

Ingallinella v Skanska USA Bldg. Inc.

2007 NY Slip Op 30507(U)

March 28, 2007

Supreme Court, Suffolk County

Docket Number: 0018584/2005

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

**JOSEPH INGALLINELLA and VIRGINIA
INGALLINELLA,**

Plaintiffs,

-against-

**SKANSKA USA BUILDING INC., CORD
CONTRACTING CO., INC., and ISLAND
TAPING, INC.**

Defendants.

SKANSKA USA BUILDING INC.,

Third Party Plaintiff,

-against-

**HAREN & KELLER PAINTING CORP.,
AND CORD CONTRACTING CO., INC.,**

Third-Party Defendants.

CORD CONTRACTING, INC.,

Second Third-Party Plaintiff,

-against-

ISLAND TAPING, INC.,

Second Third-Party Defendant.

ORIG. RETURN DATE: 10/13/06

FINAL SUBMIT DATE: 01/11/07

MOTION SEQ. NO.: 002-MG

003-MD

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Upon the following papers numbered 1 to 28 read on this motion /summary judgment
Notice of Motion/OSC and supporting papers 1-18; Notice of Cross-Motion and supporting papers 19-26; Affirmation/affidavit

in opposition and supporting papers 27-28; Affirmation/affidavit in reply and supporting papers ____Other ____; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that the plaintiffs Joseph Ingallinella and Virginia Ingallinella's motion for summary judgment is granted as to the issue of liability only. (CPLR 3212; Labor Law 240 (1)) It is further

ORDERED that the defendant / third party defendant / second third party plaintiff Cord Contracting Co., Inc.'s ("Cord") cross motion for summary judgment is denied under the circumstances presented herein.(CPLR 3212)

This is an action for personal injuries allegedly sustained by plaintiff Joseph Ingallinella from a fall on December 30, 2004 off a scaffold while engaged in spackling and sanding work at a residential construction site located at 241 Daniels Lane, Sagaponack, Suffolk County, New York. Plaintiff Virginia Ingallinella, Joseph Ingallinella's spouse has brought a derivative claim.

Defendant Skanska USA Building, Inc.("Skanska") was the general contractor for the construction of a large residential home owned by non-party Ira Rennert. Co-defendants Cord Contracting Co. Inc., and Island Taping, Inc. were named defendants as possible owners of the subject scaffold. Haren & Keller the plaintiff's employer, was the painting subcontractor on the project. On the date of the accident the plaintiff's job was to sand and spackle the ceiling in the "gallery room." There were a number of scaffolds on the premises that were shared by the different tradesmen. The plaintiff, his co-worker Edwin Lester Hayes and another worker Bob Pacella brought two Baker's scaffolds into the gallery room to allow access to the ceilings and proceeded to assemble them. The scaffolds consisted of four legs with wheels and a platform to stand on. While standing on the platform while using sanding poles to sand the ceiling, it suddenly collapsed causing him to fall and as a result, sustain serious personal injuries. By way of affidavit Hayes averred that after he heard the crash he observed the plaintiff on the concrete floor with portions of the scaffold on top of him, with one arm of the scaffold having completely come off. The plaintiff alleges by way of his verified complaint that the personal injuries that he sustained were a result of the defendants' negligence and violations of Labor Law sections 200, 240, and 241.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562) Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986])

Section 240, subdivision 1 of the Labor Law provides as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or painting 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, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“To sustain a cause of action based upon this section, plaintiff must prove that the statute was violated and that defendant's conduct in violating it was the proximate cause of plaintiff's damages. (see *Duda v. Rouse Const. Co.*, 32 [89 A.D.2d 364] N.Y.2d 405, 410, 345 N.Y.S.2d 524, 298 N.E.2d 667 ; *Mendes v. Caristo Const. Corp.*, 5 A.D.2d 268, 272, 171 N.Y.S.2d 494, affd. 6 N.Y.2d 729, 185 N.Y.S.2d 814, 158 N.E.2d 507; and see, also, *Klutz v. Citron*, 2 N.Y.2d 379, 383, 161 N.Y.S.2d 26, 141 N.E.2d 547; *Lagzdins v. United Welfare Fund-Security Div. Marriott Corp.*, 77 A.D.2d 585, 430 N.Y.S.2d 351) ” (*Smith v. Hooker Chemicals & Plastics Corp.*, 89 A.D.2d 361, 455 N.Y.S.2d 446, 448 [4th Dept. 1982]) Upon review of the record before the Court, it is apparent that the plaintiff was engaged in a protected activity while subject to an elevation risk. (see *Bonanno v. Port Authority of New York and New Jersey*, 298 A.D.2d 269, 750 N.Y.S.2d 7 [1st Dept. 2002]) In the matter at bar, the plaintiff by way of his examination before trial as well as his affidavit in support of the instant motion states that after approximately five minutes after starting work on the ceiling, the scaffold, without warning, collapsed. As set forth above, the affidavit of witness Edwin Lester Hayes provides that one arm of the scaffold completely came off. The defendants have failed to proffer any evidence to controvert said testimony and affidavits.

In opposition to the instant motion, the defendants proffer that the plaintiff and his co-workers put the subject scaffold together themselves and as such, issues of fact are present with regard to whether the plaintiff himself was the sole proximate cause of the subject accident. However, it has been held that an allegation that the plaintiff himself constructed or put together the scaffold is an insufficient defense to a summary judgment motion prefaced on Labor Law 240. (see *Vacanti v. Habasit Globe, Inc.*, 283 A.D.2d 935, 724 N.Y.S.2d 240 [4th Dept 2001]) The uncontroverted evidence proffered by the plaintiffs establish that the subject scaffold collapsed for no apparent reason which was the proximate cause of his fall and subsequent injuries. As such, the plaintiff has met his burden of proof showing that he is entitled to judgment as a matter of law. The defendants have not come forward with evidence in admissible form to establish questions of fact which would warrant denial of the plaintiffs' motion and accordingly, summary judgment as to the issue of liability only is granted.

Defendant / third party defendant / second third party plaintiff Cord Contracting Co., Inc. (“Cord”) cross moves for summary judgment averring it was not the owner of the subject scaffold nor did it direct, control or supervise the plaintiff's work at the time of his accident. In support thereof Cord has submitted an affidavit of its employee who was present at the job site, Steve Michelak who

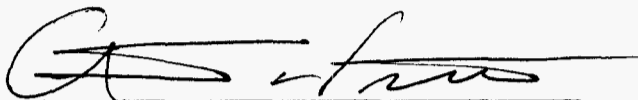
states therein that the scaffold was not Cord's, it was not responsible for providing equipment to other contractors nor was it responsible to inspect equipment being used by other contractors. Other than the plaintiff's examination before trial, there have been no depositions conducted. As such, it is apparent that the record before the Court is insufficient to determine whether issues of fact are present warranting a trial as to Cord's liability and accordingly, its cross motion is premature and denied. (see *Hammond v. Alekna Construction, Inc., et al*, 267 A.D.2d 1027, 701 N.Y.S.2d 203 [4th Dept. 1999])

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
March 28, 2007



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION ___ DO NOT SCAN