Edwards v C & D Unlimited, Inc.
2001 NY Slip Op 30001(U)
July 3, 2001
Supreme Court, Suffolk County
Docket Number: 0023558/1998
Judge: Donald Kitson
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SHORT FORM ORDER

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NO. 23558/98

SUPREME COURT - STATE OF NEW YORK
PART 29 SUFFOLK COUNTY

Present:
Hon DONALD KITSON
Justice

MOTION DATE: 05/18/01
SUBMIT DATE: 05/24/01
MOTION NO.: 009 MD

x

MORGAN EDWARDS and KRISTINE EDWARDS

Plaintiffs,

- against -

C&D UNLIMITED, INC., GOLIATH STONE SALES, LTD. and ANTORINO SEWER & DRAIN, INC.,

Defendants.

x

PLTF'S/PET'S ATTY:
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NEW YORK, NY 10007

DEFT'S/RESP'S ATTY:
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NEW YORK, NY 10022

AHMUTY, DEMERS & McMANUS, ESQS
200 I.U. WILLETS ROAD
ALBERTSON, NY 11507

The Court in its deliberations herein has considered:
1. Notice of Motion and supporting papers;
2. Affirmation in Opposition;
3. Reply Affirmation.

Remaining defendant, C&D UNLIMITED, INC., moves for leave to reargue plaintiffs' cross motion for summary judgment pursuant to Labor Law §241(6) upon the basis that this Court overlooked and/or misapprehended matters of fact and in law. Upon said reargument, defendant seeks an order that plaintiffs' cross-motion for summary judgment pursuant to Labor Law §241(6) be denied.

Counsel argues that for summary judgment to be granted on violation of Labor Law §241(6) a violation of a provision of the Industrial Code must be established and then opines that once it has been alleged that a concrete section of the Code has been violated, it is the jury's province to determine whether the negligence of some party or participant caused plaintiff's injury. Counsel does not ask this Court to decide whether a specific provision of the Industrial Code has been violated. Counsel solely argues that it is for the jury to determine whether the negligence

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caused this plaintiff's injury. Counsel further claims that whether the plaintiff was comparatively negligent was an issue which should be presented to the jury. It is well-settled that negligence is an issue for the jury absent a finding that there are no triable issues of fact on a summary judgment motion when the opposition is required to lay bare its proof. **(see, Cohen v City of New York, 128 AD2d 748, 513 NYS2d 459 (2nd Dept., 1987))**

It is this defendant's contention that plaintiffs failed to meet their burden of proof as they did not establish the injured plaintiff's freedom from comparative negligence to warrant summary judgment. This defendant is relying upon the record before this Court in which it is undisputed that the injured plaintiff determined that as part of his supervisory capacity, he was to measure the depth of the hole. Upon measuring the hole, which was not shored, the injured plaintiff fell when the ground gave way and allegedly sustained the injuries at issue.

The only issue for reargument before this Court is whether contributory or comparative negligence is a defense which must be proven by the defendant and defendant did not meet its burden or whether the plaintiffs have the burden of proof to show a violation of the Industrial Code and freedom by the injured plaintiff of any contributory or comparative negligence on his part to obtain summary judgment on the claim pursuant to **Labor Law §241(6)**.

Defendant's motion for reargument is denied because the Court did not misapprehend or overlook any aspect of the law or facts. In the very case cited by this defendant, **Lorefice v Reckson Operating Partnership, L.P., 269 AD2d 572, 703 NYS2d 507 (2nd Dept., 2000)**, the Appellate Division, Second Department recently makes it clear that it is for the "owner or general contractor" to "raise any valid defense to the imposition of vicarious liability" under **Labor Law §241 (6)**, which defense would include "contributory and comparative negligence". **(see, Lorefice v Reckson, supra, page 573).**

The Court has reviewed the previous papers submitted by this defendant's counsel and finds nothing contained therein which met its burden of demonstrating a triable issue of fact on the defense of comparative and contributory negligence. The only issue this defendant's counsel argued was the fact that if violation of the Industrial Code were to be found, then the issue of negligence should go to the jury. At no time did this defendant argue the existence of contributory and comparative negligence as a defense, which was its burden.

The foregoing constitutes the ORDER of this Court.

DATE: July 3, 2001

J.S.C.