

**Mannino v J.A. Jones Construction Group, LLC**

2003 NY Slip Op 30026(U)

September 15, 2003

Supreme Court, New York County

Docket Number: 0106905/9052

Judge: Shirley W. Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH  
Justice J.S.C.

PART 54

*Mannino LLC*

*J.A. Brew - G.M.O. LLC*

INDEX NO. 106905-01  
MOTION DATE 6/12/03  
MOTION SEQ. NO. 64  
MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
*is decided in accordance with  
the annexed decision and order.*

SCANNED  
SEP 29 2003

Dated: 9/18/03

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

..... X  
SALVATORE MANNINO and SANTINA MANNINO,

Plaintiffs,

Index No.: 106905/01

-against-

DECISION AND  
ORDER

J. A. JONES CONSTRUCTION GROUP, LLC,  
J.A. JONES-GMO, LLC and ROCKEFELLER  
UNIVERSITY,

Defendants

-----X  
-----X

J. A. JONES CONSTRUCTION GROUP, LLC,  
J.A. JONES-GMO, LLC and ROCKEFELLER  
UNIVERSITY,

Third-Party Plaintiffs

-against-

CASALINO INTERIOR DEMOLITION CORP.

Third-party Defendant

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is **an** action to recover for work-related **injury**. Plaintiff, employed by demolition subcontractor Casalino Interior Demolition Corp. (“Casalino”), was performing demolition work on a renovation project at Founder’s Hall in New York City, a building owned by Rockefeller University (“Rockefeller”). Plaintiff was injured when he fell through **an** opening on the rooftop

of the building. Plaintiff brought this action against Rockefeller and construction manager J.A. Jones Construction Group, LLC (formerly known as J.A. Jones-GMO, LLC and hereinafter “Jones”) alleging negligence and violations of Labor Law §9200,240 and 241. Jones impleaded Casalino, claiming common law indemnification, contractual indemnification and breach of contractual duty to provide insurance.

Plaintiff moved for summary judgment on the issue of defendants’ liability under Labor Law §240(1). By decision and order dated February 10,2003, this Court granted plaintiff’s motion as against defendant Rockefeller, finding, as a matter of law, that plaintiff’s injury was caused by a violation of Labor Law §240(1). The Court denied plaintiff’s motion as against Jones, however, holding that triable questions of fact existed as to whether Jones had supervisory control over the injury-producing work. The Court noted that the relevant contractual provisions did not establish whether or not Jones had supervisory control over plaintiff’s work and there was a direct conflict on the issue between plaintiff’s testimony and that of Jones’ superintendent, Al Slaninka.

### Motions

Plaintiff now moves to reargue the Court’s decision on the ground that the Court misapplied the law in denying summary judgment against Jones. Defendants do not oppose the motion, but cross-move for reargument of the decision granting partial summary judgment against Rockefeller, on the ground that triable issues of fact exist as to whether plaintiff’s injury was caused by a violation of Labor Law §240(1). Plaintiff does not oppose the cross-motion.

Separately, plaintiff moves pursuant to CPLR 3025(b) to amend the caption to add Casalino as a direct defendant and for leave to serve an amended summons and complaint on all defendants by first class mail. The motions are consolidated for unitary disposition.

## Conclusions of Law

### Plaintiff's Motion for Reargument

Plaintiff argues that the Court misapplied the law in determining that triable issues of fact existed **as** to Jones' supervisory control over plaintiff's work. The Court disagrees.

Labor Law § 240(1) imposes liability on “[a]ll contractors and owners and their agents.” A construction manager may be held liable **as** an owner's agent under the statute if it “has the authority to supervise, direct or control the injury-producing work.” Falsitta v. Metropolitan Life Ins. Co., 279 A.D.2d 879 (3<sup>rd</sup> Dept. 2001). This comports with the legislative intent of the statute to assign liability only to those with “the ability to direct, supervise and control” the work. See Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 318 (1981). Consequently, a construction manager engaged merely to “supervise the work and ensure compliance with safety regulations” is not necessarily liable under section 240(1) for an injury caused by “a dangerous condition arising from the contractor's negligent methods.” See Buccini v. 1568 Broadway Assocs., 250 A.D.2d 466, 468 (1<sup>st</sup> Dept. 1998) citing Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 (1992).

