Zanabria v Ettinger

2009 NY Slip Op 33222(U)

October 16, 2009

Supreme Court, Queens County

Docket Number: 25635/2005

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

MARVIN ZANABRIA,	Index Number 25635 2005
Plaintiff,	Motion Date August 12 2009
- against -	
ERIC ETTINGER, et al.	Motion Cal. Number 29
Defendants.	Motion Seq. No. 3

The following papers numbered 1 to 40 read on this motion by defendants Robert Ettinger, P.E., P.C. d/b/a Ettinger Engineering Associates s/h/a Robert Ettinger Associates and s/h/a Ettinger Engineering Associates, and Eric Ettinger (Ettinger defendants) for summary judgment dismissing all claims and cross claims against them; on this cross motion by F&M General Contracting Corp. (F&M) for leave to amend its answer to assert the affirmative defense of res judicata and collateral estoppel and for summary judgment dismissing all claims and cross claims in its favor as barred under the doctrines of res judicata and collateral estoppel; on this cross motion by Stephen Paul Ackerman for summary judgment in his favor dismissing all claims and cross claims against him; and on this cross motion by plaintiff to supplement his verified bill of particulars, pursuant to CPLR 3043 (c), to include a particularization that 12 NYCRR § 23-1.12(c)(2) was violated.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits......................................	1-8
Notices of Cross Motions/Answering - Affidavits - Exhibits........	9-28
Reply Affidavits..	29-40

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on January 25, 2005, while working on the renovation of defendant Eric Ettinger's personal one-family residence, located in Great Neck, New York. The complaint alleges that plaintiff sustained the amputation of two fingertips while using a table saw that was brought to the job site by his employer, R&J Renovations Corp./Roger Hernandez. In addition to suing defendant Eric Ettinger, plaintiff also sued the engineering company (of which defendant Eric Ettinger is a principal), and the architect on the project. The complaint alleges three causes of action against each defendant: common law negligence, Labor Law § 200 and Labor Law § 241(6). In the bill of particulars, it is alleged that the dangerous condition at the job site which resulted in the subject accident was an unguarded table saw. The Ettinger defendants move, and defendant Stephen Paul Ackerman cross-moves, for summary judgment in their favor on the ground that they did not supervise and control plaintiff's work, nor did they have the authority to direct the construction procedures or safety measures employed at the work site. Defendant F&M General Contracting Corp. (F&M) further cross-moves for leave to amend its answer to assert the affirmative defense of res judicata and collateral estoppel, and for summary judgment dismissing all claims and cross claims in its favor as barred under the doctrines of res judicata and collateral estoppel. Plaintiff opposes the motion and cross motions, and cross-moves to supplement his verified bill of particulars, pursuant to CPLR 3043(c), to include a particularization that 12 NYCRR § 23-1.12(c)(2) was violated.

The record reveals the following: On January 25, 2005, plaintiff was performing carpentry work as part of the renovation of defendant Eric Ettinger's personal family residence, located at 17 Ridge Drive East, Great Neck, New York. At the time, plaintiff was employed by R&J Renovations (R&J) and or its principal, Roger Hernandez. While in the course of cutting a piece of wood to be used as a decorative molding, plaintiff severed the tips of two fingers with an unguarded table saw. Defendant Robert Ettinger, P.C. d/b/a Ettinger Engineering Associates was the engineering company hired to assure compliance with relevant building codes, and defendant Ackerman was the architect hired to ensure that the contractors made the renovations in compliance with the architect's creative specifications. Workers' Compensation Board hearings were held on behalf of plaintiff on March 15 and December 12, 2007, as well as on September 19, 2008. On December 26, 2008, Judge Louis Davidowitz filed a Reserved Decision concluding that while F&M would oversee various projects involved in the renovation, it was not the "general contractor." F&M's work and presence on the total project ended January 6, 2005, about three weeks before plaintiff's accident. Roger Hernandez, owner of R&J, was the only person who directed plaintiff on how to perform his work and provided plaintiff with his tools to perform his work at the premises.

Motion by Ettinger Defendants

Generally

In order to impose liability upon a design engineer who performs on-site inspections of the construction work for compliance with blueprint specifications, a plaintiff must establish that the engineer exercised supervision and control over the activity resulting in plaintiff's injury (*see Becker v Tallamy, Van Kuren, Gertis & Assocs.,* 221 AD2d 1014 [1995]). The performance of on-site inspections does not constitute such supervision and control (*see Bogenrieder v Crippen Heating & Air Conditioning,* 244 AD2d 995 [1997]; *Warsaw v Eastern Rock Prods.,* 210 AD2d 883 [1994], *lv dismissed* 85 NY2d 967 [1995]; *Paterson v Hennessy,* 206 AD2d 919 [1994]). Plaintiff presented no evidence that the Ettinger defendants exercised the requisite supervision and control, and thus the motion for summary judgment in their favor is granted (*see Non-Linear Trading Co. v Braddis Assocs.,* 243 AD2d 107 [1998]; *see also Morgan v Prospect Park Assocs. Holdings,* 251 AD2d 306 [1998]).

