Winant v Primo Constr.
2009 NY Slip Op 30861(U)
April 15, 2009
Supreme Court, Nassau County
Docket Number: 7426-06
Judge: William R. LaMarca
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

ROBERT WINANT and MARIA G. WINANT,

Plaintiffs,

-against-

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PRIMO CONSTRUCTION,

Defendant.

Appearances:
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DECISION AFTER TRIAL

Introduction

ROBERT WINANT and MARIA G. WINANT, (hereinafter collectively referred to as "WINANT") commenced this action against PRIMO CONSTRUCTION (hereinafter referred to as "PRIMO") for damages resulting from a fall during the installation of a new roof at 7 Birch Street, New Hyde Park, New York on August 17, 2004. The job site at 7 Birch Street, New Hyde Park, New York, is a ranch style house with a pitched roof. WINANT alleges that the injuries he sustained were caused by the PRIMO's negligence in not installing a sufficient number of wooden planks on the job that would allow him, in turn, to safely install

shingles as he moved up to the top of the roof. This matter was tried by the Court, without a jury over two days: December 12, 2008 and December 15, 2008.

Background

The parties know each other and have worked together for many years. Each would work on jobs obtained by the other at a per diem rate. In this case, Ken Huff (hereinafter referred to as "Huff") d/b/a PRIMO CONSTRUCTION obtained the contract to install a new roof at 7 Birch Street, New Hyde Park, New York, and asked WINANT to work with him on the replacement of the roof. The job involved removing the existing shingles and installing wooden planks that would, in turn, permit the installation of new roof shingles. WINANT advised the Court, in his post trial memorandum of law, that he is seeking the recovery of damages under alternative theories: (1) general negligence committed by PRIMO or, alternatively, (2) recovery under the Workers Compensation Law, which would require that the Court determine that WINANT was an employee. The Court, after hearing testimony of the parties, rejects the argument that WINANT was an employee. Accordingly, the Court is proceeding on a general negligence cause of action alleged against PRIMO.

On August 17, 2004 WINANT and Huff arrived at the job site at approximately 7:00 A.M. Before commencing work, they waited for the demolition team to remove the existing roof shingles. At approximately 9:30 A.M. a demolition worker was injured and was driven to the hospital by Huff. There was a discrepancy in the testimony as to how long Huff was away from the job site. WINANT said the time away from the job was 40 minutes to 1 hour. Huff testified that he was gone for more than 2 hours.

The issue was whether a sufficient number of planks were in place so that WINANT could negotiate the roof in a reasonably safe manner. There was a discrepancy in the

testimony in that WINANT alleged that Huff installed the planks and Huff testified that WINANT installed the planks.

WINANT, an experienced roofer, said that six planks must be in place, three on each side from the middle of the roof so that they could work from the bottom up, ascending from plank to plank. The planks, said WINANT, are placed on top of a bracket that is affixed to the roof and nailed to the bracket. He testified that there were only four planks in place, three on one side and one on the other. Huff testified that he had six planks in place at the time of the accident.

WINANT testified that after completing work on one side of the roof, he moved from its top plank to the only plank on the other side of the roof with a bundle of shingles that weighed 80 lbs. He said that when he stepped across from plank to plank, the single plank shifted and he fell off the roof sustaining bodily injury. There were no safety harnesses; however, WINANT said that had there been two more planks below the one that shifted, he could have grabbed one to avert his fall.

WINANT argues that the custom and practice in the industry requires that six planks be employed to install shingles on a roof. Huff, he said, was negligent in installing only four planks to complete the installation of shingles to the side of the roof they were completing.

Huff stated that WINANT, through no fault of his, fell off the roof.

This case was tried as a bench trial. A bench trial obligates the Court to assume the role of the finder of the facts and also the arbiter of the law. In deciding this case, the Court considered, among other matters, the issues of credibility, negligence of the parties and the elements of foreseeability and proximate cause.

Discussion

Negligence is defined as the lack of ordinary care (PJI 2:10). It is the failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances. The court is always required to undertake an initial evaluation of the evidence to determine whether the plaintiff has established the elements of a negligence cause of action , to wit: the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the events which produced the injury (*Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019 [1976]; *Pironti v. Leary*, 42 A.D.3d 487, 489, 840 N.Y.S.2d 98 [2nd Dept. 2007]).

