

Comanzo v JMOA Engineering, P.C.

2008 NY Slip Op 32476(U)

August 26, 2008

Supreme Court, Suffolk County

Docket Number: 0012843/2004

Judge: Jr. Paul J. Baisley

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

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
BRIAN COMANZO and JODI COMANZO,

Plaintiffs,

-against-

JMOA ENGINEERING, P.C. and STALCO
CONSTRUCTION, INC.,

Defendants.

-----X
JMOA ENGINEERING, P.C.,

Third-Party Plaintiff,

-against-

METROPOLITAN ROOF SYSTEMS, INC.,

Third-Party Defendant.

-----X
STALCO CONSTRUCTION, INC.,

Second Third- Party Plaintiff,

-against-

PREFERRED CONSTRUCTION, INC.,

Second Third-Party Defendant.

-----X

INDEX NO.: 12843/2004
CALENDAR NO.: 200702478OT
MOTION DATE: 6/17/2008
MOTION NO.: 006 MD
007 MOT D
008 XMD

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Upon the following papers numbered 1 to 67 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-35 ; Notice of Cross Motion and supporting papers 36-38 ; Answering Affidavits and supporting papers 39-54; 55-58; 59-60; Replying Affidavits and supporting papers 61-63; 64-65; 66-67; Other ; (and after hearing counsel in support and opposed to the motion) it is,

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

ORDERED that the motion (motion sequence no. 006) by defendant JMOA Engineering, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint, as well as all cross claims asserted against it, or, alternatively, summary judgment on

its cross claim for indemnification, including attorneys' fees, over and against Stalco Construction, Inc., is denied; and it is further

ORDERED that the motion (motion sequence no. 007) by defendant Stalco Construction, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint and all cross claims asserted against it, is granted to the extent of dismissing the plaintiffs' Labor Law §§240(1) and 241(6) claims as against it, and is otherwise denied; and it is further

ORDERED that the cross motion (motion sequence no. 008) by second third-party defendant Preferred Construction, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, the third-party complaint, and any cross claims asserted against it, is denied as untimely.

The injured plaintiff, Brian Comanzo, 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 when he fell from the roof of a school building where he was working as a roofer. The nonparty school district contracted with several prime contractors to renovate and add classrooms to one of its elementary schools. The defendant JMOA Engineering, P.C. (JMOA) was hired to act as the construction manager. The defendant Stalco Construction, Inc. (Stalco) was hired to perform general construction, including the excavation and carpentry work. Stalco, in turn, hired certain subcontractors to fulfill its contract, including Preferred Construction, Inc. (Preferred), which did the carpentry. The plaintiff's employer, Metropolitan Roof Systems, Inc. (Metropolitan), was a prime contractor hired to perform the roofing for the renovation part of the project as well as for the new additions. Michael Melocoton (Melocoton), JMOA's representative, and Michael Marchese (Marchese), Stalco's representative, shared an office trailer at the school and were at the site daily.

The plaintiff testified at his deposition that he was an experienced roofer and a foreman for Metropolitan and that his bosses from Metropolitan were the only people who directed or controlled how he and his workers were to perform their work. However, as the foreman for a prime contractor, he did have contact with Melocoton, who directed where and when the plaintiff and his men were to work. Metropolitan was the only contractor working on the roof on the day of plaintiff's accident. Immediately before his fall, the plaintiff and his worker, Peter Liga, were walking across the pitched roof. Although they were both wearing safety harnesses, the harnesses were not attached to anything because the roofing work was about to move to a new location and the plaintiff was going to show Liga where to attach a new safety bracket for the harnesses. There were no toe boards or crawl boards on this section of the roof. Before a new safety bracket could be installed, the plaintiff slipped on saw dust and/or wood debris and fell off the roof. The plaintiff also testified that a few days before his fall he had spoken to Melocoton about the wood debris on the roof and had asked that it be cleaned off and that a ridge vent be cut, so that the roofing work could commence, and was told by Melocoton that it would be taken care of.

Melocoton testified at his deposition that JMOA, as the construction manager, was to act as the "eyes and ears" of the school district, and that among its functions was to coordinate the various trades to ensure timely progress of the work, to keep a daily log of the progress, and to

make sure the work was actually performed before the contractor was paid. JMOA was not qualified to inspect the work, and the decisions to ask a contractor to redo its work would be made by the architect. He stated that JMOA had no authority to stop the work and did not have the authority or responsibility to enforce safety standards. Melocoton also testified that he did not receive complaints directly from any of the workers.

Marchese testified at his deposition that Stalco subcontracted all the work required by its contract with the school district, including the carpentry work performed by Preferred. Stalco conducted weekly safety meetings with its subcontractors but had no control over the other prime contractors. Marchese testified that there were no workers from Preferred on the roof the day of plaintiff's accident and that if there was wood debris to be cleaned off the roof, JMOA would have had the authority to direct Preferred to clean it off.

The moving defendants do not argue that the plaintiff was not subject to an elevation-related hazard as contemplated by Labor Law §240(1) (*see, Striegel v Hillcrest Heights Dev. Corp.*, 100 NY2d 974, 975-976, 786 NYS2d 727 [2003]); rather, JMOA and Stalco argue that they are not subject to the strict liability imposed by §240(1).

The gravamen of JMOA's argument is that, as the construction manager, it is not subject to Labor Law §240(1) liability because it was not responsible for the manner in which the contractors performed their work. The construction management agreement establishes JMOA's responsibilities and provides, in relevant part:

3.5.7 Perform detailed monitoring of construction and coordinate work of various Contractors as related to construction schedule on a daily basis. CM (construction manager) is not responsible for the construction means, methods, or techniques utilized by the Contractors. Coordination is limited to the regular responsibilities of the project manager as defined by the construction phase responsibilities contract. *CM has authority from Owner to stop construction.* Written notice shall be give to the Owner within 24 hours of any stoppage of work ordered by the CM.[emphasis added].

* * *

3.5.11 Coordinate site safety efforts with all Contractors during construction and keep the Owner advised on an on-going basis of safety conditions. CM is not responsible for construction means, methods, and techniques utilized by Contractors as related to safety programs. The CM shall act as expeditiously as possible to resolve any safety concerns.

A party is deemed to be an agent of an owner under the Labor Law when it has supervisory control and authority over the work being performed where a plaintiff is injured (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]). To impose the vicarious liability imposed by §§240(1)

and 241(6), the defendant must have the authority to control the activity bringing about the injury so as to enable him to avoid or correct the unsafe condition (*Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2006]; *Natoli v City of New York*, 32 AD3d 507, 820 NYS2d 313 [2006]). It is not a defendant's title that is determinative, but the amount of control or supervision exercised (*Bagshaw v Network Service Mgt.*, 4 AD3d 831, 772 NYS2d 161 [2004]; *Aranda v Park E. Constr.*, 4 AD3d 315, 772 NYS2d 70 [2003]). A "construction manager charged with the duty of coordinating all aspects of a construction project is a contractor with nondelegable duties under sections 240 and 241 of the Labor Law" (*Kenny v Fuller Co.*, 87 AD2d 183, 190, 450 NYS2d 551, *lv denied* 58 NY2d 603, 459 NYS2d 1026 [1982]). Here, JMOA relies upon the contractual provision which stated that it was not responsible for the construction means, methods, or techniques utilized by the contractors, and the provision which stated that it was to coordinate site safety and to keep the owner advised of safety conditions, but did not specifically give it the authority to stop the work.¹ However, the plaintiff testified that he went to Melocoton with his concerns about the condition on the roof and that Melocoton assured him that it would be taken care of. Assuming, as the Court must on a motion for summary judgment, that the plaintiff's testimony is accurate (*Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]), the Court finds that plaintiff raised a triable issue of fact as to whether JMOA was acting as an agent of the owner with the authority to supervise and control the condition that plaintiff alleges was a cause of his fall (*Soltes v Brentwood Union Free School Dist.*, 47 AD3d 804, 805, 849 NYS2d 628 [2008]; *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2007]). Accordingly, summary judgment dismissing the plaintiff's Labor Law §§240(1) and 241(6) claims is denied to JMOA.

Stalco argues that, as a prime contractor hired to perform general construction, it is neither an owner nor a general contractor and, therefore, is not subject to the vicarious liability imposed by Labor Law §§240(1) and 241(6). "A prime contractor hired for a specific project is subject to liability under Labor Law §240 as a statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (*Nasuro v PI Assoc.*, 49 AD3d 829, 830, 858 NYS2d 175 [2008] quoting *Coque v Wildflower Estates Dev.*, 31 AD3d 484, 488, 818 NYS2d 546 [2006] and *Russin v Louis N. Picciano & Son*, *supra*; *Kwoksze Wong v New York Times Co.*, 297 AD2d 544, 549, 747 NYS2d 213 [2000]). Here, the plaintiff's employer was the prime roofing contractor and Stalco had no authority to direct plaintiff's work. Further, Stalco had no authority to coordinate the work of its subcontractors with the work performed by other prime contractors, and Preferred had completed its work on the roof well before the plaintiff's accident.² Accordingly, summary judgment dismissing the plaintiff's Labor Law §§240(1) and 241(6) claims is granted to Stalco.

