

Ahmed v Momart Discount Stores

2005 NY Slip Op 30387(U)

April 12, 2005

Supreme Court, New York County

Docket Number: 121796/02

Judge: Joan A. Madden

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

PRESENT: _____ PART 11

0121796/2002

AHMED, IBRAR
vs
MOMART DISCOUNT STORES

DEX NO. _____

OTION DATE 11-4-04

SEQ 3

OTION SEQ. NO. _____

SUMMARY JUDGMENT

OTION CAL. NO. _____

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

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

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 + cross-motion are decided in accordance with the annexed memorandum Decision + order.

FILED
APR 18 2005
NEW YORK
COUNTY CLERKS OFFICE

Dated: April 8, 2005

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 11

-----X
IBRAR AHMED,

Plaintiff,

-against-

MOMART DISCOUNT STORE, LTD. and GARRETT
FISHER,

Index No. 121796/02

Defendants.
-----X

GARRETT FISHER,

Third-Party Plaintiff,

Index No. 590844/03

-against-

SATISFACTION CONTRACTING CORP.,

Third-Party Defendant.
-----X

Joan Madden, J.:

This action arises out of plaintiff's accident while operating a table saw at premises owned by defendant Momart Discount Store, Ltd. (Momart), and rented by defendant Garrett Fisher (Fisher). Momart moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it. Third-party defendant Satisfaction Contracting Corp. (Satisfaction) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party action for common-law indemnification and contribution, and Momart's cross claim asserted as against it.

Plaintiff's amended complaint asserts one cause of

action, alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6) against defendants. Satisfaction alleges a cross claim against Momart, sounding in common-law indemnification or contribution. Momart's cross claim against Satisfaction asserts a claim apparently sounding in contractual and/or common-law indemnification, and contribution.

Plaintiff has consented to the dismissal of his Labor Law § 200 claim (Falkoff 8/30/04 Amended Affirm. in Opp. to Momart's Motion). Since "Labor Law § 200 codifies 'the common-law duty imposed upon an owner or general contractor to maintain a safe construction site' [citations omitted]" (*Carney v Allied Craftsman General Contractors*, 9 AD3d 823, 824 [3d Dept 2004]), plaintiff's claim for common-law negligence is also dismissed.

By order dated November 4, 2004, and judgment entered November 19, 2004, this court granted, without opposition, Fisher's motion for summary judgment dismissing all claims, counterclaims, and cross claims asserted as against him. When a complaint against a party is dismissed in its entirety, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence" of that dismissal (*Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]). Therefore, that part of Satisfaction's cross motion which seeks summary judgment dismissing the third-party complaint is denied as moot.

Momart owns a multi-use building located at 870

Broadway in Manhattan. The bottom two floors are commercial rentals, while the top two floors are residential apartments. Fisher rented the third-floor loft apartment from Momart pursuant to a June 19, 2002 lease. The lease provided that Fisher could renovate the apartment as long as Momart approved of the chosen contractor prior to the work beginning.

Fisher retained Satisfaction, plaintiff's employer, to perform the renovations, without obtaining Momart's approval either before, during, or after the work. On August 20, 2002, while working in Fisher's apartment, plaintiff injured his left hand while operating a table saw that had no safety guard.

In light of the dismissal of the third-party action against plaintiff's employer, this court need not determine whether plaintiff's injuries constitute a "grave injury" under Workers' Compensation Law § 11.

Only plaintiff's Labor Law § 241 (6) claim remains in the amended complaint. "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers.'" Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 879 (1993); Walker v Ekleco, Co., 304 AD2d 752, 752 (2d Dept 2003). This duty is prescribed upon owners "regardless of the level of control or supervision" which the owner exercises over the work. Piccolo v St. John's Home for the Aging, 11 AD3d 884,

[* 5]
886 (4th Dept 2004).

However, "owners of one and two-family dwellings who contract for but do not direct or control the work" are exempted from Labor Law § 241 (6). In providing for this exemption,

the Legislature intended to relax the harsh strict liability rule of that statute as against such owners because "[i]t is unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon him" (citation omitted). . . . [T]he exemption was added because the Legislature sought to make the law "fairer and . . . more nearly reflect the practical realities governing the relationship between homeowners and the individuals they hire to perform construction work on their homes" (citation omitted).

Van Amerogen v Donnini, 78 NY2d 880, 882 (1991).

Momart argues that as an owner of a two-family dwelling with a commercial space underneath, it cannot be held liable under Labor Law section 241(6). Momart also argues that as it did not contract for the work or in any way authorize it, it is not subject to liability under section 241(6).

Contrary to Momart's position, the exemption for one and two-family home owners is inapplicable to it, since it leased the buildings for commercial gain. Van Amerogen v Donnini, 78 NY2d at 883 (holding that exemption did not apply when owner, which rented a house to college students, used the house "solely for commercial purposes as income-producing property").

On the other hand, while Momart, like the owners in Van

Amerogen, used its property solely for rental purposes, the owners in *Van Amerogen* contracted for the renovations there. In this case, Momart, the owner, did not.

Labor Law section 241(6) covers "all contractors or owners and their agency...who contract for but not direct or control the work." Thus, to recover under the statute, a plaintiff must establish, inter alia, "that he was hired by the owner or an agent of the owner or general contractor." Brown v. Christopher St. Owners Corp., 211 AD2d 441, 442 (1st Dept 1995), aff'd on other grounds, 87 NY2d 938 (1996) (citations omitted); see also, Jamil v. Concourse Enterprises, Inc., 293 AD2d 271 (1st Dept 2002).

In Brown v. Christopher St. Owners Corp., supra, the Appellate Division First Department held that a window washer hired by a tenant of in a cooperative apartment, could not be maintain a personal injury action under the Labor Law, absent evidence that the tenant acted as an agent of the owner or managing agent.

In this case, it is undisputed that Momart did not contract with Satisfaction to do the renovations. Moreover, here, as in Brown v. Christopher St. Owners Corp., supra, there is no evidence that contractor employed to do the work acted as an agent of the owner or its managing agent. In fact, although the lease between Momart and Fisher, expressly required Fisher to

[*7]
obtain Momart's approval of Fisher's chosen contractor prior to the commencement of work, Fisher failed to do so.

Thus, not only did Momart not contract for Satisfaction's work, but any opportunity which Momart might have had to ensure that a safe work environment would be provided by the contractor was lost by Fisher's breach of the explicit, negotiated lease provision. Nor can it be said that Momart's inclusion of the pre-approval provision in the lease was tantamount to contracting with Satisfaction. Momart was not a party to Fisher's contract with Satisfaction, and Satisfaction was not a party to the lease between Momart and Fisher.

Accordingly, as there is no evidence that plaintiff's employer was hired by Momart or its agent, that part of Momart's motion which seeks summary judgment dismissing the complaint should be granted, and the court need not consider whether plaintiff has pleaded a violation of a regulation sufficient to establish liability under section 241(6).

In its "cross-claims" against Momart, Satisfaction seeks common-law indemnification or contribution. Neither cross claim has merit since as indicated above, Momart had no role in causing plaintiff's accident and there is no basis for its liability under the Labor Law. Thus, the part of Momart's motion which seeks dismissal of Satisfaction's cross claim against it is granted.

Finally, in its submissions Momart requested that, in the event that Fisher is dismissed from this action, that the court convert Momart's cross claim for indemnification or contribution against Satisfaction into a third-party action. Although such request may be granted under appropriate circumstances, (Wright v. E.S. McCann and Son, Inc., 216 AD2d 73, 75 (1st Dept 1995)), in this case it is unnecessary to covert the cross claims since, as indicated above, the claims against Momart have been dismissed and thus there is no basis for any recovery by Momart against Satisfaction.

Thus, Satisfaction's cross-motion for summary judgment dismissing Momart's claims against it is moot, as Momart's claims do not survive and the third-party action has been dismissed.

Accordingly, it is

ORDERED that Momart Discount Store, Ltd.'s motion for summary judgment is granted, and the complaint is dismissed as to it; and it is further

ORDERED that Satisfaction Contracting Corp.'s cross motion is moot as the main action and the third party action has been dismissed and no claims survive; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 12, 2005



J.S.C.

FILED
APR 18 2005
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