

Campbell v S. DiGiacomo & Son, Inc.

2009 NY Slip Op 33363(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 107948/06

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

CRAIG CAMPBELL,
Plaintiff,

Index No.: 107948/06

Motion Date: 11/20/08

- v -

Motion Seq. No.: 01

S. DIGIACOMO & SON, INC., and ROSA ARIANNA
as TRUSTEE of the ALFONSO ARIANNA FAMILY
IRREVOCABLE TRUST,
Defendants.

Motion Cal. No.: 21

S. DIGIACOMO & SON, INC.,
Third-Party Plaintiff,

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SUP. CT. OFFICE
NEW YORK COUNTY CIVIL

- v -

FMD WALLS CORP., GREEN ISLE CONSTRUCTION,
INC., and ROSA ARIANNA as TRUSTEE,
Third-Party Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2, 3

FILED

Cross-Motion: Yes No

APR 06 2009

Upon the foregoing papers,

COUNTY CLERK'S OFFICE
NEW YORK

Defendants Rosa Arianna as Trustee and Tobias Arianna (the "Owners") move for summary judgment dismissing the complaint and in the alternative conditional judgment on their claims for indemnity.

Handwritten signature

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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At oral argument of this motion plaintiff withdrew the Labor Law 240 claims that were asserted and therefore the only claims remaining in this action are those arising under Labor Law 200 and 241 (6) and common law negligence.

Further, the court at oral argument denied that portion of the Owners' motion which sought summary judgment as to liability for the reasons stated on the record and the transcript of the oral argument as so-ordered is incorporated into this decision.

The court reserved decision on that portion of the movants' application that sought conditional judgment on the cross-claim for indemnification and the court shall now also deny summary judgment as to that claim because the court has already determined that there are issues of fact as to whether the movants' were negligent and therefore as to whether common law indemnification is available. As stated by the Court

To establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident or in the absence of any negligence that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the injury. Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor was either negligent or exclusively supervised and controlled plaintiff's work site.

[The General Contractor] would only be entitled to common-law indemnification if he did not supervise or control the work but is vicariously liable pursuant to

[* 3]

Labor Law § 240 (1) and § 241 (6). Although it is clear from the record that the liability, if any, of the owner [] is purely vicarious, it is not entitled to conditional summary judgment at this juncture against [subcontractor] for common-law indemnification since it unclear from the record whether [subcontractor] was either negligent or exclusively supervised and controlled plaintiff's work site. The relative culpability, if any, of [the general contractor] and [subcontractor] presents issues of fact which preclude the granting of summary judgment with respect to [Owner]'s third-party claim.

Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 685 (2d Dept 2005) (citations and internal quotations omitted) citing Correia v Professional Data Management, Inc., 259 AD2d 60, 65 (1st Dept 1999) ("in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by [the] Labor Law").

The court finds there is also an issue of fact as to insurance coverage as plaintiff presents no evidence of the policy beyond a certificate of insurance and there is no written agreement concerning the procurement of insurance and the parties' deposition testimony differs on this issue.

Accordingly, it is

ORDERED that plaintiff's claim under Labor Law 240(1) is hereby WITHDRAWN and DISMISSED; and it is further

ORDERED that the motion is DENIED for the reasons stated herein and for the reasons stated on the record as set forth in the so-ordered transcript appended to this decision and incorporated by reference herein.

This is the decision and order of the court.

Dated: March 30, 2009

ENTER:

~~Debra A. James~~
DEBRA A. JAMES
J.S.C.

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