

Bevilacqua v NYP Holdings, Inc.
2008 NY Slip Op 30627(U)
March 4, 2008
Supreme Court, New York County
Docket Number: 0110539/2004
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

**AMENDED
DECISION/JUDGMENT**

-----X
JOHN BEVILACQUA,
Plaintiff,
-against-

Index No. 110539/04
Motion Date 3-4-08
Motion Seq. No. 003
Motion Cal. No.

NYP HOLDINGS, INC., and FINE LUMBER CO., INC.,
Defendants.

-----X
NYP HOLDINGS, INC.,
Third-Party Plaintiff,
-against-

Index No.
591257/05

M. FINE LUMBER CO., INC.,
Third-party Defendant.

-----X
The following papers, numbered 1 to were read on this motion for Summary Jgmt.

PAPERS

NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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
11B)

Based on the February 15, 2008 and February 26, 2008 letters from third-party defendant M. Fine Co., Inc., the February 27, 2008 letter from the plaintiff and the February 28, 2008 letter from defendant and third-party plaintiff NYP Holdings, inc., the decision dated February 7, 2008 is recalled and vacated the action is restored to active status and this decision replaces it.

Motion sequences 003 and 004 are consolidated for disposition. Both motions are for summary judgment, 003 is by defendant NYP Holdings, Inc. ("NYP") and 004 is by co-defendant, M. Fine Lumber Co., Inc. ("Fine").

Plaintiff was working on the renovation of a building for his employer Francis A. Lee Co. ("Lee"), the general contractor, when he suffered a broken ankle when loose boards from a stack of lumber fell on him. Plaintiff has made claims under labor Law §§240(1), 241 (6) and 200 against NYP, the owner of the premises.

Plaintiff claims that lumber held together by a metal band was stacked in the yard on the side of the building. At his employer's request, plaintiff brought a stack into the staging area near elevators on the main floor on runners that he claims were supplied by Fine. While in the staging area, he removed the metal band, and then engaged in conversation with an individual who had an NYP badge on. Plaintiff was deposed on two separate occasions. He testified that during a period between one and five minutes, while he was engaged in conversation, the boards slipped off their runner and fell on his foot, breaking his ankle.

In his brief and during oral argument, plaintiff waived his 240(1) claim since this was not a gravity-related injury. Plaintiff claims that there is liability against NYP, the owner, under Industrial Code §§23-21(a)(1) and (a) 2. He also asserts a common law negligence claim against NYP for its inadequate supervision through its designated representative Austin

Company. Plaintiff also claims that NYP had constructive notice of the potential harm to plaintiff because its employee was facing the wood pile during the conversation and it was evident that the wooden runners were too short to support the boards which were sticking out from the runners. These were the boards that eventually fell on plaintiff's foot.

NYP claims that Fine is responsible for indemnification because it supplied the runners, put the boards on them, bound them and brought the runners and the boards to the yard where they were stored until his employer Lee was ready to use them.

NYP states that it is not liable for common law negligence because it did not exercise any control over the work. It also contends that Industrial Code §§23.2.1(a) and (2) do not apply to the facts in this case.

NYP's motion to dismiss the Industrial Code violations and, therefore, L.L. §241(6) is granted. The yard where the boards were stored until they were ready to be used does not constitute a passageway, walkway, stairway or thoroughfare. They appear to have been stored safely. It was only after they were unstored that the accident occurred. Therefore, §23-2.1(a)(1) is dismissed. Section 232.1(a)(2) is also dismissed. No evidence has been submitted that the pile exceeded the carrying capacity of the runner that it was on and plaintiff was not below any edge of a platform, floor or scaffold.

However, the motion is denied with respect to common law negligence since NYP exercised some control over the worksite through its representative Austen company which was at the site regularly coordinating matters and which also had the power to stop the work where there was a hazardous condition affecting safety.

The Court denies without prejudice NYP's common law claim for indemnification at this time because it can only prevail on this claim if NYP is free of any negligence, and that is yet to be determined.

Fine's motion to dismiss NYP's claim for indemnification and contribution and plaintiff's claim against it is granted. Movant has successfully argued that NYP and the plaintiff have failed to establish any admissible evidence that the boards were supplied by Fine, that the trucks that delivered the boards were Fine's trucks, that the runners belonged to Fine or even if it delivered the boards that it did anything more than merely arriving with the boards and leaving it to the employees at the site to take the boards to their storage sites.

Accordingly, it is

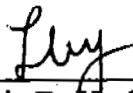
ORDERED and **ADJUDGED** that:

1. the LL §240(1) claim is dismissed without costs
2. LL §241(6) is dismissed without costs
3. the motion to dismiss the LL §200 claim and the common law claim for negligence is denied without costs

4. the third-party action and ^{any} ~~any claims~~ ^{by} ~~of~~ M. Fine Lumber Co., Inc., and all other claims against M. Fine Lumber Co., Inc. are dismissed without costs.

Dated: 3/4/08

Enter:



 Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

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