

Perron v Hendrickson/Scalamandre/Posillico (TV)

2004 NY Slip Op 30061(U)

June 28, 2004

Supreme Court, Suffolk County

Docket Number: 0004668/4668

Judge: Denise F. Molia

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**
Justice

DAVID PERRON and LINDA PERRON,

Plaintiffs,

- against -

HENDRICKSON/SCALAMANDRE/POSILLICO
(TV), HENDRICKSON BROS., INC., PETER
SCALAMANDRE & SONS, INC., J.D. POSILLICO,
INC., URS GREINER CONSULTANTS, INC.,
ESCHBACHER & ASSOCIATES, SCI
ENGINEERING AND SURVEYING PC, A&H
ENGINEERS PC, JAC PLANNING CORP. and
MABEY BRIDGE, INC.,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 6/17/02
SUBMISSION DATE: 3/12/04
MOTION SEQUENCE No.: 018 XMG

ATTORNEY FOR PLAINTIFF

Rosenberg & Gluck, LLP
1176 Portion Road
Holtsville, NY 11742

ATTORNEYS FOR DEFENDANT

Wilson, Elser, Moskowitz, et.al.
150 East 42nd Street
New York, NY 10017

Thelan Reid & Priest LLP
40 West 57th Street
New York, NY 10019

HENDRICKSON/SCALAMANDRE/POSILLICO, A
TRI-VENTURE,

Third-Party Plaintiff,

- against -

RICE MOHAWK U.S. CONSTRUCTION CO., LTD.,

Third-Party Defendant.

Milber Makris Plousadis & Seiden, LLP
990 Stewart Avenue, Suite 600
Garden City, NY 11530

Cerussi & Spring
One North Lexington Avenue
White Plains, NY 10601

Chesney & Murphy, LLP
2305 Grand Avenue
Baldwin, NY 11510

Upon the following papers filed and considered relative to this matter:

Notice of Cross-Motion dated May 24, 2002; Affirmation in Support dated May 24, 2002; Affidavit dated May 13, 2002; Exhibits A through W annexed thereto; and upon due deliberation; it is

ORDERED, that the cross-motion by defendant, Mabey Bridge, Inc., pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of the moving defendant and dismissing the complaint and all cross-claims alleged against movant; is granted.

The facts of this case have previously been set forth in the defendant, Eschbacher & Associates, motion for summary judgment, which was designated as sequence 19. Briefly, the plaintiff claims that on November 25, 1996, he was allegedly dismantling pieces of a temporary bridge, known as a Mabey bridge, when "plaintiff hammered a bolt out to release the beam they were removing and a second piece of steel fell approximately two (2) feet onto plaintiff's left foot." Plaintiff alleges, *inter alia*, that he was injured as the result of violations of Labor Law sections 200, 240 and 241. He also alleges common law negligence due to a failure to provide proper safety devices at the work site, by failing to create a proper safety plan and by failing to properly train and supervise the inspectors responsible for enforcing the safety plan.

Plaintiffs' contentions to the contrary, the evidence does not reveal that Mabey Bridge, Inc. (hereinafter "Mabey"), performed any construction work, or that it directed, supervised or controlled the means, methods, techniques or sequences of any aspect of the construction work performed by either defendants, Hendrickson/Scalamandre/Posillico (TV) or Rice Mohawk U.S. Construction Co., Ltd. Mabey merely rented two temporary bridges known as Mabey Universal Bridges to defendant, Hendrickson, for installation at South Oyster Bay Road over the Long Island Expressway at or near Exit 43.

At deposition, Andrew Boorman, the witness for Mabey, testified that there was no Mabey employees present at the subject job site on November 25, 1996, nor did Mabey have any authority to stop work at this construction site. There has been no evidence submitted to dispute this testimony. Nor has testimony been submitted to demonstrate that Mabey offered any instructions or guidance to anyone as to how the component parts of the temporary bridges were to be disassembled prior to the occurrence of plaintiff's accident.

Essentially, the plaintiffs' common law negligence claims allege that Mabey permitted the temporary bridge to be dismantled on uneven ground and that it permitted a dangerous condition to exist. However, Mabey was not an owner of the premises, and therefore did not owe any duty to the plaintiff to keep the premises in a reasonably safe condition to prevent foreseeable injury to persons upon the property. Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352

N.E.2d 868. Moreover, in order to prove a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition or had actual or constructive notice of same. McCague v. Walsh Construction, 225 A.D.2d 530, 638 N.Y.S.2d 752; Battaglia v. Toys 'R' Us, Inc., 271 A.D.2d 627, 706 N.Y.S.2d 468. Here, it is undisputed that Mabey did not own the premises where the accident occurred, and there has been no evidence submitted to show that Mabey created or had knowledge of any condition that allegedly caused the accident.

Labor Law section 200 is a codification of the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Ross v. Curtiss-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 55, 618 N.E.2d 82. Mabey did not assemble, erect, dismantle or disassemble the temporary bridge which it owned and rented to Hendrickson. Nor is there any evidence to demonstrate that Mabey was an owner of the construction site or a general contractor on the subject project. Without the authority to control the activity producing the injury, the defendant Mabey cannot be liable to the plaintiff under section 200 of the Labor Law. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 445 N.Y.S.2d 127, 429 N.E.2d 805.

Labor Law sections 240(1) and 241(6) impose liability on owners, general contractors or their agents. Rizzuto v. L.A. Wanger Contracting Co., 91 N.Y.2d 343, 670 N.Y.S.2d 816, 693 N.E.2d 1068. The evidence adduced does not support a claim that Mabey was either an owner of the premises or general contractor on the project. Whether or not Mabey could be considered as an agent of the owner or general contractor would be dependent on whether it obtained the concomitant authority to supervise or control the work. "Only upon obtaining the authority to supervise and control does a third-party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241." Russin v. Louis N. Picciano & Son, supra, 445 N.Y.S.2d at 130. Under the instant circumstances, Mabey was not disassembling the bridge, did not have employees on site on the day of the accident or at the time when the component parts of the bridge were disassembled, and was not directing, supervising or controlling the work that the plaintiff was doing at the time of the accident. Accordingly, the cross-movant herein is entitled to summary judgment dismissing the complaint and any cross-claims asserted against it.

The foregoing constitutes the Order of this Court.

Dated: June 28, 2004

DENISE F. MOLIA

HON. DENISE F. MOLIA
J.S.C.