DeLeo v JP Morgan Chase & Co.
2020 NY Slip Op 33517(U)
October 26, 2020
Supreme Court, New York County
Docket Number: 156196/2016
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JOHN DeLEO and LISA DeLEO

INDEX NO. 156196/2016

MOT. DATE

- v -

MOT. SEQ. NO. 003

JP MORGAN CHASE & CO. et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a labor law action arising from personal injuries sustained on a construction site. Defendants JP Morgan Chase & Co. ("Chase"), Plaza Construction Group, Inc. ("Plaza Inc.") and Plaza Construction LLC ("Plaza LLC" and together with Plaza Inc. collectively "Plaza") now move for summary judgment dismissing plaintiff's labor law §§ 241[6], 200 and common law negligence claims. Plaintiffs oppose the motion and cross-move for partial summary judgment on liability in connection with their Labor Law §241(6) claim. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. On September 11, 2014, plaintiff was working as a journeyman electrician for Unity Electric Company, Inc. ("Unity") at a construction project located at 4 Metrotech Center, Brooklyn, New York (the "premises" or "project"). Chase owns the premises and hired Plaza as a general contractor for the project.

At around 1:30pm that day, plaintiff was on the 13th floor at the project, which had a metal-raised floor. Plaintiff's accident occurred when he slipped on a bottle cap while carrying a six-foot ladder and a 12x6 inch cardboard box containing 3-4 speaker strobes. At his deposition, plaintiff testified about the accident in relevant part as follows:

> Q. And tell me how the accident happened?
>
> A. Well, after I set him up, he went to do his stuff and then I grabbed my little box that I needed, my pieces, I put everything in a box. I went and got myself a ladder and after I looked at the blueprints I knew which device I had to do in the corridor. So, that's when I grabbed my box, I grabbed the ladder and I started walking down the corridor.

Dated: 10/26/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

Motion X-Motion

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

And within 10 feet, 15 feet is when I slipped. My foot slipped on the bottle cap. And like I said, there was debris in the hall, but I'm aware of it because it's on the sides and I'm watching out that I don't step on anything, that no screws coming through, any studs or anything.

And physically, to actually see the cap, I didn't see it until after I slipped and I did a split. This leg went back, my right front leg went out, my arm got stuck on the ladder, the ladder went down and that's when I looked and I seen the cap next to my foot.

…

Q. And as you were walking, were your eyes straight ahead of you, were you looking at the floor? The ceiling? The sides?

A. Looking straight down the corridor and at the same time looking at what's on the floor in front of me. You know, I can't explain it. It's like peripheral vision you almost have. You know where you're going, but you kind of looking at the same time what's around you.

And I was looking at the wall to see the hole in the wall where the speaker strobe was going to go. So I was looking towards –

Q. As you walked that ten to 15 feet before the wall, did you see any debris on the floor?

A. Nothing big, small things.

Q. Tell me what?

A. Some ceiling tile, some metal studs, coupe of pieces of pencil rod, couple of screws. There might have been some old lunch bag on the floor, nothing that was blocking my way through. It was like pushed to the side, you know.

Q. Did you have to move any of the, what I'll term smaller debris –

A. No.

Q. Let me just finish.
Did you have to move any of this smaller debris as you were walking in order to get to your spot?

A. No, I did not.

Q. When you saw the various items that you told me about, the ceiling tile, the pencil rod, the screws, perhaps a lunch bag, what if anything, did you do to avoid or did you step over it? Did you do anything at all or did you just walk through?

A. I just walked by it. It was to the left and to the right of me by the walls. Nothing in the direct center path.

Plaintiff further testified that he had worked in the area of his accident approximately three to five times in the three-week period before it occurred. Plaintiff claims that he observed debris in the area

during that time. Plaintiff testified that he made a complaint about the debris during a safety meeting and the area was cleaned up the day after.

On the date of plaintiff's accident, in regards to the "small things" plaintiff observed on the thirteenth floor, plaintiff was asked why he didn't complaint about it prior to his accident.

Q: Is there any particular reason why you didn't make a complaint about the debris – the small debris in the area where you were going to set up to work?

A: Is there a reason?

Q: Yes.

A: Probably not enough of a blockage to make me make a complaint. It wasn't enough to say, "Look, you can't walk down there because of a pile of garbage." There were small pieces pushed to the side of the wall, which you encounter all over the floor.

Plaintiff further testified about debris clean-up and why he didn't make further complaints:

Q: And on those other occasions when you passed through after the debris had been cleaned up, did you see again more debris?

A: Not a lot, not substantial, small things.

Q: Can you give me an example of what a small thing would be?

A: Piece of sheetrock, ceiling tile, studding, some screws, some hardware, maybe a couple of bottles from somebody's lunch, that's about it. No piles, you know, a piece here, a piece there.

Q: When you saw those small things on the other occasions after the initial cleanup, you made a decision not to make a complaint at the safety meeting, correct?

A: Correct.

Plaza produced Sean McHugh for a deposition. McHugh is a superintendent for Plaza. He testified that he was responsible for coordinating work amongst the subcontractors at the project. McHugh first learned of plaintiff's accident after this action was commenced. He claimed that if he had been notified of the accident, he would have gone to the scene and taken photographs. He further claimed that if he had been notified of debris issues, he would have made sure laborers cleaned it up. Finally, McHugh testified that he conducted walkthroughs of the 13th floor on a daily basis which included inspecting for safety hazards.

Plaza also produced Tomasz Prezemyslaw Dering, a Corporate Safety Director. Dering was asked if food and drink were permitted at the project, which he did not recall. Dering further stated that "[d]ebris from eating and drinking is considered the same as construction debris. Good housekeeping has to be maintained, and the trades have to play a role in it."

Finally, Unity produced Frank Papasso, its foreman on the project, for a deposition. He testified that he took his directions solely from Unity and did not have any direct interactions from Chase or Plaza nor did he take any direction from the defendants.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.7[e] [1] and [2] were violated as a matter of law.

Industrial Code § 23-1.7[e] provides 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.

Defendants argue that this provision is inapplicable because plaintiff's accident wasn't caused by a "tripping hazard" within the meaning of Section 23-1.7[e][1] and the bottle cap cannot be construed as accumulated debris or scattered materials under Section 23-1.7[e][2]. The court agrees with defendants on both points.

The specific item which plaintiff claims caused him to fall was a bottle cap. A person cannot trip on a bottle cap and plaintiff himself claims to have slipped on it. Section 23-1.7[e][1] therefore cannot apply to the facts in this case since the bottle cap does not "cause tripping" (*see i.e. Madir v. 21-23 Maiden Lane Realty, LLC*, 780 N.Y.S.2d 369, 371 (2d Dep't 2004). Nor is Section 23-1.7[e][2] applicable since a bottle cap, like a sandwich wrapper, cannot reasonably be construed as an "accumulation[] of dirt and debris" (*see i.e. Vital v. City of New York*, 43 AD3d 309 [1st Dept 2007]).

Accordingly, defendants' motion for summary judgment dismissing the Labor Law § 241[6] claim is granted and plaintiff's cross-motion as to this claim is denied.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

On this record, it is clear that plaintiff was only supervised by his employer. Therefore, plaintiff must demonstrate that the defendants had actual or constructive notice or created the condition. Based upon the testimony and undisputed facts, the court finds that the defendants are entitled to summary judgment dismissing the Section 200 and common law negligence claims as well. Plaintiff admitted that after he made a complaint about debris on the thirteenth floor two weeks prior to his accident, it was cleaned up. Plaintiff did not complain of specific debris such as bottle caps or some group of items which the bottle cap could be considered a part of. Therefore, the defendants could not possibly have actual notice of the specific condition which caused plaintiff's accident.

Plaintiff further admitted that the "debris" he observed on the date of his accident in the vicinity thereof was not significant enough to warrant a complaint. Finally, the bottle cap is like the proverbial banana peel in a supermarket. There are insufficient facts on this record from which a reasonable fact-finder could conclude that the defendants had constructive notice that a bottle cap was on the ground in the area where plaintiff slipped and fell.

In light of the foregoing, the balance of defendants' motion is granted and the balance of plaintiff's cross-motion is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendants' motion for summary judgment is granted and plaintiff's cross-motion is denied; and it is further

ORDERED that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/26/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.