Riccardi v 56th & Park (NY) Owner, LLC

2019 NY Slip Op 32452(U)

August 16, 2019

Supreme Court, New York County

Docket Number: 157160/15

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
GLENN RICCARDI,

Plaintiff,

-against-

56TH AND PARK (NY) OWNER, LLC and LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants.
---X

Index No. 157160/15
Motion Seq. No. 002

DECISION AND ORDER

In a Labor Law action, defendants 56th and Park (NY) and Lend Lease (US) Construction LMB Inc. (together, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims against them. Plaintiff opposes and cross-moves for partial summary judgment on his Labor Law § 241 (6) claim.

BACKGROUND

Plaintiff Glenn Riccardi (Plaintiff) alleges that he was injured, on January 31, 2014, while working on the construction of a new building on 432 Park Avenue in Manhattan. Defendants are the owner and general contractor, respectively, on the project. Plaintiff, a journeyman steamfitter, was working for a subcontractor, nonparty Bradshaw Mechanical on the day of accident.

Bradshaw Mechanical's shanty was in the subbasement located two floors below the ground floor. Plaintiff testified that he got ready for work in the Bradshaw Mechanical shanty, and then got on an elevator in anticipation of performing work on a floor with a pool on it (NYSCEF doc No. 85 at 31-33). As the elevator reached the ground floor, Plaintiff realized that he left his cup of coffee in the shanty and "got out of the elevator and ran downstairs and fell down the stairs" (*id.* at 32-33).

As the building was under construction, it was somewhat exposed to the elements. Although Plaintiff did not notice any ice on the steps before his fall, he noticed after his fall that there was "[i]ce all over the stairs" (*id.* at 46).

Plaintiff filed his complaint on July 15, 2015 alleging that Defendants are liable under Labor Law §§ 200, 240 (1) and 241 (6). Defendants argue that Plaintiffs claims under all three statutes should be dismissed. Plaintiff only opposes with respect to section 200 and section 241 (6). In its cross motion, Plaintiff argues that it is entitled to partial summary judgment as to section 241 (6) pursuant to a violation of 12 NYCRR 1.7 (d).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Initially, the court notes that Plaintiff has abandoned his section 240 (1) claim, as he has not opposed the branch of Defendants' motion that seeks its dismissal (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Accordingly, the court must grant dismissal of the section 240 (1) claim. Moreover, Plaintiff similarly abandons all allegations of Industrial Code violations that may serve as a predicate to section 241 (6) liability, except for 12 NYCRR 1.7 (d).

I. Labor Law § 241 (6)

The court first addresses the Defendants' argument that the court should not entertain Plaintiff's cross motion for partial summary judgment as to liability under this statute, as it is untimely. First, the court notes that Plaintiff filed the Note of Issue on February 4, 2019 (NYSCEF doc No. 78). Defendants filed their motion timely on April 3, 2019. Plaintiff filed his opposition and cross motion, after two adjournments by stipulation, on June 19, 2019. Thus, if Plaintiff had moved, instead of cross-moving, his application would have been untimely.

However, it is well established that a late cross motion for dispositive relief may be entertained when the "issues or causes of action" raised are "nearly identical" to those raised by a timely motion (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014] [internal quotation marks and citation omitted]). Here, Defendants clearly raise the issue of the Plaintiff's liability under section 241 (6), as their motion seeks dismissal of the claim. Defendants argue that the caselaw allowing late cross motions is inapplicable, as Plaintiff introduces new evidence in its cross motion, namely affidavits from Plaintiff and his co-worker, Andrew Teague. Here, Defendants misconstrue the caselaw, which requires only that the issues or causes of action be nearly identical, rather than the evidence marshalled to support those issues or causes of action. As the issues and cause of action raised by the Plaintiff in the cross motion were also raised in the main motion, the court will entertain Plaintiff's cross motion.

As to substance, Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the

specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

12 NYCRR 1.7 (d)

12 NYCRR 23-1.7 (d) is entitled "Protection from general hazards; Slipping hazards. It 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"

Defendants do not challenge the specificity of this regulation. They do, however, challenge its applicability. Specifically, Defendants argue that there is no evidence that Plaintiff slipped on ice. Defendants cite to Plaintiff's deposition testimony, where he stated that he did not go up to the top of the steps, where he slipped, after his accident (NYSCEF doc No. 85 at 48) and could not recall which foot began to slip first (*id.* at 46). Thus, Defendants argue that Plaintiff's description of the accident is impermissibly speculative.

