Mahalla v New York City Dept. of Educ.
2019 NY Slip Op 33796(U)
November 4, 2019
Supreme Court, Queens County
Docket Number: 714049/17
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Bahri Mahalla,

Plaintiff,

- against -

New York City Department of Education, New York City Board of Education, New York City School Construction Agency, The City of New York and M.S.T. General Contracting Restoration, Inc.,

Defendants.

----------X

Index Number: 714049/17

Motion Date: 10/21/19

Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion by plaintiff for summary judgment; and cross-motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-7
Affirmation in Opposition-Exhibits	8-10
Reply	11-12

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law §241(6) predicated upon violation of §§ 23-1.13(b)(1),(2),(3) and (4), 23-1.7(e)(1) and (2) and 23-1.30 is denied. Cross-motion by defendants for summary judgment dismissing plaintiff's causes of action predicated upon violation of §§240(1), 241(6) and 200 of the Labor Law is granted solely to the extent that plaintiff's cause of action under §240(1) of the Labor Law and 241(6) of the Labor Law as predicated upon violation of §§ 23-1.13(b)(1),(2),(3) and (4), and §§ 23-1.7(e)(1) and (2) of the Industrial Code are dismissed. In all other respects, the cross-motion is denied.

Plaintiff, a roofer employed by a non-party roofing contractor, allegedly sustained electric shock injuries while engaged in the demolition of the roof at P.S. 14Q in Queens County on October 5, 2016. He alleges that he was walking to pick up a bag

of roof debris next to an air-conditioning unit when his foot became caught under a piece of paver debris, causing him to reach out with his left hand and touch the air conditioning unit, the outer case of which was apparently electrified. It is conceded that the casing of the a/c unit was electrified and that the casing should not have been electrified.

It is the opinion of plaintiff's expert engineer, Les Winter, that the a/c unit was dangerous and defective and was not properly maintained so as to insure that the live conductors within it did not come in contact with the unit's metallic housing, which resulted in a short circuit. He opines that defendants violated Industrial Code 1.13(b)(1) through (4) by not de-energizing the a/c and §200 of the Labor Law. He also opines that defendants violated §23-1.7(e)(1) and (2) because the roof was strewn with "non-integral longstanding tripping hazards" which should have been removed. He also opines that defendants violated §23-1.30 because the roof area was inadequately lit.

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that the owner or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing the plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]).

Section 23-1.3(b)(1) of the Industrial Code provides, "Precautions. All power lines and power facilities around or near construction, demolition and excavation sites shall be considered as energized until assurance has been given that they are otherwise by qualified representatives of the owners of such power lines or power facilities." This section is clearly inapplicable to the present facts, since an air conditioner is not a power line or power facility. Although plaintiff's counsel argues disingenuously that defendants' expert mechanical engineer, one Eugenia Kennedy, who so opines in her affidavit annexed to the cross-motion, fails to set forth any basis for her opinion that the a/c was not a power line or power facility, no such basis need be set forth, as it is self-evident that an air conditioning unit is not a power line, or a power facility. Indeed, plaintiff's counsel does not illuminate this Court as to his idea of what a power line or power facility is, and his expert engineer does not do so either. Although the a/c was plugged into the building's electric power and ran on electricity, and was thus electrified, it was not a facility for the production of power, and thus not a power facility, any more than a coffee maker is a power facility. Plaintiff's counsel proffers no authority demonstrating that an a/c is a power line or power facility. He merely offers his bare expression of indignation over defendants' denial that the a/c unit was a power line or power facility, calling such denial "absurd", without any further comment

or analysis.

Section 23-1.3(b)(2) provides, "Determination of voltages. Before work has begun at any construction, demolition or excavation site, the employer shall determine the voltage levels of all energized power lines and power facilities around or near such site. Where two or more voltages are available at a job site, all electrical equipment and circuits shall be appropriately identified. Such identification shall include voltage level and phase." This Court is at a loss to understand why plaintiff is relying upon this section. As noted, the air conditioner in question is not a power line or power facility. Therefore, this section also has no relevance to this matter.

As is the case with the previous section, safety requires that all power lines and facilities be identified before work begins and their voltage levels determined. It hardly needs the opinion of an expert to opine that a construction worker should know whether he is digging or working in an area where he might come into contact with a live wire of high voltage.

As to the second part of this provision - "Where two or more voltages are available at a job site, all electrical equipment and circuits shall be appropriately identified. Such identification shall include voltage level and phase" - it does not take an expert to inform that, when there are two or more voltages at a site, for example, where there are 120 and 220-volt lines, and/or lines that operate on Alternating Current, or AC current and Direct Current, or DC current, that it is a good idea to mark each such outlet or circuit and the electrical equipment to be used so as to assure that a piece of electrical equipment is not unknowingly or inadvertently plugged into an outlet, or circuit, of the wrong voltage or phase. Again, this section has absolutely nothing to do with the subject air conditioner.

Section 23-1.3(b)(3) provides, "Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such circuit exists. He shall advise his employees of the location of such lines, the hazard involved and the protective measures to be taken." Again, this only has to do with warning workers of the presence of power lines and circuits and has nothing to do with the facts of this case.

Section 23-1.13(b)(4) provides, in relevant portion, "Protection of employees. No employer shall suffer or permit an

employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means." This simply follows upon the previous section intended to protect workers from contacting live wires. Thus, this this section of the Industrial Code is also inapplicable to the present situation.

Section 23-1.13(b)(4) of the Industrial Code provides, "Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear." Again, an air conditioning unit is not an electric power circuit or power line. That it is plugged into an electrical outlet or contains electrical components does not make it a power circuit. That a short circuit may have occurred within it so as to electrify its metal outer casing does not implicate this section of the Industrial Code.

Section 23-1.7(e)(1) of the Industrial Code provides, in relevant portion, "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could call tripping." This section is inapplicable to the instant matter because plaintiff was not working in a passageway, but on an open roof. that the air conditioning units were near a wall does not make the area between the air conditioners and the wall a passageway.

Section 23-1.7(e)(2) requires work areas to be kept free of accumulations of dirt and debris to prevent tripping hazards. This section, however, is inapplicable to the present situation since the demolition debris upon which plaintiff alleges he tripped was created by him and/or his co-workers and thus was an integral part of the work being performed (see Salinas v Skanska Construction Co., 2 AD 3d 619 [2nd Dept 2003]). Plaintiff's expert does not set forth the basis for his conclusory statement that the very roofing material debris generated by plaintiff and his co-workers' demolition of the roof was "non-integral" and "longstanding" and there is no evidentiary support for this statement on this record.

Finally, §23-1.30 requires that sufficient illumination of not less than 10 foot candles be provided be provided where persons are required to work. Plaintiff offers no evidence of the illumination

level of the roof area where he was working. His counsel merely speculates that the requirement was not met because the accident occurred at 10:45 p.m. and plaintiff testified that it was dark. Thus, plaintiff has failed to establish a prima facie entitlement to summary judgment as to liability based upon a violation of this section of the Industrial Code.

Since §§23-1.13(b)(1),(2),(3) and (4) and 23-1.7(e)(1) and (2) are inapplicable to the facts of this case, plaintiff's cause of action under §241(6) of the Labor Law predicated upon violation of these sections of the Industrial Code must be dismissed. However, although plaintiff failed to proffer any evidence that there was a violation of §23-1.30 of the Industrial Code since he failed to demonstrate that there was less than 10 foot candles of illumination at the work area, and thus failed to meet his prima facie burden on his motion for summary judgment on the issue of liability concerning his cause of action predicated upon this section, defendants likewise failed to meet their prima facie burden on their cross-motion for summary judgment dismissing plaintiff's §241(6) cause of action predicated upon violation of §23-1.30 of the Industrial Code, since they also failed to offer any evidence of the illumination level of the work area so as to establish that there was adequate lighting in compliance with the Industrial Code.

Defendants have also failed to meet their prima facie burden on their cross-motion for summary judgment for dismissal of plaintiff's cause of action under §200 of the Labor Law. Defendants' counsel contends that §200 is inapplicable to this case because plaintiff testified in his deposition that he received all of his instructions from the foreman of his own employer, not from defendants, and that there is no evidence that defendants had notice of the electrified condition of the air conditioner.

Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]). Where the unsafe condition of the work site was caused by the methods used by the contractor in performing the work, it must be established that the owner or contractor had supervisory control over the performance of the work in order to be liable under §200 (see Griffin v. NYC Transit Auth., 16 AD 3d 202 [1st Dept 2005]; Rippolo v. Mitsubishi Motor Sales of America Inc, 278 AD 2d 149 [1st Dept 2000]). Here, there is no issue as to whether plaintiff's injuries were the result of the methods used to perform his work. Plaintiff's injuries allegedly were the result of a piece of roofing debris on the floor of the building's roof, a condition of the premises itself. Therefore, that defendants did not supervise or control plaintiff's work but that he received all of his instructions from the foreman of his own non-party employer is

irrelevant to the facts of this case.

Where the condition was not caused by the contractor's unsafe work practices, liability may only be imposed upon the owner or contractor under either §200 if the owner or contractor created the dangerous condition or, where the unsafe condition of the premises was not created by the contractor, if it is shown that the owner or contractor had actual or constructive notice of the condition (see Bradley v. Morgan Stanley & Co, 21 AD 3d 866 [2nd Dept 2005]).

Defendants have failed to proffer any evidence that they did not create the electrified condition of the air conditioner or have actual or constructive notice of that condition. It was their burden, as the cross-movants for summary judgment, to proffer affirmative evidence eliminating all issues of fact in this regard. Merely arguing that there is no evidence that defendants had notice of this condition does not satisfy their burden. "A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case" (see Campbell v New York City Transit Authority, 109 ASD 3d 455, 456 [2nd Dept 2013]).

Finally, since it is undisputed that plaintiff's injuries were not elevation-related, his cause of action based upon a violation of §240(1) of the Labor Law must be dismissed. Indeed, plaintiff does not oppose this branch of the cross-motion.

Accordingly, the motion is denied and the cross-motion is granted solely to the foregoing extent.

Dated: November 4, 2019

KEVIN J. KERRIGAN, J.S.C.