

Kral v F. J. Sciame Construction Co., Inc.
2006 NY Slip Op 30016(U)
March 2, 2006
Supreme Court, Queens County
Docket Number: 0021818/2001
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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DUSAN KRAL, Index No.: 21818/03

Plaintiff, Motion Dated:
February 7, 2006

-against- Cal. No.: 14

F. J. SCIAME CONSTRUCTION CO., INC.,
EAGLE ONE ROOFING CONTRACTORS, INC.,
And TRUSTEES OF THE SPENCE SCHOOL, INC.,

Defendants.

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EAGLE ONE ROOFING CONTRACTORS, INC., Index No.: 350421/04

Third-Party Plaintiff,

-against-

J & J CONTRACTORS COMPANY,

Third-Party Defendant.

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F. J. SCIAME CONSTRUCTION CO., INC.,
and TRUSTEES OF THE SPENCE SCHOOL, INC.,
s/h/a TRUSTEES OF THE SPENCE SCHOOL, INC.,

Second Third-Party Plaintiffs,

-against- Index No. 350525/04

JOHN KARCZ, individually and JOSEPH
SKORUPA, individually, and JOHN KARCZ
and JOSEPH SKORUPA d/b/a J & J
CONTRACTORS,

Second Third-Party Defendants.

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The following papers numbered 1 to 36 read on these motions by
plaintiff for summary judgment on liability for his claims under

Labor Law §§ 240(1) and 241(6), by defendants/second third-party plaintiffs F.J. SCIAME CONSTRUCTION CO., INC. & TRUSTEES OF THE SPENCE SCHOOL, s/h/a TRUSTEES OF THE SPENCE SCHOOL, INC. for summary judgment and dismissal of plaintiff's Complaint and for summary judgment against second third-party defendants John Karcz, individually and John Skorupa, individually, and John Karcz and Joseph Skorupa d/b/a J & J Contractors, by plaintiff to strike defendants F.J. SCIAME CONSTRUCTION CO., INC. & TRUSTEES OF THE SPENCE SCHOOL, s/h/a TRUSTEES OF THE SPENCE SCHOOL, INC.'s pleadings, and by defendant/third-party plaintiff EAGLE ONE ROOFING CONTRACTORS, INC. for summary judgment and dismissal of plaintiff's Complaint and for summary judgment against third-party defendant J & J Contractors Company.

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Upon the foregoing papers, it is ordered that these motions are determined as follows:

Plaintiff commenced this action to recover for injuries sustained on August 4, 2003, when, while working on a roof, he was struck by a plank that fell off a scaffold above him, causing him to fall off his scaffold down 10-15 feet to a ledge. Plaintiff brought suit against defendant Trustees of the Spence School, Inc. (hereinafter referred to as "Spence") as owners of the property, defendant F.J. Sciame Construction Co., Inc. (hereinafter referred to as "Sciame") as the general contractor of the worksite, and defendant Eagle One Roofing Contractors, Inc. (hereinafter referred to as "Eagle One") as contractor of the property who hired third-party and second third-party defendant J & J Contractors Company (hereinafter referred to as "J & J"), plaintiff's employer. Sciame/Spence and Eagle One each commenced third-party actions against J & J for indemnification.

Plaintiff moves for summary judgment as to liability for his Labor Law §§ 240(1) and 241(6) causes of action against Spence, Sciame and Eagle One. Plaintiff alleges that defendants violated their non-delegable duty under Labor Law § 240(1) because they

failed to provide sufficient safety devices, such as safety nets, harnesses, belts, hats or lifelines to protect him from falling while working on the roof. Further, their failure was a violation of specific Industrial Code statutes and is therefore a violation of Labor Law § 241(6). Plaintiff's expert Stanley H. Fein opines that defendants' failure to provide scaffolds, guardrails and other safety devices was a violation of Labor Law § 240(1). Plaintiff also argues that defendants are liable under Labor Law § 200 as they had actual and constructive notice that safety lines were not being used. Plaintiff admits that Labor Law § 241-a and some of the Industrial Code sections cited in his Bill of Particulars may not be applicable, but that he had a good faith basis for presenting these claims at the commencement of the case and should not be sanctioned.

Plaintiff concedes that his motion is untimely, but argues that good cause exists as discovery remains outstanding.

Plaintiff cross-moves to strike Sciame and Spence's Answer for failure to comply with discovery requests.

Sciame and Spence oppose plaintiff's motion and cross-move for summary judgment. They argue that plaintiff's motion is untimely without good cause and should be rejected. They further contend that they are not liable under Labor Law § 200 or common law negligence because they did not direct plaintiff's work nor did they create or have notice of any dangerous condition. They had no knowledge that plaintiff's employer J & J was a subcontractor on the worksite and did not supply any tools or equipment to plaintiff. Their general supervision and responsibility for the worksite does not confer liability on them. Sciame and Spence argue that any liability under Labor Law § 240(1) must be imputed to all defendants. Sciame and Spence also contend they are not liable under Labor Law § 241(6) because they did not supervise plaintiff's work and plaintiff failed to cite a specific applicable Industrial Code violation for which defendants could be liable. Many of the alleged Industrial Code violations are inapplicable to the facts in this matter or cannot be the predicate for a Labor Law § 241(6) violation. Those industrial code sections that are applicable, such as IC §§ 23-1.16, 23-1.17, 23-1.24 and 23-5.1, cannot render defendants liable as a matter of law, as these sections do not require defendants to provide safety belts, harnesses, life nets nor is there sufficient evidence of improper scaffolds or roof environment.

Sciame and Spence argue that plaintiff's claim under Labor Law § 241-a should be dismissed, as it is inapplicable to the facts in this case. Labor Law § 241-a involves work performed in elevator shaft ways and therefore cannot be a valid cause of action for plaintiff's rooftop accident. They also seek sanctions against plaintiff for making frivolous claims under Labor Law § 241-a and the Industrial Code. They note that plaintiff improperly cites new Industrial Code sections in its moving papers that were not presented in its Bill of Particulars. As plaintiff never moved to

amend his Bill of Particulars, those sections should be disregarded.

Sciame and Spence move for summary judgment against Eagle One and J & J for indemnification and present the contract that obligated Eagle One and J & J to indemnify them for plaintiff's claim. Sciame and Spence argue that they are entitled to indemnification because they are the non-negligent owner and general contractor who can only be found vicariously liable for plaintiff's injuries. Under those circumstances, they are entitled to indemnification from Eagle One and J & J, the contractors who had authority to supervise and exercise safety measures on plaintiff's work.

They also argue that Eagle One and J & J breached their contractual duties to procure insurance with Sciame and Spence as additional insureds.

Sciame and Spence oppose plaintiff's motion to strike their Answer as meritless. They argue that plaintiff failed to seek depositions and that there is no outstanding discovery.

Sciame and Spence oppose Eagle One's cross-motion, arguing that the indemnification clause is valid. They further argue that J & J failed to prove that it procured insurance on Sciame and Spence's behalf, as a certificate of insurance is not valid proof of insurance.

Eagle One opposes the above motions and cross-moves for summary judgment against plaintiff and defendants Sciame and Spence and J & J. They oppose both of the above motions as untimely without good cause. Eagle One argues that plaintiff failed to present a prima facie entitlement to summary judgment as he did not prove that Eagle One was a general contractor. It argues that it cannot be liable to plaintiff because it was only a subcontractor with no control or authority over the worksite. They present evidence that plaintiff never spoke with anyone from Eagle One and that Sciame controlled and directed the work. It further argues that there are issues of fact that preclude a finding of liability under the Labor Law. Specifically, there are issues as to whether Eagle One exercised sufficient control and supervision over plaintiff's work to render it liable for plaintiff's injuries. It also argues that there are issues of comparative negligence that preclude a finding of summary judgment under Labor Law § 241(6).

Eagle One opposes Sciame's cross-motion, arguing that Sciame exercised ultimate control and authority over the worksite and must be found liable. It also contends that it is not required to indemnify Sciame or Spence as the contract violates General Obligations Law § 5-322.1. Eagle One presents the insurance policy proving that it procured insurance for Sciame and Spence as required by their contract.

Eagle One moves for summary judgment against J & J, arguing that the contract requires J & J to indemnify Eagle One for actions where Eagle One was not negligent.

J & J oppose Eagle One and Sciame and Spence's motions, arguing that summary judgment is not warranted. It notes that Eagle One did not attach a copy of the contract between Eagle One and J & J to support any claim for indemnification. It also presents a certificate of insurance to prove that it procured insurance for Sciame and Spence. It presents an affidavit of merit demonstrating that Eagle One was negligent in affixing improper screws and brackets, causing the brackets to dislodge and plaintiff to fall.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

Labor Law § 200 codifies the common law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has control over the performance of the activity causing the injury. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].) Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safe work places, and breach of that duty may result in liability notwithstanding the absence of actual supervision or control over the work. (*Id.*) Labor Law § 241(6) imposes a nondelegable duty upon homeowners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury. (See *Toefer v. Long Island R.R.*, N.E.2d, 2005 WL 756604 [4/5/2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2nd Dept. 1986].)

While plaintiff and Sciame/Spence's motions are admittedly untimely, this Court finds sufficient cause to review the motions, based upon the ongoing discovery proceedings. (See *Brill v. City of New York*, 2 NY3d 648 [2004].)

