Ecker v City of New York
2020 NY Slip Op 30571(U)
January 15, 2020
Supreme Court, Richmond County
Docket Number: 150825/2015
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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DOUGLAS ECKER,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Defendants.

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DECISION AND ORDER

Index No. 150825/2015

Motion No. 4051-001

The following papers numbered "1" through '3" were marked fully submitted on November 20, 2019:

	Papers Numbered
Notice of Motion seeking summary judgment with an Affirmation in Support provided by Attorney Orla G. Thompson, with Exhibits Attached (dated September 23, 2019)	1
Affirmation submitted by Attorney Monty Doman, with Exhibits Attached (dated November 13, 2019)	2
Reply Affirmation by Attorney Orla G. Thompson submitted in further support of the Notice of Motion (dated November 19, 2019)	3

Defendants' motion seeking summary judgment is granted without opposition only as to plaintiff's causes of action pursuant to Labor Law § 240 and Labor Law § 241(6) based on violations of Industrial Codes §§ 23-1.7(d), 23-1.5, 23-1.7(a)-(c), 23-1.8, 23-1.22, 23-1.23, 23-1.25, 23-1.28, 23-1.23(b)-(d), 23-2.1, and 23-1.30; and is denied as to plaintiff's causes of action pursuant to Labor Law § 200 and Labor Law § 241(6) based on violations of Industrial Code Sections 23-1.7(e) and 23-1.23(a) in accordance with the following.

The New York City School Construction Authority (hereinafter "SCA") entered into an agreement with Leon D. Dematteis Construction Corporation (hereinafter "Dematteis") to act as the general contractor in the construction of a new two-story net-zero energy school designated as PS 62 located at 644 Bloomingdale Road, Staten Island, New York 10309 (hereinafter "Worksite"). The terms of the contract between SCA and Dematteis indicate:

> That the Bidder [Dematteis] is an independent contractor and not an employee of the SCA. Unless the Contract specifically provides otherwise, the conduct and control of the Work shall be entirely the Bidder's [Dematteis] responsibility at all times.

SCA produced Nisar Ahmad, a twenty-eight-year employee for an examination before trial. SCA employs Mr. Ahmad as a Project Officer Level 3, where he supervises general contractors working on line projects for the SCA such as new school buildings. Mr. Ahmad testified Dematteis provided the SCA with a site safety plan, which the SCA approved, before beginning construction at the Worksite. He indicated SCA had a trailer at the Worksite and he would look for unsafe conditions at the Worksite and report the existence of any to the site safety manager or the contractor in addition to his other duties. Mr. Ahmad provided additional testimony indicating the SCA safety unit employee, Thais Regnault, visited the Worksite either every week or every two weeks, where she looked for any potential safety concerns and deficiencies.

Dematteis produced Daniel Henderson, a Project Superintendent who managed construction activities at the Worksite, for an examination before trial. Henderson testified Dematteis contracted with either Hirani or Infinite Consulting Corporation to provide a site

safety manager.[1] Henderson indicated Ramesh Sharma provided site safety services at the Worksite on behalf of Dematteis.

Dematteis in its capacity as a general contractor subcontracted with Metropolitan Steel Industries (hereinafter "Steelco") to provide ironworking support at the job site. Steelco employed plaintiff as "Fire Watch" at the job site where his duties included monitoring welding slag and the possibility of fire. Plaintiff testified at both his 50h hearing and his examination before trial that on April 29, 2015, his supervisor John Gibson directed him to physically move a welder described as a "triangle with wheels" approximately six feet high and weighing approximately a thousand pounds by hand. The hitch attached to the welder allowed a vehicle to tow it. Plaintiff testified he moved the welder at least one time before April 29, 2015, but he used a vehicle to relocate it at the worksite. Plaintiff asked his supervisor if he could use a vehicle to relocate the welder, but Gibson denied his request. Plaintiff moved the welder approximately fifty to one hundred feet along a dirt and sand alleyway at the Worksite when the welder's wheel abruptly stopped when it encountered some debris or "some unevenness in the sand, dirt, as well as possibly something buried within it."

