Index No.: 4668-98

**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.

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HENDRICKSON/SCALAMANDRE/POSILLICO, A TRI-VENTURE,

Third-Party Plaintiff,

- against -

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

Third-Party Defendant.

CASE DISPOSED: NO
MOTION R/D: 5/15/02
SUBMISSION DATE: 7/16/04
MOTION SEQUENCE NO.: 021 MG

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

Notice of Cross Motion dated August 23, 2002; Affidavit in Support dated August 23, 2002; Exhibits annexed thereto; Affirmation in Partial Opposition dated May 8, 2002; Defendant's Memorandum of Law; Defendant's Reply Memorandum of Law; and upon due deliberation; it is

***ORDERED,*** that the motion by defendant, URS Greiner Consultants, 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 as against moving defendant, is granted.

The instant action was commenced to recover for personal injuries arising out of an alleged accident, in which the plaintiff, David Perrone, was injured while working on a bridge reconstruction project. The plaintiff claims that on November 25, 1996 he was employed by the third-party defendant, Rice Mohawk U.S. Construction Co., Ltd., (hereinafter "Rice Mohawk"), as an ironworker. At the time of the accident, plaintiff was allegedly dismantling pieces of a temporary bridge, known as a Mabey Bridge, which had previously been taken down and placed on the embankment adjacent to the service road alongside the east bound lanes of the Long Island Expressway, immediately east of Exit 43. On the date of the accident, the plaintiff alleges that he and other workers were in the process of removing a steel beam from a portion of a temporary bridge on the LIE 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.

The action was commenced on or about February 26, 1998, by the filing of a summons and complaint, with an amended summons and verified complaint being served on or about March 9, 1998. Issue was joined by the moving defendant's service of an answer on or about June 12, 1998.

Defendant, URS Grenier Consultants, Inc., (hereinafter "URS"), is seeking summary judgment on the grounds that cross-movant, as a consulting engineer, had no authority, contractual or otherwise, to supervise, direct or control the work performed by plaintiff or his employer, Rice Mohawk; nor did it engage in any action to direct or control the means and methods of the work of Rice Mohawk or any other contractor on the project. The movant also maintains that the Labor Law section 200 and common law negligence claims must fail since there is no competent evidence that movant engaged in any affirmative act of negligence, nor is

there a clear contractual provision creating an obligation to supervise, direct or control the work of the bridge contractor or of the plaintiff.

On or about September 21, 1995, URS Greiner Consultants, Inc. (hereinafter "URS"), entered into a contract with the New York State Department of Transportation, to provide resident engineering and inspection services in connection with the reconstruction of the interchange of Routes I-495 and NY135, including the construction, widening or rehabilitation of nine bridges in Plainview, New York. Pursuant to the terms of said contract, URS was an independent contractor and not an agent of the State of New York. URS has not entered into a contractual relationship with any other party in this action.

Defendant, Hendrickson/Scalamandre/Posillico, a tri- venture (hereinafter "HSP"), was the prime contractor on the project pursuant to a written agreement with the State of New York. Plaintiff's employer, Rice Mohawk, was retained by a separate agreement to assemble, erect, take down and disassemble two temporary bridges over the LIE during the rehabilitation of the South Oyster Bay Road Bridge, at or about Exit 43 in Plainview, New York. URS did not have any contractual relationship with either HSP or Rice Mohawk. The plaintiff was not employed in any capacity by URS.

Plaintiffs' contentions to the contrary, the evidence does not reveal that URS 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 HSP or Rice Mohawk or that the contract with the State of New York permitted it to do so., There is no evidence to suggest that URS instructed the Rice Mohawk workers as to what jobs to do; provided any safety equipment, directed the workers on how to perform their jobs, or directed the workers to use any equipment.

Plaintiff alleges four causes of action against URS based upon common law negligence and Labor Law sections 200, 240(1) and 241(6).

It is firmly established in this state that a consulting engineer cannot be held liable under the Labor Law or for common law negligence, if such engineer does not have the contractual right to direct or control the contractor's work. See, e.g., Suriano v. City of New York, 240 A.D.2d 486, 658 N.Y.S.2d 654, 656; Carter v. Vollmer Associates, 196 A.D.2d 754, 602 N.Y.S.2d 48; Santoro v. American Airlines, Inc., 170 A.D.2d 206, 565 N.Y.S.2d 105.

There is no evidence to demonstrate that URS had the authority to direct or control the work performed by the Tri-Venture or its subcontractor, Rice Mohawk. Pursuant to the contract between the State and URS, the latter was to inspect each item of work perfomed by the Tri-Venture to determine whether it was in conformance with the applicable plans and specifications. If so, URS would advise the State of compliance and payment would be made. If not, URS would advise the Tri-Venture and report such non-conformity to the State employed engineer-in-charge.

The facts demonstrate that URS did not have the authority to direct the Tri-Venture to repair any item of work that did not conform to the applicable plans and specifications of the project. Neither did URS have any contractual authority to direct or control the work performed by the Tri-Venture or any of its subcontractors, including Rice Mohawk. Its obligation appears to have been limited to reporting any deviations from the project design to the engineer-in-charge employed by the State of New York. In Carter v. Vollmer Associates, 196 A.D.2d 754, 602 N.Y.S.2d 48, the Appellate Division reviewed the exact form of contract at issue herein, and determined that such contract did not give the consulting engineer the authority to direct or control the work of the contractor.

"It is well established that the law of New York does not impose liability upon an engineer, who is engaged to assure compliance with construction plans and specifications for an injury sustained by a worker at a construction site unless active malfeasance exists or such liability is imposed by a clear, contractual provision, creating an obligation, explicitly running to and for the benefit of workers." Conti v. Pettibone Companies, Inc., 111 Misc.2d 772, 445 N.Y.S.2d 943, 945-46; see also, Domenech v. Associated Engineers, 257 A.D.2d 403, 683 N.Y.S.2d 67, 68; Prado v. Sidney B. Brown & Sons, 207 A.D.2d 875, 616 N.Y.S.2d 656, 657; Brooks v. A. Gatty Service Co., Inc., 127 A.D.2d 553, 511 N.Y.S.2d 642, 643.

The plaintiff has not alleged that URS committed an affirmative act of negligence nor has it been alleged that any act, order or directive of URS affirmatively caused plaintiff's alleged accident. Instead, the acts allegedly committed by URS are designated as acts of omission. Such allegations, even if true, are insufficient to impose liability on a consulting engineer. See, e.g., Prado v. Sidney B. Brown & Sons, 207 A.D.2d 875, 616 N.Y.S.2d 656, 657; Brooks v. A. Gatty Service Co., Inc., 127 A.D.2d 553, 511 N.Y.S.2d 642, 643.

In the absence of an allegation of an affirmative act of negligence by URS, the only way that said cross-movant could be potentially liable would be if there was a clear provision in the contract between URS and the State of New York which created an obligation explicitly running to and for the benefit of the plaintiff. See, Conti v. Pettibone Companies, Inc., 111 Misc. 2d 772, 445 N.Y.S.2d 943, 945-46. No such provision has been shown to exist.

Accordingly, in the absence of an allegation of an affirmative act of negligence by URS, and without the identification of a clear contractual provision upon which liability against URS could be based, the Court finds that the cross-moving defendant is entitled to the entry of summary judgment dismissing the complaint and all cross-claims interposed against it.

A spouse's claim for loss of consortium is viewed as derivative of the injured spouse's claim for personal injuries and such claim fails where the underlying cause of action is meritless. Liff v. Schildkrout, 49 N.Y.2d 622, 427 N.Y.S.2d 746, 749, 404 N.E.2d 1288; Champagne v. State Farm Mutual Automobile Insurance Co., 185 A.D.2d 835, 586 N.Y.S.2d 813, 815. Inasmuch as the underlying action against URS has been dismissed, summary judgment must also be awarded to URS on plaintiff Linda Perron's derivative claim for loss of consortium. Accordingly, the second cause of action of the complaint is also dismissed as against the cross-

moving defendant.

The foregoing constitutes the Order of this Court.

DENISE F. MOLIA

Dated: October 6, 2004

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