Juries determine whether and to what extent a particular duty was breached; however it is for the courts to first determine whether any duty exists. Thus, the question of whether a defendant owes a duty of care to the plaintiff "is entirely one of law to be determined by the courts" (*Donohue v Copiague Union Free School Dist.*, 64 AD2d 29, 407 NYS2d 874 [2nd Dept 1978]), *judgmt aff'd*, 47 NY2d 440, 391 NE2d 1352, 418 NYS2d 375 (1979).

> In so doing, courts identify what people may reasonably expect of one another. In assessing the scope and consequences of civil responsibility, they define the boundaries of "duty" to comport with what is socially, culturally and economically acceptable (*see*, Pulka v Edelman, 40 NY2d 781, 785-786; Tobin v Grossman, 24 NY2d 609, 619).

Darby v Compagnie Natl. Air France, 96 NY2d 343, 753 NE2d 160, 728 NYS2d 731 (2001).

If, in connection with the acts complained of, it is found that the defendant owes no duty to the plaintiff, then the action must fall.

In this case involving the Labor Law, Huff, doing business as PRIMO, the general contractor who contracted for the roofing job with the homeowner, had a duty under the common law to provide WINANT with the necessary equipment and materials to allow him to work reasonably safely at the job site. Defendant had a duty "to provide a place of work that is 'so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein.'" (*Lagzdins v. United Welfare Fund-Sec. Div. Marriott Corp.*, 77 AD2d 525, 430 NYS2d 351 [2nd Dept. 1980] citing *Employers Mut. Liab. Ins. Co. Of Wis. V. Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 382).

The duty to provide a safe place to work is not breached, however, when the injury arises out of a defect in the subcontractor's own methods or through the negligent acts of the subcontractor occurring as a detail of the work (*Persichilli* v. Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145, 209 N.E.2d 802, 262 N.Y.S.2d 476 [1965] *reargument denied* 16 N.Y.2d 883, 211 N.E.2d 657, 264 N.Y.S.2d 1031 [1965]). Thus, in order to impose liability upon it, a general contractor must have had the authority to control the activity bringing about the injury so as to enable it to avoid or correct an unsafe condition (*see Russin v. Louis N. Picciano & Son.*, 54 NY2d 311, 316-317, 429 N.E.2d 805, 445 NYS2d 127 [1981]).

Further, a person is only responsibly for the results of his or her conduct if the risk of injury is reasonably foreseeable.

There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in light of what could be foreseen. On the other had, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in light of what could be foreseen (PJI 2:12).

An act or omission which reasonable people would regard as a cause of an injury is the proximate cause. There may be more than one cause, be it slight or trivial; however, in order for it to be considered the proximate cause, it must be a substantial factor in causing the injury.

The Court finds that Huff's conduct in failing to provide the equipment and materials to the job site made it foreseeable that there was a risk of injury and thus constitutes negligence. With regard to the proximate cause of the accident, the Court concludes that the negligence of Huff was the cause of the injury.

In assessing the credibility of the parties, the Court had to consider any discrepancy in the evidence and attempt to reconcile the testimony of the parties by trying to fit the two stories together. This was not possible and, the Court found that WINANT's version of the facts was the more reasonable version of the events that caused his injury.

This was a bifurcated trial addressing only the liability of the parties. Based on the testimony the Court believes that plaintiff was injured; however, the Court has not considered the extent of WINANT's damages.

Having found the defendant negligent, this Court must next consider whether the plaintiff was also negligent. The defendant must prove the negligence of the plaintiff. If both are deemed negligent, then the Court must apportion of the negligence of the parties based on their degree of fault.

The Court has considered all of the factors discussed above and concludes that both WINANT and Huff were negligent.

The rationale for such conclusion is the fact that both parties were very experienced roofers and that WINANT certainly knew the danger by proceeding without the proper equipment being in place. With regard to Huff, it was his duty of care to WINANT to provide him with the proper equipment and materials to do the job in a reasonably safe manner. The factors described above established the negligence of both parties. The injury was certainly foreseeable and neither party acted reasonably in light of what could be foreseen.

Conclusion

The Court concludes the percentage of fault as follows:

WINANT - 50%

PRIMO - 50%

This constitutes the decision of the Court.

Settle Judgment on Notice.

Dated: April 15, 2009

WILLIAM R. LaMARCA, J.S.C.

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