Gomez v Nicolia

2008 NY Slip Op 32463(U)
September 2, 2008
Supreme Court, Suffolk County
Docket Number: 0018336/2007
Judge: Peter H. Mayer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 07-18336

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 3-4-08
ADJ. DATE 4-29-08
Mot. Seq. # 001 - MG
002 - MD
003 - XMotD

LUIS GOMEZ,

Plaintiff,

- against -

FRANK NICOLIA and MASSARO BUILDING CORPORATION,

Defendants.

MASSARO BUILDING CORPORATION,

Third-Party Plaintiff,

- against -

ESSEX INSURANCE COMPANY,

Third-Party Defendant.

KEEGAN & KEEGAN, ROSS & ROSNER, LLP
Attorneys for Plaintiff
147 North Ocean Avenue, P.O. Box 918
Patchogue, New York 11772

NICOLINI, PARADISE, FERRETTI & SABELLA
Attorneys for Defendant Frank Nicolia
114 Old Country Road, P.O. Box 9006
Mineola, New York 11501-9006

THALER GERTLER, LLP
Attorneys for Defendant/Third-Party Plaintiff Massaro Building Corporation
90 Merrick Avenue, Suite 400
East Meadow, New York 11554

CLAUSEN MILLER, P.C.
Attorneys for Third-Party Defendant Essex Ins. Co.
One Chase Manhattan Plaza
New York, New York 10005

Upon the reading and filing of the following papers in this matter: (1) notice of motion by third-party defendant Essex Insurance Co., dated February 7, 2008, and supporting papers (including memorandum of law); (2) notice of motion by defendant Massaro Building Corporation, dated January 30, 2008, and supporting papers (including memorandum of law); (3) notice of cross motion by defendant Frank Nicolia, dated February 19, 2008, and supporting papers; (4 & 5) affirmations in opposition by Massaro, dated March 27, 2008, and March 28, 2008; (6) affirmation in opposition by plaintiff, dated April 17, 2008, (including memorandum of law); (7) affirmation in reply by Nicolia, dated April 24, 2008; (8) affirmation in reply by Essex, dated April 24, 2008; and (9) affirmation in reply by Massaro, dated May 23, 2008; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#001) by third-party defendant Essex Insurance Company for an order pursuant to CPLR 3212 granting summary judgment declaring that it has no obligation to defend or indemnify the third-party plaintiff in the underlying action, is granted; and it is further

ORDERED that the motion (#002) by defendant Massaro Building Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is denied; and it is further

ORDERED that the cross motion (#003) by defendant Frank Nicolia for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against him or, alternatively, summary judgment on his cross claim for indemnification over and against Massaro Building Corporation, is granted to the extent that plaintiff's complaint and the cross claim asserted by Massaro are dismissed as against him; and is otherwise denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he allegedly suffered in a fall at a construction site. The new home was being constructed on property owned by Frank Nicolia (Nicolia), who planned to live there with his family and who was acting as his own general contractor. Nicolia hired Massaro Building Corporation (Massaro) to act as the framing contractor and Massaro subcontracted with nonparty Draghi Construction (Draghi), plaintiff's employer, to assist it in performing the framing work.

The plaintiff testified at his deposition that he was employed by Draghi but that he also took directions from Massaro's foreman and that the employees of both entities worked together. On the day of his accident he and a coworker were working in the garage area installing floor joists for the second story. His coworker was on top of the garage wall to receive the joists from the plaintiff, who was on the floor of the garage. The plaintiff testified that he would place one end of the joist on his shoulder and pull it along the floor to hand up to his coworker. To reach his coworker, he walked about half-way up another joist (plank)[1] which had been placed at an angle, with one end against the top of the garage wall and the other end remaining on the ground, acting like a ramp. The plaintiff testified that there were ladders present, and that when fastening the joist he would use a ladder to reach it, but that he initially used the angled plank to reach his coworker because it was more comfortable and saved time. He testified that there were many planks placed at an angle to reach the second floor, like the one he used, and that it was common practice. On the last walk up the plank, as he carried an end of the joist, the plaintiff took a few steps, the plank slipped, and the plaintiff fell to the ground, sustaining the injuries complained of herein.