Labor Law §200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, *supra*) who exercise control or

¹ Although it apparently could stop the work for other reasons, a rather curious distinction.

² Although the parties disagree on when Preferred completed its work on the roof, it appears that it was completed days or weeks prior to plaintiff's fall.

supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where the plaintiff alleges that a proximate cause of his injuries can be attributed to an allegedly dangerous condition at the work site, a defendant may be liable under Labor Law §200 and for common-law negligence if it had control over the place where the injury occurred and had actual or constructive notice of the dangerous condition (*Nasuro v PI Assoc.*, *supra*; *Payne v 100 Motor Parkway Assoc.*, 45 AD3d 550, 846 NYS2d 211 [2007]; *Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 841 NYS2d 709 [2007]). A defendant moving for summary judgment dismissing a Labor Law §200 claim must establish, as a matter of law, that it neither created nor had actual or constructive notice of the dangerous condition alleged (*Weinberg v Alpine Improvements*, 48 AD3d 915, 917-918, 851 NYS2d 692 [2008]; *Gadani v Dormitory Auth. of State of N.Y.*, *supra* at 1220-1221; *Wolfe v KLR Mech.*, 35 AD3d 916, 826 NYS2d 458 [2006]). Here, JMOA failed to eliminate all triable issues of fact as to whether it had notice of the alleged dangerous condition on the roof which the plaintiff alleges caused his injuries and Stalco failed to eliminate all triable issues of fact as to whether its subcontractor created the condition³ (*Nasuro v PI Assoc.*, *supra* at 831). Accordingly, summary judgment dismissing the plaintiff's Labor Law §200 and common-law negligence causes of action is denied to the defendants.

JMOA also seeks, as alternate relief, summary judgment on its cross claim for common-law and contractual indemnification over and against Stalco. The contractual obligation is based upon JMOA's assertion that it is the "authorized representative" of the owner, pursuant to the definition found at section 2.1 of the project manual. However, the contract between JMOA and the owner provides at article 14 - Independent Contractor: "In performing its obligations hereunder, the CM shall be deemed an Independent Contractor, and neither the CM nor any of its consultants or subcontractors shall be deemed to be an agent or employee of the Owner or of any other public or governmental entity." Therefore, it appears JMOA has adopted contradictory positions; for the purposes of Labor Law §§240(1) and 241(6) JMOA argues that it is not an agent of the owner (and presumably an independent contractor), but for the purposes of contractual indemnification, JMOA argues that it is an authorized representative of the owner. JMOA argues that as an authorized representative it is covered by the indemnification provision found at section 3.18 of the project manual⁴ which provides that Stalco would indemnify and hold harmless the owner and its agents and employees from and against any claims, including attorney's fees, arising out of the performance of the work, "but only to the extent caused in whole or in part by negligent acts or omissions of a contractor, or subcontractor . . ." Therefore, without resolving whether JMOA is an independent contractor or an "agent or employee" of the owner, the contractual obligation to indemnify is dependent upon a finding that some act or omission by Stalco or its subcontractor, Preferred, was a cause of plaintiff's accident. Since the issue of any negligent act or omission on the part of Preferred remains unresolved, the claim for contractual indemnification

³ While Preferred avers that no cutting of wood was performed on the roof itself and that all cutting was done on the ground, the plaintiff's testimony is to the contrary. Moreover, on motions for summary judgment it is not the Court's function to resolve issues of credibility

⁴ Although section 3.18 is missing from JMOA's exhibit, for the purposes of this motion the Court shall assume that JMOA has accurately quoted the section.

is premature (*D'Angelo v Builders Group*, 45 AD3d 522, 524-525, 845 NYS2d 814 [2007]; *Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 463, 791 NYS2d 634 [2005]).

Further, since a claim for common-law indemnification is dependent upon a showing that the party seeking indemnity was not guilty of any negligence and also a showing that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 822 NYS2d 542 [2006]; *Perri v Gilbert Johnson Enters.*, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [2004]), this claim is also premature. JMOA has not established that it was free of any negligence nor has it been established that Stalco was guilty of some negligence. Accordingly, summary judgment on its cross claims for common-law and contractual indemnification over and against Stalco is denied to JMOA, and Stalco's request to dismiss these cross claims is correspondingly denied.

As to the cross motion for summary judgment by second third-party defendant Preferred Construction, Inc., the Court notes that it is procedurally defective because it was made more than 120 days after the filing of the note of issue, without any showing of good cause for the delay (CPLR 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]); *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2005]). Accordingly, the motion is denied as untimely.

The claims dismissed herein are severed and the plaintiffs' remaining claims shall continue.

Dated: August 26, 2008

PAUL J. BAISLEY, JR.

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION