

**Berrios v TEG Management Corp.**

2003 NY Slip Op 30182(U)

June 16, 2003

Supreme Court, Queens County

Docket Number: 282102001

Judge: Robert W. Schmidt

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D. SCHMIDT IA Part 16  
Justice

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JOSE LUIS BERRIOS		Number <u>28210</u>	2001
- against -		Motion	
		Date <u>December 10, 2002</u>	
TEG MANAGEMENT CORP., et al.		Motion	
	<u>x</u>	Cal. Number <u>5</u>	

The following papers numbered 1 to 31 read on this motion by defendant TEG Management Corp., as successor by merger to Ash Avenue Realty Corp. ("TEG") pursuant to CPLR 3126 to dismiss the complaint and the cross claims of defendant Manchester LLC or, in the alternative, for a preclusion order for failure to comply with discovery demands, or, pursuant to CPLR 3124 to compel plaintiff and Manchester to produce all outstanding discovery; and on this cross motion by Manchester for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims; and on this cross motion by plaintiff for partial summary judgment on the issue of liability against all defendants on his Labor Law § 240(1) claim

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Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows.

This is an action for personal injuries sustained by plaintiff on November 14, 2000, when he allegedly fell from a ladder while working at an apartment building owned by TEG at 140-30 Ash Avenue in Queens (the "building" or the "TEG building"). TEG retained plaintiff's employer, non-party Disaster Masters Crisis Management ("Disaster Masters") to hire and coordinate the contractors needed to repair the roof and upper floor of the building which were damaged as a result of a fire.

During his deposition, plaintiff testified that at the time of the accident, he was standing on a ladder attempting to cover a hole in the roof of the TEG building with a tarp which had to be

tied to 2x4 boards. Plaintiff testified that to gain access to the fire-damaged roof of the TEG building, he was instructed by Ron Alford, the technical director and project manager for Disaster Masters, to use the adjacent apartment building, 140-18 Ash Avenue, which is owned by Manchester (the "Manchester building"). Plaintiff testified that he sought and obtained the permission of the superintendent of the Manchester building to go on the roof. Plaintiff stated that he got a ladder from Disaster Masters' van and took the ladder to the roof of the Manchester building. He set up the ladder by leaning the top against the TEG building and resting the base on the roof of the Manchester building. While performing the work, the ladder allegedly collapsed causing plaintiff to fall to the roof of the Manchester building and to sustain injuries.

Plaintiff commenced this action against TEG and Manchester for violations of Labor Law § 240(1), § 241(6) and § 200, and for common-law negligence. In its answer, Manchester admits that it owns the Manchester building but denies the remaining material allegations set forth in the complaint, interposes several affirmative defenses, including failure to state a cause of action, and asserts a cross claim against TEG for common-law indemnification and a counterclaim against plaintiff for trespass. In its answer, TEG admits that it owns the TEG building and contracted with Disaster Masters to refurbish and repair the building, denies liability for plaintiff's accident, interposes several affirmative defenses and asserts a cross claim for contribution and partial indemnification against Manchester.

The court will first address Manchester's cross motion for summary judgment. Manchester contends that it is not an owner within the meaning of the Labor Law statute. Manchester also contends that no work was being performed on the Manchester building, and that it did not have any interest in the work that was being performed at the TEG building. Furthermore, Manchester alleges, it did not provide any equipment, input, direction, supervision or control over any of the work. Therefore, Manchester maintains, it cannot be held liable for plaintiff's accident.

The statutory duty imposed by sections 240(1), 241(6) and 200 of the Labor Law places ultimate responsibility for safety practices upon owners of the work site and general contractors (see, Gordon v Eastern Ry. Supply, 82 NY2d 555; Russin v Picciano & Son, 54 NY2d 311; Kowalska v Board of Educ. of the City of New York, 260 AD2d 546; Sabato v New York Life Ins. Co., 259 AD2d 535; Coleman v City of New York, 230 AD2d 762, affd 91 NY2d 821; Copertino v Ward, 100 AD2d 565). The duty imposed by sections 240 and 241(6) of the Labor Law is nondelegable, and the liability of an owner under these sections is not dependent on whether the owner exercised control or supervision over the work (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Rocovich v Consolidated Edison Co., 78 NY2d 509; Allen v Cloutier Constr.

Corp., 44 NY2d 290). On the other hand, under Labor Law § 200, which codifies the common-law duty of an owner to provide employees a safe place to work (see, Jock v Fien, 80 NY2d 965), liability will attach when the injury sustained was a result of an actual dangerous condition and then only if the defendant had notice of the dangerous condition which produced the injury (see, Rizzuto v Wenger Contr. Co., 91 NY2d 343; Sprague v Peckham Materials Corp., 240 AD2d 392; Kennedy v McKay, 86 AD2d 597).

The term "owner" is not specifically defined in the Labor Law statute. Nevertheless, this court is satisfied that Manchester is not an "owner" within the intended meaning of the statute. In Mangiameli v Galante (171 AD2d 162), a case nearly identical to the one at bar, the Third Department stated that

although the [defendant] owned the land upon which plaintiff elected to place the legs of the ladder, it did not own the property upon which plaintiff was to perform the work. Nor is there any allegation that the [defendant] had either the authority to contract with the plaintiff's employer to perform the work or the right to control the work. Because the [defendant] had no ownership interest in the property upon which plaintiff was to perform his work and did not otherwise act in the capacity of an owner, it is not an owner within the meaning of Labor Law §§ 240 and 241 (id., at 164).

The court is persuaded that the same conclusion is warranted here (see also, Cantarino v New York Zoological Socy., 162 AD2d 155; Sweeting v Board of Co-op Educ. Servs., 83 AD2d 103, appeal denied 56 NY2d 503). Hence, plaintiff also cannot recover from Manchester on his Labor Law § 240(1) and § 241(6) claims.

Manchester is also entitled to summary dismissal of plaintiff's Labor Law § 200 and common-law negligence claims. Plaintiff's account of the accident establishes that there was no dangerous condition on the roof of the Manchester building which caused his accident, but rather it was caused by an allegedly defective ladder or the methods employed to do the work. Additionally, the evidence before this court reveals that Manchester neither had any involvement with nor control over the work, and did not provide any equipment for the work being performed on the TEG building. Indeed, plaintiff testified that only his employer, Disaster Masters, gave him instructions on how to perform the work and provided the subject ladder from which he allegedly fell. Consequently, plaintiff cannot recover from Manchester on either his common-law negligence claim or under section 200 of the Labor Law (see, Comes v New York State Elec. & Gas Corp., 82 NY2d 876; Lombardi v Stout, 80 NY2d 290; Grindley v Town of Eastchester, 213 AD2d 448). Accordingly, Manchester is entitled to summary judgment dismissing the complaint and all cross claims asserted against it.

The court will now address plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim against the remaining defendant, TEG. "In order to prevail on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries" (Zgoba v Easy Shopping Corp., 246 AD2d 539, 541; Sprague v Peckham Materials Corp., 240 AD2d 392, 393; see also, Bland v Manocherian, 66 NY2d 452). A fall from an elevated height, in and of itself, is not sufficient to impose liability under section 240(1) (Williams v Dover Home Improvement, Inc., 276 AD2d 626). If there is no showing that a ladder was defective, it becomes a question of fact for the jury to decide whether the ladder provided proper protection (id.; Zgoba v Easy Shopping Corp., supra; Sprague v Peckham Materials Corp., supra). On the other hand, if a plaintiff is injured as a result of an unsecured ladder, the owner and contractor are liable (Mannes v Kamber Mgt., Inc., 284 AD2d 310, lv dismissed 97 NY2d 638; Lacey v Turner Constr. Co., 275 AD2d 734; Guzman v Gumley-Haft, Inc., 274 AD2d 555). A plaintiff claiming liability because of an unsecured ladder must show that the failure to secure the ladder was a substantial factor in causing the injuries (see, Williams v Dover Home Improvement, Inc., supra).

Plaintiff alleges that at the time of his accident, it was raining, the roof was wet, the ladder had no rubber footings, and no one was holding the ladder. Plaintiff also alleges that he complained to Alford that the ladder was not tall enough to reach the roof, but the complaints were ignored. Plaintiff testified he had to descend the ladder and move it after he tied each 2x4 board to the tarp. Plaintiff testified that he had tied the tarp to two or three of the five 2x4 boards and was working on tying the tarp to the third or fourth board when the ladder slipped out from under him causing him to fall to the roof of the Manchester building.

This evidence is sufficient to establish a prima facie violation of Labor Law § 240(1) (see, Dasilva v A.J. Contracting Co., 262 AD2d 214 ["the failure to properly secure a ladder so as to hold it steady and erect during its use constitutes a violation of Labor Law § 240(1)"]; see also, Mannes v Kamber Mgt., Inc., supra; Lacey v Turner Constr. Co., supra; Guzman v Gumley-Haft, Inc., supra; Martinsen v County of Nassau, 249 AD2d 519). Accordingly, the burden shifts to TEG to raise a triable issue of fact as to its liability under Labor Law § 240(1) (see, Klein v City of New York, 89 NY2d 833).

In opposition, TEG has submitted affidavits from medical personnel employed by Flushing Hospital Medical Center where plaintiff sought treatment after the subject accident. A physician, physician's assistant and registered nurse each avers that they interviewed plaintiff to obtain his medical history and a statement as to how he was injured. Each affiant avows that plaintiff stated he injured his left wrist when he tripped and fell.

Plaintiff's inconsistent versions concerning whether he was caused to fall as a result of falling from the ladder or a trip and fall raises a question of fact as to how the accident occurred, and whether TEG breached any duty to plaintiff under Labor Law § 240(1). The issue of plaintiff's credibility is for the jury to determine (see, Castronovo v Doe, 274 AD2d 442; Alava v City of New York, 246 AD2d 614; Doo Won Choi v B.H.N.V. Rlty. Corp., 240 AD2d 619). Therefore, plaintiff is not entitled to summary judgment against TEG.

The court will now address TEG's discovery motion. In its motion papers, TEG alleges that plaintiff has failed to comply with discovery demands and seeks dismissal of the complaint, or in the alternative, to compel plaintiff to produce the items demanded. Plaintiff opposes the motion and addresses each item demanded. In its reply papers, TEG maintains that there are still outstanding items which have not been disclosed. These items include unlimited authorizations for plaintiff's employment records from Disaster Masters, Bridgefield Nursing Home, Elm York Nursing Home, and his prior employer, Carpentry Plus, authorizations for the records of plaintiff's ophthalmologist, physical therapist, pharmacies (Genovese and Time Value), and Alford's workers' compensation carrier, color laser copies of certain photographs, plaintiff's social security number, and a copy of the tape recording of the November 15, 2002 conversation between plaintiff and Alford. The court will presume that the remainder of TEG's discovery demands have been produced or otherwise resolved.

Plaintiff is required to consent to the release of documents which are neither privileged nor otherwise exempt under CPLR 3101(d) (see, Hinrichs v Tonnsen, 128 Misc 2d 196). Plaintiff has put in controversy his physical condition, including an allegation of being permanently disabled, and seeks lost earnings. Pursuant to the liberal interpretation of CPLR article 31, plaintiff is directed to serve authorizations to allow TEG to obtain the demanded authorizations of his employment records, physical therapist's records, pharmacy records, and ophthalmologist's records (see, generally, Salkey v Mott, 237 AD2d 504; Blake v Wyckoff Heights Hosp., 68 AD2d 896; Boulware v Triborough Bridge & Tunnel Auth., 161 Misc 2d 435; Eaton v Chahal, 146 Misc 2d 977). These authorizations are for disclosure of non-privileged information which may assist in the preparation for trial, thus, are "material and necessary" to the defense of this action, and, therefore, subject to disclosure (see, Johnson v National Railroad Passenger Corp., 83 AD2d 916; Sgambelluri v Recinos, 192 Misc 2d 777). Plaintiff is also directed to execute authorizations to allow TEG to inspect workers' compensation insurance files as plaintiff has applied for such benefits (see, Eaton v Chahal, supra).

The audio tape in plaintiff's possession must also be disclosed. CPLR 3101(i) requires full disclosure of any tapes involving a party to the action (see, Falk v Inzinna, 299 AD2d 120;

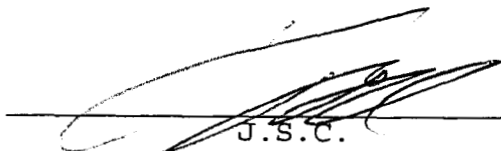
Sgambelluri v Renios, supra; Boulware v Triborough Bridge & Tunnel Auth., supra; see also, Harrington v North Shore Univ. Hosp., NYLJ, Dec. 10, 1998, p.31, col.2; Kosovsky v Zahl, NYLJ, May 16, 1995, p.25, col.5). As the audio tape contains a conversation between plaintiff and Alford regarding the subject accident, it is discoverable.

"A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case" (Titleserv Inc. v Zenobio, 210 AD2d 314, 315-316). Given the private and confidential nature of one's Social Security number, it is generally not discoverable in the absence of a strong showing that the information is indispensable to the claim (see, generally, Saratoga Harness Racing, Inc. v Roemer, 274 AD2d 887; see also, Social Security Act, 42 USC § 405[c][2][C][viii][I]). TEG has neither set forth the necessity of, nor the relevancy for obtaining plaintiff's Social Security number and invading his personal privacy, and does not claim that such information is indispensable. Therefore, plaintiff will not be compelled to disclose his Social Security number (see, e.g., Bibeau v Cantiaque Figure Skating Club, Inc., 294 AD2d 525).

Plaintiff maintains that the laser color photographs demanded by TEG were mailed. TEG denies having received the photographs. Plaintiff is directed to make the photographs available to TEG and agree upon a mutually convenient date and time for TEG to have access to same to make copies at TEG's own expense.

To summarize, TEG's discovery motion is granted to the extent of directing plaintiff to provide unlimited authorizations for the employment records demanded, and to provide the demanded authorizations to obtain the records of Carpentry Plus, his physical therapist, pharmacies and ophthalmologist. Plaintiff is also directed to provide TEG with a copy of the audio tape demanded, and to make available photographs for TEG to copy at TEG's own expense. Plaintiff is directed to produce all of these demanded items within 30 days of the date of this order. Failure of plaintiff to so comply will result in plaintiff being precluded from offering any evidence with respect to the items not produced. Manchester's cross motion for summary judgment is granted and the complaint and cross claims are hereby severed and dismissed as to this defendant. Plaintiff's cross motion for summary judgment is denied.

Dated: June 16, 2003

  
J.S.C.