

Cazho v R. Design Homebuilders, Inc.

2009 NY Slip Op 32829(U)

October 21, 2009

Supreme Court, Queens County

Docket Number: 18085/2006

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

	x	Index Number <u>18085</u> 2006
GALO CAZHO		
-against-		Motion Date <u>July 7,</u> 2009
R. DESIGN HOMEBUILDERS, INC., et al.		Motion Cal. Number <u>4</u>
	x	Motion Seq. No. <u>4</u>

The following papers numbered 1 to 43 read on this motion by defendants Martin Schaffer and Collier Realty LLC (Collier Realty) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims under Labor Law § 200 and common-law negligence, and for an order striking the answers of co-defendants Road Runner Carpentry, Inc. (Road Runner), Carlos Miranda and Maria F. Miranda based upon the failure of those defendants to appear for a court-ordered deposition, and granting Schaffer and Collier Realty indemnification against co-defendants R. Design Homebuilders (R. Design), Road Runner, Carlos Miranda, and Maria F. Miranda; on the cross motion by the plaintiff pursuant to CPLR 3126 striking the answer of the defendants Road Runner, Carlos Miranda, and Maria F. Miranda, or alternatively striking their Workers' Compensation defense and precluding these defendants from producing any witnesses at trial, and from producing in motion practice any affidavits on behalf of any persons with knowledge of any facts relevant to the circumstances of the underlying accident, and pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law § 240(1); on the cross motion by the defendant R. Design pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims under common-law negligence and Labor Law § 200; on the cross motion by the defendants Road Runner, Carlos Miranda and Maria F. Miranda pursuant to CPLR 3212 for summary judgment dismissing all claims and cross claims; and on the cross motion by the defendants Schaffer and Collier Realty pursuant to CPLR 3126 directing the plaintiff to

appear for a neuropsychological examination to be performed on behalf of the defendants without any third parties being present.

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Notices of Cross Motion - Affidavits - Exhibits.....	5-20
Answering Affidavits - Exhibits.....	21-31
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

The branch of the cross motion by the defendant R. Design granting leave for Salter & Sachs f/k/a Bolan Jahnsen Salter & Sachs to withdraw as counsel of record and a stay of all proceedings was withdrawn by counsel on June 8, 2009.

This is an action to recover money damages for personal injuries allegedly suffered as a result of a construction site accident that occurred on June 26, 2006, at property located at 143-12 181st Street, Queens, New York. The subject property was purchased by the defendant Schaffer on July 25, 2005. The subject property contained a single-family home. Schaffer decided to demolish the single-family home and build two attached two-family homes on the property. Schaffer and R. Design entered into a joint venture, where R. Design was hired as the general contractor to do this work and each party would receive profit and revenue from the sale of the property after it had been improved. On June 1, 2006, the property was transferred to Collier Realty, an existing company in which Schaffer was a principal. Prior to the accident, Road Runner was hired by R. Design as a subcontractor to frame the building and construct an interior cinder block wall that would separate the two homes. The plaintiff, a laborer, was an employee of Road Runner. Prior to the accident a wooden scaffold was constructed by Road Runner employees. The plaintiff was working on this wooden scaffold when it collapsed causing the accident. The plaintiff brought claims for Labor Law §§ 200, 240(1), 241(6) and common-law negligence.

The defendant Schaffer testified at an examination before trial. He testified that he purchased the premises and intended to utilize it as a rental dwelling. A few months later he decided to demolish the existing structure and construct two attached two-family homes on the premises. He hired R. Design, in which Ryan Baizon was a principal to act as the general contractor for the construction work. An agreement between Schaffer and Baizon was entered into and the parties agreed that any profit left after selling the property would be split

fifty/fifty. There was never a final writing that memorialized their agreement. Mr. Schaffer testified that he transferred the property in early June 2006 to Collier Realty, a realty development company in which he was the president. He testified that he would go to the work site about once a week to look around and would stay for about a half-hour to an hour. He testified that he was not at the work site when the accident happened. He further testified that he did not supervise any of the subcontractors. He stated that he never requested any changes be made during the construction and did not speak to anyone regarding the safety of the work site. He testified that he was not on the property on the date of the accident and he first learned of the accident when he received the summons and complaint associated with the lawsuit.

Ryan Baizon testified on behalf of R. Design. He testified that he is the vice-president of R. Design and his brother is the president. R. Design was in the business of building homes. Prior to the construction project at issue, R. Design had built around 10 residential homes. He testified that R. Design would normally hire subcontractors to perform all the construction work. R. Design was retained by Schaffer to construct two attached homes on the property. This was the first relationship that R. Design ever had with Schaffer. R. Design hired an architect and filed all necessary documents to obtain building permits. R. Design hired subcontractors to do all the work for this construction project. Mr. Baizon testified that he was on the construction site daily from 8:00 A.M. to 5:00 P.M. He testified that he was on site to supervise the scheduling of the various subcontractors' work, but that he did not control or supervise the work of any subcontractor or its employees, including the plaintiff. Mr. Baizon testified that R. Design hired Road Runner as a subcontractor for the construction project. Mr. Baizon testified that there were two crews from Road Runner working at the construction site. One crew was constructing the wooden exterior framing and the other crew was constructing the cinder block wall. He testified that the mason workers from Road Runner, in the course of constructing the cinder block wall, had built and utilized platforms that were attached to the wall. He testified that he was at the construction site and observed the laborers build the cinder block wall and wood frame surrounding the wall. He also observed the construction and use of the wooden platform from which the plaintiff ultimately fell when it collapsed. Mr. Baizon further testified that he was not at the construction site at the time of the accident, but arrived approximately 30 minutes after the accident.

The plaintiff testified at an examination before trial. He testified that he had been employed by Road Runner as a laborer for about a year prior to the accident and was paid \$10 an hour in cash. He testified that he had been working this construction project for two to three weeks before the accident happened. He testified that he was supervised by a Road Runner employee, Angel Neto. On the day of the accident, the plaintiff was working at the construction site framing the exterior walls and roof. The plaintiff testified that he was

directed by Mr. Neto to move tools and supplies, including nail guns, nails, and two-by-fours from the first floor to the second floor. Though the stairwell had been framed out from the basement level to the second floor, the stairs had not yet been installed. The stairwell was approximately three or four feet wide, with a stairwell on each side of the cinder block wall that separated the two attached premises. As part of the process of building the cinder block wall, the masons had built a scaffold over the stairwell. The scaffold was made by nailing a few two-by-fours across the width of the stairwell from the exposed vertical studs that were adjacent to the cinder block wall on one side to the vertical studs on the other. Planks were then laid across the two-by-fours creating a platform. The scaffold had previously been used to hold cinder blocks during the construction of the wall between the two attached dwellings. After giving the instructions to the plaintiff, Mr. Neto stepped up to the second floor using the platform. The plaintiff testified that he then stepped onto the platform and began to hand supplies up to Mr. Neto. The plaintiff began to hand cinder blocks that were on the platform up to the second floor. The platform then collapsed out from under him causing the plaintiff to fall into the basement at least 12 feet below.

Plaintiff's coworker, Franklin Pomavilla, testified at an examination before trial. He testified that he was working with the plaintiff and was about six or seven feet away from the plaintiff when the accident happened. He testified that he and the plaintiff were preparing to pass equipment and material from the first to the second floor through a framed stairway opening. He stated that the defendant Road Runner had ladders for the work that was going to be performed, but it was the plaintiff's idea to use a mason's platform.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). For an owner or general contractor to be liable under Labor Law § 200 or common-law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Here, the defendants Schaffer and Collier Realty established their prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence put forth by the defendants, established as a matter of law that none of these defendants had notice of any defective condition or had the authority to control or supervise the plaintiff, nor did the plaintiff receive any instructions from the defendants in the performance of his duties (*see Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact. On the other hand, the defendant R. Design failed to make a prima facie showing of entitlement to summary judgment dismissing the Labor Law § 200 or common-law negligence claims. R. Design failed to establish that it did not have actual or constructive notice of the unsafe

condition that caused the accident (*see Nasuro v Pl Assoc., LLC*, 49 AD3d 829 [2008]; *Godoy v Baisley Lbr. Corp.*, 40 AD3d 920 [2007]).

Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Here, the plaintiff laborer's injuries were caused by a fall from a height while performing a protected activity under Labor Law § 240(1) (*see Ford v HRH Constr.*, 41 AD3d 639 [2007]). The plaintiff made a prima facie showing of entitlement to summary judgment by showing that the scaffold he was working from did not provide him with proper protection for the task he was doing. In opposition, the defendants failed to raise a triable issue of fact. The defendants have not raised an issue of fact as to whether the plaintiff's actions were the sole proximate cause of the accident (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]). The fact that there were ladders on site is insufficient to prove that the plaintiff's action in standing on the scaffold was the sole proximate cause of the accident. Inasmuch as there is no evidence that the plaintiff received instructions to use the ladders to complete his work, the evidence does not establish that the plaintiff failed to follow instructions to use other safety equipment that the defendants, now with the benefit of hindsight, claim he should have used instead of the scaffold (*see Balzer v City of New York*, 61 AD3d 796 [2009]). In fact, not only was the manner in which the plaintiff performed his work consistent with his supervisor's instructions, but the plaintiff did the work with the tacit approval of his supervisor and was actually following the example set by his supervisor when he used the platform (*see Rico-Castro v Do & Co New York Catering*, 60 AD3d 749 [2009]; *Pichardo v Aurora Contrs.*, 29 AD3d 879 [2006]).

