SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

OWEN SUTHERLAND,

Index No.: 20921/2018E

Plaintiff,

- against -

DECISION and ORDER

TUTOR PERINI BUILDING CORP. and LEGACY YARDS TENANT, LP.,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether he is entitled to judgment as to liability on his Labor Law §§241(6) and 200 claims. This court finds that Plaintiff established his *prima facie* burden concerning his Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.7(d), however, he failed to demonstrate same concerning Industrial Code 12 NYCRR §23-1.7(e)(1)(2). Furthermore, this court finds that there are triable issues of fact that preclude Plaintiff's application for judgment on his Labor Law §200 claim.

According to Plaintiff, on the day of his accident he was employed by non-party B&R Rebar as lather foreman at the Hudson Yards Construction Project ("construction site") to install rebar cages for columns. Plaintiff testified that his general responsibility at the construction site included giving instructions and supervising a crew of approximately thirty-five to forty workers. Plaintiff further testified that in order to complete his tasks he had to work from the top of a gantry scaffold, which had platform made of plywood. In addition, Plaintiff testified that the gantry scaffold's plywood platform was exposed to the elements.

Plaintiff claims that he was injured as he was in the process of handing rebar down from on top of the gantry scaffold to his coworkers below. He alleges that due to the ongoing rain that

day his boots began to slip. Plaintiff testified that as result of his boots slipping his right foot struck and got caught onto an electrical pipe, which caused him to sustain serious injuries.

I. Labor Law §241(6)

Plaintiff seeks judgment as to liability on his Labor Law §241(6) claim. Labor Law §241(6), imposes a nondelegable duty of reasonable care upon 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. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

A. 12 NYCRR §23-1.7(d)

Plaintiff alleges that Defendants violated 12 NYCRR §23-1.7(d) which provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Plaintiff argues that Defendants violated 12 NYCRR §23-1.7(d) because they allowed him to work from on top of the gantry scaffold, which was exposed to the elements while it was raining. Therefore, Plaintiff contends that because his injuries was proximately caused from the slippery

conditions thereat, he established his *prima facie* entitlement to judgment on his Labor Law §241(6) claim premised upon 12 NYCRR §23-1.7(d).

In opposition, Defendants argue that the instant Industrial Code is inapplicable because they contend that Plaintiff's injuries did not derive from a slippery condition. Instead, they posit that Plaintiff's injuries was due to his right foot getting caught onto an electrical pipe. Therefore, Defendants claim that Plaintiff cannot demonstrate that his injuries occurred as a direct result of a slippery surface, thereby, negating Defendants liability under this Industrial Code.

This court finds that based upon Plaintiff's undisputed testimony that rainwater produced slippery conditions on the gantry scaffold's plywood platform, which in turn caused his boots to slip, thereby, leading his right foot to strike an electrical pipe rendering him injured established his *prima facie* burden that Defendants violated 12 NYCRR §23-1.7(d). *See Luciano v. NY City Hous. Auth.,* 157 A.D.3d 617, 67 N.Y.S.3d 456 (1st Dep't 2018); *see also Velasquez v. 795 Columbus LLC,* 103 A.D.3d 541, 959 N.Y.S.2d 491 (1st Dep't 2013).

This court further finds that Defendants' arguments that Plaintiff's injuries did not result from the gantry scaffold's plywood platform's slippery conditions are unavailing as it failed to raise any triable issues of fact. Further, Defendants' sole proximate cause arguments must fail as this court finds that Defendants' violation of this Industrial Code was the proximate cause of Plaintiff's injuries. Moreover, this court recognizes that comparative negligence is a valid defense to a Labor Law §241(6) claim. However even assuming, *arguendo*, that Plaintiff was comparatively negligent with respect to his accident that does not bar this court from granting summary judgment as to the issue of liability. *See Carlos Rodriguez v. City of NY*, 31 N.Y.3d 312, 101 N.E.3d 366, 76 N.Y.S.3d 898 (2018).

B. 12 NYCRR §23-1.7(e)(1)(2)

Plaintiff alleges that Defendants violated 12 NYCRR §23-1.7(e)(1)(2), which gives safety standards for tripping and other hazards and in pertinent part provides that: "(1) [a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping…; and (2) [t]he 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 ..."[1]

Plaintiff contends that there is no dispute that the rainwater on the surface of the gantry scaffold's plywood platform qualifies under 12 NYCRR §23-1.7(e)(1)(2) as any obstruction which could cause tripping. Therefore, Plaintiff claims that he has established a violation of this Industrial Code as Defendants failed to ameliorate the rainy conditions that caused his injuries.

In opposition, Defendants contend that said Industrial Codes are not applicable to the facts at bar. Defendants argue that Plaintiff's injuries do not fall within the protective purview of 12 NYCRR §23-1.7(e)(1)(2) as his injuries did not occur in a passageway or working area. Moreover, Defendants posit that the electrical pipe that caused Plaintiff's injuries provided electricity for the gantry scaffold's platform, therefore, it was consistent with the work being performed and cannot constitute a tripping hazard under 12 NYCRR §23-1.7(e)(1)(2). Also, Defendants contend that Plaintiff was the sole proximate cause of his accident as he was the foreman in control of the work being performed and he instructed his workers to continue working despite the rainy conditions that day.

This court finds that 12 NYCRR §23-1.7(e)(1) is inapplicable to the facts at bar as Plaintiff

[1] Plaintiff abandoned all other predicates, and the claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

failed to demonstrate that his injuries occurred within a passageway as envisioned by this Industrial Code as it was undisputed that Plaintiff's injuries occurred on the gantry scaffold's plywood platform, which was exposed to the elements. *See Jones v. 30 Park Place Hotel LLC*, 178 A.D.3d 604, 112 N.Y.S.3d 499 (1st Dep't 2019); *see also Purcell v. Metlife Inc.,* 108 A.D.3d 431, 969 N.Y.S.2d 43 (1st Dep't 2013).

As to 12 NYCRR §23-1.7(e)(2), this court finds that Plaintiff failed to demonstrate his p*rima facie* burden that Defendants violated this Industrial Code. Defendants demonstrated that electrical pipe that injured Plaintiff was an integral and permanent part of the construction taking place as it was provided electricity to the gantry scaffold. *See Hammer v. ACC Constr. Corp.,* 2021 N.Y. Slip Op. 02104 (1st Dep't 2021); *see also Letterese v. A&F Commercial Bldrs., L.L.C.,* 180 A.D.3d 495, 118 N.Y.S.3d 604 (1st Dep't 2020). Moreover, this court finds that the instant Industrial Code is inapplicable as Plaintiff did not allege that he tripped nor was his accident caused by an accumulation of dirt or debris, scattered tools or materials, or a sharp projection. *See Ali v. Sloan-Kettering Inst. for Cancer Research*, 176 A.D.3d 561, 112 N.Y.S.3d 14 (1st Dep't 2019).

II. Labor Law §200

Plaintiff seeks judgment as to liability on his Labor Law §200 claim. Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC,* 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor,

over which the owner or general contractor exercises supervision and/or control. *Makarius v. Port Auth. of NY & New Jersey*, 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

A. Notice of Defect or Dangerous Condition

Plaintiff argues that he established a Labor Law §200 violation because he claims that Defendants had actual notice of the dangerous condition (i.e., the gantry scaffold's slippery plywood platform due to the ongoing rain). Plaintiff relies upon Defendants' superintendent's reports, which he claims demonstrated that the superintendents had actual notice that it was raining on the day of his accident. Moreover, Plaintiff claims that Defendants' superintendent's reports demonstrate that other subcontractors on the construction site were told not to work because of the rain. In addition, Plaintiff argues that although Defendants were contractually obligated to supervise, administer, coordinate, and manage the work being performed they allowed workers in their discretion to choose whether they were going to work despite the rainy conditions. Lastly, Plaintiff contends that Defendants, at a minimum, had constructive notice of the rainy and slippery conditions on the day of Plaintiff's accident, which they failed to correct.

In opposition, Defendants argue that Plaintiff failed to establish that they had actual or constructive notice of the rainy and slippery conditions at the construction site. Defendants claim that although their superintendent's incident and daily reports stated that it was raining at the time of Plaintiff's accident said reports alone do not establish that they had notice of any slippery conditions.

This court finds that there are triable issues of fact concerning Defendants' actual or constructive knowledge of the specific slippery conditions that existed on the gantry scaffold's plywood platform at the time of Plaintiff's accident. Although it is undisputed that it was raining on the day of Plaintiff's accident and that Defendants had knowledge of same there remains

triable issues of fact as to whether Defendants possessed actual knowledge of the specific dangerous condition namely the gantry scaffold's slippery plywood platform due to the ongoing rain. *See Doodnath v. Morgan Contr. Corp.*, 101 A.D.3d 477, 956 N.Y.S.2d 11 (1st Dep't 2012). Moreover, a general awareness that the gantry scaffold's plywood platform became wet during inclement weather is insufficient to establish constructive notice of the specific condition that caused Plaintiff's injury. *See Solazzo v. NY City Tr. Auth.*, 6 N.Y.3d 734, 843 N.E.2d 748, 810 N.Y.S.2d 121 (2005).

B. Means and Methods of Work

Plaintiff claims that Defendants possessed sufficient supervisory control over Plaintiff's injury-producing work to impose liability upon them pursuant to Labor Law §200. Plaintiff supports his argument by relying upon the Defendants' construction agreement wherein it provided that they had the authority to supervise and control the work being done. Moreover, Plaintiff argues that Defendants directed and allowed Plaintiff to manually lower the rebars during raining weather conditions, which was negligent.

In opposition, Defendants argue that it had no responsibility in instructing Plaintiff's means and methods of work. Furthermore, Defendants rely upon Plaintiff's testimony that he only received instruction for his work from his employer, B&R Rebar, and that he never received any instructions as to how to perform his work from Defendants. Lastly, Defendants contend that the construction agreement Plaintiff references does not give rise to a Labor Law §200 claim as it does not prove that it actually exercised supervision or control over Plaintiff's injury-producing work.

This court finds that that Plaintiff's testimony demonstrated that he only received instruction from his employer, and he conceded that no one else at the construction site supervised or

controlled his work. Moreover, even assuming, *arguendo*, that Defendants did retain the right to generally supervise the work, to stop the contractor's work if a safety violation is noted or to ensure compliance with safety regulations this court finds that does not amount to the "supervision and control" required to impose liability under Labor Law §200. *Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 948 N.Y.S.2d 8 (1st Dep't 2012).

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion seeking judgment as to liability on his Labor Law §§241(6) and 200 claims is granted in part; and it is further

ORDERED, that Plaintiff's application for judgment on liability on his Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.7(d) is granted; and it is further

ORDERED, that Plaintiff's application for judgment on liability on his Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.7(e)(1)(2) is denied; and it is further

ORDERED, that Plaintiff's application for judgment as to liability on his Labor Law §200 claim is denied; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: May 24, 2021

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.