Acosta v Neisloss
2007 NY Slip Op 32747(U)
August 29, 2007
Supreme Court, Queens County
Docket Number: 0027951/2004
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

FIDEL VILLALBA ACOSTA	Index Number 27951 2004
- against -	Motion Date June 5, 2007
JAMES NEISLOSS, et al.	Motion Cal. Numbers 2 & 3
	Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 28 read on this motion by plaintiff for summary judgment against defendant Love Drywall, Inc. (Love Drywall) and defendant Qualico Contracting Corp. (Qualico); a separate motion by defendants James Neisloss and Alison Neisloss for summary judgment dismissing the complaint and all cross claims asserted against them; a cross motion by defendant Qualico for summary judgment dismissing the complaint and all cross claims asserted against it, and for summary judgment on its cross claim against Love Drywall; and a cross motion by defendant Love Drywall for summary judgment dismissing the complaint and cross claims asserted against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-8
Notices of Cross Motion - Affidavits - Exhibits ...	9-16
Answering Affidavits - Exhibits	17-23
Reply Affidavits	24-28

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated for the purpose of disposition and are determined as follows:

Plaintiff, an employee of third-party defendant Riveros Company, Inc. (Riveros), allegedly was injured when he fell from a makeshift scaffold while installing sheet rock on the 20-foot high ceiling of an entrance foyer during the construction of a single-family home on property owned by defendants Neisloss. The

scaffold was made by screwing 2x4's vertically into the side walls and placing a platform made of three 4x8 pieces of wood across the open span. Plaintiff accessed the platform from the second floor. The accident occurred when one of the 2x4's affixed to the wall broke, causing plaintiff and the supervisor working on the platform with him to fall to the ground.

Pursuant to a contract executed on behalf of the owners by defendant James Neisloss, defendant Qualico was the construction manager for the project. Defendant Love Drywall was hired by defendant James Neisloss as the contractor responsible for supplying and installing sheetrock and spackle, and subcontracted the sheetrock work to Riveros. Plaintiff commenced this action to recover damages for personal injuries, alleging common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff's motion for summary judgment addresses the potential liability of Qualico and Love Drywall only with regard to Labor Law § 240(1), and the court will deem the motion to be limited to that claim. Similarly, Love Drywall's cross motion will be considered only with regard to the claims it has addressed, those for violation of Labor Law §§ 240(1) and 241(6).

The unopposed motion by defendants Neisloss is granted. Labor Law §§ 240(1) and 241(6) contain exceptions to the duties imposed therein for "owners of one and two-family dwellings who contract for but do not direct or control the work." Defendants Neisloss have made a prima facie showing that they are entitled to the homeowner's exemption for the subject construction project for the one-family dwelling intended as their family's primary residence, where the family has lived since September 2005, by establishing that they did not supervise the method and manner of the work or give any instruction or directions to plaintiff. (See Ferrero v Best Modular Homes, 33 AD3d 847 [2006]; McGlone v Johnson, 27 AD3d 702 [2006].) In addition, since the record demonstrates that the dangerous condition that caused plaintiff's accident arose from the subcontractor's methods and that defendants Neisloss did not exercise any supervisory control over the work being performed, defendants Neisloss cannot be held liable under the common law or under Labor Law § 200. (See, Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Ferrero v Best Modular Homes, supra.)

The part of the cross motion by defendant Qualico that is for summary judgment dismissing the complaint and all cross claims against it is granted, and the part of plaintiff's motion that is for summary judgment against Qualico for violations of Labor Law § 240(1) is denied. Plaintiff seeks to impose liability on Qualico as a general contractor or a statutory agent of the owners for the purposes of the Labor Law. A party will be subject to

liability under Labor Law §§ 240(1) and 241(6) as an owner's agent or as a contractor where the party has supervisory control and authority over the work that brought about plaintiff's injury. (See, Walls v Turner Constr. Co., 4 NY3d 861 [2005]; Delahaye v Saint Anns School, 40 AD3d 679 [2007]; Chimborazo v WCL Assocs., 37 AD3d 394 [2007]; Linkowski v City of New York, 33 AD3d 971 [2006].) It is the possession of the requisite degree of control to be able to avoid or correct the unsafe condition, not a defendant's title, that is determinative. (See, Delahaye v Saint Anns School, supra; Linkowski v City of New York, supra.) Qualico has established that its authority as a construction manager did not rise to the level of supervision and control necessary to make Qualico an agent or a contractor liable for plaintiff's injuries under section 240(1) or 241(6). (See, Delahaye v Saint Anns School, supra; Armentano v Broadway Mall Props. 30 AD3d 450 [2006]; Damiani v Federated Dept. Stores, 23 AD3d 329 [2005].) Plaintiff has failed to raise a triable issue of fact.

The record demonstrates that Qualico's role was one of general supervision, coordinating the different contractors, making recommendations to the owners, creating work schedules and monitoring progress. (See, Delahaye v Saint Anns School, supra; Linkoswki v City of New York, supra; Armentano v Broadway Mall Props., supra.) Paragraph 2.3.15 of Qualico's construction manager agreement specifically provided that "the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's responsibility ***." (See, Delahaye v Saint Anns School, supra.) Qualico did not assume responsibility for the work of Riveros and plaintiff admittedly took his instructions from Riveros and no other party. (See, Delahaye v Saint Anns School, supra.) Under these circumstances, liability under Labor Law §§ 240(1) and 241(6) cannot be imposed on defendant Qualico. Similarly, since there is no evidence that Qualico had control over the work of plaintiff such as to enable it to prevent or correct any unsafe conditions or that Qualico created or had notice of the dangerous conditions, there are no triable issues of fact as to Qualico's liability on the Labor Law § 200 and common-law negligence claims. (See, Delahaye v Saint Anns School, supra; Linkowski v City of New York, supra; Singh v Black Diamonds, LLC, 24 AD3d 138 [2005].)

Inasmuch as Qualico is not being held vicariously liable pursuant to Labor Law §§ 240(1) and 241(6), the part of its cross motion that is for summary judgment on its cross claim for

common-law indemnification from Love Drywall is denied. (See, Perri v Gilbert Johnson Enters., 14 AD3d 681 [2005].)

In its cross motion, Love Drywall attempts to avoid liability under Labor Law §§ 240(1) and 241(6) by arguing that its president believed that the work Love Drywall was doing at the subject construction site was for Hilltop Contracting, a company in which James Neisloss is the principal. Love Drywall has not submitted evidence sufficient to make a prima facie showing in this respect. (See, Ayotte v Gervasio, 81 NY2d 1062 [1993].) In any event, the argument is unavailing. The status of Love Drywall as a party subject to liability for violation of Labor Law §§ 240(1) and 241(6) is not dependent on whether Love Drywall was performing its duties on behalf of the owners rather than a contractor. Such liability may be imposed on a party to whom an owner or a contractor has delegated the authority to supervise and control a particular part of the work, with the party thereby becoming the statutory agent of the owner or contractor for those areas and activities within the scope of that work. (See, Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]; Chimborazo v WCL Assocs., supra; Aranda v Park E. Constr., 4 AD3d 315 [2004].) The determinative factor in the liability of a contractor as statutory agent for an owner or a general contractor under the Labor Law is whether the contractor has the authority to control the work being done when plaintiff was injured. (See, Walls v Turner Constr. Co., supra; Chimborazo v WCL Assocs., supra; Natoli v City of New York, 32 AD3d 507 [2006]; Everitt v Nozkowski, 285 AD2d 442 [2001].)

The evidence in the record demonstrates that the sheetrock work giving rise to the duty to conform to the requirements of Labor Law §§ 240(1) and 241(6) was delegated to Love Drywall, which then obtained the concomitant authority to supervise and control the work and became a statutory agent. (See, Russin v Louis N. Picciano & Son, supra.) Love Drywall was hired by James Neisloss to do the sheetrock work. In its subcontract with Riveros, Love Drywall required that Riveros "conform to all OSHA, Federal, State or local occupational safety requirements" and report any injuries occurring on the work site to Love Drywall within 24 hours of the occurrence. The president and sole shareholder of Love Drywall, Christopher Love, testified that, if he did not like the quality of the work being done by Riveros employees, he could tell them to change it. Although he testified that, while he could object to work being performed in an unsafe manner by Riveros employees, he did not know if he could make them stop since they did not work for him. Love admitted that he could have instructed Juan Riveros, the subcontractor's principal, to tell his employees to stop the unsafe practice. Accordingly, the cross motion by Love Drywall is denied.

The part of plaintiff's motion that is for summary judgment against Love Drywall on the issue of liability under Labor Law § 240(1) is granted. Labor Law § 240(1) requires that contractors and owners, and their agents, provide workers with appropriate safety devices to protect them against such specific gravity-related accidents as falling from a height. (See, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Godoy v Baisley Lumber Corp., 40 AD3d 920 [2007].) To prevail on a cause of action under section 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injures sustained. (See, Bland v Manocherian, 66 NY2d 452 [1985]; Tylman v School Constr. Auth., 3 AD3d 488 [2004].) Plaintiff's unrefuted evidence that the makeshift scaffold on which he was working collapsed, causing him to fall and sustain injuries, is sufficient to establish a prima facie case of liability for violation of Labor Law § 240(1) against Love Drywall. (See Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280, 289 n8 [2003]; Panek v County of Albany, 99 NY2d 452, 458 [2003]; Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp., 303 AD2d 484 [2003].) As already determined, Love Drywall's claim that it is not subject to liability under Labor Law § 240(1) is without merit. In addition, Love Drywall has failed to submit any evidence to raise a triable issue of fact as to plaintiff's proof that he was not provided with any other safety device for his work at the ceiling level and that he was directed to assemble and use the wooden planks for that purpose by his supervisors. Christopher Love's testimony that the wooden planking constructed by the Riveros employees is not an acceptable method for working at a height confirmed that plaintiff was not provided with the proper protection required by Labor Law § 240(1). On these facts, plaintiff is entitled to summary relief. (See, Blake v Neighborhood Hous. Servs. of New York City, supra.)

Dated: August 29, 2007

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J.S.C.