---

[1] To avoid confusion the joist which plaintiff was using to reach the second story will be referred to as the "plank."

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or prime contractor[2] who breaches that duty may be held liable in damages regardless of whether they had actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]).

Clearly, not every fall from an unsecured joist or plank is a violation of Labor Law § 240(1). Where the joist or plank is not used in the performance of the injured plaintiff's work, but is used as a passageway or stairway, section 240(1) is not applicable (***Donohue v CJAM Assoc.***, 22 AD3d 710, 803 NYS2d 132 [2005]). However, 240(1) protection is applicable where the device functions as the equivalent of a scaffold, ladder or other elevation safety device for the benefit of the injured plaintiff in his work (***Paul v Ryan Homes***, 5 AD3d 58, 774 NYS2d 225 [2004]; ***Missico v Tops Market***, 305 AD2d 1052, 758 NYS2d 890 [2003]). Here, the plaintiff was using the angled plank as an elevation device to enable him to pass the joist to his coworker on the second story (***Wilson v Niagara Univ.***, 43 AD3d 1292, 842 NYS2d 819 [2007]). Accordingly, the Court finds that defendants did not establish that Labor Law § 240(1) is inapplicable. Further, defendants did not establish, as a matter of law, that the plaintiff was a recalcitrant worker because he disobeyed an "immediate specific instructions to use an actually available safety device [provided by the employer] or to avoid using a particular unsafe device" (***Santo v Scro***, 43 AD3d 897, 898-899, 841 NYS2d 627 [2007]; *see also*, ***Robinson v East Med. Ctr.***, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; ***Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 38-40, 790 NYS2d 74 [2004]); or that the plaintiff had access to properly placed and adequate safety devices and it was his own action which was the sole proximate cause of his accident (***D'Angelo v Builders Group***, 45 AD3d 522, 845 NYS2d 814 [2007]; ***Florio v LLP Realty***, 38 AD3d 829, 833 NYS2d 148 [2007]). These issues remain for resolution by the jury. Therefore, summary judgment dismissing the plaintiff's Labor Law § 240(1) claim is denied to Massaro.

Labor Law § 241(6) requires owners and contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. The Court is troubled by the fact that the plaintiff did not offer which sections of the Industrial Code were violated by defendants prior to submitting his opposition to defendants' motions for summary judgment. Further, the plaintiff has not sought leave to serve the supplemental bill of particulars annexed to his opposition, wherein he asserts

---

[2] Since Massaro had the authority to and did, in fact, supervise and control plaintiff's work, it is subject to the statutory liability imposed by Labor Law §§ 240(1) and 241(6) (***Nasuro v PI Assoc.***, 49 AD3d 829, 2008 NY Slip Op 2804; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 488, 818 NYS2d 546 [2006] quoting ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]).

specific Industrial Code violations. Nevertheless, in the absence of unfair surprise or prejudice to defendants (***Ellis v J.M.G., Inc.***, 31 AD3d 1220, 1121, 818 NYS2d 724 [2006]; ***Walker v Metro-North Commuter R.R.***, 11 AD3d 339, 783 NYS2d 362 [2004]), the Court, on its own motion, deems so much of the opposition which introduced the specific Industrial Code violations as seeking leave to serve the supplemental bill of particulars asserting same.

The plaintiff alleges violations of the Industrial Code at 12 NYCRR §§ 23-1.7 (f) and 23-5.1(b). Section 23-1.7, entitled "Vertical passage," provides, at paragraph (f):

> Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

To the extent that the plaintiff has alleged that workers routinely used angled planks to deliver joists to the second story, this section is at least arguably applicable (*see*, ***Miano v Skyline New Homes Corp.***, 37 AD3d 563, 656, 830 NYS2d 257 [2007]; ***Gonzalez v Pon Lin Realty Corp.***, 34 AD3d 638, 639, 826 NYS2d 94 [2006]). Section 23-1.5, entitled "General provision for all scaffolds," provides, at paragraph (b):

> Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used.

However, section 23-1.5 does not direct when a scaffold should be used–rather, it sets forth standards for the erection of scaffolding–and it is undisputed that the plaintiff was not using a scaffold at the time of his accident. Therefore, section 23-5.1(b) is inapplicable to the facts herein (*see generally*, ***Partridge v Waterloo Cent. School Dist.***, 12 AD3d 1054, 1056, 784 NYS2d 767 [2004]), and leave to assert this claim is denied.

Accordingly, summary judgment dismissing the plaintiff's Labor Law § 241(6) cause of action is denied and the plaintiff is granted leave to serve an amended bill of particulars asserting a violation of 12 NYCRR § 23-1.7 (f) no later than thirty (30) days after the service upon counsel of a copy of the instant order with notice of entry. The Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (*see*, ***Rizzuto v L. A. Wenger Contr.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [1997]).

As to Nicolia's cross motion, it is axiomatic that an owner of a one or two family dwelling is exempt from the absolute liability imposed under Labor Law § 240(1) and the vicarious liability imposed under Labor Law § 241(6) unless he directed or controlled the work being performed (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Miller v Shah***, 3 AD3d 521, 770 NYS2d 739 [2004]; ***Duncan v Perry***, 307 AD2d 249, 762 NYS2d 275 [2003]). The phrase "direct or control" is "construed strictly and refers to the situation where the owner supervises the method and manner of the work" (***Garcia v Petrakis***, 306 AD2d 315, 316, 760 NYS2d 551 [2003]). The fact that a homeowner acts as his own general contractor will not bar application of the exemption, as long as the homeowner did not control or direct the manner or method of the work performed by the injured plaintiff (***Soskin v Scharff***, 309 AD2d 1102, 1104, 766 NYS2d 248 [2003]; ***Reilly v Loreco Constr.***, 284 AD2d 384, 386, 726 NYS2d 142 [2001]). Here, the homeowner, Frank Nicolia, established that he lacked the requisite supervision and control over the plaintiff's work and is entitled to the protection afforded by the homeowner's exemption as a matter of law, and the plaintiff did not rebut this with evidence to the contrary (***Ferrero v Best Modular Homes***, 33 AD3d 847, 823 NYS2d 477, *lv dismissed* 8 NY3d 841, 830 NYS2d 693 [2007]). The protection provided by Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, *supra*), who exercise control or supervision over the work, or either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, *supra*; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged defect or dangerous condition arises from the subcontractor's work and the homeowners exercised no supervisory control over the method and manner of the work, no liability attaches to them under the common law or under Labor Law § 200 (***Comes v New York State Elec. & Gas Corp***., 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Mas v Kohen***, 283 AD2d 616, 725 NYS2d 90 [2001]). Accordingly, so much of Nicolia's cross motion which seeks summary judgment dismissing the plaintiff's complaint and the cross claim asserted by Massaro, is granted.[3]

Nicolia's cross motion seeks alternate relief. In the event that summary judgment dismissing plaintiff's complaint is not granted to him, Nicolia argues that he is entitled to indemnification over and against Massaro. Since Nicolia has been granted summary judgment dismissing the plaintiff's complaint herein, the Court will not address the request for alternative relief. The cross claim against Massaro is severed and shall continue (*see*, CPLR 3212 [e]).

As to the Labor Law § 200 claim against Massaro, Massaro had the authority to, and in fact did, direct and control the plaintiff's work, and the Court finds that Massaro did not establish, prima facie, that it lacked notice of the unsafe practice that the plaintiff alleges caused his accident (*see*, ***Sang Hyun Ban v Sunjin Shipping USA***, 23 AD3d 452, 453, 805 NYS2d 620 [2005]); ***Ciesielski v Buffalo Indus. Park***, 299 AD2d 817, 818-819, 750 NYS2d 246 [2002]). While Massaro's principal testified at his examination before trial that when he saw workers using the planks for access to the second story, he would tell them to stop, the plaintiff testified that this practice was common and many workers used the planks for access. These conflicting depositions create a question of fact to be resolved by the jury (*see*,

---

[3] Plaintiff did not oppose dismissal as against Nicolia.

Ferrante v American Lung Assn., 90 NY2d 623, 665 NYS2d 25 [1997]; ***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93 [1968]), as is the injured plaintiff's contributory negligence, if any[4] (***Locicero v Princeton Restoration***, 25 AD3d 664, 665, 811 NYS2d 673 [2006]). Accordingly, Massaro is denied summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims.

The gravamen of Essex Insurance Company's (Essex) motion for summary judgment dismissing the third-party complaint seeking indemnification and a defense is twofold. Essex argues that the policy contains a specific exclusion for claims based upon bodily injury suffered by Massaro's subcontractors, and argues that, although Massaro knew of plaintiff's fall and alleged injuries almost immediately, Massaro did not provide notice of the incident until receipt of plaintiff's complaint, some 10 months later.

The subject policy provides, pursuant to the New York endorsement changes, that the insurance does not apply to any claim, suit, cost or expense arising out of "bodily injury" to any employee of the named insured arising out of and in the course of employment, states that the exclusion applies to the entire policy, and that "where there is no coverage there is no duty to defend." It further lists specific exclusions, which include, in relevant part:

> K. INDEPENDENT CONTRACTORS/SUBCONTRACTORS (Applies if you are a Contractor or Builder):
>
> (1) "Bodily injury," "personal injury" or "property damage" caused by acts of Independent Contractors/subcontractors contracted by you or on your behalf unless you obtain Certificates of Insurance from them providing evidence of at least like coverage and limits as provided by this policy;
>
> (2) nor does this insurance apply to "bodily injury," "personal injury" or "property damage" sustained by any contractor, independent contractor, or subcontractor, any employee, leased worker, temporary or volunteer help of same.

Therefore, the policy does not provide coverage for bodily injury suffered by Massaro's own employees or by its subcontractors.[5] The exclusion is clear and unambiguous (***Continental Cas. Co. v Rapid American Corp.***, 80 NY2d 640, 593 NYS2d 966 [1993]; ***Seaboard Surety Co. v Gillette***, 64 NY2d 304, 486 NYS2d 873 [1984]) and this Court is "not permitted to construe a clause in a way that drains it of its only intended meaning" (***Commissioners of the State Ins. Fund v Insurance Co. of N. Am.***, 80 NY2d 992, 994, 592 NYS2d 648 [1992]; *see also*, ***North River Ins. v United Natl. Ins.***, 81 NY2d 812, 595 NYS2d 377 [1993]). Therefore, plaintiff's claims for bodily injury are excluded by the policy. Further,

---

[4] Contributory negligence is also relevant to plaintiff's Labor Law § 241(6) claim.

[5] Massaro's argument that Draghi was not a subcontractor, which contradicts his deposition testimony and his own letter to Essex, is therefore insufficient to create a question of fact as to insurance coverage.

[* 7]

Massaro's notice to Essex, 10 months after the accident, was untimely (*see,* ***Paul Developers v Maryland Cas. Ins.***, 28 AD3d 443, 816 NYS2d 75 [2006]). Moreoever, even if notice had been timely, timely notice cannot impart coverage which is unambiguously excluded by the policy. Accordingly, summary judgment dismissing the third-party claim is granted to Essex.

The Court makes the following declaration: The third-party defendant, Essex Insurance Company, has no duty to defend and indemnify the defendant/third-party plaintiff Massaro Building Corporation pursuant to the subject commercial general liability insurance policy.

Submit judgment.

Dated: 9/2/08

Peter H. Mayer
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**