

Williams v Victoria's Secret Catalog N.Y., LLC
2007 NY Slip Op 30536(U)
March 30, 2007
Supreme Court, New York County
Docket Number: 0107480/2003
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:
Index Number : 107480/2003

PART 2

WILLIAMS, RONALD

vs

VICTORIA'S SECRET CATALOGUE

Sequence Number : 009

SUMMARY JUDGMENT

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

APR 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/07

Louis B. York
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2**

RONALD WILLIAMS,)

Plaintiff,)

-against-)

Index No. 107480/2003)

VICTORIA'S SECRET CATALOGUE NEW)
YORK, LLC, VICTORIA'S SECRET DIRECT)
MEDIA, INC., VICTORIA'S SECRET DIRECT)
NEW YORK, LLC, BLEACHERS SEATING CO.)
d/b/a BLEACHERS SEATING SOLUTIONS,)
SHOWMAN FABRICATORS, INC. and BRYANT)
PARK RESTORATION CORP., HALLS)
CARPETING, SEATING SOLUTIONS, KADAN)
PRODUCTIONS and BUREAU BETAK,)

Defendants.)

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

Motion Sequence Nos. 008 and 009 are consolidated for disposition.

Defendant Kadan Productions (Kadan) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims against said defendant (seq. no. 008). Defendant Showman Fabricators, Inc. (Showman) moves, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims against said defendant (seq. no. 009).

Defendants Victoria's Secret Catalogue New York, LLC, Victoria's Secret Direct Media, Inc., Victoria's Secret Direct New York, LLC, Bureau Betak, Inc., and Brant Park Restoration Corp. (collectively, co-defendants) oppose both motions. Plaintiff also opposes both motions.

Plaintiff brought this action to recover monetary damages for personal injuries allegedly sustained on November 11, 2001, while in the course of his employment at Bryant Park. Plaintiff was employed at the time by non-party Axium/Avalon Enterprises as a laborer doing stage work (EBT of plaintiff, at 10 - 11). (The attorney for the co-defendants states in his affidavit that plaintiff was an employee of non-party Linedrive. However, he does not submit any evidentiary proof in admissible form on this point.)

Bryant Park is owned by defendant Bryant Park Restoration Corp. (Bryant). At the time, Bryant Park was leased by Victoria's Secret Catalogue New York, LLC, Victoria's Secret Direct Media, Inc., Victoria's Secret Direct New York, LLC, (collectively, Victoria's Secret) and was being set up to hold Victoria's Secret's fall 2001 fashion show.

Victoria's Secret retained Bureau Betak Inc. (Betak) to aesthetically conceptualize the event. Betak, in turn, retained Kadan to translate Betak's concepts and ideas into realistic and technically feasible designs that could be implemented on the allotted budget. Showman was retained as a fabricator of scenery for the fashion show, including the stage and runway, and to supervise their installation at the site.

According to plaintiff's deposition, plaintiff allegedly sustained his injuries when, while covering a black-carpeted platform with a plastic drop cloth, he fell through a gap between the front of the stage and the platform. Said gap was covered by a sheet of black velour which prevented plaintiff from realizing where the platform ended.

Warren Katz, Showman's project manager, testified at his deposition that plaintiff fell into a gap between the bleachers and the side of the stage. However he further

testifies that he did not see the fall but was told about it by others (Katz EBT, at 45 - 48). Thus, the only evidentiary proof in admissible form submitted on this point is plaintiff's deposition.

- Plaintiff's complaint contains five causes of action. The first cause of action seeks to recover on a theory of negligence. The second cause of action seeks to recover under Labor Law § 200. The third cause of action seeks to recover under Labor Law § 240. The fourth and fifth causes of action seek to recover under Labor Law § 241 (6).

"As we have stated frequently, 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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, 68 NY2d 320, 324 (1986).

"It is well-established that summary judgment should be granted only if there are no material and triable issues of fact."

Hantz v Fishman, 155 AD2d 415 (2nd Dept 1989).

The court will address Kadan's motion first.

"Labor Law § 200 codified the common-law duty of an owner or employer to provide employees with a safe place to work" Brown v Brause Plaza, LLC, 19 AD3d 626, 628 (2d Dept. 2005). In cases, like this one, where the injury is the result of a dangerous condition, rather than the result of the contractor's method of doing the work,

the statute applies to owners and contractors who either created the dangerous condition or had actual or constructive notice of it. Linares v United Management Corp., 16 AD3d 382, 384 (2nd Dept 2005).

According to Kadan, when it is retained by a client to do a fashion show, Kadan creates working drawings for the client based on the client's sketches or ideas or some dream they had. Kadan does not design the fashion show and does not oversee the work or perform any of the contracting work Kadan also does not have any supervision or control over the construction site. It is Kadan's position that, since it did not perform any of the construction work or have any supervision or control over the construction, and did not place the velour sheet over the gap or have anything to do with it or have any knowledge of it, it cannot be held liable under Labor Law § 200 or for negligence.

In opposition to the motion, plaintiff and co-defendants point out that, according to Mr. Katz, the decision to cover the gap was made when at some point, people from Kadan and Betak went walking through the site for aesthetic purposes and they saw the gap, and they wanted it addressed (Katz EBT, at 78 - 79). Mr. Katz was uncertain as to whether it was Mr. Violaine, vice-president of Betak, or Mr. Hunkins who ultimately decided to have the gap covered (id. at 50). However, Mr. Katz was certain that Mr. Hunkins directed employees of LInedrive to cover the gap.

Since there is a sharp question of fact as to whether Kadan knew about the covering of the gap and if Kadan directed the Linedrive people to cover the gap with the velour, this branch of the motion with respect to the first cause of action which is based on negligence and the second cause of action which is based on Labor Law § 200 must be denied.

Turning to the remaining causes of action, Labor Law §§ 240 and 241 only apply to the owner, general contractor or their agents. Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981). In order to be considered an agent for purposes of Labor Law §§ 240 and 241, the work giving rise to the duties under sections 240 and 241 must have been delegated to a third-party so that that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control the work being done that brought about the injury does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241. Thus, a subcontractor who has not been delegated the requisite authority cannot be held liable under sections 240 and 241. id.

As noted earlier, according to Kadan, it only creates working drawings for the client. Kadan does not design the fashion show and does not oversee the work or perform any of the contracting work. Kadan also does not have any supervision or control over the construction site. Thus, according to Kadan, it did not have the requisite authority to be held liable under Labor Law §§ 240 and 241.

In opposition to the motion, co-defendants contend that Kadan acted as general contractor because Kadan chose the vendors for the project (actually, Kadan only suggested the vendors to Betak), drafted the production schedule for the project, drafted the floor plans for the site, decided when and where the vendors performed their work, supervised the site to see if work was being done efficiently and correctly and if it looked correct, and stopped work if it was being done unsafely.

In opposition to the motion, plaintiff contends that Kadan acted as general contractor because Kadan drafted the final technical plans for the show and made sure the work was done according to plan. Kadan reported directly to Betak, giving daily progress reports to Betak, suggested the materials and subcontractors for the project, reviewed the subcontractors, proposals to assure compliance with Kadan's plans, drafted and enforced the production schedule for the project, made sure the floor plans were followed, and, if Kadan observed an unsafe condition, Kadan had the ability to put a stop to it, although the more likely practice was to report the problem to Betak or simply take the matter up with the workers involved.

Based on the forgoing, it is the position of these parties that Kadan had such extensive authority over the work being performed that, for purposes of the Labor Law, Kadan was the general contractor.

By way of reply, Kadan strenuously denies that it had supervision or control over any part of the work site, including that portion of the project on which the injury occurred.

Co-defendants base their claim that Kadan could stop the work if it was being done unsafely on the deposition of Mr. Katz, who stated that Kadan's function at the site included, among other things, seeing that everything was done in a safe manner (Katz EBT, at 99).

Plaintiff bases his claim that Kadan could stop the work if it was being done unsafely on the deposition of Mr. Hunkins at page 99. However, according to Mr. Hunkins' deposition, Kadan had no control over the workers' safety habits. If Kadan became aware of an unsafe condition, all Kadan could do would be report it to Betak. (Hunkins EBT, at 99).

Given the sharp question of fact as to Kadan's authority at the project site, this issue is best resolved at trial.

Kadan argues that all the cross claims against it should be dismissed because none of the parties has even attempted to controvert Kadan's claim that there is no contractual basis for claiming indemnification from Kadan. However, the cross claims are not based on any contractual basis. The cross claims are based on apportionment and common-law indemnification. Accordingly, this branch of the motion must be denied.

The court now turns to Showman's motion.

Showman in support of its motion, argues that it was neither the owner nor general contractor and that it was never delegated the requisite authority to be considered an agent for purposes of Labor Law §§ 240 and 241. Since none of the parties has submitted anything to controvert this, Showman's motion to dismiss the third, fourth and fifth causes of action should be granted.

As noted earlier, Labor Law § 200 applies contractors who either created the dangerous condition or had actual or constructive notice of it. However, "[it] is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition*' (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981] (emphasis supplied), see also, *Ross v Curtis-Palmer Hydro-Elec. Co.*, [81NY2d 494, 505-506], at 505-506; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 352 (1998).

Here, Showman had no control over the covering of the gap which created the dangerous condition that led to the injury. Showman was only retained to construct the scenery at its own facility, then disassemble it and reconstruct it at the site. As mentioned earlier, the covering of the gap with the velour was not part of the original plans. The decision to cover the gap was made when Kadan and Betak's people went walking through the site and it was decided to have the gap covered for aesthetic reasons. Thus, the covering of the gap was not part of the work under Showman's control.

Moreover, when Warren Katz, Showman's project manager, was either directed or requested to see that the gap was covered, he declined.

Co-defendants, in opposition to the motion, argue that Showman designed, built, and supervised the on-site erection of the stage and runway for the event, and is thus responsible for the existence of the gap between the runway and platform.

However, the gap was not the dangerous condition that was responsible for the accident. It was the covering of the gap that was the dangerous condition.

Moreover, although Showman built and supervised the on-site erection of the stage and runway, it did not design it. Showman built it based on the designs it received from Kadan.

Both co-defendants and plaintiff claim that Showman provided the velour material to the site that was used to cover the gap.

While Showman admits that it supplied black velour drapes which had fiber optic lights inserted across the material, it denies that it provided any plain velour material such as was used to cover the gap.

However, whether or not Showman provided the velour is of no moment. It is clear that any velour provided by Showman to the site was not provided for the purpose of covering the gap. The covering of the gap was not part of Showman's job and not part of the original plans. It was only decided as an afterthought after the material was already at

the site. Showman cannot be held liable because someone else decided to use the material to cover the gap.

Co-defendants also argue, based on the Katz deposition, that Mr. Katz was involved in the discussion with the employees of Kadan and Betak when it was decided to cover the gap.

However, the Katz deposition only shows that Mr. Katz was present, and not that he was involved in the decision. Moreover, as noted earlier, it shows that Mr. Katz declined to have the gap covered.

Accordingly, the first and second causes of action should be dismissed as against defendant Showman.

Since the entire complaint is being dismissed as against Showman, the cross claims against it which are based on apportionment and common-law contribution should also be dismissed.

There is a cross claim by Bryant against Showman which is based on contractual indemnification and breach of contract to obtain insurance coverage. However, since there is no contract between Bryant and Showman, this cross claim should also be dismissed.

For the forgoing reasons, it is

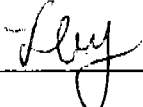
ORDERED that the motion of defendant Kadan Productions for summary judgement is denied in its entirety; and it is further

ORDERED that the motion of defendant Showman Fabricators, Inc. for summary judgment is granted, and the complaint and cross claims are severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 3/30/07

ENTER:



LOUIS B. YORK
J.S.C.

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