

Jun Zhao v Qualico Improvement Inc.

2005 NY Slip Op 30039(U)

May 9, 2005

Supreme Court, Queens County

Docket Number: 0000343/0343

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, JAMES P. DOLLARD IAS PART 13
Justice

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JUN ZHAO, Index No.: 343/03

Plaintiff, Motion Date: March 23, 2005
-against- Motion Cal. No. 31

QUALICO IMPROVEMENT INC., INDIAN
HILLS COUNTRY CLUB, INC. and
INDIAN HILLS GOLF CORPORATION,

Defendants.
-----x

The following papers numbered 1 to 19 read on this motion by plaintiff for an Order granting summary judgment against the defendants on the issue of liability pursuant to Labor Law §240(1) and this cross motion by defendant Indian Hills Country Club, Inc. ("Indian Hills") for an Order granting summary judgment dismissing plaintiff's complaint and all cross-claims; or in the alternative, an Order granting defendant Indian Hills common law indemnity over and against defendant Qualico Improvement, Inc. ("Qualico").

	<u>PAPERS</u> <u>NUMBERED</u>
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Upon the foregoing papers it is ordered that the branch of the motion by plaintiff for an Order granting summary judgment against defendant Indian Hills on the issue of liability pursuant to Labor Law §240(1) is granted. The undisputed facts are as follows: While plaintiff was working on a construction project at the defendant Indian Hills where his duties included painting and power washing parts of the clubhouse and the installation of new roofing on the carport overhanging the clubhouse's main entrance, plaintiff fell approximately twelve feet from the roof of the carport to the ground in the course of his work. He was not

[* 2]

equipped with any safety devices. Labor Law §240(1) "imposes absolute liability on owners, contractors and their agents for any breach of statutory duty which has proximately caused injury [citation omitted] (Rocovich v. Consolidated Edison, 78 NY2d 509). The duty imposed is nondelegable (Rocovich, supra).

Labor Law §240(1) provides in pertinent part: "[a]ll contractors and owners and their agents...in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pullups, braces irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court finds that plaintiff has set forth entitlement to summary judgment on liability as a matter of law as against defendant Indian Hills for his Labor Law §240(1) claim by establishing that defendant Indian Hills qualifies as an owner and that plaintiff was subject to an elevation-related risk and that defendant Indian Hills had violated Labor Law §240(1) by not providing any safety devices (See, Striegel v. Hillcrest Hts., 100 NY2d 974 (2003)). While defendant argues in its opposition papers that the lack of any safety devices was not the proximate cause of plaintiff's accident, it provides no evidence to support this contention.

The branch of the motion by plaintiff's motion for summary judgment on the issue of liability as against defendant Qualico on the Labor Law §240(1) claim is denied.

The contention here is the employment status of defendant Qualico at the time of the accident and whether it qualified as a general contractor or an agent of the owner. Initially, according to the testimony of Joseph Caputo, General Manager of defendant Indian Hills, defendant Indian Hills contracted defendant Qualico to powerwash and paint the cedar shingles on the side of their clubhouse and to also replace the roof on Indian Hills' carport structure. Defendant Qualico then came and scraped and primed, but never painted or powerwashed the shingles. Defendant Qualico had previously performed other jobs at defendant Indian Hills. According to the testimony of the plaintiff, plaintiff telephoned Mr. Chang, the owner of Qualico, looking for work. Mr. Chang told plaintiff that he had a job at

the defendant Indian Hills involving painting the walls and working on the roof. Plaintiff signed a general contractor agreement with Qualico whereby plaintiff would be responsible for the job including materials and wages. Plaintiff claims he considered himself to be an independent contractor and not an employee of defendant Qualico.

Plaintiff claims that he arrived at the worksite the first day with two assistants and his own tools, paint brushes and paint whereby he and his assistants painted the exterior of the clubhouse. On the second day, he brought his own ladder and started work on the roof of the carport installing new tiles. After about an hour of work he claims he stood up on the roof to make sure his workers were installing the tiles in a straight line. As he walked about three or four steps to his side, he stopped on a tile that had not been nailed tightly and he fell off the roof onto the ground. Plaintiff was not using any safety devices.

According to the testimony of Tsai Hsun Chang, the owner of defendant Qualico, Mr. Chang told the plaintiff that he got a job at the golf course but was too busy to handle it and asked him to handle it for him. Mr. Chang never told defendant Indian Hills that he was giving the job to plaintiff.

In determining whether Qualico is liable under Labor Law §240(1) it must be shown that Qualico had the same duties as a contractor or agent of the owner the right to control the work and insist upon proper safety practices, not whether it actually did control the work (See, Iverson v. Sweet Assoc., 203 AD2d 741).

While defendant Qualico clearly was a general contractor for the purposes of Labor Law §240(1), it did not control or supervise plaintiff's work. Plaintiff reported to no one and supplied his own equipment. Absent express provisions in the subcontract between plaintiff and defendant Qualico as to authority, it cannot be said that Qualico had the right to control or supervise plaintiff's work (See, Blank v. Hamlet on Olde Oyster Bay, 5 Misc.3d 1029 (citing, Saaverda v. East Fordham Road Real Estate Corp., 233 AD2d 125)).

The branch of the motion granting summary judgment on liability under Labor Law §240(1) as against defendant Indian Hills Gold Corporation is granted without opposition as said defendant has failed to appear on this motion.

The branch of the cross-motion by defendant Indian Hills for an Order granting summary judgment dismissing plaintiff's complaint and all cross claims, or in the alternative, for an Order granting defendant Indian Hills common law indemnity over and against defendant Qualico is granted to the extent that plaintiff's causes of action based upon Labor Law §§ 200 and 241(6) are dismissed without opposition from plaintiff. While plaintiff indicates in its opposition that defendant Indian Hills is not moving to dismiss plaintiff's Labor Law §241(6) claim, the notice of cross-motion clearly states that defendant Indian Hills moves to dismiss "plaintiff's complaint."

The branch of defendant's cross motion for an Order granting defendant Indian Hills common law indemnity over and against defendant Qualico is denied.

Dated: May 9, 2005

J.S.C.