

Vereen v Fuller Rd. Mgt. Corp.

2007 NY Slip Op 32247(U)

July 18, 2007

Supreme Court, Albany County

Docket Number: 0065772/0051

Judge: Joseph C. Teresi

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TATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

STAN VEREEN,

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 0106086727
INDEX NO.: 6577-05

FULLER ROAD MANAGEMENT CORPORATION
and AUGUST BOHL CONTRACTING COMPANY,
INC.,

Defendants,

FULLER ROAD MANAGEMENT CORPORATION,

Third Party Plaintiff,

-against-

AUGUST BOHL CONTRACTING COMPANY, INC.,

Third Party Defendant.

Albany County Supreme County All Purpose Term, June 15, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant/Third Party Plaintiff, Fuller Road Management Corporation (hereinafter Fuller Road), brings this motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's complaint and for summary judgment on its claims against Defendant/Third Party Defendant, August Bohl Contracting Company, Inc (Hereinafter August Bohl). Plaintiff and August Bohl oppose the motion separately. August Bohl brings this cross motion for summary judgment. Plaintiff and Fuller Road oppose the motion.

After fully reviewing the record, this Court denies both motions for summary judgment.

Plaintiff was allegedly injured while working at a construction site on the corner of Fuller Road and Washington Avenue which is jointly owned by New York State and Defendant, Fuller Road. Construction work was being performed there by Welliver McGuire, Plaintiff's employer, and its subcontractor, Defendant, August Bohl. Plaintiff was allegedly injured while trying to move a large portable generator with an attached light stand, weighing, in total, approximately 2,000 pounds with a crane. All crane operators, were employed by August Bohl, but answered to the Welliver McGuire site supervisor while on site. Mr. Harrington, the only crane operator on site at the time of Plaintiff's alleged injury, used the larger crane, which was positioned on the far side of the building to move the generator despite being unable to see the load. He relied on people on the ground with radios to direct him. This was the first time Mr. Harrington had ever

operated a crane with such limited visibility of the load. Plaintiff was instructed to hold a tagline that was attached to the generator to prevent it from swinging into the building. The area was filled with snow and debris. According to Plaintiff, rather than lift the generator slowly to allow for it to be guided to the far side of the room, Mr. Harrington lifted it “too fast and too high off the ground” and as a result, Plaintiff was dragged 20 to 30 feet before being dropped suddenly.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court’s main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). Summary judgment is inappropriate for this case because it is replete with triable issues.

Defendant, Fuller Road contends that pursuant to the indemnification contract signed by August Bohl, it is entitled to indemnification for any incidents resulting from the negligence of August Bohl employees, such as the alleged negligence of Mr. Harrington. Fuller Road further contends that it is entitled to summary judgment against Plaintiff pursuant to Plaintiff’s Labor Law §§ 200, 240 and 241(6) claims as well as a Plaintiff’s common law negligence claim. In response Plaintiff has agreed to withdraw claims based on Labor Law § 240 against all Defendants and to withdraw claims based on Labor Law § 200 against Fuller Road, only.

Plaintiff continues to maintain claims against Fuller Road pursuant to Labor Law § 241(6) and common law negligence. To successfully maintain a claim predicated on Labor Law § 241(6), Plaintiff must prove a violation of the Industrial Code. Plaintiff relies upon 23-1.7, 23-8.1 and 23-9.4, while Fuller Road contends that none of these is adequate for the alleged incident.

Notwithstanding claims made by Fuller Road, Industrial Code 23-1.7 is specific enough to base a Labor Law § 241(6) claim (Matter of Rizzuto v. LA Wenger Construction Company, 91 NY2d 343 [1998]). Additionally, whether or not the incident occurred in a “walkway” as required by 23-1.7 constitutes a triable issue. Moreover the applicability of 23-6.1 and 23-8.1 rely on facts in dispute.

Defendant/Third Party Defendant, August Bohl contends that it is entitled to summary judgment both against Plaintiff and against Third Party Plaintiff, Fuller Road because its only connection to the incident is as employer of Mr. Harrington who was, as a matter of law, a special employee of Welliver McGuire and, in any event, did not act negligently. Despite, August Bohl’s contentions, however, whether Mr. Harrington was a special employee of Welliver McGuire is a triable issue (Sherman v. Reynolds Metal Co., 295 AD2d 843 [3d 2002]). Here, Mr. Harrington was hired by and paid by August Bohl, but worked on site with Welliver McGuire supervisors and employees. The extent to which Mr. Harrington took instruction from and had his work directed by those supervisors is currently in dispute. Similarly, a triable issue remains as to whether or not Mr. Harrington was negligent in his operation of the crane.

Fuller Road contends that the question of whether or not Mr. Harrington was a special employee of Welliver McGuire is wholly irrelevant to enforcing the indemnification clause (Walls v. Sano-Rubin Const. Co., Inc., 4 A.D.3d 599 [3d Dept 2004]). Fuller Road slightly

overstates the holding of *Walls v. Sano-Rubin Const. Co., Inc.*, which was limited to the language of the particular indemnification clause at issue, as well as to the nature of the facts in dispute regarding “special employment.” While there are circumstances in which August Bohl might be held to honor the indemnification clause notwithstanding a potential finding that Mr. Harrington was, in fact, a special employee of Welliver McGuire, this case is not ripe for summary judgment on that issue.

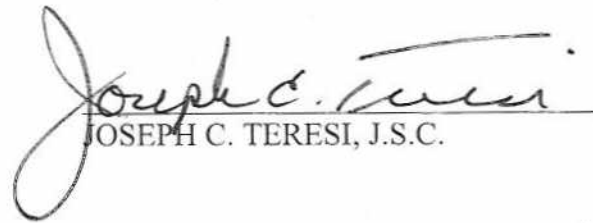
Accordingly, this Court denies both motions for summary judgment.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: July 8, 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendant/Third-Party Plaintiff's, Fuller Road Management Corporation, Notice of Motion, dated May 18, 2007 with Attached Exhibits A-J.
2. Defendant/ Third-Party Defendant's, August Bohl Contracting Company, Inc, Notice of Cross Motion, dated May 21, 2007 with attached Exhibits A-M.
3. Defendant/Third-Party Plaintiff's, Fuller Road Management Corporation, Affirmation in Opposition, dated May 29, 2007.
4. Plaintiff's affirmation in Opposition, dated June 28, 2007 with attached Exhibit A.
5. Defendant/ Third-Party Defendant's, August Bohl Contracting Company, Inc., Reply, dated June 29, 2007
6. Plaintiff's Opposition, dated July 2, 2007

7. Defendant/ Third-Party Defendant's, August Bohl Contracting Company, Inc., Reply dated July 3, 2007.
8. Defendant/Third-Party Plaintiff's, Fuller Road Management Corporation, Reply dated July 5, 2007.