Plaintiff alleges he sustained bodily injuries as a result of the abrupt stop and commenced this action against defendants. Defendants jointly move for summary judgment seeking the dismissal of Plaintiff's causes of action based on alleged violations of Labor Law §§200, 240, and 241(6). Plaintiff did not oppose defendants' motion seeking the dismissal of his cause of action based on Labor Law § 240. Plaintiff similarly did not oppose defendants' motion seeking dismissal of his Labor Law § 241(6) cause of action premised on violations of Industrial Codes

[1] Henderson testified Hirani changed its name at some point during his employment and he could not recall which entity signed the contract with Dematteis.

§§23-1.5, 23-1.7(a)-(c), 23-1.8, 23-1.22, 23-1.23, 23-1.25, 23-1.28, 23-1.23(b)-(d), 23-2.1, and 23-1.30.

It is well established that in order to grant summary judgment it must clearly appear that no material issues of fact have been presented. Otherwise, if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable," summary judgment must be denied (*Matter of New York City Asbestos Litigation,* 33 NY3d 20, 25 [2019]). The Court must also construe the facts in a light most favorable to the party opposing the motion when determining such a motion (Id.). Therefore, the movant must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact (*Xiang Fu He v. Troon Management, Inc.,* 34 NY3d 167, 2019 N.Y. Slip Op. 07643, p.4 [2019]). If the movant fails to meet the initial burden, the burden never shifts to the opponent, and the motion should be denied without regard to the sufficiency of the opposition papers (*Tyberg v. City of New York,* 173 AD3d 1239, 1241 [2d Dept. 2019]).

Labor Law § 240 (1) protects workers against elevation-related hazards by imposing the responsibility for safety practices on those controlling the worksite (see *Nicometi v. Vineyards of Fredonia, LLC,* 25 NY3d 90, 96 [2015], *Panek v. County of Albany*, 99 NY2d 452 [2003]). The statute imposes absolute liability on a narrow class of gravity or elevation differential related dangers where the failure to provide proper protection is a proximate cause of a plaintiff's injuries (see *Nicometi v. Vineyards of Fedonia, LLC*, 25 NY3d at 96-97).

In support of the motion for summary judgment, defendants argue that plaintiff's testimony, and the materials exchanged in the discovery process, do not provide a basis to establish that a physically significant elevation differential was the proximate cause of plaintiff's alleged injuries. Specifically, it is argued that pushing a welder along a dirt alleyway is not a

gravity related hazard contemplated by Labor Law § 240 (1). Once defendants established this *prima facie* entitlement to judgment as a matter of law, the burden shifted to plaintiff to raise a triable issue of fact. However, as plaintiff offered no opposition thereto, the Court grants summary judgment to defendant on plaintiff's Labor Law § 240 (1) cause of action without opposition.

Defendants also seek dismissal of plaintiff's Labor Law § 241(6) cause of action premised on alleged violations of Industrial Codes §§ 23-1.7(d), 23-1.7(e), 23-1.23(a), 23-1.5, 23-1.7(a)-(c), 23-1.8, 23-1.22, 23-1.23, 23-1.25, 23-1.28, 23-1.23(b)-(d), 23-2.1, and 23-1.30 as stated in plaintiff's bill of particulars. Plaintiff's only proferred opposition is as to Industrial Code Sections 23-1.7(e), and 23-1.23(a). Therefore, summary judgment dismissing the Labor Law § 241 (6) cause of action premised upon Industrial Codes §§ 23-1.7(d), 23-1.5, 23-1.7(a)-(c), 23-1.8, 23-1.22, 23-1.23, 23-1.25, 23-1.28, 23-1.23(b)-(d), 23-2.1, and 23-1.30 is granted without opposition.

