

Dolan v Lazslo N. Tauber & Associates

2005 NY Slip Op 30178(U)

March 30, 2005

Supreme Court, New York County

Docket Number: 0116863/2001

Judge: Marilyn Shafer

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

PRESENT:

HON. MARILYN SHAFER, JSC

PART _____

0116863/2001

DOLAN, PATRICK

vs

LASZLO TAUBER & ASSOCIATES

SEQ 5

REARGUMENT/RECONSIDERATION

INDEX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED 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, it is ordered that this motion

granted pursuant to attached Rec

FILED

APR 07 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

3/30/05

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

THIS MOTION IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
PATRICK DOLAN and TONI DOLAN,

Plaintiffs,

Index No.
116863/01

-against-

Motion Sequence No.
005

LAZSLO N. TAUBER & ASSOCIATES and LIBERTY
CONTRACTING CORP.,

Defendants.

-----X
LAZSLO N. TAUBER & ASSOCIATES I, LLC,
s/h/a LAZSLO N. TAUBER & ASSOCIATES,

Third-Party Plaintiff,

Third-Party Index No.
590917/02

-against-

TIME INC., AOL TIME WARNER, INC. and
TIME WARNER, INC.,

Third-Party Defendants.

-----X
TIME INC., AOL TIME WARNER, INC. and
TIME WARNER, INC.,

Fourth-Party Plaintiffs,

Fourth-Party Index No.
590425/03

-against-

HENEGAN CONSTRUCTION CO., INC.,

Fourth-Party Defendant,

-----X
MARILYN SHAFER, J.:

Defendant Liberty Contracting Corp. (Liberty) seeks leave to renew and reargue (CPLR 2221) this Court's October 1, 2004 Decision and Order in this action, wherein Liberty's motion for summary judgment dismissing the complaint was granted only to the extent of dismissing plaintiffs' common-law negligence and Labor Law §§ 200, 240 (1), and 241-a claims. In the instant motion, Liberty seeks leave to reargue that portion of this court's holding, that there were issues of fact as to whether Liberty was liable, under Labor Law § 241 (6), for plaintiffs' alleged injuries.

Plaintiffs oppose Liberty's motion, asserting that this Court was correct in its determination, or, alternatively, that there are questions of fact as to whether Liberty is liable under common-law negligence and Labor Law § 200 theories of liability, and that, therefore, that portion of this Court's October 1, 2004 Decision and Order should be modified to deny the dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims as against Liberty.

For the reasons stated below, Liberty's motion for leave to reargue is granted, and upon reconsideration of the facts, Liberty's motion for dismissal of plaintiffs' Labor Law § 241 (6) claims is granted; however, this court further modifies its October 1, 2004 Decision and Order, such that plaintiffs' claims under common-law negligence and Labor Law § 200 are reinstated.

Background

In this action, plaintiffs seek to recover monetary damages for injuries sustained as the result of Patrick Dolan's (Dolan) February 5, 2000 construction accident. According to plaintiffs, Dolan injured his back while pushing a mini-container, belonging to Liberty, up a wooden ramp. Plaintiffs allege that the mini-container was defective, in that at least one of the wheels locked up while Dolan was pushing the mini-container up the ramp.

Liberty admits that it owned mini-containers and leased many to Dolan's employer, fourth-party defendant Henegan Construction Co., Inc., for use in the cleanup of the construction site at which Dolan was injured. See Iacobazzo Examination Before Trial (EBT), at 24-33. Additionally, at Dolan's EBT, he testified that the word "Liberty" was printed on the side of the mini-container that he was using at the time of his accident. See Dolan EBT, at 50. Finally, Liberty admits that it checked the mini-containers for problems when Liberty regularly picked up debris from Henegan and dumped it (See Iacobazzo EBT, at 58). But according to Liberty, it was unaware of any wheel problems with the mini-containers, and it had not heard any complaints about the wheels of the mini-containers at the time of Dolan's accident. See Iacobazzo EBT, at 61.

In response to Liberty's motion for summary judgment, on October 1, 2004, this court dismissed all of plaintiffs' claims

as against Liberty, except those under Labor Law § 241 (6). According to Liberty, this Court erred in doing so, because duties under Labor Law § 241 (6) are only applicable to owners, contractors, or agents of the owner. Liberty opines that Liberty was not a contractor on the site at the time of the accident, and had, in fact, not been on site since approximately October 1999.

Discussion

A motion for leave to reargue is designed to afford a party the opportunity to establish that the court either overlooked or misapprehended the law or facts in deciding a previous motion. See William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept), lv denied 80 NY2d 1005 (1992); see also CPLR 2221(d). The motion is addressed to the sound discretion of the court, and is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. See McGill v Goldman, 261 AD2d 593 (2d Dept 1999).

Liberty asserts that this court misapprehended the facts of this case, because Liberty was not on site at the time of the alleged accident. Pursuant to Labor Law § 241 (6),

[a]ll contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or

lawfully frequenting such places.

It is well settled that Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers regardless of their control or supervision of the work site. See, Rizzuto v Wenger Contracting Co., 91 NY2d 343 (1998); see also Ross v Curtis-Palmer Hydro-Elec., 81 NY2d 494 (1993). Although there appears to be some question as to whether Liberty was still on site, at least for the purposes of inspecting their mini-carts and hauling away materials, because Liberty, a subcontractor, did not have the authority to control Dolan's work, this court is constrained to dismiss that portion of plaintiffs' complaint that seeks recovery for Liberty's breach of Labor Law § 241 (6). See Murphy v Herbert Const. Co., Inc., 297 AD2d 503 (1st Dept 2002).

In their opposition to Liberty's instant motion, plaintiffs seek to reargue that portion of the October 1, 2004 Decision and Order that granted summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims as against Liberty.

To sustain its burden of proof against a motion for summary judgment dismissing such claims, a plaintiff is required to proffer evidence that a defendant either created or had actual or constructive notice of an alleged dangerous condition, and that the alleged dangerous condition was the proximate cause of the

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injury. See, Lally v JGN Construction Corp., 295 AD2d 148 (1st Dept), lv denied 99 NY2d 504 (2002). To be charged with liability under Labor Law § 200, which codifies common-law negligence principles, a party must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981).

"Where the alleged defect or dangerous condition arises from the contractor's methods and the [allegedly negligent party] exercises no supervisory control over the operation, no liability attaches to that [party] under [either] the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993). However, where a workplace injury results from a condition created by a contractor, rather than the method of the injured party's work, that contractor can be held liable without any supervision of the injured worker. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004).

The court's function on a motion for summary judgment is issue finding rather than issue determination. Rodriguez v QD&P Construction, Inc., 194 Misc 2d 284 (Sup Ct, Bronx County 2002). Because there are material issues of fact as to whether Liberty's alleged negligent inspection and maintenance of the mini-container caused Dolan's alleged accident, this Court holds that the portion of Liberty's motion for summary judgment that seeks

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to dismiss plaintiffs' common-law negligence and Labor Law § 200 claims as against Liberty is denied.

Accordingly, it is hereby

ORDERED that Liberty Contracting Corp.'s motion for leave to reargue this Court's Decision and Order dated October 1, 2004 is granted; and it is further

ORDERED that, upon reargument, this Court holds that plaintiffs' claims as against Liberty Contracting Corp. predicated upon Labor Law § 241 (6) are dismissed; and it is further

ORDERED that, upon reargument, plaintiffs' claims as against Liberty Contracting Corp. predicated upon common-law negligence and Labor Law § 200 are reinstated.

March 30, 2005

MAHILYN SHAFER
J.S.C.

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