

Kish v Nubest Salon & Spa

2009 NY Slip Op 31344(U)

June 12, 2009

Supreme Court, Nassau County

Docket Number: 13600/06

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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ZOLIE KISH,

Plaintiff,

-against-

NUBEST SALON & SPA, and BEST & CO.
HAIRCUTTERS, LTD.,

Defendants.

-----X

BEST & CO. HAIRCUTTERS, LTD., d/b/a NUBEST
SALON & SPA s/h/a NUBEST SALON & SPA and
BEST & CO. HAIRCUTTERS, LTD.,

Third-Party Plaintiff,

-against-

ROCCO ZAGARI and ROCCO ZAGARI d/b/a
R&Z CONTRACTORS,

Third-Party Defendants.

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Defendants move in motion sequence number three for an order staying all proceedings in this matter pending the hearing and determination of the matter to reargue the Court's October 8, 2008 Decision pursuant to CPLR § 2221 on the grounds that the Court overlooked or misapprehended matters of fact or law in determining Plaintiff's motion for summary judgment.

In motion sequence number four R&Z Contractors, Third-Party Defendant moves for an order vacating the default judgment entered against them on December 4, 2007.

This is an action to recover damages for personal injury sustained by the Plaintiff who fell from a ladder while employed by Third-Party Defendant R&Z Contractors. Defendants Nubest Salon & Spa and Best & Co. Haircutters, Ltd. (“Nubest”) are the owners of a hair salon located at 1482 Northern Boulevard in Manhasset. Defendants hired Third-Party Defendant R & Z Contractors to perform certain work at the premises, including the installation of a lighting fixture. Plaintiff Zolie Kish, a carpenter/mechanic employed by R & Z, was assigned to build a frame to support the lighting fixture. The frame was to be located in the crawl space above the ceiling. On April 3, 2006, Plaintiff climbed a ladder to begin working on the frame. Shortly after climbing the ladder, Plaintiff fell to the floor and sustained serious injury.

On the day of the incident, Nubest had three ladders, which were kept in the electric room in the basement of the premises.¹ Plaintiff alleges that he was told by his supervisor, Rocky Zagari, to get a ladder from the electric room, separate it, and bring one of the sections to the job site.² Plaintiff described the ladder he separated as a 28-foot extension ladder, which was made of aluminum. According to Plaintiff, the section of the ladder which he brought to the job site had “rubber cleats,” to prevent the ladder from slipping.³

Plaintiff was instructed by Zagari to position the ladder resting on the frame of the “access panel,” the section of the ceiling immediately below the crawl space.⁴ Plaintiff estimated that he placed the ladder so that it met the access panel at a point eight to twelve inches from the end of the ladder.⁵ Plaintiff was further instructed to carry a drop light and extension cord up to the crawl space, to provide illumination while he was working.

¹Defendants’ ex. G, Plaintiff’s motion for summary judgment, ex. E at 32.

²Defendants’ ex. G, Plaintiff’s motion for summary judgment, ex. E at 31.

³Ibid 32.

⁴Ibid 32.

⁵Ibid 34.

The floor of the salon was comprised of stone tile, and Plaintiff testified that it was slippery at the time of the accident.⁶ Plaintiff instructed his co-worker, “Albero”, to secure the ladder.⁷ Although Plaintiff did not watch what Albero was doing, he believed that Albero was holding the ladder with his hands, or placing his foot on one of the lower rungs of the ladder.⁸ Plaintiff then began to ascend the ladder, carrying the extension cord and the drop light. Plaintiff testified that he reached a point about ten feet up the ladder, where he was able to see into the crawl space.⁹ Plaintiff had placed the light and the extension cord into the crawl space and was attempting to enter the crawl space himself when he fell to the floor and sustained injury.¹⁰

This action was commenced on August 23, 2006. Plaintiff asserts claims against Nubest for common law negligence, as well as violations of Labor Law §§ 200, 240, and 241. On July 18, 2007, Defendants served a Third-Party complaint on R & Z Contractors, asserting claims for contribution and indemnity. Although R & Z did not have Workers’ Compensation coverage at the time of the accident, Plaintiff has not asserted a direct cause of action against his employer. By order dated December 4, 2007, this court granted Defendants partial summary judgment on the issue of liability with respect to their Third-Party claim. The order was granted based on the failure of Third-Party Defendants in answering the Third-Party complaint and responding to the summary judgment motion.

By order dated October 8, 2008, this court granted Plaintiff partial summary judgment on the issue of liability with respect to his Labor Law § 240(1) claim. In opposition to the motion, Defendants had submitted the affidavit of Nubest’s Maintenance Manager, Jose Andres, who had measured both the height of the ceiling and the length of the ladder. According to Andres, the distance from the floor to the ceiling was 11 feet, 8 inches, and each section of the extension ladder was 12 feet long. Thus, assuming that the ladder was almost perpendicular to the floor, the ladder would have rested on the

⁶Ibid 37.

⁷Ibid 36.

⁸Ibid 37-38.

⁹Ibid 38-39.

¹⁰Ibid 39, 47.

control panel at a point only a few inches from the end of the ladder. Andres' measurement suggested that the ladder was not properly placed and Plaintiffs' conduct may have been the sole proximate cause of the accident. However, the court refused to consider Andres' affidavit because he was not disclosed as a potential witness until after Plaintiff made his summary judgment motion. In the order, the court directed a hearing on the issue of damages to be held on December 10, 2008. By order dated December 4, 2008, the Appellate Division, Second Department denied Defendants' motion for a stay of the hearing, pending determination of an appeal from this court's order.

Defendants move for leave to reargue Plaintiff's motion for summary judgment to the extent that the court granted partial summary judgment with respect to Plaintiff's Labor Law § 240(1) claim. Defendants argue that Andres' affidavit should have been considered because Andres was not an eyewitness to the accident. Defendants assert that Plaintiff had previously worked at Nubest and was aware that Andres was the Maintenance Manager. Additionally, Defendants assert that the negligence of a co-employee, Albero, was a substantial factor contributing to the accident. Thus, Defendants argue that they are subject to only an apportionment of fault and that Third-Party Defendant R & Z Contractors may be primarily responsible for the accident.

Third-Party Defendants move to vacate the default judgment entered with respect to liability on Defendants' Third-Party claim. Deborah Zagari, the secretary of R & Z Contractors, asserts that she forwarded a copy of the Third-Party summons and complaint to her insurance broker and assumed that the insurer, Utica First Insurance Company, was defending R & Z in the action. The court notes that Utica First disclaimed coverage on August 16, 2007 on the ground that their policy contained an exclusion for injury to employees of the insured, who would be covered by Workers Compensation. Defendants' motion for a default judgment on the Third-Party claim was made on October 5, 2007, after Utica had already disclaimed coverage. However, R & Z claims to have been misled by Defendants' notice of motion, which seeks a default judgment against "Third-Party Defendants TJC Development, LLC, d/b/a Tee Jay Construction." Nevertheless, R & Z Contractors was properly named as the Third-Party Defendant in both the caption and the affirmation in support of motion.¹¹

The Defendants' application to stay all proceedings until this matter was heard by the Court was

¹¹Third-party Defendant R & Z' ex. H.

granted on November 20, 2008 when the Court signed the Order to Show Cause.

The court will begin by considering Third-Party Defendants' motion to vacate the default judgment. CPLR § 5015(a) provides that a party may be relieved from a judgment on the ground of, among other things, "excusable default." A motion seeking to vacate a default under this provision must be made within one year after service of a copy of the judgment or order with written notice of entry (CPLR § 5015(a)[1]). The Defendant must demonstrate a reasonable excuse for its delay in appearing and answering the complaint or motion and a meritorious defense to the action (*Moore v Day*, 55 AD3d 803 [2d Dept 2008]). In making this discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether the default was willful, and the strong public policy in favor of resolving cases on the merits (*Id* at 804).

The default judgment with notice of entry was served on February 13, 2008. The motion to vacate the default was made when the order to show cause was signed on February 2, 2009. Thus, the motion to vacate the default was timely. The court notes that Third-Party Defendants delayed almost a year in making the motion. However, there appears to be no prejudice to Defendants. The court concludes that R & Z had a reasonable excuse for the default in answering the Third-Party complaint in that it forwarded the pleading to its insurance broker and reasonably believed that its insurer was providing a defense. As noted, the insurer disclaimed coverage prior to Defendants' motion for the default judgment. However, Third-Party Defendants may have been misled by the notice of motion which did not properly name R & Z as the party against whom relief was requested. The court concludes that R & Z had a reasonable excuse for failing to answer the motion.

As a meritorious defense, R & Z submits a release executed by Plaintiff on November 29, 2007. The release recites that it was given "in consideration of \$25,000 and full satisfaction of the medical bills for treatment rendered to the right arm resulting from the accident of 4/3/06 up to this date." Workers Compensation Law § 11 provides that, "[I]f an employer fails to secure the payment of compensation for his or her injured employees...as provided in [§ 50 of the Workers Compensation Law], an injured employee...may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the Defendant plead as a

defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee.”

A common law action against an employer who has failed to secure Workers Compensation coverage for its employees may be settled, provided the employer and the employee are both acting in good faith (*Ochal v Television Technology Corp.*, 26 AD3d 575 [3d Dept 2006]). If Plaintiff gave the release to R & Z in good faith, it relieves R & Z from liability for contribution to Nubest. General Obligations Law Section 15-80(b). While the release in favor of R & Z does not discharge Nubest, it will reduce Plaintiff’s claim against Defendants to the extent of the amount stipulated by the release, \$25,000, the amount of the consideration paid for it, or in the amount of R & Z’ equitable share of the damages, whichever is greatest (General Obligations Law § 15-108). Nubest argues that “the reasonableness of the supposed settlement amount is called into question, [and] no evidence of actual payment is offered.” However, absent a showing that the release was given in bad faith, R & Z has made a sufficient showing of a meritorious defense. Third-Party Defendants’ motion to vacate the default judgment is **granted**. Third-Party Defendants’ answer to the Third-Party complaint shall be deemed served in the form annexed as exhibit F to Third-Party Defendants’ motion.

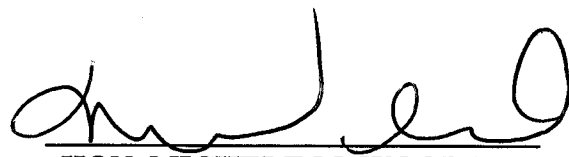
Since the default judgment granting Defendants indemnity has been vacated, the court will consider Defendants’ motion for leave to reargue Plaintiff’s summary judgment motion. Labor Law § 240(1) in pertinent part provides, “All contractors and owners...in the..repairing, altering...of a building or structure shall furnish or erect...for the performance of such labor...ladders...which shall be so constructed, placed, and operated as to give proper protection to a person so employed.” Liability under § 240(1) is “absolute” in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work (*Blake v Neighborhood Housing Services*, 1 NY3d 280, 287 [2003]). Although absolute, liability is contingent on a statutory violation and proximate cause (Id). When those elements are established, contributory negligence cannot defeat Plaintiff’s claim (Id). The improper placement of a ladder may give rise to a Labor Law § 240(1) violation (*Klein v New York*, 89 NY2d 833 [1996]). However, an owner or contractor will not be liable where the worker is entirely at fault, and his conduct is the sole proximate cause of the injury (*Blake v Neighborhood Housing Services*, supra, 1 NY3d at 290-92).

The names of eyewitnesses to the occurrence are discoverable if they are material and necessary to the prosecution or defense of the action (CPLR § 3101[a]; *Zayas v Morales*, 45 AD2d 610 [2d Dept 1974]). If a showing of materiality and necessity is made, a party may discover the names of not only witnesses to the event, but also “those who witnessed at first hand any element that reflects on the liability issue in the case” (45 AD2d at 613). Although Andres did not observe Plaintiff fall, because he observed the ladder and the ceiling, his identity as a witness was discoverable. Nevertheless, since Plaintiff had the opportunity to inspect both the ladder and the ceiling, there was no prejudice, and Andres’ affidavit should have been considered in opposition to the summary judgment motion (See CPLR § 3101[d]). Andres’ affidavit suggests that Plaintiff may have chosen a ladder which was too short and placed it where it was likely to fall off the control panel. Since Defendants showed a triable issue as to whether Plaintiff’s conduct was the sole proximate cause of the accident, summary judgment on the issue of liability on the Labor Law § 240(1) claim should not have been granted. Accordingly, leave to reargue Plaintiff’s motion for summary judgment is **granted**. Upon reargument, Plaintiff’s motion for partial summary judgment on his Labor Law § 240(1) claim is **denied**. It is hereby **ORDERED**, that the stay issued on December 10, 2008 is hereby vacated. It is further **ORDERED**, that the parties are directed to appear for trial in Central Jury on July 20, 2009 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: June 12, 2009
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

H:\Zolie Kish v Nubest Salon & Spa.wpd

ENTERED
JUN 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE