

Massie v Carnegie Hall Corp.

2004 NY Slip Op 30170(U)

August 6, 2004

Supreme Court, New York County

Docket Number: 0124269/2000

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

ROBERT MASSIE,
Plaintiff,

INDEX NO. 124269/2000

MOTION DATE 11/17/03

- v -

MOTION SEQ. NO. 001

CARNEGIE HALL CORP., TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, STOKES INDUSTRIES, INC.,
and READY MACHINE, INC.,
Defendants.

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, this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
AUG 11 2004
COUNTY OF NEW YORK

Dated: 8/06/04

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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ROBERT MASSIE,

Plaintiff,

Index No. 124269/00
Mtn Seq. 001

-against-

CARNEGIE HALL CORP., TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, STOKES
INDUSTRIES, INC., and READY MACHINE, INC.,

Defendants.
-----x

WALTER B. TOLUB, J.:

By this motion, plaintiff Robert Massie moves for summary judgment against defendants Carnegie Hall Corporation (Carnegie Hall) and Tishman Construction Corporation of New York (Tishman) pursuant to CPLR 3211 and Labor Law 240(1). Defendant Stokes Industries, Inc. (Stokes) cross moves against plaintiff and defendants Carnegie Hall and Tishman for summary judgment based on their contention that subsequent modifications made to their product renders them free of liability as a matter of law. Plaintiff cross moves against defendant Stokes for summary judgment on the issue of strict liability.

The instant action arises out of a construction accident that occurred on August, 22, 2000 during the construction of the Arthur and Judy Zankel Hall at Carnegie Hall (the construction site), located roughly twenty feet below street level. Plaintiff, an operating engineer employed by Schiavone Construction, was operating a forklift carrying a "muckbucket", a bucket designed to

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remove debris from construction sites. Debris would be loaded into the muckbucket, and plaintiff would drive the forklift onto a hydraulic material/personnel construction elevator/hoist. This hoist, which was designed and constructed, but not installed by defendant Stokes Industries, Inc. (Stokes), was then elevated to street level, at which time plaintiff would back the forklift onto the street and the debris would be removed from the muckbucket.

On August 22, 2000, plaintiff was seated in the forklift with the seatbelt engaged in the basement level of the construction site. Plaintiff drove the forklift and loaded muckbucket onto the hoist and was carried to street level, where he proceeded to back the forklift off the hoist onto the sidewalk. While backing the forklift off the hoist, the hoist collapsed, sending the hoist, the forklift, and the plaintiff to the bottom of the shaft. Plaintiff sustained serious injuries which included a tripod fracture of the left orbit, depressed zygomatic arch fracture and a depressed left lateral orbital wall fracture.

Plaintiff alleges that the hoist collapse was due to an the failure an improper weld on a piston that was used on the hydraulic lift. The piston, manufactured by defendant Ready Machine, Inc., was purchased and installed by defendant Stokes. Plaintiff further alleges that plaintiff's injuries were further caused by negligent design and installation of the hoist, including the failure to properly install a safety latch device.

Plaintiff commenced the instant litigation against defendants Carnegie Hall and Tishman in December, 2000. Defendant Carnegie Hall leases the subject property from the City of New York and operates and controls the venue. Defendant Tishman was retained by Carnegie Hall as the construction manager for the subject renovations.

Following the amendment of the summons and complaint in November, 2001, actions were commenced against defendant Stokes and defendant Ready Machine, Inc. (Ready). Defendant Stokes designed and manufactured the temporary hydraulic construction elevator/hoist used on the construction site. Defendant Ready sold a six-inch stroke hydraulic piston (alleged to have failed during operation of the hoist) to defendant Stokes, which was used in the manufacture/assembly of the subject hoist.

Plaintiff's amended complaint is comprised of nine causes of action. The first five causes of action, as against defendants Carnegie Hall and Tishman, allege violations of Labor Law §§ 200, 240, 241 and 241-a as well as violations of numerous sections¹ of the Industrial Code of the State of New York. The sixth through ninth causes of action allege manufacturing and design defects,

¹ Plaintiff alleges violations of §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.12, 23-1.16, 23-1.17, 23-1.29, 23-1.22, 23-1.17, 23-1.18, 23-1.31, 23-2.2 through 2.6; 23-3.2 through 3.4; 23-4.1 through 4.5; 23-5.1, 23-5.3, 23-5.19, 23-6.1 through 6.3; 23-7.1 through 7.3; 23-8.1, 23-9.3, 23-9.8 and violations of the applicable provisions of the Occupational Safety and Health Administration Act as it pertains to construction.

breach of warranty and strict liability and as against defendants Stokes and Ready.

Discussion

A motion for summary judgment limits the court's role to finding issues, and not resolving them. Success on the motion thus requires the movant to provide the court with admissible evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2001-2003] §37:91-92).

The opposing party bears the burden of producing evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact requiring trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]), and, if there is any doubt that triable issues of fact exist, summary judgment will not be granted.

Labor Law

Labor Law 240(1) provides that "all contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building shall furnish or erect, or cause to be furnished or erected for the performance of

such labor, scaffolding, hoists, stays, ladders, slings ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed (Labor Law 240(1)). This is a non-delegable duty, and as such, owners, contractors and their agents will be held "strictly liable for any breach of the duty to provide proper protection that proximately causes an injury" (*McCann v Central Synagogue*, 280 AD2d 298 [1st Dept 2001]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 []; *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500 [1993]).

In the instant action, at the time of plaintiff's accident, plaintiff was involved in the alteration/construction of new performance space at Carnegie Hall. His job was to remove the material debris from the site by carting said debris to street level via the usage of a temporary hydraulic elevator hoist. Contrary to the arguments made by defendants Carnegie and Tishman, the hoist and the purported lack of adequate safety devices is precisely what is addressed by Labor Law § 240(1), and neither defendant Carnegie, as lessor of the building (*Lacey v Long Island Lighting Company*, 293 AD2d 718 [2nd Dept 2002]; *Bart v Universal Pictures*, 277 AD2d 4 [1st Dept 2000]; *Frierson v Concourse Plaza*, 189 AD2d 609 [1st Dept 1993]) nor defendant Tishman, as the contractor on the project, may escape statutory liability. As such, plaintiff's motion for summary judgment predicated on Labor

Law § 240(1) as against defendants Carnegie and Tishman is granted.

Turning to the issues raised in the cross-motions brought by defendant Stokes and plaintiff, this court notes that both motions raise two main points of contention. Plaintiff asserts that defendant Stokes is liable for injury because Stokes manufactured and designed the hoist, and negligently supervised its installation. Defendant Stokes asserts that it is free from liability because while they manufactured the hoist, they did not install it, and upon installation, the hoist was materially modified by a third party, thereby removing Stokes from any liability.

It is well established that to prevail on a cause of action sounding in strict products liability predicated upon a design defect, "a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury" (*Gonzales v Delta International Machinery Corp.*, 307 AD2d 1020, 1021 [2nd Dept 2004]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102 [1983]). Equally well established is the contention that a manufacturer of a product is not liable under theories of either strict products liability or negligence where there is a subsequent modification resulting in substantial modification of the product and proximately causes the injuries

(*Robinson v Reed Prentice Division of Package Machinery Company*, 49 NY2d 471 [1980]).

In the instant matter, defendant Stokes was engaged to design, construct, and deliver a temporary hydraulic hoist to Schiavone for use in connection with the subject construction project. Pursuant to the invoice order, Stokes was to design a hoist with a lift capacity of 40,000 pounds, the lifting platform designed to be

protected at all levels by a six-foot fence. Platform will have gate on street side at street level that opens downward. Platform will have gate opposite street side at lower-level that opens upward. Platform will have two part elevator style gate on one side at both the lower-level and street level. There will be one control station located on the platform. The platform will securely latch into position at the upper-level. The upper gates will be interlocked so that they cannot open unless the platform is in the lower position. (Defendant Stokes' cross-motion, Exh. 2).

The invoice also indicated that Schiavone was responsible for installation of the hoist. Indeed, the deposition testimony submitted further indicates that while objections as to how the installation was being done were made, at no time did any individual from Stokes *participate* in the actual installation. In short, any modifications, including removal of latches to make the hoist operate faster, were done by a third party.

Defendants Tishman and Carnegie assert that defendant Stoke's apparent lack of input and supervision constitutes negligence on behalf of defendant Stokes. However, deposition testimony

indicates that the hoist itself was designed and constructed per the specifications of Schiavone's invoice. The unit was constructed and tested off-site, and then delivered to the union job site at which time installation was done by union workers. If anything, the assertions of defendants Tishman and Carnegie raise questions of fact as to whether the objections of defendant Stokes were even considered during the installation process. They do not however, on their own, establish that defendant Stokes was negligent in supervising the installation.

In support of plaintiff's cross-motion, plaintiff offers the expert testimony of Irving U. Ojaivo, an engineer who after reviewing depositions, the construction site, the subject hoist, and the relevant New York City Building Code and OSHA sections, concluded that the hoist was not reasonably safe, could have been designed safer, and was a substantial factor in the plaintiff's injuries. Mr. Ojaivo additionally concluded that the hoist designed and built by defendant Stokes violated NYC Building Code § 27-1056 as well as provisions within OSHA. However, again, taken as a whole, this testimony does not support the granting of summary judgment in favor of the plaintiff on the issue of defendant Stoke's alleged liability.

While violation of a New York City Building code may be evidence of negligence (*Elliott v City of New York*, 95 NY2d 730 [2001]), it does not, standing alone, support the contention that

no triable issues of fact exist. To the contrary, where an expert "opines that a particular product is defective or dangerous, explains how it can be made safer, and concludes that it is reasonable to do so, it is usually for the jury to make the required risk-utility analysis" (*Milazzo v Premium Technical Services Corp.* 777 NYS2d 167, 169 [2nd Dept 2004]).

Inasmuch as both cross motions have raised triable issues of fact, both cross-motions submitted by the plaintiff and defendant Stokes are denied. Accordingly it is

ORDERED that plaintiff's motion for summary judgment as against defendants Carnegie Hall Corporation and Tishman Construction Corporation of New York is granted on the issue of liability under Labor Law 240(1); and it is further

ORDERED that the cross-motions of Defendant Stokes Industries, Inc., and Plaintiff are denied.

Counsel for the parties are directed to appear for a Pre-Trial Conference in IA Part 15, Room 335, 60 Center Street, New York, New York on September 24, 2004 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/6/04

FILED

AUG 11 2004

9

WALTER B. TOLUB, J.S.C.