

Youming He v 133-22 King Rd., LLC

2008 NY Slip Op 30281(U)

January 14, 2008

Supreme Court, Queens County

Docket Number: 0013326/2005

Judge: Peter O'Donoghue

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publication.

20 feet to the ground. King Road is the owner of the subject premises and Metal Stone has admitted that it is the general contractor on the project. Plaintiff has not sought summary relief against Pane Stone, a company described as closely associated with Metal Stone.

Labor Law § 240(1) provides in relevant part:

All contractors and owners and their agents...in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

A cause of action under the statute will be sustained upon proof of a violation which has proximately caused an injury. (Rocovitch v Consol. Edison Co., 78 NY2d 509 [1991]; Galvan v Triborough Bridge and Tunnel Auth., 29 AD3d 517 [2006].) Unlike the situation where a safety device collapses or slips, a fall by a worker off a scaffold does not, alone, establish that proper protection was not afforded. (See, Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]; Kozlowski v Grammercy House Owners Corp., ___ AD3d ___, 2007 NY Slip Op 10107 [2nd Dept, Dec. 18, 2007].) Liability under the statute is contingent upon the nature of foreseeable hazards and the adequacy of the safety devices provided. (See, Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001]; Mentesana v Bernard Janowitz Constr. Corp., 44 AD3d 721 [2007].) Whether proper protection has been provided is ordinarily a question of fact for the jury. (See, Becker v AND Design Corp., ___ AD3d ___, 2007 NY Slip Op 9190 [2d Dept, Nov. 20, 2007]; Delahaye v Saint Anns School, 40 AD3d 679 [2007]; Alva v City of New York, 246 AD2d 614 [1998].)

In the instant case, plaintiff has submitted the deposition testimony of the parties, the affidavit of his expert as well as his own affidavits in English purportedly translated to him in Mandarin. Due, however, to the absence of an affidavit from the translator in compliance with the requirements of CPLR 2101(b), plaintiff's affidavits cannot be considered in support of his motion. (See, Pisarcik v Triboro Bridge and Tunnel Auth., 17 Misc 3d 1126A [2007].) While there is no factual dispute as to the manner in which plaintiff's fall occurred, upon the record presented it cannot be concluded as a matter of law whether additional safety devices were available and, if so, would they have been adequate to afford plaintiff proper protection under Labor Law § 240(1). (See, Delahaye, 40 AD3d at 682.)

Accordingly, plaintiff's motion is denied.

The cross motion by King Road to dismiss the causes of action under Labor Law § 200 and for common law negligence is granted. Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide workers with a safe place to work. (See, Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993]; Dooley v Peerless Importers, 42 AD3d 199 [2007].) In the absence of any proof that King Road was involved in supervision or control of the work site or that it created or had any notice of an allegedly unsafe condition at the subject premises, liability cannot be imposed on the owner for negligence or a violation under Labor Law § 200. (See, Lombardi v Stout, 80 NY2d 290 [1992]; Ragone v Spring Scaffolding, __ AD3d __, 2007 NY Slip Op 9752 [2nd Dept, Dec. 11, 2007]; Lofaso v J.P. Murphy Assocs., 37 AD3d 769 [2007].)

By separate notice of motion, Pane Stone moves for summary judgment dismissing the entire action or, in the alternative, the claims sounding in negligence and Labor Law § 200. Upon a review of the deposition testimony of all parties and documentary evidence, including checks paid to Gui Guo for its work as a subcontractor on the project as well as affidavits by persons with knowledge, movant has made a prima facie showing demonstrating that it had no involvement with nor was it the general contractor for the subject construction project. Despite testimony by Gui Guo Zhou given on behalf of his company asserting Pane Stone was the general contractor, Gui Guo has submitted no opposition to Pane Stone's motion and has essentially conceded in its opposition papers to Metal Stone's requests for relief, that Metal Stone was the general contractor. In light of the foregoing, summary judgment dismissing the entire action against Pane Stone is granted.

Turning next to Metal Stone's motion, it also seeks dismissal of the negligence and Labor Law § 200 claims as well as a conditional order granting summary judgment against Gui Guo for contractual indemnification. A review of the testimony clearly indicates that plaintiff received instructions from and reported solely to his employer Gui Guo. The project manager for Metal Stone further testified that he would only visit the worksite when requests for materials were made by Gui Guo. It is Gui Guo's contention, however, that Metal Stone directed the use of a metal crane for the faster installation of the steel structural elements and, therefore, controlled the manner in which work was to be performed. Inasmuch as the metal crane itself did not create a dangerous condition, in the absence of supervisory control over the activity bringing about the injury, its use alone does not form the basis upon which liability may be imposed upon Metal Stone. (See, McLeod v Corporation of Presiding Bishop of Church of Jesus Christ

of Latter Day Sts., 41 AD3d 796 [2007].)

Issues do exist as to whether the safety belts supplied by Metal Stone were, in effect, defective as only ropes rather than lanyards were provided and whether insufficient materials were supplied to erect a safe scaffold. These alleged deficiencies may have created the dangerous condition which caused the plaintiff to fall. (See, Hatfield v Bridgedale, LLC, 28 AD3d 608 [2006]; see also, Halvorsen v Baybrent Constr. Corp., 33 AD3d 862 [2006].)

In light of the foregoing issues, Metal Stone's claim for contractual indemnification is premature. (General Obligations Law § 5-322.1; see, Itri v Brick & Concrete Corp. v Aetna Cas. & Surety Co., 89 NY3d 286 [1997]; Davitt v City of New York, 40 AD3d 908 [2007].) Moreover, additional issues exist concerning the authenticity and validity of the document which need not be determined at this juncture.

Accordingly, Metal Stone's motion is denied in its entirety.

Dated: January 14, 2008

J.S.C.