

Sosa v New York Univ. School of Law Found.

2010 NY Slip Op 31064(U)

April 26, 2010

Sup Ct, NY County

Docket Number: 106969/04

Judge: Emily Jane Goodman

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5-4-10

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

PRESENT: GOODMAN
Justice

PART 17

PORFIRIO SOSA

INDEX NO. 106969/04

MOTION DATE _____

MOTION SEQ. NO. 9

MOTION CAL. NO. _____

- v -

NY UNIVERSITY SCHOOL OF LAW FOUNDATION

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

attached

is denied per

FILED

MAY 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/26/10

EMILY JANE GOODMAN S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X Index No. 106969/04
PORFIRIO SOSA and ANA SOSA,

Plaintiffs,

-against-

NEW YORK UNIVERSITY SCHOOL OF LAW FOUNDATION, ALPHA INTERIORS
INC., ALAN WANZENBERG ARCHITECT, P.C., HANINGTON, P.E. and "ABC
Corp." being fictitious as the true name of said entities are
presently unknown,

Defendants.

-----X
NEW YORK UNIVERSITY SCHOOL OF LAW FOUNDATION,

Third-Party Plaintiff,

-against-

Third-Party Index
No.590914/05

ALPHA INTERIORS, INC.,

Third-Party Defendant.

-----X Second Third-Party
Index No. 590825/08

ALAN WANZENBERG ARCHITECT, P.E.,

Second Third-Party Plaintiff,

-against-

SRC INDUSTRIES, INC.,

Second Third-Party Defendant.

-----X
HANINGTON ENGINEERING CONSULTANTS, INC.,

Third Third-Party Plaintiff,

-against-

FILED
MAY 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

SRC INDUSTRIES, INC.,

Third Third-Party Defendant.

Third Third-Party
Index No. 591044/08

-----X
Emily Jane Goodman, J.S.C.:

Defendant/second third party Plaintiff Alan Wanzenberg Architect, PC (AWA) moves to reargue that part of the Court's Decision and Order, dated January 4, 2010, granting the motion and cross motion of Hanington Engineering Consultants Inc. (HEC) for summary judgment dismissing the complaint and cross claims asserted against it.¹ AWA also seeks to renew based on Plaintiff's expert disclosure served after the motions were submitted. The motion to reargue/renew is granted to the extent of reargument and upon reargument, the Court adheres to its prior Decision.²

HEC was AWA's engineering consultant on the project where Plaintiff (an employee of SRC Industries, Inc.) was working when a portion of the first floor collapsed upon him. The parties agree that the evidence shows that three factors contributed, or may have contributed, to the collapse: (1) the metal hangers used

¹In the prior motion, Plaintiff withdrew his Labor Law §§ 240 (1) and 241 (6) claims as against HEC.

²The purported cross motion by Defendant New York University School Of Law Foundation, to reargue the Decision, is denied as it was not filed in Room 130 and no filing fee was paid.

[*4]

at the beam connections were not those specified by HEC instead of using flange-mounted hangers, flat surface-mounted hangers had been used; (2) the number of nails used to fasten the hangers was inadequate to support the weight loaded on the floor; and (3) the concentration of building materials stored on top of the hangers (approximately 1,710 pounds). It is uncontested that Alpha Interiors Inc. (Alpha), the carpentry subcontractor, was responsible for installing the new floor.

AWA states that it never submitted opposition to HEC's cross motion because it "simply incorporated AWA's motion and NYU's by cross reference" although AWA opposed HEC's cross motion to dismiss HEC's common law cross claims. AWA complains that HEC submitted nothing probative until reply, when AWA had no opportunity to respond. AWA is correct that it had no opportunity to respond to the affidavit submitted in reply regarding the controlled inspections, but the Court disagrees that AWA could not oppose HEC's cross motion initially and argue that Plaintiff's Labor Law §200 cause of action should not be dismissed against HEC, for the reasons advanced now. In any event, reargument is granted.