Plaintiff argues that Jones had authority to supervise plaintiff's work because its contract with Rockefeller required Jones to “inspect” and “supervise” the work of trade contractors such **as** Casalino. However, the record also contains evidence supporting the opposite conclusion. The Jones-Casalino agreement provided that Jones “shall not be responsible for construction means, methods, techniques, or procedures, or for safety precautions and programs in connection with the Work.” Instead, the agreement made Casalino “solely responsible for all construction means, methods, techniques and procedures within the scope of [Casalino's] work ...” (emphasis added).

Moreover, there was conflicting testimony **as** to whether Jones had supervisory control over plaintiff's work. Plaintiff testified that Jones' superintendent directed him in his work on the day of the accident and had authority over whether or not scaffolding would be used to protect plaintiff from falling. Meanwhile, Jones' superintendent testified that Jones "did not direct or supervise the Casalino employees in the means or method of the performance of its demolition work" and "was in no way directing or supervising Mr. Mannino at the time of his accident." In the context of this conflicting evidence, the Court denied summary judgment. See Morris v. Lenox Hill Hospital, 232 A.D.2d 184 (1<sup>st</sup> Dept. 1996)(summary judgment inappropriate where facts permit conflicting inferences). Plaintiff does not dispute the evidence upon which the Court made its decision. Instead, plaintiff argues that the Rockefeller-Jones agreement alone is sufficient to grant summary judgment against Jones. **As** in the previous motion, the Court disagrees. Thus, plaintiff's motion for reargument is denied.

#### Defendants' Cross-Motion for Reargument

Defendants argue that the Court "overlooked certain facts that preclude summary judgment in favor of plaintiffs." The Court disagrees. Defendants advance two arguments: 1) plaintiff's memory of the accident was unreliable; and 2) plaintiff's account of the accident was "highly improbable" and a jury "could reasonably reject his account of the accident." Neither argument convinces the Court.

In granting summary judgment on liability, the Court held that, while plaintiff's memory of some events **was** not clear, he:

testified without inconsistency **as** to the basic facts of his accident: that while working on the roof, he fell through a hole **as** a result of being hit in the leg by a wooden plank placed next to the hole; that he requested and was refused the use of a scaffold; and that he was

provided no other safety devices, which, had they been provided, could have prevented his fall. As to these basic points, defendants cite no contrary testimony by plaintiff, nor do they articulate any theory under which the alleged inconsistencies in plaintiff's testimony (which they do not specifically describe) call into question whether defendant's violation of the Labor Law was the cause of plaintiff's injury.

Citing Court of Appeals and First Department precedent, the Court held that plaintiff's memory impairment did not raise a triable issue of fact **as** to plaintiff's credibility or the determinative facts of the case. See Klein v. City of New York, 89 N.Y.2d 833 (1996); Orellano v. 29 E. 37th St. Realty Corn., 292 A.D.2d 289 (1<sup>st</sup> Dept. 2002); Nieves v. Five Boro Air Conditioning & Refrigeration Corn., 256 A.D.2d 106 (1<sup>st</sup> Dept. 1998).

Here, again, Defendants point to the fact that plaintiff's memory of the accident was unclear, and suggest that a jury "would be entitled to infer that Mr. Mannino's version of the facts is inaccurate." **As** in the prior motion, however, defendants do not offer an alternate theory of how the accident occurred that would eliminate liability under Section 240(1). At most, defendants invite speculation **as** to plaintiff's credibility based on some inconsistencies in his testimony.

Defendants also make various observations about how "improbable" plaintiff's account was in the context of photographs of the accident scene. See Affirmation of J. Uejio, Exhibit F. For example, defendants observe that, in a photograph they submit, the stack of wooden planks near the hole appeared to be too far from the hole to support plaintiff's account of the fall. Putting aside the fact that the photograph was taken after the accident and, thus, may not accurately reflect the accident scene, defendants' observations do not challenge the determinative facts: plaintiff, working at a height, fell through the hole, as a result of a lack of safety devices, and sustained injury. At most, defendants' observations call for speculation **as** to the precise chain of events

leading to plaintiffs fall without calling into question the liability-producing facts. Thus, defendants' motion for reargument is denied.

Plaintiff's Motion to Add Casalino **As** a Direct Defendant

Plaintiff argues that Casalino, plaintiffs employer, should be added as a direct defendant on the ground that "at a recent conference in connection with this matter, it was learned that [Casalino] had no worker's compensation insurance to cover the subject accident." No party opposes the motion.

Under CPLR 3025, leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay. See Leibowitz v. Mt. Sinai Hosp., 296 A.D.2d 340 (1<sup>st</sup> Dept. 2002). Leave to amend to add new parties may be granted if the proponent alleges "legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading." Peretich v. City of New York, 263 A.D.2d 410 (1<sup>st</sup> Dept. 1999) quoting Daniels v. Empire-Orr, Inc., 151 A.D.2d 370, 371 (1<sup>st</sup> Dept. 1989).

The Worker's Compensation Law generally provides the exclusive remedy for injured employees, "except that if an employer fails to secure the payment of compensation for his injured employees and their dependents ... **an** injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under [Workers' Compensation] or to maintain an action in the courts for damages on account of such injury..." Workers' Compensation Law § 11. See also Di Vincenzo v. Tripart Dev., Inc., 272 A.D.2d 904, 905 (4<sup>th</sup> Dept. 2000)(plaintiff had option of pursuing legal action against employer to recover for work-related injury where employer failed to provide workers' compensation insurance). The same is true in the context of Labor Law claims. See Barbieri v. Mount Sinai Hosp., 264 A.D.2d

1,4(1<sup>st</sup> Dept. 2000)(Labor Law § 240 claims are subsumed into exclusive protections afforded by Workers' Compensation Law unless employer failed to secure compensation insurance).

Here, plaintiffs attorney affirms that Casalino has no workers' compensation insurance covering plaintiffs accident and Casalino "has been represented by counsel and will in no way be prejudiced by the granting of this motion..." Affirmation of S. DeLorenz at ¶¶ 3-4. No party disputes these facts. Therefore, the Court grants plaintiffs request. See Duffy v. Horton Memorial Hospital, 119 A.D.2d 847 (3<sup>rd</sup> Dept. 1986)(granting leave to amend complaint to add as defendant third-party defendant where "complaint asserting a direct claim against third-party defendant involves the same transactions and facts as the underlying suit"). Moreover, CPLR 3012 authorizes service of an amended complaint by regular mail where the parties to be served have already appeared in the action. See CPLR 3012(a). **As** Casalino has appeared in this action, plaintiffs request for service by first-class mail is granted. Accordingly, it is

ORDERED that plaintiffs motion for reargument is denied; and it is further

ORDERED that defendants' cross-motion for reargument is denied; and it is further

ORDERED that plaintiffs motion for leave to amend the caption herein to add Casalino

Interior Demolition *Corp.* **as** a direct defendant is granted and the caption in this action shall be:

-----X  
SALVATORE MANNINO and SANTINA MANNINO,

Plaintiffs,

Index No.: 106905/01

-against-

**J. A. JONES CONSTRUCTION GROUP, LLC,  
J.A. JONES-GMO, LLC, ROCKEFELLER  
UNIVERSITY and CASALINO INTERIOR**

DEMOLITION CORP.

Defendants.  
-----X  
And it is further

ORDERED that plaintiff shall serve defendants with the complaint herein, amended so as to add Casalino Interior Construction Corp. as a direct defendant, and a copy of this order with notice of entry, by mail within 20 days of entry of this order; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon both the Trial Support Office (Room 158) and the County Clerk so that their records may be altered to reflect the changes in the caption.

The foregoing constitutes the decision and order of the Court.

Date: September 15, 2003  
New York, New York

  
SHIRLEY WERNER KORNREICH