

Sutter v York Ave. Assoc. of NY

2009 NY Slip Op 31966(U)

August 7, 2009

Supreme Court, New York County

Docket Number: 104987/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Anthony Sutter

INDEX NO. 104987/07

MOTION DATE 5/20/09

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

York Avenue

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that Site Safety's motion for dismissal of the third-party complaint, and all other claims and causes of actions against Site Safety is granted pursuant to CPLR 3212, and such claims are hereby dismissed. And it is further

ORDERED that Site Safety serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 8/7/09

[Signature]
HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 35

-----X
ANTHONY SUTTER AND JENNIFER SUTTER

Index No.: 104987/07

Plaintiff,

-against-

YORK AVENUE ASSOCIATES OF NY AND M.D.
CARLISLE CONSTRUCTION COMPANY,

Defendants.

-----X
YORK AVENUE ASSOCIATES OF NY AND M.D.
CARLISLE CONSTRUCTION COMPANY,

TP Index No.: 590938/07

Third-party plaintiff

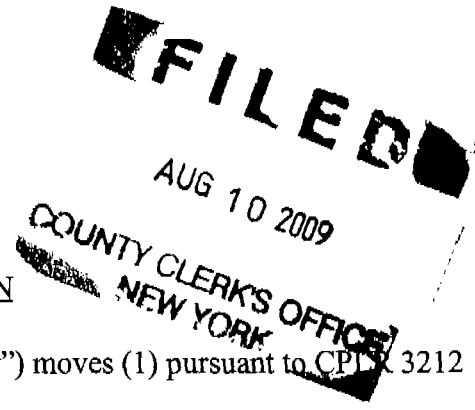
-against-

SITE SAFETY, LLC,

Third-party defendants.

-----X

MEMORANDUM DECISION



Third-party defendant Site Safety, LLC ("Site Safety") moves (1) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint, and all other claims and causes of actions against Site Safety and (2) pursuant to CPLR 3211 and applicable caselaw dismissing the third-party complaint and all other claims, including causes of actions against Site Safety.

*Factual Background*¹

This action arises from a construction site accident that occurred on April 1, 2005 at 438 East 83rd Street, New York, New York. On the date of plaintiff's accident, York Avenue Associates ("York") owned the premises and M.D. Carlisle ("Carlisle") was the Construction Manager ("CM"). Plaintiff, Anthony Sutter, was a laborer for Century-Maxim and was injured

¹ The Factual Background is taken from Site Safety's motion, third-party complaint, and the complaint.

while moving and stacking lumber. Plaintiffs commenced an action against York and Carlisle, alleging negligence, and violations of Labor Law sections 200, 240, and 241. In turn, York and Carlisle commenced a third-party action against Site Safety, alleging common law contribution, indemnification and breach of contract.

Site Safety's Motion

Site Safety argues that since it had not authority to direct, control, stop and/or supervise or even coordinate plaintiff's work, and that dismissal of the Labor Law 200 and negligence claims is warranted.

Site Safety contends that plaintiff testified at his deposition that some time before lunch (12:00PM), he was carrying a load of three or four or more of three by fours on his shoulder, and upon putting them down on a lumbar pile, a reshore hit him from behind in the back of his head. The reshore was normally bolted to the floor. A man named "Bobby" told him that a reshore hit him in the back of the head. The reshore appeared to fall forward, as it was no longer bolted at the bottom. There was no damage to the hard hat he was wearing. Leroy told him to fill out an accident report, so he went to a super, named "Bobby" who actually filled out an accident report for him. He took a break then returned to work and completed the day's work with his gang. The plaintiff was allegedly hit by a reshore which was not secured sufficiently by Century Maxim.

Site Safety also contends that its contract with Carlisle establishes that Site Safety was contracted to provide site safety services in connection with New York City Department of Building ("NYCDOB") requirements for the 438 East 83rd Street project. Site Safety was to act solely in advisory capacity, nothing more, at the project.

Site Safety was retained to do nothing more than perform the functions delineated

in the Department of Buildings' Manual for Site Safety Programs (1 RCNY §26-01 [g][3]), e.g., inspecting the construction site to monitor compliance with federal, state and local safety rules and regulations, generating and maintaining safety records and coordinating safety meetings. Site Safety's role on the site was limited to performing some safety related tasks. Site Safety was not a supplier of safety equipment, and did not have the authority to direct, control and/or supervise the manner in which the trades performed their work, nor did Site Safety ever attempt to do so.

Site Safety also argues that it had no authority to stop the work, and that even had they had such authority, it does not rise to requisite degree of supervision and control over the work being performed to sustain a Labor Law §200 or common law negligence claim. Peter Amato, Vice President of Site Safety appeared for a deposition on behalf of the third-party defendant Site Safety on November 3, 2008. Mr. Amato testified that he was contracted by the owner Carlisle to act solely in an advisory capacity and that Site Safety did not have any authority to direct/control/supervise trades' work (Pages 101-102). Amato's testimony definitively established that the means and methods and all other techniques, etc., of how reshores were to be secured was solely controlled by the concrete subcontractor Century Maxim (page 76).

Further, Brett O'Brien ("O'Brien"), who testified on behalf of the defendants York and Carlisle, testified that Site Safety did not control, supervise and/or direct the trades' work. O'Brien testified that securing reshores at the jobsite was completely the responsibility of the concrete subcontractor Century Maxim. Such testimony confirmed Site Safety's advisory capacity on safety at the jobsite.

Site Safety further contends that it never had any notice, which was also not pled against

Site Safety. Further, Site Safety never "stood in the shoes" of the owner and its contractor and never performed their duties and obligations of the owner and/or contractor. Site Safety, instead, simply acted for specific limited purposes defined in the contract as delineated in the DOB's Manual for Site Safety Programs, and nothing more.

Site Safety further contends that plaintiff's Labor Law §240(1) and §241(6) causes of action should be dismissed as against Site Safety because Site Safety is not an owner, contractor and/or an entity responsible under either section. Site Safety contends that third-party plaintiffs previously moved for summary judgment to dismiss all claims on the ground that they did not "exercise control, supervise or direct the means and method of plaintiff's work at the time of the alleged incident." Site Safety is not a contractor or owner nor an agent of either of them under Labor Law §240(1), and, therefore, has no liability. Plaintiff here simply named Site Safety as a party with some connection to the premises, when the documentary and testimonial evidence show that Site Safety did not cause any injury to plaintiff, nor direct or control his activity. Therefore, plaintiff failed to state a cause of action against Site Safety.

Opposition

Third-party plaintiffs argue that Site Safety has both misquoted and mischaracterized Mr. Amato's testimony. Contrary to third-party defendant's contention, Mr. Amato's testimony confirms that Site Safety's contractual duties and obligations far exceeded that of an advisory role. Amato's testimony confirms that Site Safety agreed to: "(1) '[A]ssist with and monitor the indoctrination and education of all contractors slash subcontractors, as they're requirements set forth in the project safety program'; (2) 'Make certain contractors and subcontractors adhere to the project safety program'; and (3) 'It's the intent of this agreement for Site Safety, LLC, to

provide and administer a comprehensive site safety program.” Site Safety simply ignores the plain and unambiguous language contained in the contract.

Further, Site Safety argues that the subject contract reveals that Site Safety’s contractual duties and obligations far exceeded that of an “advisory” role. First, the contract unambiguously states “[i]t is the intent of this agreement for Site Safety, LLC to provide and administer a comprehensive Site Safety Program.” The contract further requires Site Safety to: (a) “Direct laborer and/or carpenter provided to install temporary barriers, floor opening covers and vertical fencing at all deck edge perimeters”; (b) “Make certain contractors and subcontractors adhere to the Project Safety Program”; (c) “Assist with and monitor the indoctrination and education of all contractors/subcontractors as the requirements set forth in the project Safety Program”; (d) “Assist in pre-job setup including state posting requirements and locate/meet with local industrial clinic/doctors to be used”; (e) “Conduct safety training for contractor/subcontractor employees as needed”; (f) “Coordinate safety training for contractor/subcontractor employees and supervisors as needed”; (g) “Meet with New York City Best Squad representative during all inspections”; (h) “Prepare a New York City Project Safety Program ...”; (i) Staff the new construction project with a New York City-licensed Site Safety Manager, at all times the job is open; and (j) “Monitor contractor/subcontractor compliance with all federal state and local laws related to construction.” Therefore, third-party plaintiffs argue, it can hardly be said that its contractual duties and responsibilities were limited to that of an “advisory capacity.” Site Safety had affirmative duties and obligations pursuant the contract and if Site Safety had properly “conduct[ed] two job site safety inspections per day” as required by the contract, the alleged defect would have discovered and the alleged accident averted.

* 7]

Additionally, third-party plaintiffs argue that Amato's testimony should be disregarded. The contract between Carlisle and Site Safety was executed in April 1, 2004 by Mr. Rudy Short, who has since passed away. Amato was not an employee of Site Safety when the subject contract was negotiated, drafted and executed (p. 30). Amato does not know whether Exhibit A is a standard Site Safety contract or if it was one specifically negotiated for this project (pp. 30-31). Therefore, Amato is not in a position to interpret the terms and conditions of the subject contract. His interpretation is not only inappropriate but completely at odds with the express terms and conditions of the contract.