The focus of AWA's argument is that if the Court dismissed Plaintiff's complaint as against HEC, it should have done so for AWA or, "if AWA must go to trial based on the Court's findings

[*5]

related to the reported deflection and the alleged "unstable" floor, Hanington should go to trial, too." The Court denied AWA's motion for summary judgment dismissing Plaintiff's complaint against it under Labor Law §200 because AWA did not demonstrate that it had no notice of the hazardous condition and had no control or supervision over the work site itself, where AWA was "a representative of the Owner" during the Construction Phase who had the authority to act on behalf of the Owner. However, regarding HEC, the Court found that although, like the other defendants, HEC was aware of the springiness of the floor, the AWA/HEC contract contained no provision which would enable or oblige HEC to control or direct the work of contractors at the site. Because the standard to impose liability under Labor Law § 200 for a design engineer, who performs on-site inspections of the construction work, requires that the engineer exercised supervision and control over the activity resulting in plaintiff's injury (see cases cited in the Decision), and HEC met its burden to show that it did not have such control, AWA's argument--that the Court was required to decide to either keep both parties in or let both parties out--is not persuasive.

AWA also complains that the Decision stated that nothing in the HEC contract required HEC to inspect the first floor before it was finished. For the first time AWA maintains that HEC was

[* 6]

so obligated by virtue of HEC's agreement in the contract to "inspect and sign-off the controlled inspections required for our work." Citing to Building Code Section 16-01, AWA maintains that the controlled inspection for structural stability should have been conducted "once at a pre-construction meeting with the contractor and once during construction operations"³ and that an issue therefore exists as to HEC's liability.

HEC maintains, and AWA does not dispute, that HEC was to perform controlled inspections for "high strength bolts" "welding" and "structural stability." HEC argues that the first two types of inspections do not apply to wood floors, and apparently AWA's argument is confined to the controlled inspection for structural stability. As to structural stability, HEC notes that the provision applies to only "alterations to existing structures in which loads are transferred from one system of structural elements to another such as in the installation of columns or girders to replace existing bearing walls, the creation of openings or slots in existing bearing walls, girders or floors, or where the stability or integrity of a structural system is to be temporarily diminished." HEC

³The provision leaves the determination of the frequency of inspections (beyond the two mandated inspections) to the party performing the controlled inspection.

contends that since the existing floor was already removed and the new floor was in the process of being installed, there was no transfer of loads in connection with an alteration of an existing structure. Moreover, HEC argues that the work did not involve cutting opening or slots in an existing floor. It also argues that the stability or integrity of a structural system was not "to be temporarily diminished." HEC further contends that at the time the project was constructed, the engineer was not required to perform controlled inspections for wood flooring.

In reply, AWA surprisingly fails to respond to these arguments, which are the sole arguments that the Court believed might have merit.⁴ Notably, if HEC falls within this provision, the Court's determination that it lacked control over the other trades, would not be a bar to HEC's potential liability. The provision provides that unsafe conditions must be reported to the Department of Buildings (who has the authority to stop work) and any affected parties (some of whom also had the authority to stop the work and mandate corrective action). However, upon reargument, AWA has not demonstrated (and seemingly abandoned) its argument that HEC was required to make a controlled inspection of the wood floor installed by Alpha (cf Sendar

⁴AWA's papers, however, are otherwise very well written and briefed.

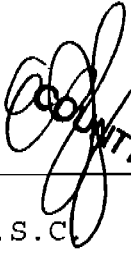
Development Co., LLC v CMA Design Studio, PC, 68 AD3d 500 [1st Dept 2009] [in deciding whether the doctrine of continuous representation applied, the Court found that the controlled inspection was limited to light gauge steel framing and did not include inspection for the exterior wall system which was the responsibility of other trades]).⁵

It is hereby

ORDERED that the motion to reargue/renew is granted to the extent of reargument and upon reargument, the Court adheres to its prior Decision; and it is further

ORDERED that the parties appear for trial on June 1, 2010 at 10am to pick a jury.

Dated: April 26, 2010

ENTER:


J.S.C.
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MAY 04 2010
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⁵AWA's citation to Plaintiff's expert disclosure notice is not persuasive as it only contains "allegations of engineering malpractice." Its request to renew on the basis that the disclosure notice was served after the motions were submitted is denied. No reason is present why AWA could not obtain its own expert on the issue of HEC's alleged engineering malpractice.