

**Espana v Michael Cunningham Carpentry, Inc.**

2007 NY Slip Op 31373(U)

May 23, 2007

Supreme Court, Suffolk County

Docket Number: 0027124/2003

Judge: Melvyn Tanenbaum

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**COPY**

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM  
Justice

MOTION #004, 005-Mot D  
R/D: 111306  
S/D 031507

MARCELO ESPANA and CARMITA ALVAREZ  
Plaintiff,

- against -

MICHAEL CUNNINGHAM CARPENTRY, INC.,  
JERRY SEINFELD and CAROLYN LIEBLING  
Defendants

PLTF'S/PET'S ATTY:  
MURRAY and HOPKINS, ESQS.  
300 Rabro Drive  
Hauppauge, New York 11788 (Action #1)

DEFT'S/RESP'S ATTY:  
CLAUSEN MILLER, P.C. (Cunningham)  
One Chase Manhattan Plaza  
New York, New York 10005

MICHAEL CUNNINGHAM CARPENTRY, INC.  
Third Party Plaintiff

- against -

VARGAS PAINTING AND CARPENTRY  
Third Party Defendant.

Action #1 (Index #27124-2003)

CATALANO, GALLARDO & PETROPOULOS, LLP  
1565 Franklin Avenue  
Mineola, New York 11501 (Andreassen)

VARGAS PAINTING & CARPENTRY  
c/o Mr. Harry J. Frizzell  
Sr. Claims Representative  
Nova Casualty Company  
180 Oak Street  
Buffalo, New York 14203

MARCELO ESPANA and CARMITA ALVAREZ  
Plaintiffs

- against -

ANDREASSEN & BULGIN CONSTRUCTION, INC.,  
Defendants

Action #2 (Index #23759-2004)

ANDRESEN & BULGIN CONSTRUCTION, INC.,  
s/v/a ANDREASSEN & BULGIN CONSTRUCTION, INC.,  
Second Third-Party Plaintiff

-against-

MICHAEL CUNNINGHAM CARPENTRY, INC.,  
Second Third-Party Defendant.

Action #3 (Index # 250376-2005)

Upon the following papers numbered 1 to 40 read on this motion for an order pursuant to CPLR §602

Notice of Motion/Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers 18-30  
Answering Affidavits and supporting papers 31-32 Replying Affidavits and supporting papers 33-34  
Other 35-35, 37-38, 39-40; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendant/third party plaintiff/third party defendant Michael Cunningham Carpentry, Inc (“MCC”) for an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs complaint against “MCC” and dismissing the third party complaint asserted by defendant/third party plaintiff Andreassen and Bulgin Construction, Inc., (“A & BC”) and the motion by defendant/third party plaintiff “A & BC” seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff’s complaint against it and granting judgment in favor of its third party action against third party defendant “MCC” are determined as follows:

On October 31, 2002 plaintiff Marcelo Espana (“Espana”) claims to have been injured while working as a laborer at a construction site. “Espana” testified that while holding a nail gun, a nail discharged striking his knee. Plaintiff’s complaint asserts causes of action for common law negligence including violations of Labor Law §200, 240 & 241 (6) against the construction project’s general contractor/defendant “A & BC” and the carpenter/framer/subcontractor/defendant “MCC”. Third party plaintiff “A & BC’s” claim against defendant/third party defendant “MCC” seeks contractual and common law indemnification from the subcontractor based upon “MCC’s” alleged failure to obtain general liability insurance naming “A & BC” as an additional insured.

Defendant “MCC’s” motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming no basis exists upon which “MCC” can be found liable for “Espana’s” injuries. In support of the motion defendant “MCC” submits an affidavit from the president and corporate owner of “MCC” and three affirmations of counsel. Defendant claims that although plaintiff “Espana” received a paycheck and workers compensation benefits from third party defendant Vargas Painting and Carpentry, he was a special employee of “MCC” on the project since “MCC’s” owner interviewed and assigned “Espana” his daily tasks and since “MCC” set his compensation and had the right to terminate him. It is defendant’s position that “Espana” cannot assert a negligence claim against “MCC” since a special employee is barred from asserting such claims pursuant to Workers Compensation Law §11 (citing Ross v. Cartis Palmer Hydro-Electric Company, 81 NY2d 494, 601 NYS2d 49 (1993)). Defendant contends that “Espana’s” claims are also barred against his employer absent proof that he suffered a “grave injury”. Defendant claims there has been no showing that plaintiff was gravely injured. Defendant “MCC” argues that neither Labor Law §240 (1) & 241 (6) violation is sustainable since “Espana’s” injury was not an elevation-related injury and since no industrial code violation has been stated.

Defendant also maintains that “A & BC’s” third party indemnification claims must be dismissed since there was no written indemnification contract for this project between “A & BC” and “MCC”. Defendant contends that even if the May 24, 2002 general indemnification contract was in effect, it is unenforceable since it makes no reference to the jobsite construction location or scope of work and its terms are therefore too vague.

In opposition and in support of its motion for summary judgment defendant "A & BC" submits three affirmations of counsel and claims that no viable claim exists against the general contractor for plaintiffs injuries. Defendant claims the undisputed evidence shows that "A & BC" did not supervise or control work performed by "Espana" and therefore the general contractor is not liable for plaintiffs injuries. Defendant claims that plaintiffs injuries were not gravity-related so the Labor Law §241 (6) cause of action is not sustainable since there is no proof to show that the failure to provide adequate protection with respect to plaintiffs use of the nail gun was a proximate cause of the accident. Defendant asserts that plaintiff conceded that he dropped the nail gun and was attempting to catch it when the nail released striking him in the knee. It is defendant's position that under such circumstances plaintiff's negligence was the proximate cause of his injury and no Labor Law violation is stated. Defendant "A & BC" also claims that the general contractor and defendant "MCC" entered into an Indemnity and Insurance Agreement dated May 24, 2002 which required that "MCC" indemnify and hold harmless the general contractor from all claims asserted against "A & BC" for work performed by "MCC". Defendant contends that "A & BC" is entitled to contractual and common law indemnification since there was a binding contract requiring indemnification and since the evidence shows the sub-contractor had authority to direct, supervise and control plaintiffs work which gave rise to the injury. Defendant asserts that the May 24, 2002 agreement required coverage naming "A & BC" as an additional insured and that "MCC's" conceded failure to provide such insurance requires that judgment be entered against the third party defendant "MCC".

In opposition plaintiffs submit an attorney's affirmation and claim that a substantial question of fact exists concerning the identity of plaintiffs employer since "MCC's" verified answer alleges that "MCC" was not "Espana's" employer. Plaintiffs also contend that "MCC" should not be permitted to assert the worker's compensation defense since "MCC" and "Vargas" conspired to avoid paying premiums for workmens compensation coverage for their employees. Plaintiffs contend valid causes of action exist based upon Labor Law §241 (6) & 240 claims since the nailgun used by "Espana" had no safety cut-off switch which violates construction code requirements and since "Espana's" injuries were gravity-related based upon defendants failure to provide a proper scaffold. Plaintiff "Espana" testified that a co-worker removed his five foot ladder and that he was injured after putting boards together to create a makeshift platform. The thrust of his claim is that this elevated platform was unstable causing him to drop the nail gun and thus a proximate cause of his injury.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Worker's Compensation Law §11 provides:

"An employer shall not be liable for construction or indemnify to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such

third person proves through competent medical evidence that such employee has sustained a “grave injury” which shall mean only on or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

Defendant “MCC” claims that although “Vargas” was plaintiff’s general employer “MCC” was plaintiff’s special employer during this construction project.

The Court of Appeals in Thompson v. Grumman Corp., 78 NY2d 503, 578 NYS2d 106 (1991) described the test for determination of special employment status.

