

Kissane v Universal Bldrs. Supply Corp.

2006 NY Slip Op 30845(U)

November 1, 2006

Supreme Court, New York County

Docket Number: 108985/2004

Judge: Karen S. Smith

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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PATRICK KISSANE AND KATHLEEN KISSANE,

Plaintiff,

-against-

Index No.: 108985/2004
Motion Seq.: 005
Motion Date: 08/28/06

UNIVERSAL BUILDERS SUPPLY CORP.,
40 EAST 14 REALTY ASSOCIATES, L.L.C, and
J. E. LEVINE BULIDERS, INC.,

DECISION AND ORDER

Defendants.

-----X
J. E. LEVINE BULIDERS, INC.,

Plaintiff,

-against-

Third Party Index No.: 591237/2004
Motion Seq.:
Motion Date: 08/28/06

EUROTECH CONSTRUCTION CORP

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Defendants

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COUNTY OF NEW YORK

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant's, Universal Builders Supply Corp.'s, motion for summary judgment dismissing plaintiffs' complaint and all cross claims against it is granted in part and denied in part as more fully provided herein. Plaintiffs', Patrick Kissane's and Kathleen Kissane's, cross-motion for summary judgment against all the defendants on the issue of liability for the violation of Labor Law §240(1) is denied.

Plaintiffs, Patrick Kissane (hereafter referred to as "Kissane") and Kathleen Kissane brought this personal injury action for injuries Kissane allegedly sustained when, while working as a carpenter on a building renovation project, he fell off the side of a temporary, elevated

loading dock. Plaintiffs brought this action against Universal Builders Supply Corp. (hereafter referred to as “UBS”), 40 East 14 Realty Associates, L.L.C. (hereafter referred to as “40 East”) and J.E. Levine Builders (hereafter referred to as “JEL”). UBS was a sub-contractor at the site which was responsible for the constructing the temporary loading dock, 40 East was the record owner of the property under renovation. JEL contracted with 40 East to act as the construction manager for the renovation project.

The plaintiffs’ pleadings allege common law negligence and violations of Labor Law sections 200, 240 and 241 as against all defendants. JEL has instituted a third-party action against Eurotech Construction Corp. (hereafter referred to as “Eurotech”) (a sub-contractor at the renovation site at the time of Kissane’s accident and is Kissane’s employer) seeking, *inter alia*, contractual and common law indemnity.

UBS now moves for a summary judgment dismissing Kissane’s complaint against it contending that it was not negligent, it was not an owner or general contractor at the renovation site and it had no authority to direct or control Kissane’s activities at the renovation site. Kissane cross-moves for summary judgment against all defendants on the issue of liability based upon New York State Labor Law §240.

The guiding principle in awarding summary judgment is that: “... the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v

Prospect Hospital et al., 68 NY 2d 320,324 [1987]).

In the instant matter, UBS has met its burden with respect to Kissane's claims which are premised upon the New York State Labor Law. UBS has presented a factual showing that it; "... was not an owner, general contractor, nor is it a statutory agent of either because it had no authority to supervise or control the plaintiff's work. Therefore, it bears no liability under Labor Law §240(1) or §241(6) ..." (*Morales v Federated Department Stores, Inc.* 5 AD 3d 744 [2nd Dept 2004], internal citations omitted). Because UBS; "...had no authority to supervise or control the work that caused the plaintiff's injuries, it cannot be found liable under Labor Law §200 either..."(*Id.*, internal citations omitted). The papers in opposition to UBS's motion have not responded with any evidence in admissible form to raise triable issues of fact with respect to these claims. Accordingly, with respect to Kissane's claims pursuant to Sections 200, 240 and 241 of the Labor Law, UBS's motion is granted.

However, the disposition of plaintiffs' labor law claims against UBS does not necessarily mean that UBS may not be found liable for common law negligence. In erecting the loading dock, UBS had a duty; "...not only to perform the work properly, but also, as a reasonably prudent person, to take precautions to prevent harm to workers coming on the job and to warn of any danger ..." (*Hooper v Anderson*, 157 AD2d 939 3rd Dept 1990]). UBS has offered evidence in admissible form to show that, when it was done constructing the temporary loading dock, all necessary safety rails were installed and both the New York City Building Department and JEL inspected the dock and accepted it. The fact of such inspections constitutes some evidence that UBS completed construction of the temporary loading dock in accordance with City codes and the specifications provided by JEL. However, in opposition to the motion Kissane has presented

evidence that there was a substantial gap in the safety railings at the side of the loading dock and that Kissane fell through that gap from the top of the loading dock to the street below while engaged in unloading a truck. That evidence is sufficient to raise a question of fact as to whether a reasonable and prudent provider of a temporary loading dock would have undertaken precautions to prevent harm or warned workers at the job site of the potential danger of such harm. Thus, UBS's motion for summary judgment must be denied with respect to Kissane's claim for common law negligence.

Given the disposition of UBS's motion concerning Kissane's Labor Law claims, the plaintiffs' cross-motion for summary judgment against UBS on Kissane's claim pursuant to Labor Law §240(1) is denied.

Kissane's cross-motion, as his Labor Law §240(1) claim relates to 40 East and JEL must also be denied. In opposition to the cross-motion, JEL argues that Kissane's choice to jump down from the top of the stack of sheetrock, located on the truck he was unloading, to the surface of the loading dock, was the sole, proximate cause of his injuries. While there is no dispute that Kissane jumped down from the truck to the surface of the loading dock, according to Kissane, his injuries were not caused by his jump from the sheetrock to the loading dock but, instead, by his further fall off of the side of the loading dock to the ground. The parties dispute whether the side rail was present at the time of the accident. The defendants contend that the side rail for the dock was in place at the time of the accident and the plaintiffs contend that it was not. Furthermore, assuming *arguendo*, without so deciding, that the guardrail was in place at the time of the accident, there has been no evidence offered in admissible form to establish whether or not the guardrail would have prevented Kissane's injuries. Finally, the defendants contend that jumping

off the bed of a truck being unloaded was unreasonable and unforeseeable because there were ladders on the job site which Kissane could have used to climb down more safely. The plaintiffs contend that jumping off of the bed of a supply truck was the common and accepted means of getting off of the truck and that workers had never been instructed they were to use a ladder instead. Thus, there are disputes and questions of fact which preclude the grant of the plaintiffs' cross-motion for summary judgment against 40 East and JEL on the issue of liability pursuant to Labor Law §240(1). Accordingly, it is;

ORDERED that UBS's motion for summary judgment dismissing plaintiffs' claims against UBS is granted to the limited extent of dismissing the plaintiffs' claims which are premised upon the provisions of New York State Labor Law §200, §240(1) and §241(6) and the motion is denied with respect to the plaintiffs' claims based upon the theory of common law negligence, and it is further;

ORDERED that plaintiffs' cross-motion for summary judgment against all defendants on the issue of liability for plaintiffs' claims, pursuant to Labor Law § 240(1), is denied.

The foregoing constitutes the decision and order of this court. The court is aware of the fact that there is no appearance date scheduled in this matter however, an additional motion to dismiss is currently pending. The court will schedule the next appearance based upon the outcome of that motion.

Dated: November 1 , 2006

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Hon. Karen S. Smith, J.S.C.