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| Metus v Ladies Mile, Inc. |
| 2008 NY Slip Op 30028(U) |
| January 3, 2008 |
| Supreme Court, New York County |
| Docket Number: 0112861/2005 |
| Judge: Rolando T. Acosta |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA
Justice

PART 61

FISNIK, Metus

INDEX NO.

112861/05

MOTION DATE

MOTION SEQ. NO.

4

MOTION CAL. NO.

- v -

LADIES MILE, INC.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

See attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or another authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

SO ORDERED

Dated: 1/3/08

[Signature]
ROLANDO T. ACOSTA, S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: 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: PART 61

Fisnik Metus,

Plaintiff,

– against –

Ladies Mile, Inc., VJB Construction Corp., &
Regional Scaffolding & Hoisting Co., Inc.,

Defendants,

DECISION/JUDGMENT

Index No. 112861/05

Seq. No. 4

Present:

Rolando T. Acosta
Supreme Court Justice

Ladies Mile, Inc., VJB Construction Corp., &
Regional Scaffolding & Hoisting Co., Inc.,

Third-Party Defendants,

– against –

Prestige Construction Services, Inc.,

Third-Party Defendants.

The following documents were considered in reviewing defendants VJB Construction Corp. (“VJB”)’s and Regional Scaffolding & Hoisting Co., Inc. (“Regional”)’s order to show cause seeking to reargue this Court’s September 24, 2007 decision pursuant to C.P.L.R. § 2221:

Papers

Numbered

**Defendants’ VJB and Regional’s
Order to Show Cause
Plaintiff’s Affirmation in Opposition
Defendant Prestige Construction Services, Inc.’s
Affirmation in Opposition**

**1 (Exhibit A)
2
3**

On September 24, 2007, this Court granted plaintiff partial summary judgment on his Labor Law 240(1) claim against defendants (motion Seq. No. 2), and granted defendants' cross-motion (Seq. No. 3) solely to the extent of dismissing the Labor Law 241(6) claim and granting defendant Ladies Mile common law and contractual indemnification from Prestige. The Court, however, denied that portion of the cross-motion which sought to dismiss the Labor Law 200 and 241(1) claims, as well as defendants VJB's and Regional's request for indemnification from Prestige.

Defendants' VJB and Regional now move by order to show cause for leave to reargue that portion of the motion which sought dismissal of the Labor Law 200 claim and for indemnification from Prestige. Defendants motion for reargument is granted and upon reconsideration, the Court finds that defendants' VJB and Regional had established that they can not be found liable under Labor Law 200 inasmuch as plaintiff did not establish questions of fact sufficient to support the theory that defendants' VJB and Regional exercised supervision and control over plaintiff's work. VJB and Regional are thus entitled to indemnification from Prestige. Accordingly, this Court's September 24, 2007 Decision and Judgment is vacated and substituted with the following Decision and Judgment.

The accident herein took place on September 7, 2005, at approximately 2:00 a.m. on the ground floor, inside the Mens Warehouse Store, located at 655 Sixth Avenue in Manhattan that was in the process of being renovated. The owner of the premises, Defendant Ladies Mile, Inc ("Ladies Mile"), hired defendant VJB Construction Corp ("VJB") to serve as general contractor. VJB subcontracted with defendant Regional Scaffolding & Hoisting Co ("Regional") to erect scaffolding for the project. Regional in turn subcontracted with Prestige Construction Services ("Prestige") to erect the interior scaffolding. Regional, who developed the interior scaffolding plans and submitted them to VJB, supplied Prestige with all the materials, but otherwise did not supervise or control Prestige's work.

Plaintiff, who worked for Prestige at the time of the accident, was injured in the process of erecting the interior scaffold. Specifically, the workers had assembled a box-like structure by connecting four vertical poles (legs) with cross bracing, placing two header beams on top of the legs and then placing junior beams across the box, with each end of the junior beam resting on top of a header. Once the steel, five feet long, 40 pound junior beams, were placed on top of the headers, flat corrugated tin, measuring six by four feet, was placed on top of the junior beams. Plaintiff, who was about six feet tall, was standing on the floor and in the process of handing up a piece of corrugated tin to a worker who was situated on top of the scaffold. The piece of tin slid across an unsecured junior beam causing the beam to fall and strike plaintiff in the face. Plaintiff was knocked unconscious and suffered injuries.

In his complaint, plaintiff alleged Labor Law §§ 200, 240(1), and 241(6) violations and he moved for partial summary judgment on liability on his Labor Law 240(1) claim (motion seq. 2). Plaintiff's motion is granted. As the Court of Appeals held in Ross v Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501 (1993), Labor Law 240(1) is designed to protect workers from "gravity-related accidents [such] as . . . being struck by a falling object that was . . . inadequately secured." See also Outar v The City of New York, 5 N.Y.3d 731 (2005); Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001). Here, the junior beam was inadequately secured since it fell during the construction of the scaffold. See Aragon v. 233 West 21st Street, Inc., 201 A.D.2d 501 (1st Dept. 1994)(collapse of a scaffold is prima facie evidence of a violation of labor law 240(1)). Accordingly, plaintiff established his prima facie entitlement to summary judgment and the burden shifted to defendants to raise triable issues of fact, which they have failed to do.

Defendants' assertions to the contrary, there is no indication in the record that plaintiff was solely responsible for the accident. And although defendants' expert asserts that there are no code or regulations which require that a junior beam be secured, the fact remains, that plaintiff was not properly protected from the risk of having an unsecured beam falling on his face.

Defendants' and third-party defendant (Prestige)'s motion to dismiss the complaint is granted to the extent of dismissing plaintiff's Labor Law 241(6) cause of action inasmuch as plaintiff has failed to identify an applicable industrial code violation. Ross v Curtis-Palmer Hydro-Electric Co., supra, 81 N.Y.2d at 505. Indeed, plaintiff does not even address this portion of the motion in its opposition.

VJB and Regional have established their prima facie entitlement to summary judgment dismissing the Labor Law 200 claim against them. Labor Law 200 liability attaches where the owner and/or general contractor exercises supervisory control over the work, equipment or safety procedures and had actual or constructive notice of the unsafe condition. Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263 (1st Dept 2007). The record makes clear that defendants were not supervising or controlling Prestige's work during the time of the accident. VJB and Regional provided Prestige with a sketch and materials to build the scaffold, however caselaw makes clear that providing design specifications and/or materials, without a showing that the defendant actually supervised and controlled the work environment, does not meet the Labor Law 200 standard. The standard requires the party charged to have authority or control over the activity causing the injury (see, O'Sullivan v. IDI Const. Co., Inc., 28 A.D.3d 225, (1st Dept 2006)) and contemplates more than merely providing design plans or materials. Boyd v. Lepera and Ward, 275 A.D.2d 562 (3rd Dept. 2000) (architect's activities that do not extend beyond planning and design can not be basis for liability imposed regarding construction safety issues).

Plaintiff and defendant Prestige argue that our prior decision was correct given that there are questions of fact regarding the scope of the defendants' work. However, the uncontroverted evidence presented by movants clearly establishes that defendants VJB and Regional did not direct or supervise the activities at the accident site. Beyond providing the design plans and materials used to build the construction scaffolding, the movants had no supervisory role or control at the work site and thus can not be found liable under Labor Law 200 as a matter of law. Indeed, the evidence presented shows that movants were never at the worksite during the hours in which the scaffolding was being built.

Having found that defendants VJB and Regional are not liable under Labor Law 200, defendants' motion for common law and contractual indemnification from Prestige is also granted. Accordingly, based on the foregoing it is hereby

ADJUDGED that plaintiff's motion (Seq. 2) for an order granting partial summary judgment on liability on his Labor Law § 240(1) claim against defendants is GRANTED; and it is further

ORDERED that defendants' and defendant/third-party plaintiffs' cross-motions (Seq. 2) for an order dismissing the complaint is granted solely to the extent of dismissing the Labor Law 200 and Labor Law 241(6) claims; and it is further

ADJUDGED that defendants and defendant/third-party plaintiffs' motion (Seq. 3) for common law and contractual indemnification from Prestige is GRANTED; and it is further

ORDERED that the matter proceed to trial on the remaining issues.

This constitutes the Decision, Judgment and Order of the Court.

Dated: January 3, 2008

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER
SO ORDERED
Rolando T. Acosta
ROLANDO T. ACOSTA
J.S.C.
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