The defendants Collier Realty and Schaffer have not established their prima facie entitlement to summary judgment on the issue of common-law indemnification against the defendant R. Design. Summary judgment on a claim for common-law indemnification is only appropriate where there are no triable issues of fact as to the degree of fault attributable to each party involved (*see Tama v Gargiulo Bros.*, 61 AD3d 958 [2009] ; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]). Furthermore, the defendants Collier Realty and Schaffer failed to establish as a matter of law that the defendant R. Design had the authority to direct, supervise or control the work of the plaintiff (*see Nasuro*, 49 AD3d at 832; *Bendetto v Carrera Realty Corp.*, 32 AD3d 874 [2006]). On the other hand, the defendants Collier Realty and Schaffer have established their prima facie entitlement to summary judgment on the issue of common-law indemnification against the defendant Road Runner. The defendant Road Runner failed to raise an issue of fact in opposition. Inasmuch as the defendant R. Design failed to establish that it was free from negligence, it is not entitled to summary judgment on its claim for indemnification from the defendant Road Runner.

Turning next to the branches of the motion and cross motions to strike the answer of the defendants Road Runner, Carlos Miranda, and Maria F. Miranda, while striking a pleading pursuant to CPLR 3126(3) is a drastic remedy, it is warranted where a party's conduct is willful, contumacious or in bad faith (*see Devito v J&J Towing*, 17 AD3d 624 [2005]; *Beneficial Mtge. Corp. v Lawrence*, 5 AD3d 339 [2004]). Here, the willful and contumacious character of these defendants can be inferred from the repeated failure to appear for a scheduled examination before trial even after being directed to do so by the court (*see Sowerby v Camarda*, 20 AD3d 411 [2005]; *Rowell v Joyce*, 10 AD3d 601 [2004]). Furthermore, the explanation proffered by the defendants' counsel that he is no longer in contact with these defendants does not excuse the repeated failure to comply.

The cross motion by the defendants Road Runner and Miranda for summary judgment dismissing the complaint is denied as the motion was not supported by any admissible evidence from a party with knowledge of the facts related to the motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Finally, the court turns to the cross motion by the defendants Schaffer and Collier Realty pursuant to CPLR 3126 directing the plaintiff to appear for a neuropsychological examination. The defendants retained Dr. William Barr to perform a neuropsychological examination of the plaintiff. The plaintiff requests that a Spanish speaking psychologist attend the examination and that at the time of the scheduling of the examination the defendants' expert provide the plaintiff with a list of the tests that he intends to perform. It would not be fair to allow the plaintiff to have his own expert attend the examination nor would it be fair to provide a list of the tests to be performed as it would give the plaintiff an unfair advantage at trial. However, the plaintiff is entitled to be examined in the presence of his attorney or other legal representative and an interpreter as long as they do not interfere with the performance of the examination (*see Ponce v Health Ins. Plan of Greater N.Y.*, 100 AD2d 963 [1984]).

Accordingly, the branches of the motion by the defendants Schaffer and Collier Realty for summary judgment dismissing the Labor Law § 200 and common-law negligence claims are granted and those claims are dismissed. The branches of the motion by Schaffer and Collier Realty for summary judgment on its common-law indemnification cross claim against the defendant R. Design, Carlos Miranda and Maria F. Miranda are denied. The branch of the motion by Schaffer and Collier Realty for summary judgment on its cross claim for indemnification against the defendant Road Runner is granted.

The branches of the cross motion by the defendant R. Design for summary judgment dismissing the Labor Law § 200 and common-law negligence claims is denied. The branch

of the cross motion by R. Design for summary judgment on its common-law indemnification cross claims against the defendant Road Runner is denied.

The cross motion by the defendants Road Runner, Carlos Miranda, and Maria F. Miranda pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

The branches of the motion by the defendants Schaffer and Collier Realty and the cross motions by the defendant R. Design and the plaintiff to strike the answer of the defendants Road Runner, Carlos Miranda, and Maria F. Miranda are granted and the answers of those defendants are stricken unless those defendants make themselves available for a deposition within thirty (30) days after service of a copy of this order with notice of entry.

The cross motion by the defendant Schaffer and Collier Realty pursuant to CPLR 3126 directing the plaintiff to appear for a neuropsychological examination is granted to the extent that the plaintiff is ordered to appear at a neuropsychological examination to be performed on behalf of the defendants at a time to be determined by the parties in the presence of the plaintiff's counsel and an interpreter.

Dated: October 21, 2009

AUGUSTUS C. AGATE, J.S.C.