

Jevric v 42/43 Realty LLC

2008 NY Slip Op 30727(U)

March 11, 2008

Supreme Court, New York County

Docket Number: 0124646/2002

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

124646/02

Index Number : 124646/2002
JEVRIC, RASIM
vs
42/43 REALTY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/11/08

BARBARA R. KAPNICK J.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 12

-----X

RASIM JEVRIC and SABRINA JEVRIC,

Plaintiffs,

DECISION/ORDER
Index No. 124646/02
Motion Seq. No. 002

-against-

42/43 REALTY LLC and BRF CONSTRUCTION
CORP.,

Defendants.

-----X

42/43 REALTY LLC and BRF CONSTRUCTION
CORP.,

Third-Party Plaintiffs,

Third-Party
Index No. 590275/04

-against-

R&J CONSTRUCTION CORP. and REGIONAL
SCAFFOLDING & HOISTING CO., INC.,

Third-Party Defendants.

-----X

BARBARA R. KAPNICK, J.:

FILED
MAR 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Rasim Jevric on January 18, 2002, while working as a carpenter apprentice for third-party defendant R & J Construction Corp. Plaintiff claims that one of the wheels on the A-frame cart filled with sheet rock which he was pushing became stuck in an opening between two loose planks on a wooden ramp, causing the A-frame to tip over and forcing plaintiff to fall off the ramp onto the concrete floor,

which was approximately eight to ten inches below the outer edge of the ramp.

Defendants/third-party plaintiffs 42/43 Realty LLC and BRF Construction Corp. ("BRF") are the owner and general contractor/construction manager of the site, respectively.

Third-party defendant Regional Scaffolding & Hoisting co. ("Regional") constructed and installed the ramp pursuant to a Subcontract Agreement with BRF.

Regional now moves for summary judgment dismissing the third-party complaint and all other causes of action against it on the grounds that there are no genuine issues of fact with respect to its liability, and all the claims asserted against it lack merit.

Regional does not dispute that it agreed pursuant to its Standard Rider to indemnify, defend and hold BRF

harmless from and against all claims, damages, losses, suits, judgments, actions, and expenses (including attorney's fees and costs) directly resulting from the performance of any act, error, omission or breach by the Subcontractor [i.e., Regional], their employees or other persons within Subcontractor's control during the performance of the Work as defined in the Contract.

However, Regional denies that plaintiffs' claim herein resulted directly from its work, and argues that there is no evidence that the wooden planks in the ramp as constructed by Regional were loose or were constructed in a fashion that could have resulted in their becoming loose at a later time.

Rather, Regional contends that an unidentified person at the site 'materially modified' the ramp prior to plaintiff's accident by removing the two outside wooden planks of the ramp and by cutting off a portion of what became the outside plank.

Defendants/third-party plaintiffs do not dispute that two planks were removed but contend that said modification was required in order to allow duct work to come through the floor. They argue that there are thus triable issues of fact as to whether such a modification was foreseeable when Regional constructed the ramp.

In support of their position, defendants/third-party plaintiffs have annexed an Affidavit from Herbert Heller, Jr., P.E., who states, in relevant part, as follows:

8. It is my opinion with a reasonable degree of engineering certainty that had the ramp been constructed in accordance with the procedures testified to by Regional Scaffolding the planks would not have separated as described. The removal of two planks from one side of the ramp and the shortening of an adjacent plank was an

inconsequential modification of the ramp which would not have caused it to separate in the middle had it been constructed in accordance with Regional Scaffolding's testimony and, which is consistent with sound construction practices.

9. It is my opinion with a reasonable degree of engineering certainty that since the ramp planks did separate, the ramp constructed by Regional Scaffolding was defective when constructed and separated as a result of failure to properly fasten each plank in accordance with sound construction practice as well as Regional's own testimony.

10. The slight modification of the one side of the ramp had no effect on the separation of the planks in the middle of the ramp where Mr. Jevric sustained his accident.

