

Urbina v 26 Court Associates, LLC

2003 NY Slip Op 30106(U)

September 21, 2003

Supreme Court, New York County

Docket Number:

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

0111632/2001

URBINA, CARLOS
VS
26 COURT ASSOCIATES

INDEX NO. _____

MOTION DATE _____

SEQ 2

MOTION SEQ. NO. 2

SUMMARY JUDGMENT

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

motion is decided in accordance with accompanying memorandum decision.

SCANNED
SEP 30 2003

MOTION/ORDER IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/21/03

Lby
LOUIS B. YORK

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
CARLOS URBINA and LUCY NUNEZ,

Plaintiffs,

-against-

Index No. 111632/01

26 COURT ASSOCIATES, LLC, TOWN SPORTS
INTERNATIONAL, INC., and R&J CONSTRUCTION
CORP.,

Defendants.

-----X

TSI COURT STREET, INC.,

Third-party Plaintiff,

-against-

ABSOLUTE ELECTRICAL CONTRACTING, INC.,

Third-party Defendant.

-----X

26 COURT ASSOCIATES, LLC,

Second Third-party Plaintiff,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH,

Second Third-Party Defendant.

-----X

LOUIS B. YORK, J. :

Motions with sequence numbers 002 003, and 004 are
hereby consolidated for disposition.

In motion sequence no. 002, which is unopposed,
defendant/second third-party plaintiff 26 Court Associates, LLC

(26 Court) moves, pursuant to CPLR 3212 (a) (1), for summary judgment on its common-law and contractual indemnification cross claims against defendant Town Sports International, Inc. (TSI).

- In motion sequence no. 003, defendant R&J Construction Corp. (R&J) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it. 26 Court and third-party plaintiff TSI Court Street, Inc. (TSI Court) ("i/s/h/a Town Sports International, Inc.") cross-move, pursuant to CPLR 3212, for summary judgment against third-party defendant Absolute Electrical Contracting, Inc. (Absolute). Absolute cross-moves for leave to amend its answer nunc pro tunc in order to assert a cross claim for common-law indemnification or contribution against R&J.

In motion sequence no. 004, plaintiffs Carlos Urbina (plaintiff) and Lucy Nunez move, pursuant to CPLR 3212, for summary judgment against 26 Court and TSI on the issue of their liability to plaintiff pursuant to Labor Law § 240 (1).

BACKGROUND

Plaintiff, an electrician employed by Absolute, was injured on April 4, 2001 while he was working at a construction site located at 26 Court Street in Brooklyn. 26 Court is the owner of the premises. TSI leased the premises, and was renovating the space to open a New York Sports Club facility. TSI acted as the general contractor for the project, and hired

the various subcontractors, including R&J, which performed drywall and carpentry work there, and Absolute, which performed the electrical work. Plaintiff was kneeling on a scaffold, ~~approximately-eight feet from the ground, installing plug molding~~ in the ceiling, which was approximately 10 to 12 feet from the ground. The scaffold, which was owned by R&J, was made of steel, with a plywood platform. While plaintiff was working on the platform, it collapsed and fell through the structure of the scaffold. Plaintiff fell with it, and was injured.

Plaintiff alleges four causes of action, sounding in negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). His wife, Lucy Nunez, asserts a fifth cause of action for loss of consortium.

DISCUSSION

26 Court's Motion for Summary Judgment Against TSI; 26 Court and TSI Court's Cross Motion for Summary Judgment Against Absolute

In its answer to plaintiffs' amended complaint, dated April 16, 2002, 26 Court asserts six cross claims against TSI, sounding in contribution, common-law indemnification, and breach of contract to procure insurance. 26 Court was represented by the law firm of Morris, Duffy, Alonso & Faley, and TSI was represented by the firm of Jacobowitz, Garfinkel & Lesman, Esqs.

In its answer to plaintiffs' amended complaint, dated April 9, 2002, TSI Court asserts three cross claims against 26 Court: (1) contribution; (2) contractual indemnification; and (3)

breach of contract to procure insurance. The same two law firms represented the two parties. In its original answer, dated August 2, 2001, TSI ("d/b/a New York Sports Club") was represented by Jacobowitz, Garfinkel & Lesman.

In the Preliminary Conference Order, dated January 16, 2002, and the Compliance Conference Order, dated October 17, 2002, 26 Court and TSI were represented by the same separate counsel.

When 26 Court made its motion (sequence no. 002), dated December 9, 2002, it was still represented by the firm of Morris, Duffy, Alonso & Faley, LLP, and TSI was still represented by Jacobowitz, Garfinkel & Lesman, Esqs.

Then, suddenly, and without notice that can be discovered either in the present motion papers or in the County Clerk's file for this case, in March and April of 2003, 26 Court and TSI Court ("i/s/h/a Town Sports International, Inc.") both were represented by the firm of Jacobowitz, Garfinkel & Lesman. No Substitution of Counsel appears in the County Clerk's file, and no explanation has been given for the apparent fact that these two parties, who have brought one motion and nine cross claims against each other, and who, presumably, have separate and distinct interests, are now represented by one and the same counsel. If, indeed, these parties' interests are no longer distinct or adverse to each other, no explanation has been given

for the fact that neither motion sequence no. 002, nor the nine cross claims, have been withdrawn.

26 Court and TSI Court's cross motion (sequence no. 003) is dated March 14, 2003. Although the cross motion is allegedly brought by both 26 Court and TSI Court, and seeks summary judgment on the third-party claims against Absolute, only TSI Court has brought such claims against Absolute.

Since the court is unable to ascertain the propriety, or lack thereof, of TSI's failure to oppose 26 Court's motion, or of this present apparent dual representation of these two presumably adverse parties, or, if the dual representation is proper, counsel's failure to withdraw motion sequence no. 002 and the nine cross claims, both 26 Court's motion (sequence no. 002) and the cross motion of 26 Court/TSI Court (motion sequence no. 003) are denied.

R&J's Motion for Summary Judgment Dismissing the Complaint as Against It

R&J, the drywall and carpentry subcontractor, owned and erected the scaffold which collapsed under plaintiff. It is undisputed that plaintiff's accident occurred after R&J's employees had left for the day, and that it was not unusual for employees of one subcontractor to use the scaffolding or ladders of another. It is also undisputed that plaintiff used R&J's scaffold instead of one of Absolute's ladders because the scaffold was positioned where he had to work, and because work

materials covered the floor, making it difficult to properly position a ladder where he needed it.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees a safe work place [citations omitted]. This provision applies to owners, contractors, or their agents, who "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" [citations omitted]. In order for liability to attach under Labor Law § 200 or under a theory of common-law negligence, an owner or contractor must have created or had have [sic] actual or constructive notice of the defective condition which caused the accident [citation omitted]

(*Paladino v Society of New York Hosp.*, ___ AD2d ___, 2003 WL 21754272, *1 [2d Dept 2003]). Liability under Labor Law § 200 "may not be assigned absent proof that the defendant exercised some supervisory control over the work in the course of which the plaintiff was injured" (*DeSimone v Structure Tone*, ___ AD2d ___, 762 NYS2d 39, 40 [1st Dept 2003]; *Artiga v Century Mgt. Co.*, 303 AD2d 280, 280-281 [1st Dept 2003]; *Chuchuca v Redux Realty LLC*, 303 AD2d 239, 240 [1st Dept 2003]).

There is no indication or evidence that R&J had any authority to supervise or control the work or workers of Absolute. Moreover, the fact that R&J supplied the scaffold that plaintiff used does not constitute supervision, direction, or control of plaintiff's work (*see Wysocki v Balalis*, 290 AD2d 504, 505 [2d Dept 2002]; *Lodato v Greyhawk North America, LLC*, NYLJ,

Aug. 14, 2003, at 26, col 6 [Sup Ct, Kings County 20031]).

Hence, plaintiff's claims for negligence and violation of Labor Law § 200, as against R&J, must be dismissed.

'Labor Law § 240 (1) protects workers from elevation-related hazards when they are injured while involved in certain enumerated work activities," including the erection or alteration of a building or structure (*Panek v County of Albany*, 99 NY2d 452, 455 [2003]).

We have repeatedly observed that the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves [citations omitted]. Consistent with this objective, the section imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty that proximately causes a plaintiff's injury. As a result, this strict liability provision 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" [citation omitted]

(*id.* at 457).

The collapse of the scaffold on which plaintiff was working constitutes a prima facie case of liability under Labor Law § 240 (1) (*see e.g. De Jara v 44-14 Newtown Rd. Apt. Corp.*, ___ AD2d ___, 2003 WL 21915879 [2d Dept 2003]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]).

Plaintiff need not prove that the scaffold was defective in some way. He only needs to show that the scaffold was an inadequate safety device, in that it failed to protect him from falling (*see*

e.g. *Bonanno v Port Auth. of New York and New Jersey*, 298 AD2d 269, 270 [1st Dept 2002]).

Nor can it be said that plaintiff's use of the scaffold instead of a ladder made his actions the sole proximate cause of his accident. As long as the failure of a safety device is "a cause of plaintiff's injury" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [emphasis in original]), plaintiff's actions cannot be the sole proximate cause of his accident (*see also Hernandez v 151 Sullivan Tenant Corp.*, ___ AD2d ___, 2003 WL 21545104 [1st Dept 2003]).

The fact that plaintiff was the only witness to his accident is also of no moment (*see e.g. Yurkovich v Kvarner Woodworking*, 289 AD2d 183, 184 [1st Dept 2001]).

Liability under Labor Law § 240 (1), as well as under Labor Law § 241 (6), attaches only to owners, contractors, and their agents. It is uncontested that R&J was neither the owner of the premises, nor the general contractor for the project. It was also not an agent of either, because in order to be a statutory "agent" of an owner or general contractor, the owner or general contractor "must have delegated to that party the authority to supervise or control the injury-producing work" (*Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 835 [4th Dept 2002]; *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 61 [1st Dept 1991]). As discussed earlier, R&J had no such

authority.

Therefore, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims must also be dismissed.

A spouse's derivative claim is dependent upon the cause of action of the injured party" (*Spouse v Ragu Foods*, 124 AD2d 980, 980 [1st Dept 1986]). Thus, "any cross claim or derivative claim for loss of consortium must fall" once plaintiff's primary claim fails (*Maddox v City of New York*, 108 AD2d 42, 49 [2d Dept], *affd* 66 NY2d 270 [1985]).

Since all of plaintiffs' claims against it fail, R&J's motion for summary judgment dismissing the complaint as against it is granted.

Absolute's Cross Motion for Leave to Amend Its Answer

"Although leave to amend a pleading should be freely given (see CPLR 3025 [b]), leave is properly denied where [as here] the proposed amendments are devoid of merit and are legally insufficient' (*Duffy v Wetzler*, 260 AD2d 596, 597 [2d Dept 1999])" (*Schrader v Sunnyside Corp.*, 297 AD2d 369, 371 [2d Dept 2002]).

Absolute's proposed cross claim against R&J sounds in common-law indemnification or contribution. Since the complaint is dismissed as against R&J, neither common-law indemnification nor contribution can be had against R&J.

Therefore, Absolute's cross motion for leave to amend

its answer is denied.

Plaintiffs' Motion for Summary Judgment Against 26 Court and TSI on the Issue of Their Liability Pursuant to Labor Law § 240 (1)

26 Court was the owner of the premises, and TSI was the general contractor for the renovation project. Thus, they are subject to the absolute liability for any failure to provide safety devices which give proper protection to workers at a construction site, when that failure is a proximate cause of the worker's injury (*see e.g. Panek v County of Albany*, 99 NY2d 452, *supra*).

This court has already found that the collapse of the scaffold constitutes a prima facie case of a violation of Labor Law § 240 (1), and that the violation was a proximate cause of plaintiff's injuries.

Therefore, plaintiffs' motion for summary judgment against 26 Court and TSI on the issue of their liability pursuant to Labor Law § 240 (1) is granted.

CONCLUSION

Accordingly, it is

ORDERED that the motion of 26 Court Associates, LLC for summary judgment on its common-law and contractual indemnification cross claims against Town Sports International, Inc. is denied; and it is further

ORDERED that the cross motion of 26 Court Associates, LLC and TSI Court Street, Inc. for summary judgment against

Absolute Electrical Contracting, Inc. is denied; and it is further

ORDERED that the cross motion of Absolute Electrical Contracting, Inc. for leave to amend its answer is denied; and it is further

ORDERED that the motion of R&J Construction Corp. for summary judgment dismissing the complaint as against it is granted, and the complaint is severed and dismissed as against defendant R&J Construction Corp., and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the motion of plaintiffs Carlos Urbina and Lucy Nunez for partial summary judgment against 26 Court Associates, LLC and Town Sports International, Inc. on the issue of these defendants' liability to plaintiffs pursuant to Labor Law § 240 (1) is granted, and the issue of the amount of a judgment to be entered against them shall be determined at the trial herein.

Enter:

Dated: 9/21/03

Lucy
150.

~~XXXXXXXXXX~~

LOUIS B. YORK