

**Giannola v Freeman Decorating Co.**

2007 NY Slip Op 30583(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0102463/2004

Judge: Jane S. Solomon

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JANE S. SOLOMON  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Solomon Justice

PART 55

Index Number : 102463/2004  
GIANNOLA, SALVATORE  
vs  
SHEPARD EXPOSITION SERVICES  
Sequence Number : 004  
SUMMARY JUDGMENT

INDEX NO \_\_\_\_\_  
MOTION DATE 2/5/2007  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

is motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits  
Answering Affidavits — Exhibits  
Replying Affidavits

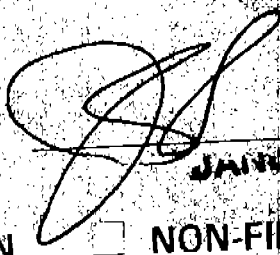
PAPERS NUMBERED  
1-8  
9-18  
19-25

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**  
APR 9 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4-4-07

  
JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
SALVATORE GIANNOLA and MARIA GIANNOLA

Plaintiffs,

-against-

INDEX NO. 102463/04

DECISION and ORDER

FREEMAN DECORATING COMPANY, SHEPARD  
EXPOSITION SERVICES, INC., and  
PFINGSTEN PUBLISHING, LLC,

Defendants.

-----X  
JANE S. SOLOMON, J.

In this personal injury action, defendant Freeman Decorating Company ("Freeman") moves for summary judgment dismissing the Complaint and all cross-claims against it. Defendants Pfingsten Publishing, LLC ("Pfingsten") and Shepard Exposition Services, Inc. ("Shepard") separately cross-move for summary judgment dismissing the Complaint and all cross-claims against them. Plaintiffs Salvatore Giannola ("Giannola") and Maria Giannola (collectively, "Plaintiffs") cross-move for summary judgment against all defendants, or alternatively to supplement their Bill of Particulars and to conduct additional discovery. For the reasons described herein, Freeman's motion and Pfingsten and Shepard's cross-motions, are granted, and Plaintiffs' cross-motion is denied.

Background

The New York Convention Center Development Corp. ("NYCCDC") is the owner of the Jacob K. Javits Convention Center ("Javits Center") in Manhattan. Plaintiff Giannola is employed by the New York Convention Center Operating Corp. ("NYCCOC"), which is the employer and exclusive source for carpenter and teamster labor for shows at the Javits Center. When a contractor procures carpenters from NYCCOC in connection with a trade show, NYCCOC directs the carpenters to report to the Javits Center's labor hall to sign in. A carpenter is assigned to only one contractor for a specific day. NYCCOC prepares, and has waiting for each carpenter, a time card which has preprinted on it the date, the carpenter's name, and the contractor to which the carpenter has been assigned.

Defendant Pfingsten sponsored a trade show named the Décor Show at the Javits Center. The Décor Show ran from February 28 through March 3, 2003, and was preceded by a three day move in and set up period. Pfingsten hired defendant Shepard as its official trade show contractor for the event, and Shepard coordinated the move in and set up period.

Defendant Freeman was hired by a few exhibitors to assist them in connection with the set-up of their exhibit booths for the Décor Show. Freeman claims that it obtained three

NYCCOC-employed carpenters to provide services to these specific exhibitors on February 25 and February 26, 2003, but that it did not work on the Décor Show any other day.

Giannola's deposition testimony and affidavit are somewhat inconsistent, but he claims that when he arrived to work at the Javits Center on February 27, 2003, at approximately 8:00 AM, a supervisor from Freeman (rather than someone from NYCCOC) provided him with a time card and assigned him to work for Shepard. Freeman denies this allegation. Giannola's February 27, 2003 time card and an NYCCOC injury investigation report ("Injury Report") dated the same day support the contention that Giannola was assigned to Shepard on that date.

Giannola states that he was sent by Freeman to Shepard to hang a 60-80 pound temporary banner at a booth. Working with him was a female carpenter who was about 5 feet tall. He claims that they were climbing separate, unsecured six-foot A-frame ladders, and that his ladder was yellow and labeled with the name "Freeman".<sup>1</sup> Giannola is unsure if the banner was to be hung from the ceiling of the Javits Center, or from something else.

Giannola claims that while he and the co-worker were raising the

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<sup>1</sup> Freeman argues that the ladder could not have been its because Giannola was working for Shepard, contractors only use their own tools and equipment, and moreover, it only used orange colored ladders at the Javits Center.

banner, she lost her grip, and that the banner and ladders moved, causing them both to fall to the ground. Giannola required surgery for his injuries and has been unable to work. According to the Injury Report, Giannola stated that "he did not have a good grip on the rung and he fell backwards onto the small of his back," and he fell due to lack of "attention to the task at the moment."

