

**Iliadis v Tully Constr. Co.**

2007 NY Slip Op 33669(U)

September 17, 2007

Supreme Court, Queens County

Docket Number: 0022797/2004

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

|                                |   |                                     |
|--------------------------------|---|-------------------------------------|
| KARAMFYLLIS ILIADIS            | x | Index<br>Number <u>22797</u> 2004   |
| - against -                    |   | Motion<br>Date <u>June 12,</u> 2007 |
| TULLY CONSTRUCTION CO., et al. |   | Motion<br>Cal. Number <u>16</u>     |
| x                              |   | Motion Seq. No. <u>1</u>            |

The following papers numbered 1 to 11 read on this motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law § 240(1).

|   | <u>Papers<br/>Numbered</u> |
|---|----------------------------|
| Notice of Motion - Affidavits - Exhibits.....     | 1-4                        |
| Notice of Cross Motion - Affidavits - Exhibits... | 5-8                        |
| Reply Affidavits.....                             | 9-11                       |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for personal injuries suffered as a result of a work site accident. The accident allegedly occurred on August 9, 2003. The plaintiff brought claims for violations of Labor Law §§ 200, 240(1) and 241(6), and common law negligence.

The accident occurred at the World Trade Center reconstruction site. The defendants were the general contractors on the project. The plaintiff, an electrical worker, was an employee of E-J Electric Installation Company (EJ Electrical). EJ Electrical was hired by Daidone Electrical, which was a subcontractor on the project. EJ Electrical's work included placing pipes for the electrical conduit that supplied power to the water pumps at the

site. On the day of the accident, the plaintiff was working in the pit at ground zero, located between Church Street and the West Side Highway as part of the PATH train restoration project. At the time of the accident the plaintiff was in a trench and was in the process of securing and connecting conduit pipe that was ten-feet long. The pipe weighed in excess of fifty pounds. The process of securing the pipe required the manual spinning of the pipe to connect it to a ninety-degree elbow. Plaintiff testified that the accident occurred as he was spinning the pipe with the elbow his back hurt and he slipped and fell down. The plaintiff further claims that after he fell the pipe he was holding dropped down and landed on top of him. The foreman for EJ Electrical testified that he witnessed the accident and that plaintiff kneeled down and complained of lower back pain as he was spinning the pipe. In the incident report he stated that the plaintiff pulled a lower back muscle while working. The emergency room medical records indicate that the plaintiff told doctors that he felt pain in his back as he was lifting heavy piping.

The note of issue was filed on November 24, 2006, but pursuant to a so-ordered stipulation, summary judgment motions had to be returnable no later than April 16, 2007. The defendants' motion was made returnable on May 1, 2007 and was thus untimely. The defendants, however, seek leave of court to make this summary judgment motion. Since there was outstanding discovery at the deadline to make the motion, and the defendants promptly moved for summary judgment after the completion of the deposition, good cause exists to make this motion (see Sclafani v Washington Mut., 36 AD3d 682 [2007]; Herrera v Felice Realty Corp., 22 AD3d 723 [2005]). As to the cross motion by the plaintiff, though it was untimely and the plaintiff did not seek leave of Court, the Court will consider it as the motion of the defendants for summary judgment was made on nearly identical grounds (see Ellman v Village of Rhinebeck, 41 AD3d 635 [2007]; Grand v Peteroy, 39 AD3d 590 [2007]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496 [2005]).

The defendants' argument that the complaint should be dismissed as the wrong parties are named because the contract was signed by the defendants as a joint venture is not supported by the evidence submitted. The defendants submitted no evidence that the joint venture was a separate corporate entity that needed to be separately named. Since each defendant signed the contract and were acting as general contractors they are the correct defendants in this action.

Owners and contractors are subject to strict liability under Labor Law § 240. To prevail under such a claim, a plaintiff must

provide evidence that the statute was violated and that the violation was the proximate cause of the injury (Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]). The claim under Labor Law § 240(1) must be dismissed as the work involved did not involve elevation related risks for which special safety devices were required (see Bonse v Katrine Apt. Assoc., 28 AD3d 990 [2006]; Magnuson v Syosset Community Hosp., 283 AD2d 404 [2001]; Wendell v Sylvan Lawrence Co., 279 AD2d 383 [2001]; Rossi v Mount Vernon Hosp., 265 AD2d 542 [1999]). Plaintiff's argument that this case falls under a falling object case is without merit. The plaintiff was holding the pipe at around his waist level when he fell to the ground and the pipe fell on top of him. "The fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a Section 240(1) claim" (Narducci v Manhasset Bay Assoc., 96 NY2d 259 [2001]). Since the pipe was at the same level as the plaintiff, not at an elevated level, the statute is not implicated (see Melo v Consol. Edison Co. of New York, 92 NY2d 909 [1998]; Turczynski v City of New York, 17 AD3d 450 [2005]; Zdunczyk v Ginther, 15 AD3d 574 [2005]; Aloi v Structure-Tone, 2 AD3d 375 [2003]).

To support their claim under Labor Law § 241(6) the plaintiff has alleged violations of 12 NYCRR §§ 23-1.7(d), 23-1.7(e), 23-1.8(c)(2), 23-1.33(a), (b), 23-1.41(a), (b), 23-4.2(a), (b), (c), (g) and (l), 23-4.3, 23-4.4(a), (b), (c), (d), (e) and (h), and 23-4.5(a), (b), (c), (d), (e), (f), (g), (h), (I) and (j). The plaintiff does not oppose the dismissal of claims except one based on a violation of 12 NYCRR § 23-1.7(d) as the other provisions are either general safety provisions or not applicable to the facts of the case. Therefore the portion of the Labor Law § 241(6) claims predicated on any other provision of the Industrial Code will be dismissed. The plaintiff argues that the Labor Law § 241(6) claim should not be dismissed because it is predicated on a violation of 12 NYCRR § 23-1.7(d). As there are contradictory descriptions of whether the plaintiff slipped on water in the trench where he was working, the plaintiff raised an issue of fact as to whether there was a violation of 12 NYCRR § 23-1.7(d) that was the proximate cause of the accident (see Dowd v City of New York, 40 AD3d 908 [2007]; Wrighten v ZHN Contr. Corp., 32 AD3d 1019 [2006]; Bradley v Morgan Stanley & Co., 21 AD3d 866 [2005]; Cameron v City of Long Beach, 297 AD2d 773 [2002]).

For an owner or general contractor to be liable under Labor Law § 200 and common law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition

causing the accident. On this issue, the defendants have established as a matter of law that they had no actual or constructive knowledge of the defective condition at the work site and exercised no control or supervision over plaintiff's work (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006] Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact that would warrant denial of the motion.

Accordingly, the branches of the defendants' motion for summary judgment dismissing the common law negligence and Labor Law §§ 240(1) and 200 are granted and those claims are dismissed. The branch of the cross motion for summary judgment to dismiss the Labor Law § 241(6) claim is granted to the extent provided herein and the portions of the Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(e), 23-1.8(c)(2), 23-1.33(a), (b), 23-1.41(a), (b), 23-4.2(a), (b), (c), (g) and (l), 23-4.3, 23-4.4(a), (b), (c), (d), (e) and (h), and 23-4.5(a), (b), (c), (d), (e), (f), (g), (h), (I) and (j), while the portion of the claim predicated on a violation of 12 NYCRR § 23-1.7(d) is not dismissed. The cross motion by the plaintiff is denied.

Dated: September 17, 2007

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AUGUSTUS C. AGATE, J.S.C.