Gallina v MTA Capital Constr. Co.
2019 NY Slip Op 33831(U)
December 29, 2019
Supreme Court, New York County
Docket Number: 157087/2015
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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Vita Gallina and Daniela Gallina

Petitioner,

-against-

MTA Capital Construction Company, Metropolitan Transportation Authority, and The New York City Transportation Authority,

Respondents.

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DECISION AND ORDER

Index No.: 157087/2015

Mot. Seq. 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Paper	Numbered	NYCEF #
Defendant's Motion/ Affirmation/Memo of Law	1	39-52
Plaintiff's Opposition/Affirmation	2	55-57
Defendant's Reply	3	58-59

LISA A. SOKOLOFF, J.

In this labor law action in which Plaintiff alleges injury from a construction accident, Defendants MTA Capital Construction Company ("MTACC"), Metropolitan Transportation Authority ("MTA") and the New York City Transit Authority ("NYCTA"), incorrectly s/h/a New York City Transportation Authority, move for summary judgment and to dismiss Plaintiff's common law negligence and Labor Law §§ 200 and 241(6) claims. During oral argument, Plaintiff conceded, and the court dismissed, the common law negligence and Labor Law § 200 claim.

On February 16, 2015, Plaintiff, a laborer employed by Judlau Contracting (Judlau) on the Second Avenue Subway construction project near the 63rd Street/Lexington Avenue subway station, was working underground patching holes using 4x8-inch bricks and cement. To replenish his supply of bricks, Plaintiff proceeded to a material room a level below the level he was working where the bricks were stored in a large square bag. Plaintiff was in the

process of stacking approximately 14 bricks to bring upstairs, when he saw a rat scurry out of the bag. He jumped back, stepping on top of a foot-long pipe that began to roll causing Plaintiff to twist and fall backward injuring himself.

According to the deposition testimony of Joseph Mazza, the Site Safety Inspector employed by the Hirani Group, a construction consulting firm, Judlau was the East 63rd Station project's general contractor, responsible for housekeeping, including removing construction debris, food and materials. Tony Salvadore was the Judlau foreman at the time of the accident. Mr. Mazza confirmed that if he saw a loose pipe, he would ask the contractor to stack it neatly.

According to the affidavit of Judlau's Project Manager, Thomas Riso, all Judlau workers on the project, including Plaintiff, were supervised, instructed and directed by Judlau which also provided Judlau workers with all tools and materials to perform the work. At no time did the MTA, NYCTA or the MTACC direct on control Plaintiff's work.

Defendants contends that a § 241(6) claim based on 12 NYCRR 23-1.7(e) is inapplicable because the location of Plaintiff's accident was not a "passageway" as required by subsection (1) or a "working area" as provided by subsection (2), or that the pipes were improperly stored. Plaintiff opposes, maintaining that a question of fact exists as to whether Plaintiff's accident occurred in a passageway or working area and whether the pipe constituted scatted materials.

Summary judgment under CPLR § 3212(a), is a drastic remedy and will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Id.*). If after viewing the facts in the light most favorable to the non-moving

party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*Vega*, at 503).

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations" contained in the New York State Industrial Code (*Caminito v Douglaston Development, LLC*, 146 AD3d 597 [1st Dept 2017] quoting *Ross v Curtis Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501–502 [1993]).

To prevail on a cause of action under Labor Law § 241(6), a plaintiff must prove a violation of a specific safety regulation of the Industrial Code (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]) and that the violation was the proximate cause of the injury (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). 12 NYCRR 23-1.7(e)(2) is sufficiently specific to sustain a claim under Labor Law § 241(6) (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]).

In support of his claim under § 241(6), Plaintiff relied exclusively on 12 NYCRR 23-1.7(e) which concerns tripping hazards. Subsection (1) of the regulation, captioned "Passageways," provides that passageways be kept free from ... conditions that could cause tripping. Subsection (2) of the regulation, captioned "Working Areas," provides that the parts of floors where persons work or pass be kept free from accumulations of dirt, debris, scattered tools and materials and sharp projections.

Subsection (1) does not apply because Plaintiff's accident did not occur in a passageway, but rather a designated material room for supplies. "A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway. In other words, it pertains to an interior or internal way of passage inside a building" (*Quigley v Port Authority of New York*, 168 AD3d 65 [1st Dept 2018] quoting Merriam–Webster's online Thesaurus).

Liability under §23-1.7(e)(1) does not attach when the plaintiff was injured in an open work space, not a passageway (*O'Sullivan v IDI Const. Co., Inc.*, 28 AD3d 225 [1st Dept 2006]; *Meslin v New York Post*, 30 AD3d 309 [1st Dept 2006]) or in a room that measured approximately 18 feet by 20 feet (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept. 2007]).

Although Plaintiff variously described the material room as a walkway, passageway and corridor, he repeatedly described a "room," a "big room," and a "long room" that was entered through a door.

> Q: So at the time of the accident, were you in the material room?
> A: Yes.
> Q: You were inside the material room?
> A: Yes. It's a walkway. It's a room like that with the material on the side to side. It's a walkway.

Plaintiff then clarified what he meant by walkway, stating "The walkway wasn't exactly—was a little way to walk through. Only entrance was the door.

> Q. How many doors did the material room have?
> A. One door. When you go inside, it's one door.

Since Plaintiff's testimony clearly establishes that he was gathering bricks from a supply room, the accident site does not constitute a passageway under §23-1.7(e)(1) (*Conway v Beth Israel Med. Ctr.*, 262 AD2d 345 [2nd Dept 1999] [storeroom in which Conway was injured was not a "passageway"]).

Plaintiff also argues that he fell in an area that he routinely had to traverse to retrieve the bricks necessary for his work, thus "making it arguably an integral part of the work site" (*Smith v Hines GS Properties, Inc.*, 29 AD3d 433 [1st Dept 2006]). The accident site in *Smith* was an open area between the building under construction and the materials storage trailers which the plaintiff traversed regularly. Here, it was not necessary for Plaintiff to pass through the material room to reach his work area which was on the floor above (*Canning v Barney's New York*, 289 AD2d 32 [1st Dept 2001]). Nevertheless, it is arguable that the material room is an integral part of Plaintiff's work site and that the short pipe on which

Plaintiff stepped was a "scattered" tool or material within the meaning of § 23-1.7 (e)(2). While the provision would have no application if the object that caused the plaintiff's injury was an integral part of the work being performed (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007] [stack of floor tiles on which plaintiff was injured was consistent with the work being done in the room and therefore not "scattered"]; *Harvey v Morse Diesel Intern., Inc.*, 299 AD2d 451 [2nd Dept 2002] [plaintiff tripped over piece of cable of the type with which she was working]), the court finds that Defendant failed to establish, as a matter of law, that the short pipe on which Plaintiff stepped did not constitute "scattered tools and materials" within the meaning of 12 NYCRR 23–1.7(e)(2). Thus, Plaintiff has made a showing that § 23-1.7 (e)(2) arguably applies in the circumstances of this case and is sufficient to support a Labor Law § 241(6) cause of action.

Accordingly, it is

ORDERED, that Plaintiff's claims of violation of Labor Law § 200 and common law negligence are dismissed; and it is further

ORDERED, that Plaintiff's claims of violation of Labor Law§ 241(6) predicated on 12 NYCRR 23-1.7 (e)(1) is dismissed; and it is further

ORDERED, that Defendants' motion for summary judgment and to dismiss Plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7 (e)(2) is denied.

Dated: December 29, 2019
New York, New York

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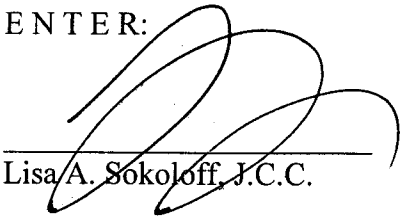

Lisa A. Sokoloff, J.C.C.

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