Torres v Triborough Bridge & Tunnel Auth.
2020 NY Slip Op 32412(U)
July 23, 2020
Supreme Court, New York County
Docket Number: 154199/2016
Judge: Laurence L. Love

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 62**

Justice

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JOSEPH TORRES,

Plaintiff,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, MTA BRIDGES AND TUNNELS, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 154199/2016

MOTION DATE 3/5/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the decision on plaintiff's motion for partial summary judgment against defendants Triborough Bridge and Tunnel Authority d/b/a MTA Bridges and Tunnels ("TBTA"), and the City of New York ("City") pursuant to Labor Law §241(6) and defendants TBTA, and City's cross-motion for summary judgment, dismissing the complaint, is as follows:

Plaintiff's complaint, filed May 18, 2016, alleges causes of action for i) negligence and violation of the laws, rules, and regulations under Labor Law §200, 240(1), and 241(6); and ii) for violating the rules and regulations promulgated under 12 NYCRR §§23-1.7(e)(1), 23-1.7(e)(2), 1.30, 3.3(f), 3.3(l), 3.4(b), 3.4(c)(3), 3.4(c)(4), and 3.4(c)(5). Defendant TBTA's answer, was filed June 10, 2016 and asserts cross-claims against the City of New York for common-law indemnification, and for contribution in proportion to the relative degrees of fault of wrongdoing

among the parties to this action or otherwise provided under Articles 14 and 16 of the CPLR. Plaintiff served a notice of claim upon defendants on March 3, 2016.

On December 21, 2015, plaintiff was employed by Defoe Corp., working on the roadway beneath the Manhattan-bound (westbound) 125th Street off-ramp of the RFK Bridge. This project involved reconstruction and rehabilitation to the approach ramps of the bridge at 125th Street. Plaintiff "was caused to step on a piece of loose debris on an uneven ramp-like asphalt surface" and suffered personal injuries.

Defoe Construction was retained under a contract by Triborough as the general contractor for this project. Plaintiff testified, "I was told to climb over the [Jersey] barrier, pass sheets of plywood over the barrier to my foreman (Felice Marie)." Plaintiff further testified that he climbed over the barrier with no trouble and passed the plywood to his foreman. Plaintiff climbed back over this three-foot high Jersey barrier and testified, "I swinged [sic] my left leg over first and then I swing the right after, and my left ankle twisted and I fell backwards. When I came back over the barrier, my ankle rolled as I put it down to the floor." Torres testified that he observed debris on the left side of the barrier before climbing back over but he did not move it, sweep it, or pick it up before stepping down. Based upon same, plaintiff now moves for summary judgment.

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Labor Law §241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (see *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 85 NYS3d [1st Dept 2018]). As a predicate to a claim for violation, a plaintiff must show that the owner or general contractor failed to comply with a specific safety rule promulgated by the Commissioner of the Department of Labor in Part 23 of the New York Industrial Code (see *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

It is undisputed that plaintiff was assigned to clean up and remove debris on the street generated by his co-workers as they demolished the ramp of the RFK bridge. Plaintiff had a wheelbarrow and broom. It was plaintiff's responsibility to clean up any loose debris falling on the street as a result of the demolition. Plaintiff climbed over a Jersey barrier to assist his foreman with the placement of plywood to catch falling debris. When he climbed back over the Jersey barrier, he did not trip. Plaintiff alleges that he turned or rolled on his ankle when he stepped on blacktop patch material with debris on top and further testified that he knew the debris was on the ground but chose not to sweep it up, move it, or pick it up before placing his left foot on it. Plaintiff stepped on the very debris he was assigned to sweep up and remove from the street.

Liability under Labor Law § 240(1) depends on whether the worker was exposed to the type of elevation related risk encompassed under the statute. "The governing rule is … that Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (see *Runner v New York Stock Exchange, Inc*, 13 NY3d 599 [2009]).

Here, plaintiff was injured when he stepped down on debris generated by his co-workers who were demolishing the ramp of the RFK bridge. Torres was aware of the debris and was assigned to clean it up. He was not hit by a falling object, nor was there any type of special hazard that safety devices like those enumerated in Labor Law § 240(1) were designed to prevent. Plaintiff was injured when he attempted to climb over a 2 to 4 ft concrete wall, injured his ankle and was not exposed to the kind of special risk contemplated under the statute but rather the usual and ordinary dangers associated with construction (see *Farmer v City of Niagara Falls*, 249 Ad2d 922 [4th Dept 1998]).

Labor law § 200 is the codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (see *Allen v Cloutier Constr Corp*, 44 NY2d 290, 299 [1978]). When the manner of work is at issue, i.e., arises as a result of the means and methods of the work, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed" (see *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]).

Plaintiff's reply in paragraph three states, "Mr. Torres was instructed by his foreman, Feliz Marie, to perform three tasks in the area of the northbound service road on First Avenue and 125th Street directly below the original bridge ramp which was being demolished. Those tasks were to

clean up construction debris that was falling on to the street, to stop traffic on the service road when loads were being swung directly overhead, and to signal to stop the demolish work using an air horn whenever debris that was too large began to fall from the overhead demolition."

Plaintiff alleges violations of 12 NYCRR 23-1.7(e)(1) – (3)(2), which states:

> 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.

Defendants state in their reply that 12 NYCRR 23-1.7(e)(1) is not applicable to the facts of this case because Torres climbed over a Jersey barrier in an open area and not a passageway. There is no basis for imposing liability upon the defendants pursuant to 12 NYCRR 23-1.7(e)(1) since the area where the plaintiff was injured was an open dirt area, and not a "passageway" with the meaning of that regulation (see *Spence v Island Estates at Mt Sinai II, LLC*, 79 AD3d 936 [2d Dept 2010]). The record establishes that the Jersey barrier was not a passageway.

Plaintiff testified he observed the debris on the left side of the barrier before climbing back over. As described in plaintiff's EBT, "[a]nd sir when you climbed over the second time, you climbed from the right to the left of the barrier, correct? The right side to the left side of the barrier, correct? Yes. And was there any debris on the left side of the barrier when you first climbed over it? Yes. And you did not move that debris out of the area prior to you climbing over the barrier, correct? Yes, I did not."

Defendants also argue that Industrial Code Rule 12 NYCRR 23-1.7(e)(2) is inapplicable to the facts of this accident because the debris was placed there by Torres and he was assigned to

clean it up. Where plaintiff assigned to demolish a building slipped on the demolition debris created by the demolition, 23-1.7(e)(2) was inapplicable to support a claim for violation of Labor Law 241(6) because the debris was an integral part of the task to which plaintiff was assigned (see *Salinas v Barney Skanska Const Co*, 2 AD3d 619, 622 [2d Dept 2003]). The regulation was not violated by accumulations of demolition debris at the very place where plaintiff, as one of his assigned tasks, was required to remove it (see *Murdock v R&P Oak Hill Dev, LLC*, 144 AD3d 1613 [4th Dept 2016]). As plaintiff slipped on the very debris that he was assigned to remove, plaintiff has failed to establish a *prima facie* entitlement to summary judgment.

Defendants cross-move for summary judgment, dismissing plaintiff's action based upon the above facts. As discussed, *supra*, defendants have conclusively established that Labor Law §§ 240(1) and 241(6) are not applicable to the facts of this action, leaving negligence as codified in § 200 as plaintiff's sole remaining cause of action to be evaluated. As discussed *supra*, Labor Law § 200 is the codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work. An implicit precondition of this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). When a premises condition is at issue, the owner may be held liable for a violation of the statute if the owner created the condition that caused the accident or had actual or constructive notice of the dangerous condition. See, *Azad v. 270 5th Realty Corp*., 46 A.D.3d 728, 730 (2d De't 2008). When the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed" *Dennis v. City of New York*, 304 A.D.2d 611, 612 (2d Dep't 2003). It is well established that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability

attaches to the owner under the common law or under Labor Law § 200. *See, Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d, 290, 299 (1978); *Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d 136, 145 (1965). Here, the accident arose out of the means and methods of the work. Plaintiff was assigned to pick up the debris caused by his co-workers demolishing the ramp above. Plaintiff was supervised and solely under the control of his foreman. The TBTA defendants did not supervise or control Torres' work, nor did TBTA have notice that plaintiff would climb over the barrier and place his foot on the debris he was assigned to clean up and remove. As such, defendants' motion must be granted in its entirety.

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to plaintiff as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/23/2020
DATE

LAURENCE L. LOVE, J.S.C.

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