

Monda v City of New York

2008 NY Slip Op 32601(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0104884/2003

Judge: Eileen A. Rakower

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.

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

PRESENT: Rakower

PART 5

Index Number : 104884/2003
MONDA, BARTOLOMEO
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 006
 SUMMARY JUDGMENT

INDEX NO. 104884/02
 MOTION DATE _____
 MOTION SEQ. NO. 006
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	<u>1, 2</u>
Answering Affidavits - Exhibits	<u>3, 4, 5</u>
Replying Affidavits	<u>6, 7, 8</u>

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

FILED

SEP 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 9/23/08


EILEEN A. RAKOWER v.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 5

-----X

BARTOLOMEO MONDA,
Plaintiffs,

Index No.
104884/03

- against -

DECISION/ORDER

CITY OF NEW YORK AND CONSOER
TOWNSEND ENVIRONDYNE ENGINEERS
OF NEW YORK,
Defendants.

-----X

CITY OF NEW YORK,
Third Party Plaintiff,

Third Party Index No.
591452/03

- against -

FILED
SEP 29 2008 Motion Seq. 006
COUNTY CLERK'S OFFICE
NEW YORK

NORTHSTAR CONTRACTING CORP.,
NORTHSTAR ELECTRICAL CONTRACTING
CORP.,
Third Party Defendant.

-----X

HON. EILEEN A. RAKOWER

Plaintiff Monda brings this Labor Law action for injuries he allegedly sustained when he fell at his work site, a construction project known as the East 10th Street pedestrian bridge, on September 27, 2002. Monda was an employee of Northstar Contracting Corp. (Northstar), who was hired by The City of New York (City) as the general contractor on the project, and claims he was injured in the performance of his duties. Consoer Townsend Envirodyne Engineers of New York (CTE) was hired by City to perform engineering and inspection services at the East 10th Street Bridge. CTE now moves, pursuant to CPLR 3212, to dismiss all claims and cross claims as against it. Plaintiff, City and Northstar oppose.

CTE, in support of its motion, provides: (1) the pleadings; (2) the decision and order of Hon. Michael D. Stallman dated July 17, 2006 consolidating the above

captioned actions; (3) excerpts of the deposition of Bartolomeo Monda, dated May 22, 2006; (4) excerpts of the deposition of Sat Kataria, dated September 21, 2005; (5) excerpts of the further deposition of Sat Kataria, dated May 15, 2007; (6) CTE's contract with City dated April 28, 1999; (7) excerpts of the deposition of Suresh Patel, dated May 15, 2007; (8) excerpts of the deposition of Amrish Unadkat, dated April 21, 2006; and (9) excerpts of the deposition of Richard Colabelli, dated January 31, 2006.

Monda alleges he tripped and fell on an earthen ramp, which gave way, while walking down into an excavation. CTE argues that Northstar constructed the ramp for its employees to gain entry into the excavation. CTE shows that its contract stated that it was not the responsibility of the engineer, but the construction contractor, to determine the means and methods of construction. CTE claims that it had no authority to stop work at the job site or correct an unsafe condition. CTE concludes that it did not exercise supervisory control or direct the work that brought about Monda's injury, and it is entitled to summary judgment dismissing the common law negligence and Labor Law §200 causes of action. Further, it is not an owner, general contractor or agent within the meaning of Labor Law §§240 and 241(6), and those causes of action must also fail. Thus, it urges that all claims and cross claims must be dismissed as against it.

Northstar, referring to CTE's exhibits, argues that CTE's employee, Mr. Unadkat, specifically testified that if CTE observed a safety hazard, he would take appropriate action. He stated, "we can issue a stop work order to the contractor." Thus, Northstar claims there is an issue of fact as to whether CTE had a sufficient supervisory function to invoke liability under the Labor Law.

Plaintiff, in opposition, provides a preliminary conference order and orders relating to compliance during discovery. Initially, plaintiff argues that the motion is untimely. The first party action was initially assigned to Justice Diamond, who ordered that dispositive motions were to be made no later than 60 days after the filing of the note of issue. That case was later consolidated with the third party action, and by order of Justice Stallman, "the time in which to move for summary judgment is extended to 120 days after completion of disclosure unless otherwise ordered by the assigned Justice." The consolidated matter was then reassigned to this Part. This Part adheres to the statutory time for filing a motion for summary judgment, 120 days after the filing of the note of issue, which is consistent with Justice Stallman's order.

Plaintiff argues that CTE's contract clearly shows that CTE was responsible for the subject construction ramp. Plaintiff points to various paragraphs requiring, among other things, that CTE was responsible to "extend the approach ramps to provide standard slopes and landings", inspection of work done at the construction site, and requiring CTE to report hazardous conditions. Thus, there are issues of fact as to whether CTE supervised or controlled the work site.

Finally, plaintiff asserts that CTE's submissions are deficient. The deposition transcripts are not complete, do not contain a signature page, are unsworn and of no probative value. Indeed, a review of the submitted excerpts shows that only the transcripts of depositions of Mr. Monda and Mr. Colabelli were duly sworn. City joins in plaintiff's opposition.

CTE urges that the general supervisory functions it exercised are not sufficient as a matter of law to impose liability for the causes of action set forth by plaintiff. CTE points out that plaintiff does not dispute the fact the CTE did not exercise any control or authority over the plaintiff or the work performed by plaintiff. Also, CTE claims that plaintiff completely misconstrues the contract between it and City. CTE argues that the ramps plaintiff refers to do not include the temporary earthen ramp Northstar constructed. Additionally, other quoted paragraphs refer to a completely different project from the 10th Street Bridge. Finally, CTE provides the signature pages of the excerpts of the deposition transcripts on which it relies.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

It is well settled that CTE's motion should be granted unless the parties in opposition can show that CTE exercised supervisory control over plaintiff's work at the time of the accident, including his use of the earthen ramp that was constructed by

Northstar. (*Conforti v. Bovis Lend Lease LMB, Inc.*, 37 A.D.3d 235[1st Dept. 2007]). Indeed, a professional engineer can only be held liable under Labor Law §200 causes of action if that engineer has the authority to supervise and control the activity which brought about the injury. (*Carter v. Vollmer Associates*, 196 AD2d 754[1st Dept. 1993]). Here, CTE's contract with the City is for "Resident Engineering Inspection Services." The contract clearly states that "It is the responsibility of the Construction Contractor(s), and not the responsibility of the Engineer, to determine the "Means and Methods of Construction." On its face, the contract does not impose any supervisory duties on CTE.

Despite the plain language of the contract, the parties opposing CTE's motion point to certain evidence and claim that a question of fact is raised as to whether CTE was in fact given greater control over the construction project than is intended by the contract itself. To this end, Northstar first points to the deposition testimony of Mr. Unadkat in order to show that CTE had control over the construction site:

Q: You told us before that if you saw something very hazardous on the job, that you would do something about it. What would you do?

A: I would call engineer in charge and will describe everything that this is the safety hazard on the job site and then he would notify commissioner or he would take an appropriate action. We can issue a stop work order to the contractor.

Northstar claims that Mr. Unadkat's statement shows that CTE had the ability to stop work if he had observed a dangerous condition. However, it is not clear in the first instance whether Mr. Unadkat's subjective opinion that he had the ability to stop the work proves that CTE had such an ability. Secondly, even if it was shown that CTE could "stop the work," such a showing would be insufficient to raise a question of fact as to CTE's liability under Labor Law §200. (*Burkoski v. Structure Tone, Inc.*, 40 AD3d 378[1st Dept. 2007])(where court found that liability under Labor Law §200 could not be found against general contractor, even though he did regular "walk-throughs" and had the ability to stop work if there was a safety violation, as he did not exercise direct supervisory control over the work site).

Next, Plaintiff posits that, pursuant to the contract, CTE had direct responsibility for the ramp that caused plaintiff's accident. Plaintiff cites to Page SR-1 Paragraph (1) of the contract, which states, in relevant part:

Reconstruction of the E. 10th St. Ped. Bridge over F.D.R. Drive

. . . Extend approach ramps to provide standard slopes and landings per ADA requirements . . .

As an initial matter, the above paragraph is preceded by the title “General Description of Construction Project Scope.” The ramps referred to in those sections are the permanent pedestrian ramps leading to the bridge, not the temporary earthen ramp constructed by Northstar to provide its workers with access to the construction area.

The other sections of the contract referred to by plaintiff also fail to raise questions of fact as to CTE’s liability. Specifically, GR-5, Paragraph III(A) simply reiterates that CTE is to generally monitor the site for unsafe conditions. A duty which, as was held in *Burkoski*, is insufficient to raise a question of fact as to the negligence of CTE under Labor Law §200, where there is no evidence that CTE actually exercised control over the work site.

Finally, CTE argues that plaintiff’s Labor Law §240 and §241 causes of action as against it must be dismissed because it is not an owner, general contractor or agent within the meaning of the statute. Both §240 and §241(6) expressly exempt engineers from liability unless they direct or control the work activities. Labor Law §241(9) states, in relevant part:

No liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers . . . who do not direct or control the work for activities other than planning and design . . .

Labor Law §240(1) states, in relevant part:

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers . . . who do not direct or control the work for activities other than planning and design.

In limited instances, courts have found non-owner defendants liable when the work giving rise to the duty to conform to the requirements of §240(1) “has been

delegated to a third party, [and]that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor." (see *Walls v. Turner Constr. Co.*, 4 NY3d 861[2005]). There, the court found that the defendant construction manager, although generally not liable under Labor Law §240(1), "functioned as the eyes, ears, and the voice of the owner," and had broad responsibility as both "coordinator and overall supervisor" of the work site. Here, CTE was not contractually obligated to direct or control the work activities at the site, was not a delegated agent of the owner, and neither plaintiff nor Northstar provides evidence demonstrating an issue of fact as to CTE's level of control over the work site. Thus, the Labor Law §241and §240(1) causes of action must also fail as against CTE.

Wherefore it is hereby

ORDERED that the motion is granted and the complaint is hereby severed and dismissed as against defendant Consoer Townsend Envirodyne Engineers of New York and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATED: September 23, 2008


EILEEN A. RAKOWER, J.S.C.

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK