

Tobio v Boston Props., Inc

2006 NY Slip Op 30557(U)

February 10, 2006

Supreme Court, Queens County

Docket Number: 27294/2002

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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FRANCISCO TOBIO, et al.	x	Index		
		Number	<u>27294</u>	2002
		Motion		
- against -		Date	<u>October 19,</u>	2005
BOSTON PROPERTIES, INC., et al.		Motion		
		Cal. Number	<u>42</u>	
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BOSTON PROPERTIES, INC., et al.		Third-Party Index		
		Number	<u>350420</u>	2003
- against -				
ONE SOURCE HUDSON SHATZ, et al.				
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The following papers numbered 1 to 33 read on this motion by defendants/third-party plaintiffs Boston Properties, Inc., Insignia/ESG, Inc., Insignia Financial Group, Inc., Thelen Reid & Priest, LLP and Structure Tone, Inc. for summary judgment dismissing the plaintiffs' common-law and Labor Law §§ 200, 240 and 241(6) claims and in their favor on their third-party claims for contractual defense and indemnification and breach of contract for failing to procure liability insurance and cross motion by the plaintiffs for summary judgment in their favor on the issue of liability against the defendants pursuant to Labor Law § 240(1).

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-7
Answering Affidavits - Exhibits	8-23
Reply Affidavits	24-33

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Francisco Tobio, on October 14, 2002, during the course of his employment as a painter. The accident occurred at a construction site located at 875 Third Avenue when the plaintiff fell more than 10 feet from a wooden plank on which he was standing while painting a portion of a 15-foot high ceiling within the premises. The wooden plank was placed over a metal framework or soffit measuring approximately three feet by three feet. It broke in half while the plaintiff was standing on it and was allegedly the only device that the plaintiff was provided to access his work on the ceiling above the soffit. He claims that he sustained severe injuries to his head, neck and shoulder as a result of his fall and has not returned to work in any capacity since the date of the accident.

Defendants/third-party plaintiffs Boston Properties, Inc., Insignia/ESG, Inc., and Insignia Financial Group, Inc. were the owners and/or managers of the subject premises. They retained the services of defendant/third-party plaintiff Structure Tone, Inc. to perform the services of general contractor in connection with the construction and renovation work that is the subject of this action. Defendant/third-party plaintiff Thelen, Reid & Priest, LLP was a lessee of the subject premises. At the time of the accident, the plaintiff was employed by third-party defendant OneSource Facility Services s/h/a One Source Hudson Shatz and Hudson Shatz Painting (OneSource), a subcontractor of Structure Tone, Inc.

The plaintiffs' verified amended complaint alleges common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6) against the defendants/third-party plaintiffs.

The plaintiff appeared for examination before trial on February 11, 2004. Upon examination before trial the plaintiff testified, among other things, that he never spoke to nor received instructions from Structure Tone, the general contractor. His instructions came solely from his foreman at OneSource, Mr. Vito DeCarlo. The foreman did not discuss safety except to tell the painters to be careful. The plaintiff states that his employer provided A-Frame ladders at the work site, that all ladders he used on the job were provided by his employer and that a lift, which was being used by another employee at the time of the accident, was also provided at the job site. The plaintiff did not know whether his employer had any scaffolds at the job site. On the date of the accident, the foreman told the plaintiff to retrieve plywood from the area where the work materials were located and to put the plywood on top of the metal framework in order to make a platform on which to paint the ceiling. The plaintiff used an eight or 10-foot ladder to gain access to the metal framework. From atop the ladder the

plaintiff placed three plywood sheets across the metal framework. One piece of plywood was four feet by eight feet by 3/4 of an inch thick and the other two pieces of plywood were two feet by eight feet by 3/4 of an inch thick. The metal frames were about three feet apart. A five-foot ladder was placed on top of the plywood on the metal frame. From atop the frame, the plaintiff asked foreman Mr. DeCarlo for a scaffold whereupon he purportedly replied, "I don't have nothing more." The plaintiff also spoke to his boss, who told him that there were no available scaffolds. At the time of the accident, the plaintiff's right foot was situated on the two by eight piece of plywood and his left foot was on the four by eight piece of plywood. As he tried to move, the board broke beneath him and he fell.

Defendants/third-party plaintiffs move for an award of summary judgment in their favor dismissing the plaintiff's common-law claims and claims brought pursuant to Labor Law §§ 200, 240 and 241(6). The plaintiffs cross-move for summary judgment in their favor on the issue of liability pursuant to Labor Law § 240(1).

Liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the dangerous condition (see Pirootta v EklecCo, 292 AD2d 362 [2002]; Kobeszko v Lyden Realty Investors, 289 AD2d 535; Giambalvo v Chemical Bank, 260 AD2d 432 [2002]). Based upon this standard and the evidence presented herein, that branch of the motion which seeks summary judgment dismissing the plaintiffs' common-law and Labor Law § 200 claims is granted. The defendants have established and it is uncontroverted that they did not exercise supervision and control over the injured plaintiff's work or possess actual or constructive notice of the condition which caused the plaintiff's injuries (Pirootta v EklecCo, supra).

Accordingly, that branch of the defendants' motion which seeks summary judgment dismissing the plaintiffs' common-law and Labor Law § 200 claims is granted.

The defendants also seek dismissal of the plaintiffs' claims made pursuant to Labor Law § 241(6). Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control. It is well settled that in order to prevail under this section of the Labor Law, a plaintiff must establish that certain "concrete specifications" of the Industrial Code were violated (see Ross v Curtis-Palmer

Hydro-Elec. Co., 81 NY2d 494, 505 [1993]; Ares v State of New York, 80 NY2d 959 [1992]). In support of his Labor Law § 241(6) claim, the plaintiff has alleged only a violation of several provisions of the Occupational Safety and Health Administration (OSHA). Violations of OSHA standards do not provide a basis for liability under § 241(6) (see Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311 [1997]; Vernieri v Empire Realty Co., 219 AD2d 593 [1993]).

Accordingly, that branch of the defendants' motion which seeks summary judgment dismissing the plaintiffs' Labor Law § 241(6) claim is granted.

With respect to the defendants' motion and the plaintiffs' cross motion regarding the plaintiffs' Labor Law § 240(1) claims, the defendants are awarded partial summary judgment dismissing the plaintiffs' Labor Law § 240(1) claim against defendant Thelen Reid & Priest, LLP and the plaintiffs are entitled to partial summary judgment in their favor and against defendants Boston Properties, Inc., Insignia/ESG, Inc., Insignia Financial Group, Inc., and Structure Tone, Inc. on their Labor Law § 240(1) claim.

Labor Law § 240(1) imposes strict liability on owners and their agents. It provides, in relevant part, the following:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

It is well-settled that the purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, "those best suited to bear that responsibility" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]) instead of on the workers, who are not in a position to protect themselves (Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 [1985]) This provision imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury (see Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]; Striegel v Hillcrest Heights Development Corp., 100 NY2d 974 [2003]; Keaney v City of New York, 24 AD3d 615 [2005]). The duty imposed by the statute is "nondelegable and . . . an owner is liable for a violation of the section even though

the job was performed by an independent contractor over which it exercised no supervision or control [citations omitted]" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993], quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991], supra; see also Amato v State of New York, 241 AD2d 400, 401 [1997], lv to appeal denied 91 NY2d 805 [1998]).

As a matter of law, the work that was being performed by the plaintiff at the time of the accident falls within the purview of Labor Law § 240(1), which applies to work performed at heights and where the work performed involves risks related to differences in elevation (see Groves v Land's End Housing Co., 80 NY2d 978 [1992]; Rocovich v Consolidated Edison Co., supra, 78 NY2d 509, 514 [1991]). The plaintiffs made a prima facie showing of entitlement to judgment as a matter of law against defendant Boston Properties, Inc., Insignia/ESG, Inc., Insignia Financial Group, Inc., and Structure Tone, Inc. pursuant to Labor Law § 240(1) by demonstrating that the injured plaintiff fell as a result of the absence of safety devices while engaged in a work-related activity involving an elevation-related risk (see Hagins v State of New York, 81 NY2d 921, 922 [1993]; Mariani v New Style Waste Removal Corp., 269 AD2d 367 [2000]). On the other hand, the lessee of the subject premises, defendant/third-party plaintiff Thelen Reid & Priest, LLP cannot be held liable under Labor Law § 240(1) because there is no evidence that it was a statutory agent of the owner or contractor (see Nelson v Chelsea GCA Realty, Inc., 18 AD3d 838 [2005]).

Finally, contrary to subcontractor third-party defendant OneSource's contention, the indemnification agreement between it and general contractor defendant/third-party plaintiff Structure Tone does not run afoul of General Obligations Law § 5-322.1.

Accordingly, the defendants/third-party plaintiffs are awarded partial summary judgment in their favor and against third-party defendant OneSource on their claims for contractual indemnification, resulting from OneSource's negligence and/or strict liability, pursuant to the plain terms of the indemnification agreement dated February 9, 1995 (cf. Yacovacci v Shoprite Supermarket, 24 AD3d 539 [2005]).

Dated: February 10, 2006

J.S.C.