Brown v City of New York
2023 NY Slip Op 31849(U)
June 1, 2023
Supreme Court, New York County
Docket Number: Index No. 152070/2019
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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INDEX NO. 152070/2019

ALEX BROWN,

MOTION SEQ. NO. 004

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, NEW YORK CITY DEPARTMENT OF EDUCATION, URBAN AMERICAN MANAGEMENT CORPORATION, and TOWER ROAD CONSTRUCTION, LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

In this Labor Law action, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment against defendants New York City Educational Construction Fund (NYCECF), Urban American Management Corporation (UAMC), BSREP UA 3333 Broadway LLC (BSREP), and UAB Property Management LLC (UAB) on the issue of liability regarding his Labor Law §§ 200 and 241(6) claims and common-law negligence claim. NYCECF, UAMC, BSREP, UAB and defendant Tower Road Construction, LLC (Tower) (collectively, defendants)[1] oppose, and cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

[1] Defendants New York City Housing Authority and New York City Department of Education are no longer in the action (Doc No. 73).

I. Factual and Procedural Background

This case arises from an incident on June 4, 2018, in which plaintiff was allegedly injured when he fell after slipping on stairs inside a building located at 3333 Broadway in Manhattan (the premises) (Doc No. 83). Plaintiff commenced the instant action against NYCECF, UAMC, and Tower, among others, in February 2019 alleging violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 83). NYCECF, UAMC, and Tower joined issue by their answer dated April 25, 2019, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 84).

In July 2021, the parties stipulated to join this action for discovery and trial with an action commenced by plaintiff against BSREP and UAB bearing index No. 154063/2021, which this Court so-ordered (Doc No. 73). In that action, plaintiff alleged common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 2).

Plaintiff moves for partial summary judgment against NYCECF, UAMC, BSREP, and UAB on the issue of liability regarding its claims under Labor Law §§ 200 and 241(6) and common law negligence (Doc No. 78). Defendants oppose, and cross-move for summary dismissal of all of plaintiffs' claims in the two actions (Doc No. 104).

Relevant Documents

In support of his motion, plaintiff submitted a lease agreement and assignment. The lease agreement provided that the premises were sold from nonparty Riverside Park Community (Stage 1), Inc. to nonparty Riverside Park Community, LLC (Riverside), which then leased the premises to NYCECF (Doc No. 93). The lease was then assigned to BSREP by Riverside (Doc No. 95).

In support of their cross-motion, defendants submitted a management agreement between BSREP and UAB, which identifies BSREP as the property owner, provides that UAB is "the

exclusive property manager" for the premises and is responsible for maintaining them, and designates UAB as an independent contractor (Doc No. 121).

Deposition Testimony of Plaintiff (NYSCEF Doc No. 86)

At his deposition, plaintiff testified that, on the day of the incident, he was employed by nonparty Verizon and was dispatched with a coworker to install fiber optic cables at an apartment on the second floor of the premises, which was the only unit receiving the installation. The apartment owner or tenant was the person who had hired Verizon to perform the installation. In describing the installation procedure, plaintiff explained that sometimes small holes were drilled to help route cables down to a central junction in a different area of a building, but such drilling was not always required.

Upon arrival, plaintiff did not notice any construction work occurring on the premises, and he and his coworker took the elevator to the second floor. After they reached the customer's apartment, he realized that a crucial piece of equipment was left in the truck and went to retrieve it. As plaintiff stepped into a nearby stairwell, which he described as dimly lit, he slipped on "something wet" and fell down one flight of steps to the ground level where he saw a wet floor warning sign. Before he fell, plaintiff was looking straight ahead, walking at a normal pace, and did not see the wet substance before he fell because it had no color or odor. As plaintiff proceeded to the security office to file an accident report, he noticed a man with a mop and pail nearby. However, neither that man nor plaintiff's coworker witnessed the accident. Plaintiff completed an accident report with a building manager and continued working the rest of the day.

Deposition Testimony of Defendants (NYSCEF Doc No. 87)

A porter employed by UAMC, testifying on behalf of defendants, stated that the premises are a residential building. He was unaware of plaintiff's accident and could not recall whether he

was on the premises that day. The porter was one of approximately 20 porters who were responsible for various cleaning and maintenance duties, and he was specifically responsible for cleaning stairwells and hallways in three of the five towers located at the premises, although he also sometimes worked in the other two towers.

The porter testified that there was no formal procedure, policy, or schedule for cleaning, but stairwells were cleaned once per day, and he was taught the correct procedure to use when he first started with UAMC. Stairwells were cleaned with a mop and a solution containing water mixed with scented odor control detergent, and once mopping had ended, he would place a yellow warning sign at the bottom of the stairs and wait 15 minutes for the stairs to dry, although he sometimes left the area earlier. The cleaning process differed based on the individual—he would only place a warning sign at the bottom of the steps, whereas other porters would place one at the top and bottom. Before removing the sign, he would inspect the area to make sure it was dry.

II. Legal Analysis and Conclusions

Plaintiff's Labor Law § 240(1) Claim

Defendants contend that plaintiff's Labor Law § 240(1) claim must be dismissed because he fell on a permanent staircase, which is not covered under the statute. Plaintiff argues in opposition that dismissal is inappropriate because permanent staircases may be covered by the statute when they are the "sole means of access to and from a work area," which he alleges was the case here.[2]

The First Department case of *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430 (1st Dept 2007), is instructive on this issue. There, a Verizon employee brought a cause of action under

[2] Plaintiff's contentions are only made in opposition to defendants' cross-motion for summary dismissal of the complaint; in his motion for partial summary judgment, he does not seek judgment as a matter of law on the issue of liability under Labor Law § 240(1).

Labor Law § 240(1) after she was allegedly injured while "provid[ing] new digital telephone service to a tenant in [a] building" owned by the defendants (44 AD3d at 431). The First Department dismissed the section 240(1) claim after finding the plaintiff "[wa]s not entitled to any relief under [the statute] since she was not engaged in construction-related activity" (*id.* at 432). Moreover, it was determined that "[s]plicing a fiber into preexisting fiber optic cable for one tenant in a building d[id] not effect a significant physical change to the configuration or composition of the building or structure and d[id] not amount to an alteration under [the statute]" (*id.* [internal quotation marks and citations omitted]).

The holding in *Rhodes-Evans* aligns with several other cases within the First Department where Labor Law § 240(1) claims brought by cable television/internet provider technicians injured on the job were dismissed for the reasons articulated in *Rhodes-Evans* (*see Spencer v 322 Partners, L.L.C.*, 170 AD3d 415, 416 [1st Dept 2019] [technician injured after falling off ladder during service call to customer residence "not entitled to relief under Labor Law § 240(1) since he was not engaged in construction-related activity at the time of his accident"]; *Sarigul v New York Tel. Co.*, 4 AD3d 168, 170 [1st Dept 2004] [dismissing Labor Law § 240(1) claim because plaintiff called to building by tenant and defendant "did not hire or even know" plaintiff retained to perform work], *lv denied* 3 NY3d 606 [2004]; *Abbatiello v Lancaster Studio Assoc.*, 307 AD2d 788, 789 [1st Dept 2003] [similar], *affd* 3 NY3d 46 [2004]; *Ceballos v Kaufman*, 249 AD2d 40, 40 [1st Dept 1998] [similar]).

It is undisputed that plaintiff and his coworker went to the premises to install fiber optic cabling in a single apartment, which required them to run wires from the apartment down to the basement. Although plaintiff testified that drilling into the walls of the building was sometimes required, the work at issue for the customer's apartment was substantially similar, if not identical,

to the work performed by the plaintiff in *Rhodes-Evans*, which was found to fall outside the protection of Labor Law § 240(1) because it was not "construction-related activity" (*Rhodes-Evans*, 44 AD3d at 432; *see Spencer*, 170 AD3d at 416). Similarly, here, plaintiff's Labor Law § 240(1) claim must be dismissed (*see Spencer*, 170 AD3d at 416; *Rhodes-Evans*, 44 AD3d at 432, *Abbatiello*, 307 AD2d at 789; *Sarigul*, 4 AD3d at 170; *Ceballos*, 249 AD2d at 40).

Plaintiff's Labor Law § 241(6) Claim

Plaintiff contends that he made a prima facie showing that defendants violated Labor Law § 241(6) and Industrial Code (12 NYCRR) § 23-1.7(d) because the water on the stairs constituted a slipping hazard. Defendants argue that the Labor Law § 241(6) claim must be dismissed because the stairwell was not a passageway covered by the statute. They contend further that the statute is inapplicable to plaintiff because he was authorized to be on the premises pursuant to Public Service Law § 219 and the work he was to perform did not constitute an alteration under the Labor Law.

Plaintiff relies heavily on the First Department's decision in *Luciano v New York City Hous. Auth.*, 157 AD3d 617 (1st Dept 2018), in arguing that he has made the requisite prima facie showing. There, it was determined that the plaintiff "establishe[d] a prima facie violation of Labor Law § 241(6) predicated on [Industrial Code (12 NYCRR) § 23-1.7(d)] ('Slipping hazards')" based on his testimony that "he slipped on water on the floor of [a] stairwell where he was working" to run cable (*Luciano*, 157 AD3d at 617). However, *Luciano* never addressed the issue of whether the plaintiff was a worker covered under Labor Law, unlike other First Department cases.

"To be entitled to the protection of [the statute], a worker must establish that the injury occurred in an area in which construction, excavation[,] or demolition work is being performed" (*Rhodes-Evans*, 44 AD3d at 433 [internal quotation marks and citation omitted]; *see Sarigul*, 4

AD3d at 170). Installing fiber optic cabling for a single apartment is not "part of a construction, demolition[,] or excavation of a structure," and it does not "affect[] the structural integrity of the building or structure," nor was it "an integral part of the construction of a building or structure" (*Rhodes-Evans*, 44 AD3d at 434 [internal quotation marks and citation omitted]; *see Sarigul*, 4 AD3d at 170). "Thus, there is no merit to plaintiff's [Labor Law § 241(6)] claim" and it must be dismissed (*Rhodes-Evans*, 44 AD3d at 434 [dismissing Labor Law § 241(6) claim of cable television/internet provider technician plaintiff because statute not applicable]; *see Sarigul*, 4 AD3d at 170 [affirming dismissal of Labor Law § 241(6) claim because statute not applicable]).

Plaintiff's Labor Law § 200 Claim

Plaintiff contends that he made a prima facie showing that UAB either controlled or supervised his work, and had sufficient notice of the allegedly hazardous condition, but failed to warn him about it.[3] Defendants contend that plaintiff's Labor Law § 200 claims must be dismissed because they had no notice of any allegedly hazardous condition.

Labor Law § 200 codified the common-law duty owed by an owner or general contractor "to provide *construction site* workers with a safe place to work" (*Comes v New York State Elec. & Gas. Corp.*, 82 NY2d 876, 877 [1993] [emphasis added]), by "maintain[ing] a safe *construction site*" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] [emphasis added]). Thus, the statute "covers all places to which the Labor Law applies" and "requires those places to be so constructed, equipped, arranged, operated[,] and conducted as to provide reasonable and adequate protection to the lives, health[,] and safety of employees" (*Jock v Fien*, 80 NY2d 965, 967 [1992] [internal quotations marks, brackets, and citations omitted]).

[3] Between his complaint in this action and his complaint in the consolidated action, plaintiff asserted Labor Law § 200 claims against every named defendant. However, his motion for partial summary judgment only argues that such relief should be granted against UAB. He makes no mention of the other Labor Law § 200 claims against the remaining named defendants. Defendants seek to dismiss all of plaintiff's Labor Law § 200 claims.

Here, as the premises are not a construction site covered by Labor Law, and as plaintiff is not a worker entitled to Labor Law protection, plaintiff's Labor Law § 200 claim must be dismissed.

Plaintiff's Common-Law Negligence Claims

Plaintiff's Request for Partial Summary Judgment Against UAB

Plaintiff contends that he made a prima facie showing that UAB was responsible for cleaning the stairs, and that it created the allegedly hazardous condition, failed to remedy it, and failed to warn him that it existed.[4]

Defendants argue in opposition that they did not have notice of any allegedly hazardous condition.

"To establish a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the condition that caused the accident or had actual or constructive notice of it" (*Mullin v 100 Church LLC*, 12 AD3d 263, 264 [1st Dept 2004] [citations omitted]). "To constitute 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'" (*Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 107 [1st Dept 2003], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Although it is unclear on what wet substance plaintiff slipped, he argues that it was water or solution remaining on the steps after they had been recently mopped. Defendants, on the other hand, appear to argue that the fluid was caused by something other than mopping.

First, plaintiff fails to make a prima facie showing that the substance was caused by mopping performed by UAB. His testimony that he "saw a janitor with a mop and pail . . . around

[4] Plaintiff does not argue that partial summary judgment should be granted against BSREP, even though he also asserted a common-law negligence claim against it.

the corner of the hallway" near the stairs is insufficient (*Sanchez v Delgado Travel Agency*, 279 AD2d 623, 624 [2d Dept 2001] [finding "plaintiff's deposition testimony that she had observed a man holding a mop in a bucket near the spot where she fell" and "did not see him mopping anywhere" was insufficient to demonstrate question of fact about defendants' creation of allegedly hazardous condition], *lv denied* 96 NY2d 711 [2001]). Additionally, his testimony that the wet substance had no odor is controverted by the porter's testimony that the stairs were always mopped with a water-based solution that smelled of "lavender and pine." Although he presented photographic and testimonial evidence of a wet floor sign present at the bottom of the stairs, that fact alone does not eliminate all triable questions of fact and/or establish that UAB mopped the stairs before his accident (*see Cortes v Ventura*, 188 AD3d 487, 488 [1st Dept 2020] [denying summary judgment because plaintiff failed to eliminate triable questions of fact]).

To the extent that the stairs could have been wet from a foreign substance, i.e., a spilled drink or leaky garbage bag, plaintiff also fails to make a prima facie showing that UAB had actual or constructive notice of it. There is no evidence of prior complaints about the stairs being wet or how long the foreign substance was present on the steps before plaintiff's incident, and no evidence that the wet substance was a recurring hazardous condition. Therefore, plaintiff has not shown that the allegedly hazardous condition was visible and apparent for a sufficient length of time for UAB to have discovered and remedied it (*see Gordon*, 67 NY2d at 837-838; *Franco v D'Agostino Supermarkets, Inc.*, 34 AD3d 328, 329 [1st Dept 2006]).

Given plaintiff's failure to meet his initial burden, there is no need to consider the sufficiency of defendants' opposition papers (*see Castellanos v 57-115 Assoc., L.P.*, 211 AD3d 459, 460 [1st Dept 2022]).

Defendants' Request for Summary Dismissal of Plaintiff's Common-Law Negligence Claims

Defendants contend that plaintiff's common-law negligence claims against BSREP must be dismissed because it cannot be liable for any alleged negligence of an independent contractor. They contend further that plaintiff's common-law negligence claims against UAB must be dismissed because it owed no duty to him.[5]

In opposition, plaintiff reiterates the arguments he made in his motion seeking partial summary judgment against UAB regarding notice, failure to remedy, and failure to warn. However, he does not address defendants' contentions that the claims against BSREP must be dismissed.

"[A] property owner who engages an independent contractor ordinarily is not liable for the latter's negligent acts, unless certain exceptions . . . are present. Such exceptions include negligence in hiring the independent contractor, where an independent contractor is hired to perform inherently dangerous work[,] or where the owner is subject to a nondelegable duty" (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 97 [1st Dept 2001] [citations omitted]; *see Maristany v Patient Support Servs.*, 264 AD2d 302, 302-304 [1st Dept 1999]).

Defendants have demonstrated that none of the exceptions are applicable here. There is no indication of negligent hiring, inherently dangerous work required to maintain the premises, or a nondelegable duty (*see Burgdoerfer v CLK/HP 90 Merrick LLC*, 170 AD3d 427, 428 [1st Dept 2019] [granting summary dismissal to defendant property owner because plaintiff's theories of liability did not include any identified exceptions]; *cf. LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st Dept 2008] [denying summary dismissal to defendant property owner and

[5] Defendants also argue that plaintiff's common-law negligence claims against NYCECF, UAMC, and Tower must be dismissed, however, a review of plaintiff's complaints reveals that he only asserted common-law negligence claims against BSREP and UAB. Thus, there are no claims against NYCECF, UAMC, and Tower to dismiss.

management company because building being open to public created "nondelegable duty to provide the public . . . with reasonably safe means of ingress and egress"]). Thus, they have made a prima facie showing that BSREP cannot be held liable for any alleged negligence by an independent contractor such as UAB.

Plaintiff fails to raise a triable question of fact regarding these exceptions and thus, his common-law negligence claim against BSREP must be dismissed (*see Burgdoerfer*, 170 AD3d at 428).

With respect to plaintiff's claims against UAB, however, defendants fail to make a prima facie showing that UAB lacked actual or constructive notice because they fail to submit "evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before . . . plaintiff fell" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). Although defendants' porter testified that a cleaning policy existed, he could not explain what it required, whether it was followed on the day of plaintiff's accident, or whether the area had been inspected (*see Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016] [denying summary dismissal because defendant's witness "failed to aver as to when (defendant's) employees last cleaned or inspected the accident location before the incident occurred"]; *cf. Rodriguez v New York City Hous. Auth.*, 205 AD3d 631, 632 [1st Dept 2022] [finding defendant satisfied prima facie burden by providing testimonial evidence of cleaning/inspection schedule and testimony that allegedly dangerous condition not present when last inspected]).

In any event, even assuming defendants made a prima facie showing, "the presence of at least one warning sign is sufficient evidence to raise an issue of fact as to whether a defendant had actual notice of a hazardous condition" (*Geffs v City of New York*, 105 AD3d 681, 681-682 [1st

Dept 2013]). Here, plaintiff presented evidence that a warning sign was placed at the bottom of the stairs upon which he slipped. Therefore, questions of fact exist that prevent summary dismissal of plaintiff's common-law negligence claim against UAB (*see id.*).

The parties remaining contentions are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law §§ 200 and 241(6) claims and his common-law negligence claims is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is decided as follows:

(1) motion granted as to plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims, and these claims are severed and dismissed;

(2) motion granted as to plaintiff's common-law negligence claims as against BSREP, and this claim is severed and dismissed;

(3) motion denied as to plaintiff's common-law negligence claims as against UAB;

and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on August 30, 2023, at 9:30 a.m.

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6/1/2023
DATE

DAVID B. COHEN, J.S.C.

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