Owner Liability

Labor Law § 200 is a codification of the common-law duty of owners and general contractors to provide construction workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876 [1993]). When an injury results from a contractor's methods, recovery cannot be had against an owner who did not exercise supervisory control over the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Lombardi v Stout,* 80 NY2d 290 [1992]). Here the Ettinger defendants made a prima facie showing that they did not exercise supervisory control over plaintiff's method of cutting the wood and did not provide the tools used by plaintiff. General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200 (*see Alexandre v City of New York,* 300 AD2d 263 [2002]). To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393 [2002]). Here, no such supervisory control was delegated to the Ettinger defendants, thus they are entitled to dismissal of the common-law negligence and Labor Law § 200 claims.

Homeowner Exemption

An owner of a one- or two-family dwelling is exempt from liability under the Labor Law unless he or she directed or controlled the work being performed (*see Bartoo v Buell*, 87 NY2d 362 [1996]; *Cannon v Putnam,* 76 NY2d 644 [1990]; *Morocho v Marino Enterprises Contracting Corp.*, 65 AD3d 675 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). This exemption is construed very strictly in favor of homeowners because they

generally do not have the business sophistication to obtain the insurance required to protect them from the absolute liability imposed by the statute (*see Lombardi v Stout,* 80 NY2d 290 [1992]; *Angelucci v Sands,* 297 AD2d 764 [2002]*).* Thus, the phrase "direct or control" is also "construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Garcia v Petrakis,* 306 AD2d 315, 316 [2003] [internal quotation marks omitted]; *see Kolakowski v Feeney,* 204 AD2d 693 [1994]). In response to defendant Eric Ettinger's prima facie showing that he is entitled to the protection of the homeowners' exemption as a matter of law, plaintiff failed to raise a triable issue of fact as to whether defendant Eric Ettinger exercised the requisite degree of direction or control necessary for the imposition of liability (*see Decavallas v Pappantoniou,* 300 AD2d 617 [2002]; *Facteau v Allen,* 293 AD2d 847 [2002). Accordingly, the branch of the motion which seeks to dismiss the claims against defendant Eric Ettinger, as owner of the premises, is granted.

Covered Activity

The Ettinger defendants also move to dismiss on the ground that plaintiff was not engaged in a "covered" activity when he was injured. There is no "bright line" rule regarding what tasks constitute repair work covered under the Labor Law, and what activities are deemed to be "routine maintenance," or "decorative modification" which is not covered. Rather, "the question of whether a particular activity constitutes a repair, decorative modification or routine maintenance must be determined on a case-by-case basis" (*Riccio v NHT Owners, LLC.,* 51 AD3d 897, 899 [2008]). In making such determinations, courts must weigh various factors including the complexity and scope of the work. Here, even if the specific work performed at time of the accident was cosmetic in nature, the project was part of an overall capital improvement, and thus was a covered activity under the Labor Law (*see Belding v Verizon New York, Inc.*, 65 AD3d 414 [2009]). Thus, there is no basis for dismissal on this ground.

Cross Motion by F&M

CPLR 3212 (a) provides that motions for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court on "good cause" shown. A cross motion for summary judgment made after the expiration of the time period set by the Court for the filing of a dispositive motion may not be considered by the court, absent a showing of good cause (*see Colon v City of New York,* 15 AD3d 173 [2005]; *Thompson v Leben Home For Adults,* 39 AD3d 624 [2005]). Here, the record reveals that plaintiff filed and served the Note of Issue on January 28, 2009, thus making May 28, 2009, the deadline for service of any dispositive motions, with five additional days upon service by mail. The cross motion in the instant case was mailed on May 28, 2009, however, it was sent to plaintiff's counsel's former address and, therefore, not forwarded and received by plaintiff's counsel until June 9, 2009. Although a change of address was on file with F&M,

the latter submits that, due to law office failure, the service list for the cross motion was mistakenly copied from one of the prior pleadings that listed plaintiff's counsel's former address. The parties discussed the error by telephone and thereupon agreed to adjourn the motion. The Supreme Court is afforded wide latitude with respect to determining whether good cause exists for permitting late motions, and it may, as here, entertain belated but meritorious motions in the interest of judicial economy where the opposing party fails to demonstrate prejudice (*see Rossi v Arnot Ogden Med. Ctr.,* 252 AD2d 778 [1998]).

F&M seeks to amend its answer to the amended complaint to include the affirmative defense that plaintiff's claims against F&M are barred by res judicata and collateral estoppel. F&M submits that the issue of whether F&M was the general contractor at the work site and whether F&M was the statutory "agent" of the owner or general contractor have already been fully and fairly litigated among the parties at a hearing before the Workers' Compensation Board (WCB), and that the WCB determined that F&M was not the general contractor on the job.

