

Gutowski v GDM Hudson Laight St., LLC

2008 NY Slip Op 31792(U)

June 25, 2008

Supreme Court, New York County

Docket Number: 0116634/2005

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 116634/2005
GUTOWSKI, DANIEL
vs
GDM HUDSON LAIGHT ST.
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 12/17/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

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

PAPERS NUMBERED

1-3
4-7
8-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- pre-trial conference is scheduled for August 11, 2008 at 2PM

FILED

JUN 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/25/08

JANE S. SOLOMON 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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X
DANIEL GUTOWSKI,

Plaintiff,

-against-

GDM HUDSON LAIGHT STREET, LLC and
CAR-WIN CONSTRUCTION, INC. and
48 LAIGHT STREET ASSOCIATES, LLC,

Defendants.
-----X

JANE S. SOLOMON, J.

Plaintiff Daniel Gutowski moves for summary judgment as to liability under Labor Law § 240(1) in this lawsuit arising from a construction site accident. He also seeks leave to amend his bill of particulars. By a separate motion, defendant Car-Win Construction, Inc. (Car-Win) moves for summary judgment dismissing the complaint and all cross-claims as against it.

Gutowski was employed by the Helix Group, a construction contractor hired to work in a building located at 48 Laight Street in Manhattan. Gutowski was among a group of workers who installed staircases. On October 6, 2004, Helix Group had substantially completed installing the staircases, and Gutowski was directed to perform clean-up work using a vacuum cleaner. The vacuum became dirty, and Gutowski's supervisor attempted to rinse it off. When he did this, water sprayed out of the vacuum toward Gutowski, who stepped back. Behind him was

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DECISION AND ORDER

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a hole in the floor which led to the basement floor, eleven feet below. Gutowski fell through the hole into the basement, sustaining serious injuries.

The hole was guarded by an orange mesh barrier. The barrier was secured to a wire approximately four feet above the ground. It was not secured at ground level, however, and consequently Gutowski slid through the barrier without resistance. The hole had been covered by boards at some point, but the boards were not there at the time of the accident, and it appears they were removed by Helix Group employees.

The building was owned by defendant 48 Laight Street Associates, LLC¹ (48 Laight Street). 48 Laight Street hired the Helix Group to be its general contractor in renovating the building. Helix Group hired Car-Win to install steel columns and pre-cast concrete. Car-Win's records show that it worked on the site from April 10, 2004 through July 23, 2004. Car-Win claims that it did not have a formal written contract with Helix Group, and was not obligated to install safety netting around interior floor holes.

In opposition to Car-Win's motion, 48 Laight Street offers an un-executed copy of a sub-contract between Helix Group and Car-Win. 49 Laight Street acknowledges that it failed to

¹ Plaintiff initially sued GDM Hudson Laight Street, LLC as the owner, but it conveyed the property to 48 Laight Street before the accident.

produce this document in response to discovery demands before the note of issue was filed. The purported contract contains an indemnification provision in favor of 48 Laight Street, and includes the following in its description of the scope of work:

7. Contractor shall adequately protect the adjacent structure and finishes from any damage due to his operations. All safety netting as may be required by New York City Department of Buildings, OSHA rails and 2 rows of lifeline cables shall be installed and maintained by the contractor until exterior walls of building are installed. (Contract annexed at Ex. A to Affirmation in Opposition of Erika Omundson, Esq.)

In reliance on this provision, 48 Laight Street contends that Car-Win was obligated to install and maintain interior safety netting through the time of Gutowski's accident. 48 Laight Street also submits the affidavit of William Lozito, president of the Helix Group, who states that he specifically recalls Car-Win installing safety wires around the perimeter of the hole through which Gutowski fell.

Not surprisingly, Car-Win objects to 48 Laight Street's submission of the contract it previously failed to produce, and it further objects to the timing of 48 Laight Street's submission, which was made in violation of the parties' briefing schedule. Car-Win's complaints are well founded, but need not be addressed because 48 Laight Street fails to raise a triable issue of fact.

DISCUSSION

Gutowski is entitled to summary judgment on his claim under Labor Law § 240(1). He was engaged in a protected activity (Broggy v Rockefeller Group, Inc., 8 NY3d 675 [2007]), and he sustained a gravity-related injury caused by the failure to provide an adequate safety device. There is no question of fact as to whether the barrier was adequately secured in order to serve its purpose of preventing workers from falling through the hole in the floor.

His motion to amend the bill of particulars, however, is denied. He seeks to add regulations promulgated pursuant to the Occupational Safety and Health Act of 1970 (OSHA) as a basis for defendants' liability. The proposed regulations, however, may not form a basis for Gutowski's claim under Labor Law § 241(6), and he already is granted summary judgment on liability under Labor Law § 240(1). With respect to his common law negligence claims, they are duplicative and unnecessary.

Car-Win's motion for summary judgment is granted in full. It is not liable to Gutowski under the Labor Law because Car-Win was not an owner or general contractor. Moreover, the undisputed evidence shows that it had left the work site more than two months before the accident, and it could not have been responsible to maintain the barrier after its work was completed.

48 Laight Street's tardy submission of the purported

subcontract does not raise a triable issue of fact. The subcontract was not executed, and it provides only hearsay evidence of an alleged agreement. Section 7 of the subcontract, upon which 48 Laight Street relies, states that safety netting required by the New York City Department of Buildings "shall be installed and maintained by the contractor until exterior walls of building are installed". This does not implicate a duty to install safety netting inside the building, and it does not appear that Gutowski's accident occurred before exterior walls were in place. In short, 48 Laight Street has failed to produce admissible evidence to counter Car-Win's evidence that it was not obligated to install and maintain the subject barrier. Lotenzo's specific recollection that Car-Win installed the safety wire around the hole does not establish that Car-Win was obligated to keep the premises safe for workers months after it completed its work under the subcontract.

Gutowski also fails to raise a triable issue of fact regarding Car-Win's duty to him, so his common law negligence and Labor Law § 200 claims against Car-Win are dismissed. He acknowledges that he has no claim against Car-Win under Labor Law §§ 240(1) and 241(6). Accordingly, it hereby is

ORDERED that Gutowski's motion is granted to the extent that he is entitled to summary judgment as to liability on his claim under Labor Law § 240(1), and otherwise is denied; and it


[*7]
further is

ORDERED that Car-Win's motion for summary judgment dismissing the complaint and all cross-claims as against it is granted, and the complaint is severed and dismissed as against Car-Win, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements to Car-Win as taxed; and it further is

ORDERED that counsel for Gutowski and 48 Laight Street shall appear for a pre-trial conference in Part 55 on August 11, 2008 at 2 PM.

Dated: June 25, 2008

ENTER:



J.S.C.
JANE C. SOLOMON

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