In February 2004, Plaintiffs commenced this action against NYCCDC, Greyhound Exposition Services Inc. ("Greyhound"), Precision Trade Show Services, Inc. ("Precision"), and Freeman, in which Giannola asserts common law negligence claims and seeks damages under New York Labor Law §§ 200, 240 and 241, and unspecified OSHA and Industrial Code regulations. In his Bill of Particulars, Giannola identified NYCRR §§ 23-1.5(a)(b) and (c)(2) as the only Industrial Code sections allegedly violated. (His wife has a derivative claim.)

NYCCDC and Precision were granted summary judgment on October 19, 2004 and May 16, 2005, respectively. Following depositions of Plaintiffs and of Freeman's General Manager William Kuehnle, Plaintiffs stipulated to remove Greyhound as a defendant. On or about October 27, 2005, they filed an Amended Summons and Complaint adding Pflingsten and Shepard as defendants. The defendants cross-claimed against each other for common law

contribution, indemnity and apportionment. Under Motion Sequence 003, on October 30, 2006 this Court ordered Plaintiffs to file their Notice of Issue within 30 days, and set December 31, 2006 as a deadline for all parties to file dispositive motions. Freeman now moves, and Shepard and Pfingsten each separately cross-move, for summary judgment dismissing the Complaint and all cross-claims against them. Plaintiffs cross-move for summary judgment, or in the alternative for a continuance pursuant to CPLR § 3212(f), leave to supplement their Bill of Particulars and leave to depose Pfingsten and Shepard.

#### Discussion

##### **Freeman's Motion for Summary Judgment on Giannola's Claims**

Giannola claims negligence against Freeman under both the common law and Labor Law § 200. Labor Law § 200 codifies the common law duty of an owner or contractor to provide employees with a safe place to work. Jock v. Fien, 80 N.Y.2d 965 (1992). To succeed on his Labor Law § 200 claim against Freeman, Giannola must show that Freeman exercised actual supervision or control over the work that resulted in his injury. Gonzales v. United Parcel Service, 249 A.D.2d 210 (1<sup>st</sup> Dep't 1998). To succeed on his common law negligence claim, Giannola must show (1) the existence of a duty on Freeman's part; (2) a breach of that duty;

and (3) that he was injured as a result. Alfaro v. Wal-Mart Stores, Inc., 210 F.3d 111, 114 (2d Cir. 2000).

Accepting all of Giannola's claims as true, Freeman assigned him to work under Shepard and Giannola used Freeman's ladder. There is no allegation that Freeman supervised his work or that the ladder used was defective. Thus, Freeman was not in a position to control or supervise Giannola's work, and therefore it did not owe him a duty that would support a negligence claim. See Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222 (2001). Accordingly, that part of Freeman's motion seeking to dismiss the common law negligence and Labor Law § 200 claims against it is granted.

Giannola also brings claims under Labor Law §§ 240 and 241. Labor Law § 240 was designed to prevent those types of accidents in which a scaffold, ladder, or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person, by placing ultimate responsibility for work site safety practice on the owner or general contractor. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993). In order to come within the protection of Labor Law § 240(1), an employee must be engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. To

come under the protection of Labor Law § 241(6), the employee must be engaged in construction, demolition or excavation work. Giannola alleges that he was injured while hanging a banner at one of the exhibit booths at the Décor Show. This does not fall within the protective shield of either of these Labor Law provisions. See Perchinsky v. State, 232 A.D.2d 34 (3<sup>rd</sup> Dep't 1997); Esposito v N.Y.C. Indus. Dev. Agency, 1 N.Y.3d 526 (2003).

Moreover, even if Giannola's activities were protected under the Labor Law, his Labor Law claims would have to be dismissed as against Freeman because Freeman was not an owner or general contractor. It is undisputed that NYCCDC is the owner of the Javits Center, and that Giannola was being supervised by Shepard at the time of Giannola's accident. Even accepting Giannola's claim that, contrary to Javits Center practice, a supervisor from Freeman (instead of NYCCOC) assigned him to Shepard, Shepard was the contractor for the Décor Show.

In addition, in order to sustain a claim under Labor Law § 241(6), Giannola must show an Industrial Code violation that sets forth a specific positive command or a concrete specification. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d at 501-05. Giannola's Bill of Particulars identifies 12 NYCRR § 23-1.5(a), (b) and (c)(2) as the sections violated by Freeman (and the other defendants). As a matter of law, these

sections merely establish a general safety standard that does not give rise to the non-delegable duty imposed by Labor Law § 241(6). Meslin v. New York Post, 30 A.D.3d 309 (1<sup>st</sup> Dep't 2006); Maldonado v. Townsend Ave. Enters., Ltd. P'ship, 294 A.D.2d 207 (1<sup>st</sup> Dep't 2002). Accordingly, that part of Freeman's motion seeking to dismiss Giannola's claims under Labor Law §§ 241(6) and 240(1) is granted.

**Pfingsten's Cross-Motion for Summary Judgment on Giannola's Claims**

Pfingsten was the organizer of the Décor Show and hired Shepard as its official contractor for the event. Giannola's timecard, labor procedures for the Javits Center and Giannola's own statements all indicate that he was employed by NYCCOC and assigned to work for Shepard. Moreover, there is no evidence that Pfingsten, the trade show organizer, exercised any actual control or supervision over Giannola's work or that it had the ability to determine the manner in which he did his job. Therefore, Pfingsten's motion for summary judgment dismissing the common law negligence and Labor Law § 200 claims against it is granted.

As discussed above under Freeman's motion, summary judgment also is granted dismissing Giannola's Labor Law §§ 240 and 241 claims against Pfingsten because Giannola's work does not fall under the activities protected under those sections. In

addition, as trade show organizer, Pfingsten does not fall under the sections which impose strict liability on the owner and general contractor. Accordingly, Pfingsten's motion for summary judgment dismissing Giannola's claims against it is granted.

#### **Shepard's Cross-Motion for Summary Judgment on Giannola's Claims**

Shepard argues that it was Giannola's "special employer," and that it is thus entitled to summary judgment as Giannola's sole remedy is worker's compensation, of which Giannola has already availed himself. A special employee is one who is transferred for a limited duration to the service of another. Thompson v. Grumman Aerospace Corp., 78 A.D.2d 553 (2d Dep't 1991). Under the exclusive remedy provision of the Worker's Compensation Law, an employee is barred from bringing a negligence action against the special employer, even though the general employer is responsible for paychecks and benefits. Id.

It is undisputed and acknowledged by all parties that at the time of his accident, Giannola was temporarily assigned by his employer NYCCOC, to work on behalf of Shepard for setting up at the Décor Show, and Giannola was under Shepard's direction during his accident. This is supported by Giannola's own deposition testimony as well as his timecard. Thus, Giannola was assigned to, and worked for, Shepard at the time of his accident, and was Shepard's special employee. Accordingly, worker's

compensation is Giannola's exclusive remedy against Shepard, and Shepard's summary judgment motion is granted.

### **Marie Giannola's Claims Against All Defendants**

Marie Giannola's claims are for loss of her husbands's society, companionship and services. Under New York law, a claim for loss of consortium is a derivative action which cannot exist independent of the injured spouse's right to maintain an action for injuries. Liff v. Schildkrout, 49 N.Y.2d 622 (1980).

Because all three defendants have been granted summary judgment dismissing Giannola's claims, his wife's claims must also be dismissed.

### **Defendants' Cross-Claims**

Defendants' cross-claims against each other are for common law contribution, indemnity and apportionment. As a consequence of summary judgment having been granted to all three defendants to dismiss Plaintiffs' claims against them, these cross-claims similarly are dismissed. See Stone v. Williams, 64 N.Y.2d 639 (1984).

### **Plaintiffs' Cross-Motion**

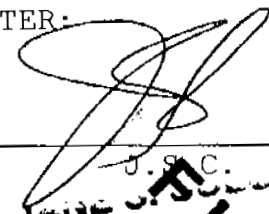
In light of the foregoing, Plaintiffs' cross-motion for summary judgment and for leave to supplement their Bill of Particulars and re-open discovery is denied. Plaintiffs argue that Pfingsten did not appear for its deposition in June 2006, so

the court should either deny defendants' motions or order a continuance to permit that deposition now. CPLR 3212(f). However, Plaintiffs offer no explanation for how that deposition might result in the discovery of evidence that might justify Plaintiffs' opposition, resuscitate their inability to make out a prima facie case of liability against any other party, or even help Plaintiffs to articulate a theory under which Pfingsten is liable. Id. That branch of the cross-motion seeking to amend the Bill of Particulars is denied as moot.

Accordingly, it hereby is

ORDERED that Freeman's motion is granted, Pfingsten and Shepard's cross-motions are granted, Plaintiffs' cross-motion is denied, the Complaint and all cross-claims are dismissed and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements to defendants as taxed.

Dated: April 4, 2007

ENTER:  
  
JANE J. COUGHLIN  
J.S.C.  
**FILED**  
APR 09 2007  
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