It is well established that leave to amend shall be freely given, pursuant to CPLR 3025 (b), absent prejudice or surprise. The determination to grant leave rests with the discretion of the court and should be made on a case-by-case basis *(see Mayers v D'Agostino,* 58 NY2d 696 [1982]; *Fahey v County of Ontario,* 44 NY2d 934 [1978]; *Matter of Department of Social Servs. [Katherine McL.] v Jay W.,* 105 AD2d 19 [1984]; *Fulford v Baker Perkins, Inc.,* 100 AD2d 861 [1984]). Upon review of the record, this Court concludes that granting F&M leave to amend their answer is proper. At the time of joinder of issue, the defense of res judicata was not available as the Workers' Compensation determination on plaintiff's claim had not yet been made. In addition, the delay in making the motion to amend after this determination was not so lengthy to be considered an abuse of the procedure *(cf. Gallo v Aiello,* 139 AD2d 490 [1988]). There is no merit to plaintiff's contention that he is prejudiced because of this defendant's delay in making the motion for leave to amend its answer to assert the defense of res judicata with respect to the Workers' Compensation determination.

Collateral estoppel, or issue preclusion, may be invoked in a subsequent action to prevent a party from re-litigating an issue decided against that party in a prior adjudication *(see, Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65 [1969]). In order to invoke the collateral estoppel doctrine, it is required that (1) an issue in the present proceeding be identical to that necessarily decided in the prior proceeding, and (2) in the prior proceeding the party against whom preclusion is sought was afforded a full and fair opportunity to contest the issue *(see Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271 [1988]; *Ryan v New York Tel. Co.*, *supra*). Further, the doctrine of collateral estoppel is "applicable to give conclusive effect to the

quasi-judicial determinations of administrative agencies ... when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law" *(Ryan v New York Tel. Co., supra*, at 499). Collateral estoppel is an "elastic doctrine" and "the fundamental inquiry is whether re-litigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results" *(Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]).

Based upon a review of the record, there is an identity of issues which were necessarily decided in the proceedings before the WCB which are decisive in the present action. The questions of whether F&M was the general contractor at the site and or an agent of the owner were the issues necessarily resolved by the Board. Further, plaintiff had a full and fair opportunity to contest the issues, notwithstanding plaintiff's contention that his involvement in the hearing before the WCB was passive. Therefore, this Court finds that the doctrine of collateral estoppel applies and bars plaintiff's causes of action against F&M, and all related cross claims.

Furthermore, since F&M was neither an owner nor a general contractor, "liability will attach under Labor Law § 241 only if it is evinced that it was a statutory 'agent' of the owner or general contractor" (*D'Amico v New York Racing Assn.,* 203 AD2d 509, 511 [1994], quoting *Russin v Picciano & Son,* 54 NY2d 311 [1981]). The record reveals that the last day that F&M worked at the premises was January 6, 2005, approximately three weeks before plaintiff's January 25, 2005 accident; and that F&M did not hire any subcontractors and or subtrades at the site. Plaintiff testified that Roger Hernandez, owner of R&J, was the only person who directed him on how to perform his work and provided plaintiff with his tools to perform his work at the premises. Also, Hernandez testified that no one, other than himself, directed plaintiff and the R&J employees on how to perform their work at the premises. Thus, for purposes of imposing liability under Labor Law § 241 (6), there is no question that F&M did not have the authority to act as the "agent" of the owner by exercising supervision and control over plaintiff's work being performed on January 25, 2005.

<u>Cross Motion by Ackerman</u>

Defendant Ackerman met his prima facie burden of establishing entitlement to summary judgment by demonstrating that he was not responsible for the means and methods of the plaintiff's work (*see Zolotar v Krupinski,* 36 AD3d 802 [2007]). Notwithstanding any obligation undertaken by defendant Ackerman, the project architect, to assure compliance with its construction plans and specifications, liability for plaintiff's injury may not be imposed on him since there is no evidence that he committed an affirmative act of negligence

and there is no clear contractual provision creating an obligation explicitly running to and for the benefit of workers such as plaintiff (see *Hernandez v Yonkers Contr. Co.*, 306 AD2d 379 [2003]; *Giordano v Seeyle, Stevenson & Knight*; 216 AD2d 439 [1995]; *Bernal v Pinkerton's, Inc.*, 52 AD2d 760 [1976], *affd* 41 NY2d 938 [1977]).

Nor may Labor Law § 241 (6) or § 200 serve as a basis for imposing liability against a project architect as an "agent" of the owner unless the project architect controls and supervises the work or has the authority to direct the construction procedures or safety measures employed at the site (*see Carter v Vollmer Assoc.*, 196 AD2d 754 [1993]; *Davis v Lenox School*, 151 AD2d 230 [1989]). Here, the record furnishes no ground to believe that these conditions of liability might be established as against defendant Ackerman.

Conclusion

Accordingly, the motion by the Ettinger defendants for summary judgment in their favor is granted. The branch of the motion which seeks to dismiss as against Eric Ettinger based upon the homeowner's exemption is granted. The cross motion by F&M for summary judgment in its favor is granted. The cross motion by defendant Ackerman for summary judgment in his favor is granted. Consequently, the complaint and all cross claims are hereby dismissed against all defendants. The cross motion by plaintiff to supplement his verified bill of particulars to add a particularization that 12 NYCRR § 23-1.12(c)(2) was violated, is denied as moot.

Dated: October 16, 2009

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J.S.C.