Defendants also cite to an accident report which states that the circumstances of Plaintiff's accident was "[s]lip on wet surface" and states that "[t]he stairs have been wet for a few weeks due to constant thawing of snow and ice in building. Stairs are clean from ice build up" (NYSCEF doc No. 91).

In support of his allegation that Defendants violated this regulation, Plaintiff submits not only his own deposition testimony, but an affidavit from his co-worker at Bradshaw Mechanical, Andrew Teague, who stated:

> "At the time of the accident, I had just entered the Building to start work for the day and I was using the staircase to walk down to the shanty to change into my work clothes. Riccardi was just ahead of me, as he proceeded down the stairs. When Riccardi reached the second or third stair down from the ground level, I saw him slip and fall. There was definitely ice on the stair upon which Riccardi slipped and fell. I saw Riccardi fly into the air. He fell onto the landing at the bottom of the staircase."

(NYSCEF doc No. 96, Teague aff, ¶¶ 8-11).

Plaintiff also submits an affidavit in which he responds to Defendants arguments: "I am aware that Defendants have claimed in their motion that I 'assumed' that I slipped on ice and that I did not recall seeing ice on the particular step where I slipped. Nothing could be further from the truth … I was caused to slip and fall due to ice on the stair" (NYSCEF doc No. 96, Plaintiff aff, ¶¶ 8-11).

Plaintiff makes a *prima facie* showing of a violation of 12 NYCRR 23-1.7 (d) through his and Riccardi testimony that he slipped on an icy step. Defendants argue, citing to *Vazquez v Takara Condominium* (145 AD3d 627), that the court should reject Riccardi and Plaintiff's affidavits, as they contradict Plaintiff's deposition testimony. However, neither of these affidavits contradict Plaintiff's deposition testimony. Plaintiff has consistently maintained that he

slipped on ice, so neither of these affidavits is improperly tailored to avoid the consequences of prior testimony.

Defendants fail to raise an issue of fact as to whether Plaintiff slipped on ice in the stairwell through the incident report. Although the accident states "[s]tairs are clean from ice build up," the report does not state whether the stairs were clean from ice build up at the time of Plaintiff's accident. Moreover, Lend Lease's Patrick McAlarney, who testified that he created the accident report, also testified that he could not remember creating the accident report (NYSCEF doc No. 86 at 18). As Defendants fail to raise an issue of fact, Plaintiff is entitled to summary judgment on his Labor Law 241 (6) based on a Defendants violation of 12 NYCRR 23-1.7 (d).

III. Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled

the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*).

Here, Plaintiff alleges that his injuries were caused by a defect on the premises, icy stairs. To show a lack of constructive notice, defendants must show when they last inspected the premises (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]; *compare Ezzard v One East River Place Realty Co., LLC*, 129 AD3d [1st Dept 2015] [in a misleveled elevator case, defendants made *prima facie* showing as to constructive notice by providing evidence of when they had last inspected the elevator]). Here, Defendants fail to make a *prima facie* showing as to constructive notice, as they do not submit evidence as to when they last inspected the stairs.

Moreover, Defendants' incident report raises a question of fact as to whether Defendants had actual notice of a recurring ice condition on the stairs. As Defendants fail to make a *prima facie* showing of entitlement to judgment as a matter of law, and as Plaintiff, in any event, raises an issue of material fact, the branch of Defendants' motion that seeks dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendants 56th and Park (NY) and Lend Lease (US) Construction LMB Inc. (together, Defendants) motion for summary judgment is granted only to the extent that Plaintiff's Labor Law § 241 (6) claim and all allegations relating to Industrial Code regulations, other12 NYCRR 23-1.7 (d), are dismissed; and it is further

ORDERED that Plaintiff's cross motion for summary judgment as to Defendants' liability under Labor Law § 241 (6) is granted; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly, and the remaining claims are severed and continue against the Defendants; and it is further

ORDERED that the counsel for Plaintiff is to serve a copy of this decision, along with Notice of Entry, on all parties within 10 days of entry.

Dated: August 16, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC