

Licata v J.E. Levine Bldr. Inc.

2008 NY Slip Op 30033(U)

January 8, 2008

Supreme Court, Nassau County

Docket Number: 4045-06/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JOSEPH S. LICATA and VIRGINIA LICATA,

TRIAL/IAS PART 9
NASSAU COUNTY

Plaintiff(s),

INDEX NO. 4045/06

- against -

MOTION SEQUENCE
NO. 1 & 2 & 3 & 4 & 6

J.E. LEVINE BUILDER INC., A.J.S. TRUCKING &
EXCAVATING CORP., and JET-DRIVE GENERAL
MARINE CONTRACTING CO., INC.,

MOTION RETURN
DATE: October 29, 2007

Defendant(s).

J.E. LEVINE BUILDERS INC.,

Third Party Plaintiff,

- against -

J & A CONCRETE CORP. and J & A CONCRETE
PUMPING CORP.,

Third Party Defendants.

The following papers read on this motion:

- | | |
|---------------------------|------------|
| Notice of Motion | X |
| Notice of Cross Motion | XXX |
| Order to Show Cause | X |
| Reply | XXXXXX |
| Affirmation in Opposition | XXXXXXXXXX |
| Affirmation | X |

Upon the foregoing papers, the motion by the defendant Jet-Drive General Marine Contracting Co., Inc. (hereinafter referred to as Jet Drive) for an Order pursuant to CPLR 3212 granting summary judgment in favor of defendant Jet-Drive General Marine Contracting Co., dismissing plaintiff's Complaint and any and all cross-claims as against said defendant; the motion by the defendant/Third Party Plaintiff J. E. Levine Builders, Inc. (hereinafter referred to as J. E. Levine) for an Order (a) pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's Complaint as against J. E. Levine Builders, Inc. as a matter of

law, along with any and all cross-claims in their entirety; or alternatively (b) pursuant to CPLR §3212, granting summary judgment over and against third-party defendants J & A Concrete Corp., and/or J & A Concrete Pumping Corp., for contractual indemnification and failure to procure insurance and (c) pursuant to CPLR §3212 granting summary judgment over and against co-defendant Jet-Drive General Marine Contracting Corp. for contractual indemnification and failure to procure insurance; the cross-motion by the Third Party Defendants J & A Concrete Corp and J & A Concrete Pumping Corp (hereinafter referred to as J & A) for an Order pursuant to CPLR §603 and §1010 to either dismiss or sever the third party action herein; the cross-motion by the plaintiffs for an Order pursuant to CPLR §3212 granting plaintiffs, Joseph S. Licata and Virginia Licata, summary judgment against defendant J. E. Levine Builders, Inc. on their Labor Law §240 claims and the motion by J. E. Levine brought by Order to Show Cause for an Order (a) extending the Trial Requirement Date from November 18, 2007 to June 23, 2008, or alternatively (b) staying the trial of this matter until the pending summary judgment motion by each of the parties are determined, are all determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on October 16, 2003 at a construction site located at 555 West 23rd Street, New York, New York. At the time of the incident in issue, the plaintiff Joseph S. Licata was employed as a surveyor for defendant J & A at the site. The general contractor at the location was J. E. Levine. At the time of the alleged incident, there were steel pilings being driven into the ground by the defendant Jet Drive. Once the steel pile was driven into the ground to the requisite depth, the pile was marked and the unnecessary portion was cut and removed. The removal of the unnecessary portion was being performed by the defendant A.J.S. Trucking & Excavating Corp.

In describing the incident in question, the plaintiff Joseph S. Licata in said plaintiff's affidavit set forth:

"2. This case stems from the accident that I was involved in on October 16, 2003 while I was employed by J&A Concrete as a surveyor for a new building under construction at 555 West 23rd Street, NY, NY. The general contractor at the site was defendant Levine. At approximately 1:30 pm on the above-mentioned date, while I was at the aforesaid location, I sustained severe and debilitating injuries to my right leg and ankle requiring, inter alia, surgery, as well as injuries to my face and teeth. The injuries and their after-effects are permanent in nature.

3. On that day, I appeared on the job site set forth above. The job site was very small, congested and chaotic. Various trades (contractors) were on the job site performing various tasks. Among other tasks being performed, steel pilings of approximately fifty to sixty feet in length were being driven vertically into the ground using a pile driver. Defendant Jet-Drive was driving piles. Once the pilings were drive to reach the necessary depth, the proper height for each steel pile was then marked for cut-off, in accordance with engineer specifications. This process is referred to as giving grades to the dock builders. I, as the surveyor, gave the grades to the bock builders. The dock builders then cut the beams at the prescribed height. The scrap pieces, which varied in length, were then removed. At the time of the accident, an excavator was being used as a crane to move the cut-off remnants of the pilings for disposal.

4. The person operating the excavator at the time of my accident was named Jorge (a/k/a George). He was employed by defendant A.J.S. The steel "H" beam scrap (cut-off) that actually hit my right leg was approximately 12 inches wide by 12 inches deep and 10 feet in length and was attached to the bucket of the excavator via a single 5/8-inch diameter cable and shackle. For some unknown reason, the deposition transcript did not set forth the length of the "H"

beam piece that hit me. The width (flange) was 12 inches, the height (web) was 12 inches, the thickness of the steel was 5/8 inch, and the length was 10 feet. There were no ropes, slings, stays or tag lines being utilized. The accident occurred when Jorge, while utilizing the excavator as a crane, picked up a metal "H" beam scrap (cut-off) which acted as pendulum to a height of approximately 12 to 15 feet into the air and swung it towards me. The "H" beam swung about like a pendulum. Jorge was in the process of moving and transporting the load that he had hoisted when he struck me. Part of the 10-foot long cut-off was suspended above me in the air and part of it was hanging toward the ground when I was hit. I ran in an attempt to get out of the way, but unfortunately, I was unable to do so. The steel pinned my right leg to the ground until Jorge raised it out of the way using the excavator.

5. On prior occasions, Jorge hoisted and pulled the scrap pieces up into the air with the excavator/crane, moved the pieces inward towards him, and then rotated and swung the load out to the right to deposit it into the pile of other scrap pieces being gathered behind the excavator. During the load involved in the accident, he did not move the "H" beam inward towards him before rotating and swinging the load out to the right. Rather, he only hoisted the "H" beam up into the air and swung the load out to the right and the effect was a pendulum which resulted in the accident and my injuries.

6. At the time and location of my accident, there were no persons present from either defendant. Levine or defendant Jet-Drive supervising the work being performed by Jorge in that portion of the job site."

The plaintiff's Verified Complaint sets forth causes of action sounding in Labor Law §200, 240(1) and 241(6).

The Court finds upon review of the respective submissions and in particular the deposition transcript of the plaintiff Joseph S. Licata, the deposition transcript of Joseph J. Scully, the deposition transcript of Thomas L. Denapole and the affidavit of Werner E. Laag, that the "H" beam should have been secured pursuant to the provisions of Labor Law §240(1) at the time of its movement (see, **Narducci v Manhasset Bay**, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085). As such, to the extent the plaintiff seeks the requested relief as to the general contractor the defendant J. E. Levine pursuant to the provisions of Labor Law §240(1), the plaintiff's application for an Order pursuant to CPLR §3212 granting plaintiffs, Joseph S. Licata and Virginia Licata, summary judgment against defendant J. E. Levine Builders, Inc. on their Labor Law §240 claims, is **granted**. The Court observes that although the plaintiffs' papers refer to certain requested relief pursuant to Labor Law §241(6), said relief is not requested in the plaintiff's Notice of Motion pursuant to CPLR §2214 and as such will not be considered herein. That branch of the Defendant/Third Party Plaintiff J. E. Levine's application which seeks an Order (a) pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's Complaint as against J. E. Levine Builders, Inc. as a matter of law, along with any and all cross-claims in their entirety, is **denied**.

Based upon a review of the foregoing deposition transcript, the defendant Jet-Drive's motion for an Order pursuant to CPLR 3212 granting summary judgment in favor of defendant Jet-Drive General Marine Contracting Co., dismissing plaintiff's Complaint and any and all cross-claims as against said defendant, is **granted** as to plaintiff's claims pursuant to Labor Law §240(1), **denied** as to those claims related to Labor Law §200 and 241(6) and **denied without prejudice to renew** as to the cross-claims after trial as to the remaining issues. That branch of the Defendant/Third Party Plaintiff J.E. Levine's motion which seeks an Order pursuant to CPLR §3212 granting summary judgment over and against co-defendant Jet-Drive General Marine

Contracting Corp. for contractual indemnification and failure to procure insurance, is **denied without prejudice to renew** after trial as to the remaining issues.

Based upon the fact that discovery in the Third Party action has not been undertaken, that branch of the Third Party Defendants' motion which seeks an Order pursuant to the provisions of CPLR §603, is **granted**. That branch of the Defendant/Third Party Plaintiff J. E. Levine's application which seeks an Order pursuant to CPLR §3212, granting summary judgment over and against third-party defendants J & A Concrete Corp., and/or J & A Concrete Pumping Corp., for contractual indemnification and failure to procure insurance, is **denied without prejudice to renew** after discovery is completed in the Third Party action. The counsel for the parties in the Third Party action shall appear for a **Discovery conference in Part 9 on January 31, 2008 at 9:30 a.m.**

The Defendant/Third Party Plaintiff's application brought by Order to Show Cause for an Order extending the Trial Requirement Date from November 18, 2007 to June 23, 2008, or staying the trial of this matter until the pending summary judgment motion by each of the parties are determined, is **denied** in light of the foregoing determination of the Court in this Order. All **stays** previously issued herein are **vacated**.

SO ORDERED.

DATED:

1/8/2008

Ray S. Wehner

J.S.C.

ENTERED

JAN 10 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**