Although plaintiff's attorney attempts to create an issue of fact by arguing that plaintiff needed a hoist to accomplish his task, the facts do not support this argument. Plaintiff stated that Marcial told him that he was to carry rebar from the fifth to the sixth floor, however, this is not the activity in which plaintiff was engaged at the time of the incident. Indeed, plaintiff stated in his affidavit in opposition to the motion that "my co-worker and I were simply walking across the floor to the place we were directed to go" when the incident occurred. Doc. 49 at par. 13. Since the incident occurred on the fifth floor, and not in the process of moving rebar from the fifth to the sixth floor, the incident would not have been prevented by a hoist. Additionally, as noted above, Quick states in his affidavit in support of the motion that it was custom and practice in the

construction industry to carry rebar in the manner in which plaintiff and his coworker were doing, and that no "crane or other mechanical device" was required for such work. Doc. 42 at par. 13.

Plaintiff attempts to raise an issue of fact by submitting Fein's affidavit, in which the expert states, inter alia, that "[i]t is clear, and unquestionable, that a hoist should have been provided" to plaintiff. Doc. 52 at par. 3. However, as defendants assert, Fein's opinion that plaintiff and his coworker should not have been carrying the rebar cannot be considered since he did not cite to any industry standards, rules or regulations to support it. *See Pena v City of New York*, 161 AD3d 522, 523 (1st Dept 2018).

Labor Law § 241(6)

Defendants also move for dismissal of plaintiff's claim pursuant to Labor Law section 241(6). That section provides, in relevant part, that:

> 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 section 241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993). To establish a violation of this statute, and successfully oppose a defendant's motion for summary judgment, it must be shown that defendant violated a

specific, applicable, implementing regulation of the Industrial Code. *Id.*, at 503-505. In his affidavit in support of the motion, Quick established defendants' prima facie entitlement to summary judgment on the § 241(6) claim by opining that defendants have not violated any of the provisions of the Industrial Code, or any of the other regulations, cited by plaintiff.

Despite the numerous sections of the Industrial Code allegedly violated by defendants, plaintiff's affirmation in opposition to the motion limits his argument to one provision of the Industrial Code, 12 NYCRR 23-1.7(e), which addresses tripping hazards. Thus, plaintiff has abandoned his reliance on the remainder of the Industrial Code sections alleged. *See Kempisty v 246 Spring Street, LLC*, 92 AD3d 474 (1st Dept 2012). 12 NYCRR 27-1.3(e)(1) provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping" and that "[s]harp projections . . . shall be removed or covered." 12 NYCRR 27-1.3(e)(2) provides that "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 . . ." Here, plaintiff claims that there were dangerous conditions at the premises but does not specifically allege that his coworker fell as the result of dirt, debris or sharp projections. Although snow and/or ice has been held to fall within the scope of section 23-1.7(e) (*see Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004]), defendants cannot be liable pursuant to Labor Law § 241(6) because plaintiff cannot establish a violation of this provision of the Industrial Code "without relying on speculative or inadmissible hearsay evidence." *Steinsvaag*, 96 AD3d at 933; *see also Luciano v New York City Hous. Auth.*, 157 AD3d 617 (1st Dept 2018).

In arguing that he has a claim pursuant to Labor Law § 241(6) founded upon section 23-1.7(e), plaintiff relies on *Bradshaw v 845 U.N. Ltd. Partnership*, 2 AD3d 191 (1st Dept 2003). In

that case, plaintiff was injured while his coworker was helping him guide rebar into place. The incident occurred when the coworker fell over a pile of construction material, causing the rebar to injure plaintiff. The facts of *Bradshaw* are distinguishable, however, since in that case, unlike here, there was admissible evidence at trial regarding the cause of the coworker's fall. Here, as noted above, the only evidence that the coworker slipped on ice arose from the coworker's alleged statement to Marcial to that effect. However, since plaintiff and his attorney both admit that it is mere conjecture that ice was involved in the accident, the coworker's hearsay statement does not defeat defendants' entitlement to summary judgment. *See Tompa v 767 Fifth Partners, LLC*, 113 AD3d 466, 468 (1st Dept 2014) *citing Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 (1st Dept 2006), *lv denied* 8 NY3d 803 (2007).

Contrary to plaintiff's argument, Fein's affidavit does not raise an issue of fact precluding the dismissal of the Labor Law § 241(6) claim. Fein opines that Industrial Code section 23-1.7 was violated because plaintiff's coworker "slip[ed] on something." Doc. 52 at par. 8. However, plaintiff conceded that he did not know whether the coworker slipped. Doc. 38 at 118.

Although plaintiff also alleges violations of Labor Law §§ 240 (2) and (3), 241(1-5), and 241-a, those statutes are clearly inapplicable to the facts of this case.

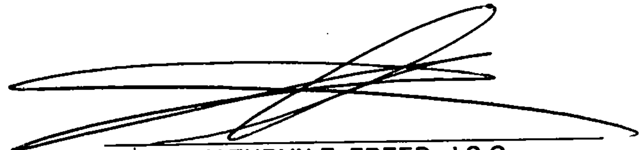
The parties' remaining contentions are without merit or need not be addressed in light of the result above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants LSG 365 Bond Street, LLC and Lettire Construction Corp. is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.



7/17/2019
DATE

KATHRYN E. FREED, J.S.C.

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