

Vann v Young Men's Christian Assn. of Greater N.Y.
2010 NY Slip Op 31212(U)
May 13, 2010
Supreme Court, New York County
Docket Number: 118523/2006
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

SALIANN SCARPULLA J.S.C.

PART 19

Index Number : 118523/2006

VANN, ALBERT SCOTT

vs

YOUNG MEN'S CHRISTIAN

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/13/10

SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
ALBERT SCOTT VANN,

Plaintiff,

Index No. 118523/2006

-against-

YOUNG MEN'S CHRISTIAN ASSOCIATION
OF GREATER NEW YORK,

Defendant.

DECISION AND ORDER

-----X
YOUNG MEN'S CHRISTIAN ASSOCIATION
OF GREATER NEW YORK,

Third-Party Plaintiff,

-against-

SIGNATURE CONSTRUCTION GROUP, INC.,

Third-Party Defendant.

-----X
HON. SALIANN SCARPULLA, J.:

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 in the above captioned action are consolidated for disposition.

In motion sequence number 001, defendant and third-party plaintiff, Young Men's Christian Association of Greater New York ("YMCA"), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as to plaintiff's claims based upon negligence and Labor Law § 200 and pursuant to CPLR 3212, for partial summary judgment on its third-party complaint, declaring that third-party defendant Signature

Construction Group, Inc. (“Signature”) is contractually obligated to defend and indemnify YMCA and seeking damages for breach of contract to procure liability insurance. In motion sequence number 002, plaintiff Albert Scott Vann (“Vann”) moves, pursuant to CPLR 3212, for summary judgment as to liability on his third cause of action.

Vann alleges that on June 29, 2006, he sustained serious personal injuries when he fell off of a 12 to 18-foot high, cinder-block wall at a construction site located at the YMCA at 1121 Bedford Avenue, Brooklyn, New York. At the time of the accident, Vann was employed as a laborer by Signature.

Pursuant to an contract dated October 25, 2005, between the YMCA and Signature (“the Contract”), Signature had undertaken to construct a new, \$6.5 million, YMCA fitness and community center at 1121 Bedford Avenue, Brooklyn, New York. The new building was going to be a two-story facility, separate from, but adjacent to another building owned by the YMCA, known as the School Authority Building or the SCA, at 1119 Bedford Avenue, Brooklyn, New York. On the date of Vann’s accident, Signature had only two employees at the site, but there were a number of sub-contractors working there.

According to Vann’s deposition testimony, on the day of the accident, he was directed by his supervisor, Moeed Malick (“Malick”), who was also an employee of Signature, to remove aluminum siding from the adjacent SCA building at 1119 Bedford Avenue. Between the building under construction and the adjacent building, there was a

cinder block wall with a concrete stairwell on one side and dirt on the other. According to Vann, upon receiving these directions from Malick, he complained that it was not safe and asked for a scaffold. Vann states that Malick told him to ask the bricklayers if he could use their scaffold, and that he did so, but that he was told by the bricklayers that they did not have one they could spare. Vann testified that he then went back to Malick and said that there was no scaffold and that it was not safe, but that Malick called the owner of Signature, Dan Tomai, and relayed the message that "You do it or go home." When asked if Signature had any safety lines, safety belts or ropes at the work site, Vann replied that it did not.

Vann testified that he used a ladder from inside the building under construction to access the second floor of that building, and from that point, was able to get to the cinder block wall. Thereafter, in order to remove the siding, Vann testified that he was required to stand on the wall, which was six inches wide, and, using a ratchet, reach around the corner of the building and remove the rivets which were holding the siding in place. Vann testified that he was "not comfortable," so he attempted to turn around to go back to the new building, but when he tried to make a 180-degree turn on the wall to go back, he lost his balance and fell off of the wall.

Vann commenced an action against YMCA in December 2006, alleging causes of action for negligence (first cause of action) and violations of New York Labor Law, §§ 200 (second cause of action), 240 (third cause of action) and 241 (6) (fourth cause of

action). By letter dated April 23, 2007, YMCA tendered its defense and indemnity to Signature pursuant to the Contract. Signature never responded to the letter. YMCA also directly contacted Signature's insurer, Arch Speciality Insurance Company ("Arch Insurance"), which denied coverage on the grounds that Signature's insurance policy did not contain a blanket endorsement and that the YMCA may have had independent negligence.

In June 2007, YMCA commenced a third-party action against Signature for contractual indemnification (first cause of action), breach of contract for failure to obtain liability insurance naming YMCA as an insured (second cause of action), and common-law indemnification (third cause of action).

Motion Sequence 001

In support of its motion for summary judgment dismissing Vann's negligence and Labor Law § 200 claims against it, YMCA contends that the deposition testimony indicates that it did not have anyone present at the work site who either instructed or supervised Vann in the performance of his work. Signature opposes the motion on the ground that there is an issue of fact as to whether YMCA exercised control over the work site.

New York Labor Law Section 200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. *Comes v New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993). It is well

settled that, in order to prevail on a claim based upon a failure to maintain a safe construction site, the plaintiff must demonstrate that the defendant had the authority to “control the activity bringing about the injury to enable it to avoid or correct an unsafe condition,” *Rizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998) (internal quotation marks and citation omitted); *Hughes v Tishman Constr. Corp.*, 40 A.D.3d 305, 306 (1st Dept 2007); *Singh v Black Diamonds LLC*, 24 A.D.3d 138, 140 (1st Dept 2005); *Dalanna v City of New York*, 308 A.D.2d 400 (1st Dept 2003); *Reilly v Newireen Assoc.*, 303 A.D.2d 214, 220-221 (1st Dept), *lv denied* 100 NY2d 508 (2003); *Buccini v 1568 Broadway Assoc.*, 250 A.D.2d 466, 468 (1st Dept 1998).

Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor’s methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. *Hughes v Tishman Constr. Corp.*, 40 A.D.3d at 306. Further, “[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor [or owner] controlled *the manner in which the plaintiff performed his or her work . . .*” *Id.*

Here, there is no evidence to suggest that the YMCA controlled the manner in which Signature’s employees performed their work. Vann testified that YMCA employees had never given him instructions on what to do at the work site. Daniel Tomai, Signature’s president, testified that John Rappaport, executive director of the

YMCA, was at the construction site on a daily basis but he did not testify that the YMCA exercised any supervisory control of the manner in which Signature employees or subcontractors performed their work. Further, Tomai testified that YMCA had stopped work only because of noise, dust or interference with the SCA building operations.

The mere presence of a YMCA employee at the construction site does not raise an issue of fact as to its control over the site. The fact that an owner or contractor exercises general duties to oversee work and to ensure compliance with safety regulations does not raise a triable issue of fact as to whether it was negligent. *Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 A.D.3d 763 (2d Dept 2009); see also *Picchione v Sweet Constr. Corp.*, 60 A.D.3d 510 (1st Dept 2009). Once a *prima facie* case has been made that the plaintiff's injuries, if any, were sustained as a result of the methods or materials used, rather than as a result of a dangerous condition at the site, and that the owner did not exercise supervisory control over the work, the owner is entitled to a conditional order of summary judgment against the contractor overseeing the work. See *Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 A.D.3d at 763.

Vann also opposes YMCA's motion, arguing that there is an issue of fact as to whether YMCA exercised control over the construction site. Vann contends that, although he was directed by Signature's superintendent Malick to remove the aluminum siding, the initial directive came from "above Signature at the meetings." Therefore, Vann reasons, because only the YMCA was above Signature, the directive to remove the

siding must have come from the YMCA, and therefore, there is an issue of fact as to whether the YMCA was negligent.

Here, again, as there is no evidence to suggest that Vann's injuries were a result of a dangerous or defective condition of the work place, and there is no evidence that a the YMCA possessed the requisite control of the means and methods of the work, Vann's claims based upon Labor Law § 200 and common-law negligence must be dismissed. *See Collado v City of New York*, ___ AD3d ___, 2010 Slip Op 02852 (1st Dept 2010). For these reasons, Vann's claims against YMCA based upon negligence and Labor Law § 200 are dismissed.

YMCA also seeks summary judgment on its second cause of action against Signature for breach of contract to procure liability insurance. The Contract between YMCA and Signature explicitly sets forth, in paragraph 11.1, that the Contractor [Signature] was required to purchase liability insurance naming the Owner [YMCA] as an additional insured.

Paragraph 11.1 provides, in relevant part, as follows:

§ 11.1 Prior to the commencement of the Work and prior to the performance of any services hereunder, the Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, in addition to causing each of the Subcontractors to obtain, such insurance, - consistent with the provisions of Exhibit H annexed to the Agreement, as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under

the Contract and for which the Contractor may be legally liable . . .

(Hann Aff., Ex. E). Exhibit H includes a Certificate of Insurance which names YMCA of Greater New York and Bedford YMCA as an additional insured. As noted above, Signature's insurer, Arch Insurance, refused coverage, claiming that Signature's policy did not contain a blanket endorsement. Nonetheless, this Certificate is sufficient evidence of Signature's obligation to procure insurance and, given that Signature has not presented any evidence to indicate that it did, in fact, procure coverage, YMCA has demonstrated its entitlement to summary judgment on its second cause of action. *Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 A.D.3d at 763.

YMCA further seeks summary judgment on its first cause of action for contractual indemnification pursuant to Paragraph 3.18 of the Contract. That section provides, in part, as follows:

§ 3.18 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Section 11.3, *the Contractor shall indemnify, defend and hold harmless the Owner . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by, in whole or in part, the negligent acts or omissions, or breach or willful misconduct of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by the concurrent action or passive negligence*

or vicarious or strict liability of, a party indemnified hereunder

(*id.*) (emphasis added).

Signature opposes YMCA's motion for summary judgment on the ground that the above provision provides that Signature will indemnify YMCA only to the extent that the damages complained of were caused by Signature's negligent acts or willful misconduct. Signature reasons that YMCA's motion is premature because liability has not been determined, and should therefore be denied. Inasmuch as this court has determined that YMCA was free from any negligence, and further, that it is undisputed that Signature controlled the manner in which Vann performed his work, summary judgment on the issue of YMCA's claim for indemnification is not premature. *See Picchione v Sweet Constr. Corp.*, 60 A.D.3d 510, *supra.*; *Mejia v Levenbaum*, 57 A.D.3d 216 (1st Dept 2008).

Motion Sequence 002

Vann moves for summary judgment on his claim based upon New York State Labor Law § 240 (1).

YMCA asserts that Vann's motion is procedurally defective in that the rules of this court provide that motions for summary judgment must be brought within 60 days after filing the note of issue, but Vann moved for summary judgment approximately 116 days after the note of issue was filed. However, the Local Rules of Court for the First Judicial District – New York County allow a party to move for summary judgment within 120

days after filing a note of issue. Rule 17 provides that “[u]nless otherwise provided in a particular case in the preliminary conference order or other directive of the Justice assigned, a motion for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court for good cause shown” (NY R NY CTY J RUL Rule 17). Here, the Court did not provide for a shortened date for summary judgment motions, thus Vann’s motion is timely.

New York Labor Law, section 240 (1), known as the “Scaffold Law,” provides that

all contractors and owners . . . in the erection, demolition, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility” *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993), *citing Zimmer v Chemung County Performing Arts*, 65 N.Y.2d 513, 520 (1985). “The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers ‘are scarcely in a position to protect themselves from accident’” *Cherry v Time Warner, Inc.*, 66 A.D.3d 233, 235 (1st Dept 2009) *quoting Zimmer v Chemung Co. Perf.*

Arts, 65 N.Y.2d at 520. However, a defendant cannot be held liable under Labor Law § 240 (1) where the worker's actions were the "sole proximate cause" of his injuries. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 290 (2003).

On a motion for summary judgment, once the plaintiff has made a *prima facie* showing that the contractor violated Labor Law § 240 (1) by failing to furnish adequate safety devices, the burden then shifts to the contractor to raise a question of fact as to whether plaintiff's own actions were the "sole proximate cause" of his injuries. *Gallagher v New York Post*, 14 N.Y.3d 83 (2010).

Here, Vann has made a *prima facie* showing that his injuries were proximately caused by the defendants' failure to provide him with adequate safety equipment while performing work on top of a cinder-block wall.

In opposition to the motion, Signature asserts that there is an issue of fact as to whether Vann was provided with safety equipment, but chose not to use it. Signature points to Malick's testimony, which, it alleges, demonstrates that there were extension ladders all around the job site for Vann to use while performing the task of removing aluminum siding from the adjacent SCA building, and yet he failed to use them.

Malick's testimony indicates that the ladders were secured at specific sites, and that Vann was expected to use a ladder to access the second floor of the building under construction, and from there, the wall upon which he was standing. There is no indication that Vann was expected to move any of the extension ladders, which were secured at

specific sites, and then use an extension ladder to access the SCA building. Malick testified as follows:

Q. And did you tell him specifically to grab an extension ladder or use an extension ladder to access that wall?

A. They were tied up or they were up.

Q. They were up?

A. Yeah, the ladders were already couple of locations—

Q. Were they up in the area he needed to get to remove the siding, the two levels?

A. I don't remember exactly.

Q. Did you give him a specific instruction to use a specific extension ladder?

A. No, no.

Q. Did you give him a specific instruction to use an extension ladder?

A. No. Told him to go up the second floor. That was the way everybody went up there. The whole job.

Q. You didn't tell him how really to get up?

A. I don't think I would need to. It's just a lad – just go up the ladders, there's two or three locations . . .

Q. Sir, with respect to the use of the ladder and the instruction to use an extension ladder to get up on the wall to remove the siding, where was the ladder situated that he was supposed to use?

A. One tied up on this side –what side is this?–Gates, Gates Avenue side and on the Monroe side to get to the second floor.

Q. Were they locked or secured in some manner?

A. Yeah, they were tied down, yeah . . .

(Malick Dep. at 52 - 55) (emphasis added).

Malick's testimony continued:

Q. Now, was it your understanding that Mr. Vann was to take that extension ladder and lean it up against the wall, the [cinder block] wall that's between the two buildings, is that how he was to access the wall?

A. He didn't move around the extension ladder –

Q. It was there?

A. Yeah. Like I said, they're on the job site tied up daily.

Q. He was to climb up that extension ladder –

A. Yeah, climb up–

Q. –and get onto the CMU wall?

A. No, onto the decking

Q. Onto the decking.

A. Yeah.

Q. And the decking is the flooring to the second floor?

A. Yes.

(*id.* at 71 -72).

In addition, Signature's president, Daniel Tomai testified that he did not believe that Vann was given any safety equipment when he was asked to perform height related tasks:

Q. When Mr. Vann was asked to perform tasks on the job which were height related was he given any safety equipment?

A. I don't believe so.

(Tomai Dep. at 30).

Here, Malick's testimony is that he expected Vann to use a ladder to get to the second floor decking and from there to access the cinder block wall, which he could stand on to remove the siding of the adjacent building. Defendants have not presented any evidence that there were ladders available for Vann's use, or even that he would have been able to access the adjacent building with an extension ladder. They have therefore failed to raise an issue of fact as to Vann's Labor Law § 240 (1) claim.

Accordingly, based upon the foregoing it is

ORDERED that as to motion sequence number 001, that part of the motion by defendant/third-party plaintiff Young Men's Christian Association of Greater New York for summary judgment dismissing the complaint as to plaintiff's claims based upon negligence and Labor Law § 200 is granted, and plaintiff's first and second causes of action are dismissed; and it is further

ORDERED that the part of the motion by defendant/third-party Young Men's Christian Association of Greater New York for summary judgment on its first and second causes of action in the third-party complaint for contractual indemnification and breach of contract is granted; and it is further

ORDERED that a hearing shall be held to determine Young Men's Christian Association of Greater New York's damages, including costs and attorney's fees, incurred to date and through the conclusion of this case; and it is further

ORDERED that as to motion sequence 002, plaintiff Albert Vann's motion for partial summary judgment on the issue of liability on his third cause of action pursuant to Labor Law § 240 (1) is granted, with the amount of damages to be determined at trial; and it is further

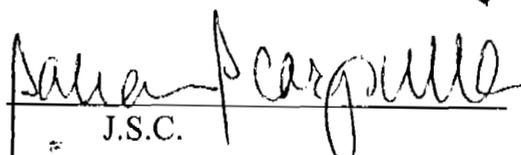
ORDERED that the remainder of the action shall continue

This constitutes the decision and order of the court.

Dated: New York, New York
May 13, 2010

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.
SALIANN SCARPULLA
J.S.C.