The Court now addresses plaintiff's remaining Labor Law § 241(6) cause of action premised upon Industrial Code Sections 23-1.7(e), and 23-1.23(a).

Labor Law § 241(6) is not self-executing and imposes liability on contractors and owners during construction, excavation, or demolition for violation of the Industrial Code regulations (see *Nagel v. D&R Realty Corp.*, 99 NY2d 98 [2002], *Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343 [1998]). Here, defendants have moved for summary judgment seeking dismissal of plaintiff's Labor Law § 241(6) cause of action arguing that the accident which forms the basis of this litigation does not constitute a violation of Industrial Code § 23-1.7(e), which protects laborers against tripping and other hazards at a worksite. It is argued that summary judgment is warranted because, *inter alia*, "plaintiff does not claim that he tripped on anything" and that the

area where his injuries allegedly occurred was not a "passageway" contemplated by the regulations. Defendants also move to dismiss plaintiff's cause of action premised upon Industrial Code Section 23-1.23(a) which protects laborers utilizing earth ramps and runways. Defendants argue that this section is also inapplicable on the facts presented, i.e., that liability attaches only where the ramp or runway was constructed for the work that was being performed. In support, defendants cite a trial court decision and order that echoes their contention.

The Court disagrees and first addresses Industrial Code § 23-1.7(e) which reads as follows:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) 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.

A reading of the plain statutory language reveals that it protects laborers from tripping and other hazards not only on passageways but in other working areas at a job site (see *Torres v. Forest City Ratner Cos., LLC*, 89 AD3d 928 [2d Dept. 2011]). According to plaintiff, he was working at an active job site [as conceded by defendants] while attempting to relocate a welder when it struck debris or other materials. The cases cited by the moving Defendants are inapplicable to the facts before this Court (see *Morra v. White*, 276 AD2d 536 [2d Dept., 2000][Summary judgment granted because plaintiff was not within the class protected and the accident location was in an open area of the construction site]; *Delanna v. City of New York*, 308 AD2d 400 [1st Dept., 2003] [Summary judgment granted because a bolt embedded in the ground

was "not dirt, debris, scattered tools, and materials, or a sharp projection as required by 23-1.7(e)(2)."]; and *Mitchell v. New York Univ.*, 12 AD3d 200 [1st Dept. 2004] [Liability could not attach where there "was no more than a big hole in the ground with an unfinished muddy bottom" which was "not the type of flooring or passageway contemplated in the various cited sections of the Industrial Code"]).

Accordingly, that portion of defendants' motion seeking to dismiss plaintiff's Labor Law § 241(6) claim based on a violation of Industrial Code 23-1.7(e) is denied based upon plaintiff's testimony and defendants' concessions without regard to the sufficiency of plaintiff's opposition (*Tyberg v. City of New York,* 173 AD3d 1241).

Next, the Court addresses Industrial Code Section 23-1.23(a) which reads as follows:

> (a) Construction. Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive unevenness.

It is noted from the outset that the trial court case cited by defendants provides no guidance or reasoning supporting its holding. However, the plain statutory language does not qualify or limit the protection afforded laborers at job sites to earth ramps or runways created for the project. Plaintiff's deposition testimony indicates he allegedly injured himself moving the welder from one portion of the worksite to another. The record indicates construction was ongoing at the worksite and paving remained incomplete. Therefore, defendants have failed to sustain their burden and that portion of defendants' motion seeking to dismiss plaintiff's Labor Law § 241(6) based on a violation of Industrial Code 23-1.23(a) is likewise denied (*Tyberg v. City of New York,* 173 AD3d 1241).

Finally, Labor Law § 200 codifies common law negligence and causes of action thereunder fall into two broad categories: 1) those where a worker sustains injuries as a result of dangerous or defective conditions at a worksite, and 2) those involving the manner of work performance. The courts disjunctively analyze causes of action brought under Labor Law § 200 (see *Pchelka v. Southcroft, LLC,* __ NY3d __, 2019 N.Y. Slip Op. 08853, p.1 and *Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept., 2008]). "Where a premises condition is at issue, property owners [or contractors] may be held liable . . . if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v. Puccia, supra*).

Testimony provided by defendants indicates each took steps to ensure safety at the worksite. Nisar Ahmad, from the SCA, testified Dematteis, the general contractor, provided SCA with a worksite safety plan as a condition of the contract to build the new school. Ahmad testified he, along with, Thais Regnault, another SCA employee, surveyed the Worksite for unsafe conditions and reported them either to Dematteis, or to the relevant subcontractor. Daniel Henderson, a Project Superintendent with Dematteis, testified Dematteis contracted with a third-party firm to provide a site safety manager to oversee the subcontractors at the worksite.

Defendants argument that Labor Law § 200 requires plaintiff to report the specific condition that caused his injury in advance of the injury is without merit. This would, in effect, eliminate constructive notice as well as shift the burden of safety away from the defendants who are statutorily obligated to provide workers with a safe place to work. Defendants further contend plaintiff's testimony that he encountered debris and an uneven surface while moving the welder was not specific enough because he could not definitely testify concerning the content of the debris he encountered and this inability to do so is fatal to his Labor Law § 200 cause of

action. This argument also is not supported by the case law cited in movants' papers. In, *Alabre v. Kings Flatland Car Care Ctr, Inc.*, 84 AD3d 1199 [2d Dept. 2011], although plaintiff slipped on an unknown substance, summary judgment was affirmed because the "evidence indisputably showed that the unidentified substance *had never been observed before the occurrence* of the plaintiff's accident" (*id.* at 440 [emphasis added]), i.e., defendants lacked prior actual or constructive notice of its existence.

Here, the evidence does not establish that the alleged dangerous condition was unknown to the defendants prior to plaintiff's accident. Plaintiff testified that the welder suddenly stopped when it encountered "some unevenness in the sand, dirt, as well as possibly something buried within it," thereby allegedly causing his injuries. A jury, therefore, would not speculate about the cause of plaintiff's injuries, but instead would make a credibility determination concerning plaintiff's testimony relating to the cause of his injuries (*Compare, Aguilar v. Anthony*, 80 AD3d 544 [2d Dept. 2011]. In *Aguilar*, the only person with knowledge of the incident passed away and, therefore, any testimony concerning the decedent's fall down the staircase was speculative).

Accordingly, defendants have not provided evidence substantiating a prima facie entitlement to judgment as a matter of law and that portion of their motion seeking to dismiss plaintiff's Labor Law § 200 is denied (*Tyberg v. City of New York,* 173 AD3d 1241).

Accordingly, it is hereby,

ORDERED, that defendants' motion seeking summary judgment dismissing plaintiff's Complaint is granted only as to the causes of action pursuant to Labor Law § 240 and Labor Law § 241(6) premised on violations of the following provisions of the Industrial Code Sections 23-1.7(d), 23-1.5, 23-1.7(a)-(c), 23-1.8, 23-1.22, 23-1.23, 23-1.25, 23-1.28, 23-1.23(b)-(d), 23-2.1, and 23-1.30, only, and these are severed and dismissed; and it is further

ORDERED, that defendants' motion seeking summary judgment dismissing plaintiff's Complaint is denied only as to the causes of action pursuant to Labor Law § 200 and Labor Law § 241(6) premised upon Industrial Code Sections 23-1.7(e) and 23-1.23(a); and it is further

ORDERED, the parties shall appear for a settlement conference in the Settlement Conference/Mediation Part ("SCMP") located at 18 Richmond Terrace, Room 114, Staten Island, New York on January 28, 2020, at 9:30 A.M.

This constitutes the decision and order of the Court.

ENTER,

HON. THOMAS P. ALIOTTA, J.S.C.

DATED: January 17, 2020