Third-party defendant Regional argues in reply that BRF has failed to offer any evidence specifically showing how the ramp was modified, and has failed to provide any factual foundation for Mr. Heller's conclusion that the removal of the outside planks could not have adversely affected the integrity of the inside planks. See, Jones v. City of New York, 32 A.D.3d 706 (1st Dep't 2006).

Regional further argues that the modification of the ramp violated the terms of the Subcontract Agreement, as set forth in the Standard Rider dated September 6, 2001.

In an attorney's affirmation only, BRF argues that Regional has not demonstrated that this Rider, which was stamped "Received" by BRF on December 24, 2001, after execution of the original

Subcontract, and which does not appear to have been countersigned by BRF, was made part of the Subcontract.

However, there is no dispute that various Riders and Addendum were, in fact, made part of the Subcontract.

Moreover, the copy of the Subcontract Agreement produced by defendants/third-party plaintiffs during discovery contains a handwritten and initialed insert at the end of paragraph 4 ("Subcontractor's Liability") which states, "THIS SECTION TO BE MODIFIED IN ACCORDANCE WITH REGIONAL STANDARD RIDER (ATTACHED) AND "SCAFFOLD & HOISTING & BRIDGE" LANGUAGE. A handwritten and initialed insert at the end of paragraph 5 ("Subcontractor's Insurance") similarly states, "AS MODIFIED BY RIDER."

In the absence of any affidavit based on personal knowledge denying that Regional's Standard Rider was incorporated into the Subcontract, this Court finds that the Agreement was modified in accordance with said Rider, which provides, in relevant part, as follows:

3.1 The Parties hereto agree that, notwithstanding any provision to the contrary in the Contract, Subcontractor [i.e., Regional] will complete the installation of the equipment as required by the Contract, and retains responsibility for its Work in installing, servicing and retrieving such equipment at the conclusion of the Contract. It is agreed, however, that once installation is complete, and the care, custody and control of such

equipment is assumed by the Contractor [i.e., BRF], such passage of care, custody and control will be construed as a Lease of such equipment by the Contractor, until such time as possession of the equipment is surrendered to the Subcontractor (the "Lease Period").

3.2 During the Lease Period, the Contractor agrees to retain full and complete responsibility for the proper operation and security of the leased equipment, including, but not limited to the following:

* * *

3.2.2. Contractor, its agents, servants or subcontractors will not alter or modify the equipment provided by subcontractor without the express written consent of the Subcontractor;

3.2.3 Contractor, its agents, servants or subcontractors will not alter, modify, remove, adjust, or in any way change the equipment provided by Subcontractor once it has been installed by the Subcontractor, and without the express written consent of the Subcontractor.¹

There is no evidence that consent was ever given by Regional to modify the equipment. There is also no evidence in the record that Regional had actual or constructive notice that its installation had been modified, and Regional was not required under the terms of the Subcontract to inspect the ramp after the installation was completed.

¹ Similar provisions are contained in the Hoisting Language Rider to the Subcontract.


Accordingly, based on the papers submitted and the oral argument held on the record on August 8, 2007, this Court finds that third-party defendant Regional is not required to indemnify, defend and hold 42/43 Realty, LLC and BRF harmless.²

Third-party defendant Regional's motion for summary judgment is, therefore, granted. The Clerk may enter judgment dismissing the third-party Complaint and all cross-claims against third-party defendant Regional only with prejudice and without costs or disbursements. The main action and the third-party action against R&J Construction Corp. are severed and continued.

All remaining parties are directed to appear by counsel for a settlement conference in IA Part 12, 60 Centre Street, Room 341 on April 9, 2008 at 9:30 a.m. Only counsel with authority to settle the case may attend. If the case is not settled on that date, a trial date will be scheduled.

This constitutes the decision and order of this Court.

Dated: March 11, 2008


Barbara R. Kapnick
BARBARA R. KAPNICK
COUNTY CLERK NEW YORK
MAR 13 2008
J.S. CLERK OFFICE

² This Court, thus, need not reach Regional's additional arguments relating inter alia to giving timely notice of plaintiff's accident.