Nerkowski v Triborough Bridge & Tunnel Auth.
2021 NY Slip Op 31600(U)
May 12, 2021
Supreme Court, New York County
Docket Number: 155855/2017
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **IAS MOTION 33EFM**

Justice

----------X

DANIEL NERKOWSKI,

Plaintiff,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendant.

----------X

INDEX NO. 155855/2017

MOTION DATE 08/19/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90.[1]

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law matter, defendant Triborough Bridge and Tunnel Authority (TBTA) moves for summary judgment to dismiss plaintiff Daniel Nerkowski's Labor Law §§ 200, 240(1), 241(6) claims regarding Industrial Code (IC) §§ 23-1.7(d) and 23-1.7(e)(1), and common law negligence claims pursuant to CPLR 3212. Defendant does not move to dismiss plaintiff's Labor Law § 241(6) claims regarding IC §§ 23-1.7(e)(2), 23-1.30, 23-2.1(a) and (b). Plaintiff opposes only the portion of defendant's motion regarding Labor Law §§ 200 and common law negligence. The Decision and Order is as follows:

BACKGROUND

Plaintiff alleges that on March 30, 2016, he was working on a renovation project at a TBTA facility located at 10-50 50th Avenue, Long Island City, New York. General contractor and non-party GMDV Trans, Inc. (GMDV) was plaintiff's employer on the date of his accident.

Plaintiff testified that he received instructions exclusively from his employer. Plaintiff claims that a GMDV supervisor directed him to carry and move materials into a small storage room inside the TBTA building that was under renovation. Plaintiff alleges that he tripped due to debris on the floor and the inadequate lighting.

[1] The parties submitted letter sur-replies which were not considered for this motion (NYSCEF ## 91-92).

TBTA offers the testimony and affidavit of Marissa Woods, a Senior Project Engineer, in support of its motion (NYSCEF ## 77, 81-82). Woods averred that TBTA did not direct or supervise the work performed in the storage room where plaintiff tripped. She further averred that TBTA had no notice of any issues in the storage room. Woods testified that TBTA did not supervise workers on a day-to-day basis and merely oversaw the progress of the project.

TBTA additionally offers the testimony of plaintiff's co-worker, Orane Reid (NYSCEF # 78). Reid testified that he went into the storage room at least nine times during the same period as plaintiff's accident. He had no issue with lighting in the room and no debris on the ground. Reid added that he cleaned the room and ensured that it was free of debris.

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

As plaintiff does not oppose the portion of TBTA's motion seeking dismissal of plaintiff's Labor Law §§ 240(1) or 241(6) claims regarding IC §§ 23-1.7(e)(2), 23-1.30, 23-2.1(a) and (b), the motion is granted, and those claims are dismissed.

Turning to the Labor Law § 200 and common law negligence claims, TBTA's motion is granted, and the claims dismissed. Labor Law § 200 "codified landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer-Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery,

> equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

(Labor Law § 200[1]).

There are two distinct standards applicable to Labor Law § 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

The parties do not dispute that this is a premises condition case. Where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; *see also Jaycox v VNO Bruckner Plazza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]).

In this case, it is undisputed that TBTA did not have actual notice of the alleged defective condition. The only issue then is whether TBTA had constructive notice of the alleged debris.

For a property owner to be charged with constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

Here, there is no indication that TBTA had reason to be on constructive notice of a defective condition. TBTA did not exercise day-to-day oversight of the construction site. Reid testified that there was no debris at the worksite and that he had cleaned up the accident site prior to plaintiff's accident. While plaintiff did testify that there was debris, plaintiff offers no countervailing evidence to show that the debris existed long enough for TBTA to recognize the hazardous condition.

Plaintiff argues that TBTA's failure to annex a complete copy of the TBTA-GMDV contract in TBTA's initial moving papers necessitates denial of TBTA's motion. Plaintiff's argument fails. Marissa Woods, plaintiff's project engineer, testified and averred that TBTA did not exercise supervisory control over the day-to-day activities of GMDV's employees. Plaintiff offers no evidence to rebut this fact

and does not identify any portion of the contract that counters her testimony. As TBTA had no constructive notice, plaintiff's Labor Law § 200 and common law negligence claims cannot survive and are dismissed. Remaining in this action are plaintiff's Labor Law § 241(6) claims regarding IC §§ 23-1.7(e)(2), 23-1.30, 23-2.1(a) and (b).

Accordingly, it is ORDERED that TBTA's motion for summary judgment is granted, and plaintiff's common law negligence and Labor Law §§ 200, 240(1), and 241(6) claims regarding Industrial Code (IC) §§ 23-1.7(d) and 23-1.7(e)(1) are dismissed; it is further

ORDERED that TBTA is to serve a copy of this order with notice of entry on plaintiff within fifteen (15) days of this order; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

MARGARET A. CHAN, J.S.C.

5/12/2021								
DATE					MARGARET CHAN, J.S.C.			
CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE