

Hassett v Celtic Holdings, LLC

2002 NY Slip Op 30091(U)

September 12, 2002

Supreme Court, New York County

Docket Number: 125499/00

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARILYN SHAFER
J.S.C. Justice

PART 36

Thomas Hasset

- v -

Celtic Holdings, LLC

INDEX NO.

125499/00

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

for summary judgment
denied pursuant to attached decision

SCANNED
1 SEP 23 2009

Dated: 9/12/02

MARILYN SHAFER
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESOLVED FULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; IAS PART 36**

THOMAS HASSETT,

Plaintiff,

INDEX NO.: 125499/00

DECISION/ORDER

-against-

**CELTIC HOLDINGS, LLC and TISHMAN
TECHNOLOGIES CORPORATION,**

Defendants.

-----X

MARILYN SHAFER, J.:

Plaintiff Thomas Hassett (Hassett) commenced this action seeking damages for personal injuries which he suffered on October 4, 2000, during the course of his employment as a construction worker at a building owned by Celtic Holdings, LLC (Celtic). Specifically, Hassett alleges that a metal grinder which he was using to remove excess re-bar from a construction form “kicked back” upon hitting an obstruction and deeply lacerated his left forearm. The company for whom Hassett was working at the time was a subcontractor of Tishman Technologies Corporation (Tishman), which had been hired as general contractor to perform work for a tenant of the subject premises, MCI Worldcom, Inc. Hassett’s complaint alleges that his injuries are the result of the negligence of co-defendants Celtic and Tishman. Celtic’s answer contains a cross claim against Tishman for complete indemnification under the common law. The instant motion seeks summary judgment on this cross claim. In opposition, Tishman avers that there are factual issues as to Celtic’s authority and control over the work site, and as to the role of Celtic’s negligence in Hassett’s injury. For the following reasons, Celtic’s motion is denied.

DISCUSSION

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is arguable or debatable. See, e.g., Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Stone v Goodson, 8 NY2d 8 (1960); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957). When seeking summary judgment, the movant bears the burden of proof. See, e.g., Nicholas DiMenna & Sons, Inc. v City of New York, 301 NY 118 (1950); Ramsammy v City of New York, 216 AD2d 234 (1st Dept 1995).

Here, Celtic alleges that it is entitled to summary judgment against Tishman on its cross claim for common-law indemnity. This cause of action exists between two parties where the first party is compelled by a court's judgment to answer in damages for the wrongful act or neglect of the second party. See, e.g., Margolin v New York Life Insurance Co., 32 NY2d 149 (1973). Celtic argues: 1) that it neither supervised nor controlled the work site where Hassett was injured; 2) that it was not negligent; 3) that Hassett's injury was due solely to Tishman's negligence; and 3) that under the common law, Celtic should not be required to bear the cost of said injury. Certainly the uncontroverted evidence reveals that Celtic had no employees or supervisors at the work site. See, Hassett Deposition, Exhibit D annexed to moving papers, at 37; Paradise Deposition, Exhibit E annexed to moving papers, at 22. However, Tishman argues that because Celtic's building manager would occasionally conduct "walkthroughs" of the work site, supervision and control thereof should be imputed to Celtic. This argument (which is legal, not factual) ignores prior holdings that the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability [emphasis added]." Brown v New York City Economic Development Corp., 234 AD2d 33 (1st Dept 1996). Thus, the court finds that, from the evidence

before it, Celtic has shown that there is no issue of fact that it either supervised or controlled the subject work site. However, although this finding may support the first three points of Celtic's argument, it does not end the inquiry. In order to prevail on this motion, Celtic must also show that there is no triable issue regarding whether it will be compelled to answer in damages for Tishman's tort.

Celtic's argument is premised on the assumption that it will be held vicariously liable to Hassett for Tishman's negligence by virtue of the non-delegable duty to workers imposed on property owners by New York's Labor Law.¹ Specifically, the complaint (as amplified in the Bill of Particulars) pleads that the co-defendants negligently violated Labor Law § 200, § 240(1), § 241-a, and § 241(6). See, Exhibit C annexed to moving papers, ¶ 3(b). However, it is not at all clear that Celtic can be found liable to Hassett under any of these provisions.

An owner will not be held liable under Labor Law § 200 where it did not exercise supervision or control at the work site where the alleged injury occurred. See. e.g., Comes v New York State Electric and Gas Corp., 82 NY2d 876 (1993); Lombardi v Stout, 80 NY2d 290 (1992). As just stated, the evidence now before the court is insufficient to raise an issue of fact that Celtic exercised either supervision or control at the subject work site. Accordingly, based upon this evidence, the court could not find liable to Hassett under Labor Law § 200.

Liability under Labor Law § 241(6) requires that a plaintiff demonstrate that his injury was caused by a violation of a specific safety regulation which was related to the plaintiffs work and which imposed an affirmative duty upon the project owner. See. e.g., Ross v Curtis-Palmer Hydro-

¹ Although the case has not yet been tried, Celtic may move for a conditional order of indemnification. See. e.g., Dickstein v Sarwil Associates, 221 AD2d 496 (2nd Dept 1995).

Electric Co., 81 NY2d 494 (1993); Hawkins v City of New York, 275 AD2d 634 (1st Dept 2000). Hassett’s current pleadings allege that the co-defendants violated the following provisions of the Industrial Code: 1) 12NYCRR 23; 2) 12NYCRR 23.-1.5(a), 3) 23-1.5(c) (1), (2), and (3); 4) 23-1.12; 5) 23-1.12(c) (1) and (2); 6) 23-1.12 (d) 8; and 7) Part (Rule) 19. See, Exhibit C annexed to moving papers, ¶ 3(b). It has been held that violations of the first, second and third of these provisions² are not legally sufficient predicates to support liability under Labor Law § 241(6). See, Silhy v New York City Transit Authority, 282 AD2d 337 (1st Dept 2001) (12 NYCRR 23.-1.5(a), 23-1.5(c) (1), 23-1.5(c) (2), and 23-1.5(c) (3) are insufficient predicates); Roias v County of Nassau, 210 AD2d 390 (2nd Dept 1994) (12 NYCRR 23 is an insufficient predicate). The fourth provision cited³ simply states that “power-driven machines not specifically considered in this Part (rule) shall be guarded in accordance with the requirements of ... Part (rule) 19 ... ,” and the ensuing subparagraphs⁴ pertain to “power-driven saws” and “sprockets and gears” respectively. No specific mention is made in the fourth, fifth or sixth provision of “metal grinders” like the one which allegedly injured Hassett. Indeed, the entire Industrial Code is silent as to these devices; nor does it state anywhere that the regulations for “power driven saws” may be applied to “metal grinders.” Such devices would thus fall within the ambit of 12NYCRR Part (Rule)19, the seventh provision

² 12NYCRR 23; 12NYCRR 23.-1.5(a); and 12NYCRR 23-1.5(c) (1), 23-1.5(c) (2), and 23-1.5(c) (3), respectively.

³ 12NYCRR 23-1.12 (a).

⁴ Subparagraphs 12NYCRR 23-1.12(c) (1) and (2); and 12NYCRR 23-1.12 (d) are the fifth and sixth provisions of the Industrial Code cited in Hassett’s papers. The court notes that there is no such provision as “12 NYCRR 23-1.12 (d) 8” since subparagraph (d) contains no subdivisions, however the court will assume that this mistake is the result of scrivener’s error.

⁵ The court is loath to do this without specific authorization from the regulations since the two types of devices are so different.

cited in Hassett's papers. However, this provision was repealed effective October 1, 1997. See, **NY** Reg, April 2, 1997, at 9-10. It has been held that where the code violations alleged in the pleadings are found to be inapplicable to the facts of a case, no liability will attach to an owner under Labor Law § 241(6). See. e.g., Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 supra; Greenfield v New York Telephone Co., 260 AD2d 303 (1st Dept 1999). Here, the code provisions cited by Hassett are either not specific enough to support a Labor Law § 241(6) claim, or they are inapplicable to the facts of the case, or they fall within a repealed section of the Industrial Code. Thus, Hassett's complaint, as currently pled, does not state a valid cause of action under Labor Law § 241(6). Accordingly, the court could not find Celtic liable under that statute.

Liability under Labor Law § 240(1) exists where a person is injured in a fall from, or involving, "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, (or) other (similar) devices." Hassett's alleged injury was not the result of a fall or of an object falling on him. See, e.g. Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981). Similarly, liability under Labor Law § 241-a exists where a person is injured while working in or at an elevator shaftway, a hatchway, or a building stairwell. Once again, Hassett's alleged injury did not occur in such a location, but on an open floor. Id. Thus, the court could not find Celtic liable under either of these Labor Law provisions.

In conclusion, the evidence and pleadings presently before the court cast serious doubt on whether Celtic could be found liable to Hassett under the Labor Law.⁶ This, in turn, raises a genuine triable issue as to one of the elements of Celtic's common law indemnity claim against Tishman.

⁶ Indeed, the court is somewhat perplexed that Celtic chose to move for indemnification rather than to move for dismissal of the complaint.

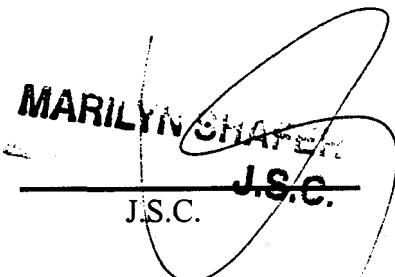
Specifically, Celtic has failed to bear its burden of proving that it will be compelled to answer in damages for Tishman's negligence. Although the court is empowered to issue a conditional order granting indemnification, it should not do so in the absence of a prima facie showing of entitlement. See. e.g., Dunlap v United Health Services Inc., 189AD2d 1072(3rd Dept 1993). Accordingly, there is no basis for granting summary judgment at this time, and Celtic's motion must be denied as premature.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion of defendant Celtic Holdings, LLC, for summary judgment is denied.

Dated: September 17, 2002


MARILYN SHAPIRO
J.S.C.

J.S.C.