

**Giangrosso v Kummer Development Corporation**

2003 NY Slip Op 30165(U)

March 17, 2003

Supreme Court, Erie County

Docket Number:

Judge: Eugene M. Fahey

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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**IIC GIANGROSSO**

Plaintiff

v.

Index No. 2001/4509

**KUMMER DEVELOPMENT CORPORATION, ADAM'S  
RIB RANCH CORPORATION, HBE CORPORATION,  
CONCEPT CONSTRUCTION CORP. and CAPITAL  
CONCRETE CUTTING, INC.**

Defendants

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**MEMORANDUM** \_\_\_\_\_

FAHEY, J.

Plaintiff, Dominic Giangrosso, brings this consolidated action against Defendants, HBE Corporation, Concept Construction Corp., Capital Concrete Cutting, Inc., Kummer Development Corporation, and Adam's Rib Ranch Corporation for injuries suffered on March 3, 1999 at the Adam's Mark Hotel in Buffalo, pursuant to common law negligence and violations of Labor Law Sections 200, 240(1), and 241(6).

Defendant Concept now moves for summary judgment dismissing the Complaint.

Plaintiff Giangrosso moves for summary judgment on its Labor Law Section **240(1)** cause of action against Defendants Kummer and Adam's Rib.

Defendant HBE moves for leave to reargue a portion of the matter, heard on June **19,2001**, and subject to a Memorandum Decision dated August **16,2001**, and Order granted on September **12, 2001**, pertaining to document discovery.

Defendants Kummer and Adam's Rib move for an order compelling Plaintiff Giangrosso to attend an examination before trial and cross-move for summary judgment dismissing the Complaint against them.

Plaintiff Giangrosso also moves for summary judgment on its Labor Law Section **241(6)** cause of action against Defendants Kummer and Adam's Rib.

Defendant Concept's motion for summary judgment is granted as to the Labor Law Section **240(1)** claim and otherwise denied.

Plaintiff Giangrosso's motion for summary judgment on the Labor Law Sections **240(1)** and **241(6)** claims is denied.

Defendant **HBE's** motion for leave to reargue is denied.

Defendants Kummer and Adam's Rib's motion to compel is granted; their cross-motion for summary judgment is granted as to the Labor Law Section **240(1)** claim and otherwise denied.

#### The Accident

Taking the evidence in this case in a light most favorable to Plaintiff Giangrosso, on March **3,1999**, he, an employee of Adam's Mark Hotel, was working at the

hotel, moving various items including furniture, other furnishings, and lamps or light fixtures, into individual hotel rooms that were being renovated during an extensive remodeling of the hotel.

At a certain point, his work crew ran out of the lamps or light fixtures that they were installing, and he had to go where the lamps or light fixtures were stored in the tennis court of the old gym that was being remodeled. As he walked, wearing a hard hat, in the gym area, he was struck by a large piece of concrete from above, a second level balcony or mezzanine, where workmen were doing renovation/demolition work. The area was not roped off, there were no warning signs, and there was nothing to prevent the material that might fall from above from striking the area below.

#### Ownership

Defendants Kummer and Adam's Rib submit a series of deeds and leases in support of their contention that they are not "owners" for the purposes of the Labor Law:

1. A deed of conveyance , dated January **22, 1998**, from Buffalo Hotel Development Venture L.P. as "grantor" to Defendants Kummer and Adam's Rib as "grantee" of all the grantors rights to the improvement attached to the land leased by the Buffalo Urban Renewal Agency to the grantor, to wit: the hotel.

2. An Agency Lease Agreement and Deed between the Erie County Industrial Development Agency and Defendants Kummer and Adam's Rib for the **1998 Buffalo Hilton Hotel Renovation Project**, also dated January 22, 1998.

3. A lease agreement between Defendants Kummer and Adam's Rib as "Lessor" and Seven Seventeen HB Buffalo Corporation as "Lessee", also dated January **22, 1998**.

### Conclusions of Law

1. On these facts, a Labor Law Section 240(1) claim does not properly lie against Defendants Concept, Kummer, and Adam's Rib.

The Scaffolding Law does not apply to all falling objects , "a plaintiff must show more than simply that an object fell causing injury. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. (*Narducci v. Manhasset Bay*, 96 N.Y.2d 259 [2001])"

Plaintiff Giangrosso has made no such showing here.

2. On these facts, a Labor Law Section 241(6) claim is properly stated so as to survive summary judgment against Defendants Concept, Kummer and Adam's Rib.

Plaintiff Giangrosso has adequately pled various specific violations found in Industrial Code Rule No. 23, (Sections 23-1.7(a) [Overhead Hazards], 231.1.19 [Catch Platforms], 23-1.20 [Chutes], 23-3.2(c) [Barricades], and 23-3.3 [Demolition by Hand]) in his Bill of Particulars.

Additionally, Plaintiff Giangrosso, although ordinarily working at the hotel as a maintenance man, on the day of his injury was engaged in renovating hotel rooms by reinstalling lamps or lighting fixtures, which necessitated his obtaining additional fixtures, during the course of which he was injured. As such, he was a worker so necessarily affiliated with the construction - renovation - demolition work so as to come within the protection of employees in construction areas. At the time, he was in no way

engaged in routine maintenance. The term “employed” is to be broadly defined (see *Pegler v. L&A Builders*, 251 A.D.2d 1015 [4<sup>th</sup> Dept. 19981]).

The various cases cited by Defendants involving light bulb changers, security guards, independent bridge inspectors, and corporate presidents, are readily distinguishable, as there are not employees engaged in construction, demolition, excavation activities.

Furthermore, Defendants Kummer and Adam’s Rib have failed to demonstrate that they are not owners of the property for Labor Law purposes, to wit one “who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit’ (*Mangiameli v. Galante*, 171 A.D.2d 162, 163 [3d Dept. 19911, quoting *Copertino v. Ward*, 100 A.D.2d 565, 566 [2d Dept. 1984]).” See also *Ogden v. City of Hudson Industrial Development Agency*, 277 A.D.2d 794, 795 (3d Dept. 2000).

It is uncontested that Defendants Kummer and Adam’s Rib “have leasehold interests in the land and improvements on and from which the Adam’s Mark Hotel is operated (Flascher Affidavit of November 12, 2001).”

The Court might be prepared to concede that the titleholder here is the Erie County Industrial Development Agency, but that is not the issue here (*see Mangiomeli supra*) The characterization in the subcontract between Defendant Concept and Defendant HBE (see Exhibit “H” of Plaintiff Giangrosso’s Notice of Motion dated September 21, 2002) “that the Owner (Adam’s Rib Ranch Corporation and Kummer Development Corporation) is constructing the project pursuant to a lease between the Owner and Erie County Industrial Development Agency” is entirely apt for our purposes.

The Court is also persuaded that there is enough of a showing here, concerning the possible activities of Defendant Concept's personnel in the balcony area, so that summary judgment does not properly lie.

3. Summary judgment is not appropriate for Plaintiff Giangrosso on the Labor Law Section **241(6)** claim.

"a violation of certain regulations or administrative rules, even admitted by defendants, does not establish negligence as a matter of law but is 'merely some evidence to be considered on the question of a defendant's negligence and lacks the force and effect of a substantive legislative enactment' [*Zimmer v. Chemung County Performing Apts.*, 55 N.Y.2d 154, 160-161 (1985)]...Liability under Labor Law §241(6) is not self-executing but 'require[s] reference to outside sources to determine the standard by which a defendant's conduct must be measured' [*Zimmer v. Chemung County Performing Arts supra* at 523] (*Craig M. Schmeen v. County of Monroe*, 175 A.D.2d 633 [4<sup>th</sup> Dept. 1991])."

As to Defendants Kummer and Adam's Rib's motion to compel, the Court finds Plaintiff Giangrosso's objection to their deposing him, on the basis that their attorneys through their representations of Defendant HBE have already deposed him, that such an objection is without merit. It is the parties, not their counsel, who have the right to examine parties and witnesses before trial.

As to Defendant HBE's motion for leave to reargue, that motion is denied. The defense raised by Defendant HBE, that it is the employer of Plaintiff Giangrosso, puts the issue of the business relationship between it and Seven Seventeen HB in all its ramifications into play. Plaintiff Giangrosso is entitled to comprehensive responses to its document demands.

Defendant Concept's motion for summary judgment is granted as to the Labor Law Section 240(1) claim and otherwise denied.

Plaintiff Giangrosso's motion for summary judgment on the Labor Law Sections 240(1) and 241(6) claims is denied.

Defendant HBE's motion for leave to reargue is denied.

Defendants Kummer and Adam's Rib's motion to compel is granted; their cross-motion for summary judgment is granted as to the Labor Law Section 240(1) claim and otherwise denied.

Submit Order upon consent of opposing counsel.

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EUGENE M. FAHEY, J.S.C.

DATED: March 17, 2003