

Malloy v Madison Forty Five Co.

2005 NY Slip Op 30037(U)

August 8, 2005

Supreme Court, New York County

Docket Number:

Judge: Leland G. DeGrasse

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SCANNED ON 8/10/2009
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DEGRASSE
Justice

PART 25

MALLOY, PATRICK

INDEX NO. 118750/00

MOTION DATE AUG 0 8 2009

MOTION SEQ. NO. 08

MOTION CAL. NO. _____

MADISON FORTY FIVE CO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with
accompanying Memorandum Decision.

FILED

AUG 10 2009

NEW YORK
COUNTY CLERK'S OFFICE

45

AUG 0 8 2009

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
PATRICK MALLOY

Plaintiff,

-against-

Index No. 118750/00

MADISON FORTY FIVE CO. and HRH CONSTRUCTION
CO., INC.

Defendants.

-----X
HRH CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

Index No. 590302/02

GENERAL INDUSTRIAL SERVICES CORPORATION,

Third-Party Defendant.

-----X

DeGrasse, J.:

Defendant / third-party plaintiff, HRH Construction Co., Inc., moves for summary judgment and leave to renew its prior motion for the same relief. Defendant Madison Forty Five Co., Inc. cross-moves for summary judgment. The facts regarding plaintiff's accident are set forth in the opinion of the Appellate Division (13 AD3d 55 [2004]). By order dated September 3, 2003, this court granted summary judgment motions by HRH and Madison and directed the entry of judgment dismissing the complaint. The Appellate Division modified the order to the extent of reinstating plaintiff's Labor Law § 240 (1) claim and his Labor Law § 241 (6) claim insofar as it is based on Industrial Code (12 NYCRR) §§ 23-9.4 (e) and 23-9.5 (b). The order was affirmed

with respect to the dismissal of plaintiff's common-law negligence and Labor Law § 200 claims as well as his Labor Law § 241 (6) claim premised on a violation of Industrial Code § 23-3.3 (h).

Madison, the owner of a demolition project, hired HRH to perform "pre-construction services" under an alleged oral agreement. HRH seeks leave to renew on the ground that plaintiff's claims against it should be dismissed because "the record is devoid of any evidence that HRH had the authority to control activities and issue a stop work order."

In dismissing the complaint this court, nevertheless, expressly rejected HRH's asserted ground that it had no construction management agreement with Madison and had not been delegated the authority to supervise the work which caused plaintiff's injury. In rejecting the argument, this court noted that the papers submitted at that time were insufficient to shed any light on the question of whether HRH had the requisite authority. A party seeking leave to renew in this instance must demonstrate "that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). HRH proffers *Walls v Turner Construction Company* (4 NY3d 861 [2005]) as the basis for its motion for leave to renew. *Walls* stands for the proposition that a construction manager at a work site may be vicariously liable under Labor Law § 240 (1) as an owner's agent where the manager had the ability to control the activity which brought about the injury (*id.* at 863-864). The said proposition, however, does not represent a change in the law. Instead, it is a restatement of a settled principle. To be sure, the holding in *Walls* is based on *Russin v Picciano & Son* (54 NY2d 311 [1981]), a case cited for the very same proposition in this court's opinion. HRH's own words bespeak the inappropriateness of renewal. HRH does not assert that *Walls* represents a change in the law. Instead, it claims that *Walls* "*clarified* [emphasis added] when a construction manager can be deemed a 'statutory agent.' " In any

event, the Appellate Division has issued the last order regarding HRH's liability. "Once the appellate process has been exhausted and absent the circumstances set forth in CPLR 5015, a final determination should remain inviolate even though it is predicated on principles of law that have been overruled" (*Bray v Gluck*, 235 AD2d 72, 74 [1997]). Therefore, HRH is not entitled to leave to renew.

Madison's motion and the remainder of HRH's motion are based upon contractual indemnification claims against third-party defendant, General Services Industrial Corporation (GISC), the contractor of the project. Madison and HRH are referred to as "additional insureds" in a rider annexed to Madison's contract with GISC. The contract requires GISC to, to the fullest extent permitted by law, to indemnify and defend such additional insureds against all claims arising out of the performance of the contract. GISC does not dispute Madison's contractual rights but asserts that Madison is not entitled to indemnification because it has not interposed a third-party claim for such relief. The assertion is unavailing. Summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and the opposing party has not been misled to its prejudice (*Weinstock v Handler*, 254 AD2d 165, 166 [1998]). In this case, Madison is entitled to consideration of its cross motion inasmuch as GISC has been afforded an opportunity to oppose it on the merits. GISC also opposes HRH's claim for indemnification on the ground that there is no privity between HRH and GISC. That argument also lacks merit. As a third-party beneficiary HRH is entitled to enforce GISC's agreement to indemnify it. Contrary to GISC's assertion, HRH's right to contractual indemnification would not be defeated by a determination that it acted as a general contractor. In addition, GISC cannot claim that a triable factual issue exists as to whether Madison was negligent. The Labor Law §

200 and common-law negligence claims against Madison were dismissed. As found by this court and the Appellate Division, there was no evidence that Madison controlled or supervised the work plaintiff was doing when injured.

For the foregoing reasons, HRH's motion for leave to renew its prior motion for summary judgment is denied. Madison's motion and the balance of HRH's motion are granted to the extent that Madison and HRH are awarded contractual indemnification by GISC. An assessment of damages shall be conducted at the time of trial.

Dated: August 8, 2005.



J. S. C.

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