Plaintiff presented a prima facie entitlement to summary judgment as to Labor Law § 240(1). (See *Cun-En Lin v. Holy Family Monuments*, NYS2d, 2005 WL1283095 [2nd Dept. 5/31/2005].) Plaintiff presented sufficient evidence that defendants Sciame, Spence and Eagle One did not provide any safety equipment to prevent him from falling. (See *Zimmer v. Chemung County Performing*

Arts, Inc., 65 NY2d 513 [1985].) All parties' depositions clearly indicate that plaintiff was not provided any safety harnesses, nets or barricades to assist him in his elevated work. Further, there is no evidence that plaintiff was the sole proximate cause of his injuries. (See *Brandl v. Ram Builders Inc.*, 7 AD3d 655 [2nd Dept. 2004]; *Clark v. Fox Meadow Builders Inc.*, 214 AD2d 882 [3rd Dept. 1995].)

Defendants failed to raise a triable issue of fact with regard to Labor Law § 240(1). It is clear that these defendants were obligated to provide safety devices for plaintiff while he worked on the roof. (See *Cordeiro v. Shalco Investments*, 297 AD2d 486 [1st Dept. 2002]; *John v. Baharestani*, 281 AD2d 114 [1st Dept. 2001]; *Schultze v. 585 West 214th Street Owners Corp.*, 228 AD2d 381 [1st Dept. 1996].) Under Labor Law § 240(1), liability is absolute, regardless of whether the owner or general contractor exercises direction or control over plaintiff's work. (See *Blake v. Neighborhood Housing Services of New York*, 1 NY3d 380 [2003]; *Ross v. Curtis-Palmer Hydro Elec. Co.*, 81 NY2d at 500.) Further, contributory negligence is not a defense to a claim predicated on Labor Law § 240(1). (See *Zimmer, supra.*; *Gandley v. Prestige Roofing & Siding Co., Inc.*, 148 AD2d 666 [2nd Dept. 1989], *appeal dismissed* 74 NY2d 792 [1989].)

Eagle's claim that it was not a contractor under Labor Law § 240(1) is without merit. A party which has authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1). (See *Williams v. Dover Home Improvement, Inc.*, 276 AD2d 626 [2nd Dept. 2000].) Eagle One qualifies as a contractor as it hired plaintiff's employer J & J to perform roof work and had authority to exercise control and safety over the work.

Therefore, as defendants provided no protective gear to plaintiff, they are liable under Labor Law § 240(1). (See *Blair v. Cristani*, 296 AD2d 471 [2nd Dept. 2002].)

Plaintiff presented a prima facie entitlement to summary judgment under Labor Law § 241(6). (See *Hayden v. 845 UN Ltd. Partnership*, 304 AD2d 499 [1st Dept. 1999].) To recover on an action alleging a violation of Labor Law § 241(6), plaintiff must establish that defendants violated an Industrial Code provision that sets forth specific safety standards. (*Reinoso v. Ornstein Layton Management, Inc.*, 19 AD3d 678 [2nd Dept. 2005]; *Ross*, 81 NY2d at 503-505.) Plaintiff presented sufficient evidence that defendants failed to provide safety equipment in violation of specific Industrial Code §§ 23-1.7, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.24 and 23-5.1 which proximately caused his injuries.

Defendants Sciame, Spence and Eagle One failed to raise any issues of fact or prove as a matter of law that they are not liable under Labor Law § 241(6). (See *Rosado v. Briarwood Farms, Inc.*, 19 AD3d 396 [2nd Dept. 2005].) There are issues of fact with regard to

the lack of safety railings and equipment on the roof in violation of specific Industrial Code sections that preclude summary judgment. (See *Alvia v. Temen Elec. Contracting, Inc.*, 287 AD2d 421 [2nd Dept. 2001], *lv denied* [2002]; *Messina v. City of New York*, 300 AD2d 121 [1st Dept. 2002].) Defendants failed to present expert testimony or other objective evidence that they complied with the Industrial Code. Further, they concede that they did not provide any safety equipment to plaintiff. Therefore, there are no issues of fact to rebut the violation of the aforementioned Industrial Code sections. Defendants' argument that plaintiff failed to include Industrial Code § 23-1.7(b) or 23-1.11 in his Bill of Particulars does not preclude this Court from searching the record and finding a violation of that section. (See *Walker v. Metro-North Commuter R.R.*, 11 AD3d 339 [1st Dept. 2004].) However, it is undisputed that Industrial Code §§ 23-1.5, 23-1.7, 23-1.8, 23-1.13, 23-1.15, 23-1.18, 23-1.19, 23-1.20, 23-1.21, 23-1.22, 23-1.23, 23-1.28 and 23-1.30 are inapplicable or not sufficient predicates for a claim under Labor Law § 241(6).

Plaintiff's motion to strike Spence and Sciame's Answer is denied, as he failed to establish their wilful failure to comply with discovery.

Defendant Spence presented a prima facie entitlement to summary judgment under Labor Law § 200. (See *Walker v. Ekleco, Co.*, 304 AD2d 752 [2nd Dept. 2003].) It is undisputed that Spence exercised no supervision or control over plaintiff and was merely the owner of the property. Spence also had no notice of any dangerous condition with regard to the work performed on the roof or the failure to use safety equipment. (See *Nobre v. Nynex Corp.*, 2 AD3d 602 [2nd Dept. 2003].)

Plaintiff failed to present sufficient evidence to raise an issue of fact as to his claim under Labor Law § 200 against Spence. An owner will be liable for a violation of Labor Law § 200 and common law negligence when the injuries are caused by a dangerous condition at work only if the owner exercised supervision and control over the work performed or had actual or constructive notice of the dangerous condition. (*Cuartas v. Kourkoumelis*, 265 AD2d 293 [2nd Dept. 1999].) Plaintiff presents no evidence that Spence either directed the work or had notice of a dangerous condition. (See *Comes v. New York State Elec. and Gas Corp.*, 82 NY2d 876 [1993].)

Sciame and Eagle One, however, did not present sufficient evidence to establish prima facie that they are not liable as a matter of law under Labor Law § 200. It is unclear whether these defendants have notice of any dangerous condition with regard to the scaffold or the worksite. However, the deposition testimony presented evidence that both parties exercised control and supervision over the workplace. As there are issues as to the

level of control, direction and supervision given by the respective defendants, summary judgment is not warranted. (See *Kerins v. Vassar College*, 293 AD2d 514 [2nd Dept. 2002].)

Spence's motion for summary judgment against J & J Contractors for indemnification is granted, while Sciame and Eagle One's motions for summary judgment for indemnification from J & J is denied. Spence sufficiently demonstrated that it is entitled to indemnification as a matter of law, while Sciame and Eagle One did not. An owner held vicariously liable under the Labor Law is entitled to full common law indemnification from an actively negligent contractor provided that the owner did not direct or control the work performed. (*Dawson v. Pavarini Const. Co. Inc.*, 228 AD2d 466 [2nd Dept. 1996].) It is undisputed that Spence's liability, if any, is vicarious in nature and not through any negligence. However, there are issues of fact with regard to whether Sciame and Eagle One were negligent in failing to provide a safe working environment that preclude summary judgment. (See *Kader v. City of New York* [2nd Dept. 3/14/2005]; *Greco v. Archdiocese of New York*, 268 AD2d 300 [1st Dept. 2000].)

Sciame and Spence's motion for sanctions is denied, as they failed to present sufficient evidence of wilful and contumacious behavior to warrant the requested relief.

Sciame and Spence's motion for summary judgment and dismissal of plaintiff's claims under Labor Law § 241-a is granted. It is clear that this statute is not applicable to the facts in this case and warrants dismissal. (See *Silvers v. E.W. Howell, Inc.*, 129 AD2d 694 [2nd Dept. 1987].)

Sciame and Spence's motion for summary judgment on their breach of contract claim against Eagle One is denied. Eagle One presented its insurance contract with Arch Insurance Co. that provided coverage for defendants, thereby raising issues of fact. Defendants' claim that Eagle One's insurance company denied coverage does not prove Eagle One failed to obtain coverage. Rather, the evidence indicates that Eagle One obtained coverage for defendants but that Arch Insurance has denied the claim on other grounds. As defendants failed to present objective proof that Eagle One did not obtain insurance for them, their motion for summary judgment is denied.

Accordingly, plaintiff's motion for summary judgment on liability is granted as to Labor Law §§ 240(1) and 241(6). Defendant Spence's motion for summary judgment is granted as to Labor Law § 200 and common law negligence and plaintiff's causes of action regarding Labor Law § 200 and common law negligence are dismissed as to Spence. Defendant Sciame's motion for summary judgment as to Labor Law § 200 is denied. Defendants Sciame and Spence's motion for summary judgment under Labor Law § 241(6) is

denied. Spence's motion for indemnification against J & J is granted. Sciame's motion for indemnification against J & J is denied. Eagle One's motion for indemnification against J & J is denied. Sciame and Spence's motion for sanctions is denied. Plaintiff's motion to strike defendants Sciame and Spence's Answer is denied. Defendants Sciame and Spence's motion for summary judgment against Eagle One for breach of contract is denied.

Dated: March 2, 2006

Augustus C. Agate, J.S.C.