

Risko v Alliance Builders Corp.

2006 NY Slip Op 30452(U)

October 20, 2006

Supreme Court, New York County

Docket Number: 114187/01

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____ J.S.C.

PART 11

Index Number : 114187/2001

RISKO, JOHN

vs

ALLIANCE BUILDERS

Sequence Number : 003

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION 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 *is determined in accordance with the annexed decision and order.*

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

FILED
OCT 27 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 20, 2006


HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
JOHN RISKO and KATHLEEN RISKO,

INDEX NO. 114187/01

Plaintiffs,

-against-

ALLIANCE BUILDERS CORP., ROBERT
A. COOK and GARY PETERS,

Defendants.

-----X

JOAN A. MADDEN, J.:

Arguing that there has been a change in the applicable law, defendant Gary Peters (“Peter”) moves for leave to reargue the motion by defendant Alliance Building Corp. (“Alliance”) for common law indemnification against defendant Peters, and upon reargument, Peters seeks to vacate this Court’s order granting indemnification, and find instead that pursuant to Article 16 of the CPLR, Alliance can only recover from Peters, the percentage of liability found against Peters. Alliance opposes the motion on the ground that under the circumstances of this case, the change in the law regarding the applicability of Article 16 apportionment provisions, does not apply to the instant case, as Peters’ liability was based on his negligent operation of a motor vehicle, which is expressly excepted from the provisions of Article 16. Reargument is granted and for the reasons stated below, this Court adheres to its original decision.

In the instant action, plaintiff John Risko (“Risko”) sued defendants for injuries he allegedly sustained due to a fall from a scaffold, when the truck operated by Peters struck a utility

wire, causing the scaffold to collapse. This Court granted plaintiffs partial summary judgment as to their Labor Law §240(1) claims, finding that Alliance was statutorily liable as the general contractor. At trial, the jury found that Risko was 90% and Peters was 10% responsible for Risko's injuries.

As noted above, this Court granted Alliance's post-trial motion for common law indemnification against Peters on the ground that as Alliance's liability was statutorily imposed, Alliance was not actively negligent, and, therefore, under principles of common law indemnification, Alliance was entitled to 100% indemnification from Peters, the actively negligent party.

In support of the instant motion, Peters relies on the decision in Frank v. Meadowlakes Development Corp., 6 NY3d 687 (2006), where the Court of Appeals found that CPLR §1602(2)(ii) "is a savings provision intended to insure the courts do not read article 16 as altering or limiting the pre-existing right of indemnification." However, the Court went on to state that "[t]his does not, however, entitle a party to 100% recovery," and held that article 16 provisions apply. In Frank, the trial court granted a directed verdict finding that the owner and general contractor were statutorily liable under Labor Law §240(1); on the issue of negligence, the jury apportioned fault in the amount of 10% to plaintiff, 10% to the employer and 80% to the general contractor. The issue on appeal was whether the owner, who was statutorily liable, was entitled to 100% indemnification from the employer whom the jury found was only 10% at fault.

Thus, the facts in Frank while similar to the instant matter, in that both plaintiffs were injured due to falls from a scaffold, and that the legal issues involve whether one party may recover 100% indemnification from another party whose liability is less than 50%, there is a

significant difference in this action, as Peters' liability stems from the negligent operation of his truck. CPLR §1602(6), specifically excepts from its provisions, liability due to the "use, operation or ownership of a motor vehicle." As Peters' liability was based on his negligent operation of his truck, by the clear and express language of CPLR §1602(6), the provisions of Article 16 are inapplicable. Thus, the decision in Frank does not alter the outcome herein.

Peters argues that in granting Alliance indemnification from Peters, this Court "relied on" Salamone v. Wincaff Properties, Inc., 249 AD2d 169 (1st Dept 1998), which was overturned by Frank. To the extent this argument can be read to infer that the Court's determination was based on precedent that is no longer good law, such inference is without merit. While it is correct that this Court cited Salamone, the Court's determination was based not on Salamone, but on well established principles of common law indemnification as supported by the numerous case law citations in the Court's decision.

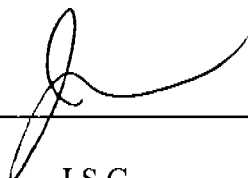
Accordingly, it is hereby

ORDERED that the motion by defendant Gary Peters for leave to reargue granted, and upon reargument the Court adheres to its original decision.

DATED: October 20, 2006

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OCT 27 2006
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