Finally, Site Safety failed to meet its burden of establishing that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law. There are numerous issues of fact as to Site Safety's contractual duties and obligations. It is Carlisle's position that pursuant to the subject contract Site Safety had the affirmative duty "to provide and administer a comprehensive site safety program." Further, if Site Safety had properly "conduct[ed] two job site safety inspections per day" as required by the contract, the alleged defect would have discovered and the alleged accident averted (p. 2).

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a

prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Negligence and Labor Law 200

In order to establish liability for common-law negligence or a violation of Labor Law 200, there must be a showing that the defendant had “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; see *Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470, 810 NYS2d 493 [2006]; *Gatto v Turano*, 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2003]; *Duncan v Perry*, 307 AD2d 249 [2003]; *Giambalvo v Chemical Bank*, 260 AD2d 432 [1999]). Liability under Labor Law 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work (*Hughes v Tishman Const. Corp.*, 40 AD3d 305, 836 NYS2d 86 [2007]).

The record clearly indicates that Site Safety had no supervision or control over the manner in which plaintiff performed his work which led to his injuries, and plaintiff failed to raise any issues of fact as to Site Safety’s responsibility for plaintiff’s injuries. All of Site Safety’s obligations under its contract with third-party plaintiff related to administering a site safety program, and training and educating workers of safety requirements, and did not involve supervising or controlling the manner in which laborers performed their respective tasks. Although Site Safety was obligated to direct laborers to install fencing, covers for floor openings, and barriers, there is no indication that such obligation had any bearing on plaintiff’s accident, which was allegedly caused by an unsecured reshore hitting plaintiff in the back of his head. Nor

is there any indication that Site Safety's obligation to perform two inspections a day sufficient to raise an issue of fact (*see Doherty v City of New York*, 16 AD3d 124, 791 NYS2d 523 [2005] ["Since Total Safety was not the supplier of safety equipment to the job site, did not direct, supervise or control plaintiff or his coworkers in the performance of their duties, and there is no evidence that it acted negligently or otherwise unreasonably as the site safety consultant, the motion court properly released it from this litigation]; *Uva v H.R.H. Const. Corp.*, 11 Misc 3d 144, 819 NYS2d 852 [App. Term 1st Dept 2006] [while the "on-site safety manager may have had overall responsibility for the safety of the work done by the subcontractors, such duty to supervise and enforce general safety standards at the work site was insufficient to raise a question of fact as to its negligence"]).

Nor is there any showing that Site Safety had notice of the allegedly unsecured reshore that tilted and struck the plaintiff (*see Waller v Site Safety LLC*, 28 AD3d 236, 813 NYS2d 379 [1st Dept 2006]).

Third-party plaintiffs' contention that Amato's testimony should be disregarded is inconsequential. O'Brien, an employee produced by third-party plaintiffs' testified that (1) Site Safety's role was "to interpret the New York City safety code" for the contractors and "have a daily presence" at the job site (p. 10); (2) that Century Maxim was the trade which installed the reshores, which were used to hold concrete in place (p. 27), and that (3) the party assigned to ensure that the reshores were installed and secured properly was "Century Maxim and the people installing them" (pp. 32-33).

Further, it is uncontested that Site Safety was not an agent of third-party plaintiffs.

Therefore, Site Safety's motion for summary dismissal of the complaint and all cross-

claims asserted against it is granted

Labor Law 240(1) and 241(6)

Labor Law § 240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). Third-party defendants contracted with Site Safety to provide site safety services, and it is uncontested that Site Safety was neither an owner, contractor, or agent thereof for purposes of Labor Law 240(1) or 241(6). Notably, third-party plaintiffs did not address this branch of Site Safety's motion. Therefore, any claims as asserted against Site Safety under Labor Law 240(1) and 241(6) are dismissed. The Court does not address whether such claims are subject to dismissal pursuant to CPLR 3211.

Conclusion

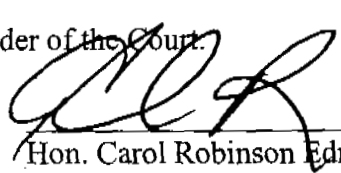
Based on the foregoing, it is hereby

ORDERED that Site Safety's motion for dismissal of the third-party complaint, and all other claims and causes of actions against Site Safety is granted pursuant to CPLR 3212, and such claims are hereby dismissed. And it is further

ORDERED that Site Safety serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 7, 2009



Hon. Carol Robinson Edmead, J.S.C.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK