Goulston v Tutor Perini Corp.
2022 NY Slip Op 33541(U)
October 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 512174/2014
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme
Court of the State of New York, held
in and for the County of Kings, at
360 Adams Street, Brookly, New York,
17th on the day of October, 2022.

P R E S E N T:
Hon. Wayne P. Saitta, Justice.

--X

LAWRENCE J. GOULSTON,

Plaintiff,

Index No.: 512174/2014

-against-

DECISION AND ORDER
MS #17

TUTOR PERINI CORPORATION, FIVE STAR ELECTRIC CORP. and ATLANTIC DETAIL & ERECTION CORPORATION,

Defendants.

--X

TUTOR PERINI CORPORATION Third-Party

Plaintiff,

-against-

JGM, INC.,

Third-Party Defendant

--X

TUTOR PERINI CORPORATION

Second Third-Party Plaintiff,

-against

AMETIS INDUSTRIES, INCORPORATED

Second Third-Party Defendant

--X

The following papers numbered on this motion:

	NYSCEF Doc Numbers
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	253-254, 266
Answering Affidavit (Affirmation)	267-269
Reply Affidavit (Affirmation)	271, 273
Supplemental Affidavit (Affirmation)	
Pleadings –Exhibits	255-265, 272
Stipulations – Minutes	
Filed Papers	

This action arises from a construction accident that occurred on October 2, 2014, at 450 Clarkson Avenue, Brooklyn, New York (the Premises). Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff TUTOR PERINI (Defendant TUTOR) was the general contractor. Defendant TUTOR subcontracted with Third-Party Defendant JGM, INC. (Defendant JGM) to do miscellaneous ironwork. Plaintiff was employed by Defendant JGM.

On the morning of his accident, Plaintiff was assigned to work at the Premises. This was Plaintiffs first day on the job at the Premises. On the morning of Plaintiff's accident, Plaintiff arrived at 5:45 am and called his foreman, Robert Falcone. Falcone told Plaintiff they start at 6:00 am and Falcone met Plaintiff at the gate of the job site to escort him in.

Falcone told Plaintiff they needed to go up to the fifth floor to access the JGM gang box to get the materials they needed. Falcone and Plaintiff had to take the stairs to the fifth floor because the hoist did not start operation until 7:00 am. There were no lights in the staircase on the third, fourth, or fifth floors.

When he reached the fifth floor, Plaintiff stepped onto the landing but was unable to see anything in front of him. When he took steps forward, Plaintiff was able to see that the fifth floor was blocked off by safety cables and orange mesh. To enter the fifth floor,

Plaintiff had to go through a hole that had been cut in the mesh and then between two safety cables. As he did this, Plaintiff's left foot got caught on a portion of the cut mesh that was on the floor causing him to trip and fall to the ground. Plaintiff's accident occurred at 6:10 am.

Plaintiff's complaint alleges causes of action for negligence and violations of Labor Law § 200, Labor Law § 240(1) and Labor Law § 241(6).

Defendant TUTOR moves to dismiss the complaint as against it.

Labor Law § 240(1)

The Court previously granted that portion of Defendant TUTOR's motion to dismiss Plaintiff's § 240(1) claims, as Plaintiff did not oppose Defendant TUTOR's motion as to § 240(1), nor did he allege any facts which would support a finding that his accident was related to a height differential or the result of the force of gravity.

Labor Law § 241(6)

Defendant TUTOR moves to dismiss Plaintiff's claims under Labor Law § 241(6) arguing that the Industrial Code sections cited by Plaintiff were either not violated or not applicable.

"Labor Law § 241(6) imposes a nondelegable duty upon an owner [an owner's agent] or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Grant v. City of New York,* 109 AD3d 961, 963 [2d Dept 2013]). "To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the Code" (*Galarraga v. City of New York*, 54 AD3d 308, 309 [2d Dept 2008]).

Plaintiff pled violations of Industrial Code §§ 23-1.7(e), and 23-1.30, which involve tripping hazards and inadequate lighting.

Industrial Code § 23-1.7(e) protects workers from tripping hazards and states:

(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.

Here, Plaintiff's foot got caught in the mesh causing him to trip while exiting a passageway, the stairwell, to retrieve material, making § 23-1.7(e)(1) applicable. Defendant TUTOR argues that the mesh was a safety device, not a tripping hazard and it not foreseeable that a worker would climb through the mesh. However, the mesh had been cut which permitted access, and part of the mesh was lying on the floor. Therefore, there is a question of fact as to whether it was foreseeable that a worker who climb through the cut mesh and whether the mesh, had become a tripping hazard once it was cut resulting in a portion lying on the floor.

Additionally, Plaintiff argues that the lack of lights at the site violated Industrial Code § 23-1.30, which states:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Here, it is undisputed that there was no lighting in the area where Plaintiff was injured at the time Plaintiff was injured.

Defendant submitted an Affidavit from Bernard Lorenz, a licensed professional engineer, who opined that Defendant was not obligated to comply with § 23-1.30 since work on the project was not supposed to begin until 7:00 am.

Contrary to Defendant's assertion that the site opened at 7:00 am, Plaintiff testified that his workday began at 6:00 am on the day of his accident. Plaintiff's testimony is corroborated by Falcone, a non-party witness, who also testified that that their workday began at 6:00 am on the day of Plaintiff's accident and there was no lighting at the time of Plaintiff's accident. This conflicting testimony precludes granting of summary judgment as to Plaintiff's claim based on § 23-1.30.

Therefore, that part of Defendant TUTOR's motion to dismiss Plaintiff's § 241(6) claim based on Industrial Codes §§ 23-1.7(e), and 23-1.30 is denied.

While Plaintiff also pled violations of Industrial Code §§ 23-1.15, and 23-2.1(b), he did not provide any evidence of violations of these sections of the Industrial Code in his opposition. Therefore, that part of the § 241(6) claim based on Industrial Codes §§ 23-1.15 and 23-2.1(b) must be dismissed.

Labor Law § 200 and Common Law Negligence

Defendant TUTOR moves to dismiss Plaintiff's claims under Labor Law § 200 and Common Law negligence arguing that they did not exercise supervision or control over the work performed by Plaintiff.

"Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (*Zukowski v. Powell Cove Estates Home Owners Association,* 187 AD3d 1099, 1101 [2d Dept 2020], quoting *Lombardi v. Stout,* 80 NY2d 290, 294 [1992]). Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

As discussed above, there is a question of fact whether the cut mesh was a dangerous condition. The existence of cut mesh on the floor if determined to be dangerous would be a dangerous condition as opposed to a means and methods of performing the work.

Further, a failure to provide adequate lighting would constitute a dangerous condition.

Defendant TUTOR, as the general contractor, "may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition" (*Bessa v Anflo Industries Inc.,* 148 AD3d 974 [2nd Dept 2017]; *White v Village of Port Chester,* 92 A.D.3d 872 [2nd Dept 2012]; *Bridges v. Wyandanch Community Development Corp*., 66 AD3d 938, 940 [2d Dept 2009].)

"A defendant has constructive notice of a defect when it is visible and apparent and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Nicoletti v. Iracane* 122 AD3d 811, 811 [2d Dept 2014]).

Defendant TUTOR did not establish that it did not have either actual or constructive notice of the condition of the torn mesh, the lack of lighting, or that Plaintiff would be working at the site before 7:00 a.m.

Given these questions of fact, that part of Defendant TUTOR's motion to dismiss Plaintiff's § 200 and common-law negligence claim must be denied.

WHEREFORE, it is ORDERED that Defendant TUTOR's motion for summary judgment as to Labor Law § 241(6) is GRANTED as to Industrial Code §§ 23-1.15 and 23-2.1(b) only and Plaintiff's § 241(6) claim as to Industrial Code §§ 23-1.15 and 23-2.1(b) only as against Defendant TUTOR is DISMISSED; and it is further

ORDERED that Defendant TUTOR's motion for summary judgment as to Plaintiff's Labor Law § 241(6) is DENIED as to Industrial Code §§ §§ 23-1.7(e) and 23-1.30; and it is further

ORDERED that Defendant TUTOR's motion for summary judgment as to Labor Law § 200 and common law negligence is DENIED.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.