

Conforti v Bovis Lend Lease LMB, Inc.

2005 NY Slip Op 30186(U)

November 3, 2005

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

PRI

0100320/2002

PART _____

CONFORTI, CHRISTOPHER S
vs
BOVIS LEND LEASE

SEQ 1

SUMMARY JUDGMENT

EX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED CAL. NO. _____

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

*granted
pursuant to attached items*

FILED

NOV 09 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/3/05

(Signature)
HON. MARILYN SHAFER, JSC

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: IAS PART 36

-----X
CHRISTOPHER S. CONFORTI and
KRISTINE CONFORTI,

Plaintiffs,

Index No. 590684/02

-against-

BOVIS LEND LEASE LMB, INC., THE CITY
OF NEW YORK, and NEW YORK HEALTH AND
HOSPITALS CORPORATION,

Defendants.

-----X
BOVIS LEND LEASE LMB, INC.,

Third-Party Plaintiff,

-against-

SANTA FE CONSTRUCTION, INC.,

Third-Party Defendant.
-----X

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

MARILYN SHAFER, J.:

Defendants Bovis Lend Lease LMB, Inc., The City of New York, and New York City Health and Hospitals Corp. (collectively, movants) in this motion sequence 001, move for summary judgment dismissing the complaint in its entirety.

Plaintiff Christopher Conforti (Conforti) commenced this action seeking damages for personal injuries allegedly sustained on September 18, 2001, in the course of his employment as a construction worker at Queens General Hospital in the City of New York. Plaintiff Kristine

Conforti seeks damages for loss of consortium.

Specifically, Conforti alleges that a grinder he was using to cut a steel I-beam became stuck and “kicked back,” injuring two tendons on his hand. The grinder was allegedly missing its safety guard at the time of the incident. The guard had allegedly been missing for at least 16 months prior to the accident.

Defendant Bovis Lend Lease LMB, Inc. (Bovis), was the construction manager pursuant to a contract with New York State Dormitory Authority. The Dormitory Authority is not a defendant.

At the time of the accident, Conforti was employed by Santa Fe Construction, Inc. (Santa Fe). His foreman, a Santa Fe employee who gave plaintiff his work assignments on a daily basis, instructed plaintiff and his partner to use a particular Bosch grinder, provided by Santa Fe, to cut and remove a six-inch protruding portion of a steel I-beam. Defendant Bovis has named Santa Fe as a defendant in a third-party action, seeking common-law indemnification.

Movants seek an order, pursuant to CPLR 3212, granting their motion for summary judgment dismissing the complaint, on the grounds, first, that plaintiff's claims under Labor Law § 241 (6) cannot be established under the facts before this court, because plaintiff has not alleged violation of a section of the Industrial Code that imposes specific requirements that would trigger a violation of Section 241 (6); and, secondly, that the requirements for imposing liability under either Labor Law § 200 or common-law negligence are not satisfied, because there is no evidence that Bovis or the municipal defendants had control over the means and methods of the work involved.

In support of their motion, movants present the deposition and affidavit testimony of Joseph Murray, a superintendent employed by Bovis at the jobsite, stating that Bovis did not supervise Santa Fe in the means and methods of its work, but merely coordinated it for scheduling purposes. Mr. Murray conducted twice-daily safety inspections of the construction site. The contract between Bovis and the Dormitory Authority required Bovis to conduct daily safety inspections and hold weekly safety meetings with all contractors. He testified that he had not seen any grinders without safety guards, but would have ordered a work stoppage if he had, and that he did not know that plaintiff was using the grinder to cut the I-beam until after the accident.

Plaintiffs argue that there are factual questions both with respect to their Labor Law § 241 (6) claim, for which they rely on Industrial Code § 23-1.12 (c), and their Labor Law § 200 and common-law negligence claims, which preclude summary judgment. Plaintiffs also contend that there are factual questions concerning whether Bovis's safety inspector was required to stop work when a grinder without a guard was being used, and also whether Bovis had constructive notice of the missing guard, because it had allegedly been missing for 16 months.

DISCUSSION

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is arguable or debatable (see Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223 [1978]). The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The

proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (see Bush v St. Clare's Hospital, 82 NY2d 738, 739 [1993]; Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (see Vermette v Kenworth Truck Co., Div. of Paccar, Inc., 68 NY2d 714, 717 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Labor Law § 241 (6)

Section 241 (6) provides:

"all contractors and owners and their agents . . . when constructing . . . 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

In Allen v Cloutier Construction Corp. (44 NY2d 290 [1978]), the Court of Appeals held that under Labor Law § 241 (6) liability can be imposed on an owner or general contractor even

in the absence of a showing of control or direction of the work. However, a provision of the Industrial Code must apply as a predicate for liability under Section 241 (6) (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Although plaintiffs initially alleged numerous Industrial Code provisions as predicates for their Section 241 (6) claim, they settled on only one, Industrial Code § 23-1.12 (12 NYCRR 23-1.12), entitled “[g]uarding of power-driven machinery,” as the basis for their claim. Subdivision (c) contains specific mandates for power-driven saws.

Plaintiff’s reliance on Industrial Code 23-1.12, and therefore on Labor Law § 241 (6), is misplaced. In Hassett v Celtic Holdings, LLC (7 AD3d 364 [1st Dept 2004]), the Appellate Division affirmed the award of summary judgment to an owner and a general contractor on facts essentially identical to those at bar. The Appellate Division states that the tool involved is not covered by Industrial Code § 23-1.12 (c) (12 NYCRR 23-1.12 [c]), but does not identify the tool in its decision. However, in the same case, an earlier unreported decision (attached as Ex. C to defendants’ moving papers), dated September 12, 2002, from which no appeal was taken, describes the tool as a grinder, and holds that this provision of the Industrial Code does not apply (Hasset v Celtic Holdings LLC, Sup Ct, NY County, 4/11/03, Shafer, J., Index No. 125499/00). Thus, the Appellate Division has held that a grinder is not covered by the Industrial Code for purposes of Labor Law § 241 (6).

Therefore, the claim under Labor Law § 241 (6) must be dismissed as to all defendants for plaintiff’s failure to cite an applicable provision of the New York State Industrial Code (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, supra). Inasmuch as nowhere is it alleged that either of the municipal defendants, NYHHC and the City of New York, exercised

supervision and control of the work, the same analysis applies to the municipal defendants as to Bovis with respect to Section 241 (6).

Labor Law § 200 and Common-law Negligence

Labor Law § 200 (1) provides:

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Labor Law § 200 codifies the common-law duty imposed upon owners and contractors to provide construction site workers with a safe place to work (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501).

“The duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor’s own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work” (Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]; see also Curtis v State of New York, 23 NY2d 976 [1969]; DeSimone v Structure Tone, Inc., 306 AD2d 90 [1st Dept 2003]; Vilardi v Berley, 201 AD2d 641 [2d Dept 1994]).

To be held liable under Labor Law § 200 or common-law negligence, where the alleged defect or dangerous condition arises from the contractor's methods, the owner or construction manager must exercise supervisory control over the work (see Lombardi v Stout, 80 NY2d 290

[1992]; Reyes v Silfies, 168 AD2d 979 [4th Dept 1990]).

In support of their contention that Bovis exercised supervision and control of the work, plaintiffs rely upon the provisions of the contract with the Dormitory Authority, which required Bovis to conduct daily safety inspections, hold weekly safety meetings with all contractors, and authorized Bovis to stop work if a safety violation is found. This argument is unavailing. "The construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees" (Buccini v 1568 Broadway Assoc., 250 AD2d 466, 468 [1st Dept 1998]). It is well settled that "[t]he general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations" (Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 [1st Dept 2005], quoting Buccini v 1568 Broadway Assoc., 250 AD2d at 469; see also Landa v City of New York, 17 AD3d 180, 182 [1st Dept 2005]; Masciotta v Morse Diesel Intl. Inc., 303 AD2d 309, 312 [1st Dept 2003]).

Plaintiffs' argument that Bovis can be held liable under a theory of constructive notice fails because the standard of constructive notice applies when the injuries are caused by a dangerous condition at the site (see Murphy v Columbia University, 4 AD3d 200 [1st Dept 2004]), rather than a defect in the subcontractor's tools.

Because no showing has been made that any defendant exercised supervision and control over plaintiff's work, no claim lies against any of the defendants for liability under either Labor Law § 200 or common-law negligence.

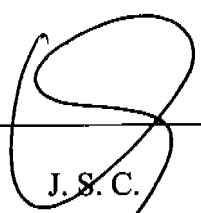
Accordingly, it is

ORDERED that the motion is granted in its entirety, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

DATED: 11/3/05

ENTER:



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

FILED
NOV 09 2005
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