

Greaves v Obayashi Corp.

2008 NY Slip Op 31529(U)

June 3, 2008

Supreme Court, New York County

Docket Number: 0107729/2006

Judge: Carol R. Edmead

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

CAROL EDMEAD

PRESENT: _____ J.S.C. Justice

PART 35

Index Number : 107729/2006
GREAVES, HENDERSON
vs
OBAYASHI CORPORATION
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ 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

The instant motion is decided in accordance with the annexed memorandum decision, it is hereby

ORDERED that the motion for reargument is granted, and upon reargument, the motion by Total Safety Consulting, LLC for summary judgment dismissing plaintiff's Labor Law §240(1) cause of action, and all third-party and cross-claims against it is granted. And it is further

ORDERED that Total Safety Consulting, LLC serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED
JUN 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/3/08

[Signature]
CAROL EDMEAD 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 35

-----X
HENDERSON GREAVES,

Plaintiff,

Index No. 107729/06

-against-

DECISION/ORDER
Motion Sequence 004

OBUYASHI CORPORATION, OBUYASHI USA, LLC.,
E.W. HOWELL CO., INC., EIC ASSOCIATES,
INC., CHARLESTON ENTERPRISES, LLC, and
TOTAL SAFETY CONSULTING, LLC,

Defendants.

-----X
OBUYASHI CORPORATION, OBUYASHI USA, LLC.,
E.W. HOWELL CO., INC., EIC ASSOCIATES,
INC., and CHARLESTON ENTERPRISES, LLC,

Third-Party Plaintiffs,

-against-

TOTAL SAFETY CONSULTING, LLC,

Third-Party Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
JUN 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff was injured while working at a construction site, when a gust of wind caused an unbraced wall being constructed at the site to strike the scaffold on which plaintiff was working, causing the scaffold to collapse.

Defendant Total Safety Consulting, LLC ("Total Safety") now moves pursuant to CPLR

2221 to reargue, and upon reargument, granting summary judgment dismissing plaintiff's Labor Law §240(1) cause of action, and all third-party claims and cross-claims against it.

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Upon review of the submissions, the Court grants reargument.

Labor Law § 240(1) reads as follows:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 subcontractor may be held liable under Labor Law §240(1) where the subcontractor is an agent of the owner or general contractor (*Predmore v EJ Const. Group, Inc.*, ---- NYS2d ----,

2008 WL 1914938 [4th Dept 2008] citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]). Essentially, Total Safety's liability to plaintiff pursuant to Labor Law § 240(1) turns on whether Total Safety was an "agent" under said statute. Interpretation of the statutory "agent" language "appropriately limits the liability of a contractor as agent for a general contractor or owner for job site injuries to those *areas and activities within the scope of the work delegated* or, in other words, to the particular agency created" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311 *supra*). For example, the Court in *Russin* explained "Stellmack [Air Conditioning Refrigeration Corp.], . . . was the Village of Endicott's agent with respect to the heating, ventilation and air-conditioning work. It was not the village's agent with respect to the general construction activity which produced the plaintiff's injury, i.e., the erection, maintenance and dismantling of the scaffolding equipment."

Likewise, Total Safety was the "agent" for purposes of inspecting the scaffolding and other safety devices at the site; it was not the "agent" for purposes of inspecting the integrity of the unbraced wall that fell upon the scaffold. The Court notes that defendant/third-party plaintiff E.W. Howell retained the responsibility to enforce safety rules at the work site (EBT of E.W. Howells' project superintendent, Nicholas McAree, Page 155). And, while it was the duty of Total Safety to inspect the scaffold, and Total Safety in fact inspected the scaffold, there is no evidence that Total Safety failed to fulfill its contractual obligation of advising E.W. Howell of the placement of appropriate protective devices around the job site. As argued by the Obayashi defendants, in order to impose liability upon Total Safety under Labor Law § 240(1), Total Safety must have the authority to enable it to avoid or correct the unsafe condition (Affirmation in Opposition ¶17). The key criterion in ascertaining Labor Law § 240(1) liability is not whether

the party charged with the violation actually exercised control over the work, but rather whether he or she had the right to do so” (*Griffin v MWF Development Corp.*, 273 AD2d 907, 709 NYS2d 322, 2000 citing *Kelly v LeMoyne Coll.*, 199 AD2d 942, 943, 606 NYS2d 376 [3d Dept 1993]). “The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether he has control of the work being done *and the authority to insist that proper safety practices be followed*” (*Everitt v Nozkowski*, 285 AD2d 442, 443-444, 728 NYS2d 58 [2d Dept 2002] (emphasis added)).