We have consistently found as a general proposition that a general employee of one employer may also be in the special employ of another, notwithstanding the general employer’s responsibility for payment of wages and for maintaining workers’ compensation and other employee benefits (Stone v. Bigley Bros., 309 NY 132; Irwin v. Klein, 271 NY 477, Murray v. Union Ry. Co., 229 NY 110 112-113; Matter of Schweitzer v. Thompson & Norris Co., 229 NY 97, 99, see also, Cameli v. Pace Univ., 131 AD2d 419, 410) A special employee is described as one who is transferred for a limited time of whatever duration to the service of another ( Brooks v. Chemical Leaman Tank Lines, 71 AD2d 405, 407). General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer (Stone v. Bigley Bros., supra at 140-143 (and cases cited therein); Sweet v. Board of Educ., 290 NY 73, 76-77; Irwin v. Klein, supra, at 484-485, Ramsey v. New York Cent. R.R. Co., 269 NY 219, 224).

Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive (Braxton v. Mendelson, 233 NY 122, 124, supra). While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee’s work ( Stone v. Bigley Bros., 309 NY 132, supra; Sweet v. Board of Educ., 290 NY 73, 76-77, supra; Irwin v. Klein, 271 NY 477, 474, supra; Wawrzonek v. Central Hudson Gas & Elec. Corp., 276 NY 412, 419, supra; Wyllie v. Palmer, 137 NY 248, 257).

Labor Law §240(1) provides:

“1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing 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 shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Labor Law §241(6) provides:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

An owner and a contractor have a non-delegable duty to provide required safety devices to a workman at a building site and will be held absolutely liable for worker’s injuries resulting from a breach of that duty (ROSS v. CURTIS-PALMER HYDRO ELECTRIC COMPANY, 180 AD 2d 385, 585 NYS 2d 516 (3<sup>rd</sup> Dept., 1992)). The “exceptional protection” provided for workers by §240(1) is aimed at “special hazards” that arise when the work site either is itself elevated or is positioned below the level where “materials or load [are] hoisted or secured.” “Special hazards” do not encompass any and all perils connected with gravity but are limited to such specific gravity-related accidents as falling from a height or RE: VIRAG v. being struck by a falling object that was improperly hoisted or inadequately secured (see, ROSS v. CURTISS-PALMER HYDRO ELECTRIC CO., supra; ROCOVICH v. CONSOLIDATED EDISON CO., 78 NY 2d 509, 577 NYS 2d 219 (1991); ZIMMER v. CHEMUNG COUNTY PERFORMING ARTS, 65 NY 2d 513, 493 NYS 2d 102 (1985). The legislative purpose behind §240(1) is to protect workers by placing ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers, who are “scarcely in a position to protect themselves from accident” (see ROCOVICH v. CONSOLIDATED EDISON CO., supra; KOENIG v. PATRICK CONSTRUCTION CO., 289 NY 313 (1948)). However, in order to prevail upon a claim pursuant to Labor Law §240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see BLAND v. MANCHERIAN, 66 NY 2d 452, 497 NYS 2d 880 (1985); SPRAGUE v. PECKMAN MATERIALS CORP., 240 AD 2d 392, 658 NYS 2d 97 (2d Dept., 1997)).

The evidence submitted in the form of the parties deposition transcripts establishes that “MCC” interviewed, hired, and supervised “Espana’s” daily assignments. “Espana” was clearly a “special employee” of “MCC” while working at the construction site (see Thompson v. Grumman, supra). Defendant “MCC’s” motion for an order dismissing plaintiffs complaint must therefore be granted.

No viable general negligence claim exists against the general contractor/defendant “A & BC” since the undisputed evidence shows that “A & BC” exercised no supervisory control over “Espana” at the construction site. Plaintiffs cause of action for negligence against defendant “A & BC” must therefore be dismissed.

Substantial issues of fact remain however concerning plaintiffs Labor Law §240 & 241 (6) claims against the general contractor “A & BC” based upon the conflicting testimony about the cause of the accident sufficient to require a plenary trial. Defendant “A & BC’s” motion seeking an order dismissing these claims must therefore be denied.

Indemnity is defined as the obligation of one party to reimburse in full another party who has discharged a common liability. The fundamental distinction between indemnity and contribution was discussed by the Court of Appeals in McFall v. Compagnie Maritime Belge, 304 NY 314, 327-28 (1952):

“The right of contribution is not founded on nor does it arise from contract and only ratable or proportional reimbursement is sought in an action for contribution....The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from a contract, express or implied, and full, not partial, reimbursement is sought...”

In constructing the terms of a contract, the judicial function is to give effect to the parties intentions (MALLAD CONSTRUCTION CORP. v. COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION, 32 NY2d 285, 344 NYS2d 925 (1973)). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (SELIGMAN v. MOUNT ARAFAT CEMETERY, INC., 112 AD2d 928, 492 NYS2d 445 (2nd Dept., 1985)). An agreement should be read as a whole so as to give each section meaning. Where a contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of parties intent or to rules of construction to ascertain the contract's meaning ( BETHLEHEM STEEL CO. v. TURNER CONSTRUCTION CO., 2 NY2d 456, 161 NYS2d 90 (1957)). However where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (See BRAY TERMINALS, INC. v. GRAND UNION CO., 74 AD2d 965, 425 NYS2d 886 (1st Dept., 1980)).

Defendant “MCC” entered into an Indemnity and Insurance Agreement dated May 24, 2004 obligating “MCC” to provide general liability insurance naming “A & BC” an additional insured “for all work entered into from hereon until terminated in writing by both parties.”

The contract provides:

Michael Cunningham agrees at its own expense shall procure, carry and maintain throughout all of its operations, the following coverage and limits of coverage.

\* \* \*

Comprehensive General Liability Insurance, covering accident, injury or death and property damage with limits of not less than \$1,000,000.00 per occurrence and \$2,000,000.00 General Aggregate. Coverage will be written on an “occurrence” basis containing the appropriate additional insured and hold harmless and indemnity provisions, naming Andreassen & Bulgin Construction, Inc., as an additional insured. An umbrella of excess liability policy written in the amount of \$1,000,000.00 per occurrence and aggregate covering over and above the above coverage’s on a “following form” basis...

To the fullest extent provided by law, Michael Cunningham shall indemnify and hold harmless Andreassen & Bulgin Construction against any and all claims, damages, loss of any and all work, act or omission of framing, caused

in whole or part by Michael Cunningham or anyone directly or indirectly employed by them while acting on their behalf.

Based upon the terms of the agreement, defendant "MCC" was required to obtain a general liability insurance policy naming the general contractor as an additional insured and to indemnify "A & BC" against any claims asserted against "A & BC" for work performed by "MCC". Defendant/third party plaintiff "A & BC's" cross motion seeking an order granting summary judgment against defendant/third party defendant "MCC" must therefore be granted based upon "MCC's" failure to provide the insurance and to indemnify "A & BC" as it was required to do pursuant to the May 24, 2002 Agreement. Accordingly, it is

**ORDERED** that defendant "MCC's" motion for an order pursuant to CPLR §3212 is granted to an extent that plaintiffs complaint against "MCC" is hereby dismissed, and it is further

**ORDERED** that defendant "A & BC's" motion for an order pursuant to CPLR §3212 is granted to the extent that plaintiffs cause of action for violation of Labor Law §200 is hereby dismissed, and it is further

**ORDERED** that defendant "A & BC's" motion for an order pursuant to CPLR §3212 with respect to the second third party complaint granting summary judgment against third party defendant "MCC" is granted.

Dated: May 23, 2007

**MELVYN TANENBAUM**

---

J.S.C.

**NON-FINAL DISPOSITION**