The responsibility of inspecting the wall as to whether it was properly and safely constructed so as to withstand the gust of wind and not fall upon the scaffold, was not within the scope of Total Safety’s agency. Under paragraph 4 of the October 26, 2005 Project Proposal, signed by the parties, Total Safety was to provide a “Site Safety Manager” whose “primary responsibility shall be to *monitor* safety at the construction project” (emphasis added). Under the Proposal, Total Safety “shall only have the authority to advise and make recommendations.” However, the Proposal expressly provided that “Under no circumstances will the Site Safety Manager have authority over . . . the correction of hazardous conditions.” Total Safety’s duty under the Proposal therefore was to simply monitor safety at the site and advise and make recommendations. At the deposition of Trapini, when asked “Did you have authority - I’m not asking to actually enforce it - to stop work at a particular location? Did you have authority to make that recommendation?” Trapini answered “Yes.” Trapini’s deposition testimony is consistent with the Proposal, in that Total Safety merely had authority to recommend that work be stopped. That Total Safety checked and inspected “all site equipment” is insufficient to establish that the duty to control the safety and manner in which the wall was constructed was

delegated to Total Safety. Notably, it was not the breach of the duty to inspect or monitor the site delegated to Total Safety, that caused plaintiff's injuries.

At his deposition, Trapani testified that his responsibilities as safety manager "varies from job site to job site" and that his responsibilities as Safety Manager at the work site in question were to "adhere to Article 19" and check on "certain things that are required by the site safety manager, which were the cranes, scaffolding, toe boards, stuff like that." (EBT, page 25). Trapani testified that it was not his responsibility to inspect the integrity of the wall being constructed, as he was "not that type of engineer"; E. W. Howell had overall responsibility for site safety, and sent "a corporate rep" to the site, "Sometimes more than weekly" to check the job, and "talk to the individual contractors if he saw a problem." (EBT, pages 64-65). When asked if "anybody from E. W. Howell was responsible to insure the wall was secure, so one could work on the scaffold," Trapani answered "To my knowledge, this was up to King." (EBT, page 64). "[M]aking sure that the wall didn't collapse" "was not part" of Trapani's job. (EBT, page 63). Whether the "wall require[d] bracing" was "not [Trapani's] job" (EBT, page 61). Trapani did not have authority to stop work at the site (EBT, page 77). There is no evidence that Total Safety had the authority "to supervise or control plaintiff or the injury-producing work" *to wit*: the construction of the wall (*see Headen v Progressive Painting Corp.*, 160 AD2d 319, 553 NYS2d 401 [1st Dept 1990] [a subcontractor can be deemed an "agent" under this statute, and be held liable, if to it is delegated the supervision and control either over the specific work area involved or the work which gives rise to the injury] *cf.*, *Predmore v EJ Const. Group, Inc.*, ---- NYS2d ----, 2008 WL 1914938 [4th Dept 2008]).

Further, there is no evidence that Total Safety made any recommendation or suggestion

concerning the construction of the wall that fell upon the scaffold (*cf. Goodleaf v Tzivos Hashem, Inc.*, 19 Misc 3d 1104 [N.Y.Sup. 2008] [“Though Total Safety had no authority over “decision or actions affecting ... the correction of hazardous conditions,” “and had limited authority only “to advise and make recommendations,” there appear to be factual issues concerning whether or not Total Safety fulfilled its contractual obligation of advising H & H of the placement of appropriate protective devices around the job site, and more particularly over the shaft where the sledge hammer fell. Further, Total Safety's report of May 21, 2001 contained a recommendation to cover the floors above the basement level, in compliance with Labor Law § 241(2). An issue exists as to whether noncompliance with this recommendation, which apparently continued to the day of the accident, was again discussed at the next safety meeting on May 28, 2001]).

Further, to the degree plaintiff's Labor Law § 240(1) claim is premised upon the failure to provide safety equipment, Total Safety was not an agent for such purpose. Thus, it cannot be said that Total Safety was an agent of the owner for purposes of Labor Law § 240(1).

In opposition to Total Safety's cross-motion for summary judgment, the Obayashi defendants pointed the Court to the November 2, 2005 log entry made by John Trapini, the Site Safety Manager at Total Safety, wherein he reported that he informed laborer that safety glasses are needed when cutting block on a wet saw. Issued a pair of safety glasses to the employee. Employee was using hearing protection, hard hat and mask.” (Affirmation in Opposition, ¶5). Thus, according to the Obayashi defendants, Total Safety had the authority to direct and control the work, sufficient to impose liability under Labor Law § 240(1). However, providing safety glasses does not meet the requisite level of supervision and control over safety of the wall to impose liability under Labor Law § 240(1).

Based on the foregoing, it is hereby

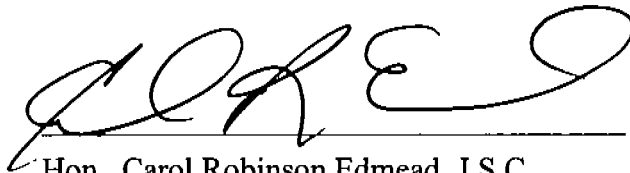
ORDERED that the motion for reargument is granted, and upon reargument, the motion by Total Safety Consulting, LLC for summary judgment dismissing plaintiff's Labor Law §240(1) cause of action, and all third-party and cross-claims against it is granted. And it is further

ORDERED that Total Safety Consulting, LLC serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 3, 2008



Hon. Carol Robinson Edmead, J.S.C.

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