

Fitzgerald v Toll Bros. Real Estate, Inc.

2010 NY Slip Op 32191(U)

August 5, 2010

Supreme Court, New York County

Docket Number: 113106/2008

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JAMES FITZGERALD AND MARY FITZGERALD,
Plaintiffs,

INDEX NO. 113106/2008

-against-

MOTION DATE _____

TOLL BROTHERS REAL ESTATE, INC.,
CASINO DEVELOPMENT GROUP, INC., KTL
303 L.L.C., HKAL 33RD STREET, L.L.C.,
HKAL 34TH STREET, L.P., HKAL GP 34
L.L.C., K.L. 33 L.L.C., THE KIBEL
COMPANIES, L.L.C.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Defendants.

CASINO DEVELOPMENT GROUP, INC. AND
INTERCITY CONCRETE STRUCTURES, INC.,
Thrd-Party Plaintiffs,

-against-

NEW YORK REBAR INSTALLATION INC.
Third-Party Defendant.

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 2 were read on this motion by defendants(s) for an Order for Summary Judgement.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

<u>PAPERS NUMBERED</u>
<u>1</u>

Cross-Motion: Yes No

Third-party defendant New York Rebar Installation Inc. (Rebar) moves for summary judgment dismissing Casino Development Group, Inc.'s (Casino) and Intercity Concrete Structures, Inc.'s (Intercity) third-party complaint against it. Casino and Intercity have cross-

moved for summary judgment dismissing plaintiffs' complaint against them.

Procedural History

James Fitzgerald (plaintiff) alleges that, on August 15, 2008, he fell several stories within a building (the Building) located at 303 East 33rd Street, New York, during construction work (the Project) at the building (Bill of Particulars, items 3, 4). The complaint alleges that the accident occurred on September 15, 2008 (Complaint, ¶ 85). Plaintiff Mary Fitzgerald's claim is a derivative claim for loss of services based upon the injury to her husband. This action was commenced on September 26, 2008. Casino joined issue by interposing an answer on January 6, 2009. Intercity is not a party defendant in this case. Toll Brothers Real Estate, Inc., KTL 303, L.L.C., HKAL 34th Street, L.P., K.L. 33 L.L.C. (KL 33), and the Kibel Companies, L.L.C. (collectively, the Owner Defendants) interposed their answer on January 8, 2009.

Plaintiff filed a request for judicial intervention (RJI) on March 24, 2009. On March 26, 2009, plaintiff served a verified bill of particulars in response to the Owner Defendants' demand. A preliminary conference was held on May 29, 2009. It set forth a comprehensive discovery schedule, with party deposition scheduled in September, 2009, a physical examination of the plaintiff thereafter, a date of January 8, 2010 for the completion of discovery and a time to file a note of issue of January 22, 2010. On August 13, 2009, Casino and Intercity filed a third-party complaint against Rebar. Rebar answered the third-party complaint on November 18, 2009. The Owner Defendants filed an amended answer on December 8, 2009 and filed an answer to Rebar's cross claims on December 28, 2009.

On January 5, 2010, Rebar made the instant motion to dismiss the third-party action. On January 14, 2010, a compliance conference was held, setting a note of issue date of January 22, 2010. On January 22, 2010, Casino and Intercity served a reply to Rebar's counterclaim. Casino and Intercity served the instant cross motion to dismiss plaintiffs' complaint.

On October 7, 2009, plaintiffs commenced a separate action against Intercity and 303 Construction, Inc. (303 Construction), under index number 114113/2009, alleging that, on September 15, 2008, plaintiff was injured at the Building in a workplace accident (¶ 30). No answer to this complaint has been filed nor has there been an RJI or any motion made.

Parties

KL 33 is the developer (Charon affidavit, ¶ 3) and it contracted with Intercity for superstructure work on the Project (*id.*, ¶ 3) and with Casino for foundation work (*id.*, ¶ 2). The Owner Defendants have not submitted any papers on either Rebar's motion or Casino and Intercity's cross motion. Rebar was plaintiff's employer (Young affidavit, ¶ 3; Bill of Particulars, item 19) and it was a subcontractor for interior columns, shear walls and concrete slabs and beams from the ground floor through the roof (Charon affidavit, ¶ 3). Intercity was a contractor for superstructure work that subcontracted a portion of its work to Rebar (*id.*, ¶ 3). Plaintiff did not sue it in this action.

Contentions

Plaintiff contends that he was working for Rebar as a foreman (Bill of Particulars, item 19) and that he was working in the Building on the Project, when he fell from the fifth floor, due to the failure to provide adequate flooring and/or other devices that would have prevented his fall (*id.*, items 4, 5). He asserts that he was severely injured as a result of the fall, suffering multiple spine fractures, brain injury, multiple rib fractures, spine injury and a torn left rotator cuff (*id.*, item 11). Plaintiff claims that defendants are liable under Labor Law §§ 240 (1), 241 (6) and 200.

Rebar contends that it did not enter into any contract with Casino for performance of its work on the Project. Casino alleges that its sole role in the Project was foundation work and that it had no responsibility with respect to the superstructure (Charon affidavit, ¶¶ 3, 4). It

further contends that it had no contract with Rebar and no control over Rebar or authority over how Rebar performed its work (*id.*, ¶ 7).

Plaintiff states that the construction fence around the Building has a sign that identifies KL 33, L.L.C as the owner and Casino Construction as the contractor (Farooq affidavit, ¶¶ 3, 4; Skor affirmation, ¶ 4). Plaintiff also states that Casino's motion is premature (Skor affirmation, ¶ 22) and that he needs further discovery to ascertain which entity was responsible for the purportedly inadequate flooring (*id.*, ¶ 15).

Rebar's motion for summary judgment dismissing the third- party complaint is unopposed. Moreover, Intercity is not a defendant in this action and, consequently, it cannot properly bring a third-party action. CPLR 1007 provides that "a defendant may proceed against a person not a party ... by filing ... a third party summons and complaint". Casino has stated that it had no contract with Rebar (Charon affidavit, ¶ 7) and, therefore, it has no basis for any claim against it. Accordingly, Rebar's motion for summary judgment dismissing the third-party complaint against it is granted.

Labor Law

Labor Law § 240 (1) provides that:

"All contractors and owners and their agents ... shall furnish or erect, or cause to be furnished or erected ... scaffolding, hoists, stays, ladders, slings, ... pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a [worker]."

Labor Law § 241 provides:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith shall comply with the following requirements: ...

[6] All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ...[in accordance with rules promulgated by the Commissioner of Labor]."

The purpose of these statutes is to protect workers by placing responsibility for project

safety practices and appropriate safety equipment in construction projects on owners and general contractors (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-513 [1991]; *Bland v Manocherian*, 66 NY2d 452, 459 [1985]). Casino is not the owner or the general contractor and it can be held liable as a statutory agent only if it has "the authority to supervise and control the job" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Labor Law §§ 200 is a codification of common-law negligence and, where the purported defect or dangerous condition arises from a contractor's method of work, only a party with supervisory control over the work can be held liable (*Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]).

Casino has proffered evidence that it had no role above the grade level (Charon affidavit, ¶ 8), that it had completed its work and it was no longer on the job site when plaintiff fell (*id.*, ¶ 9). It also states that it had no contract with Rebar and no authority to control Rebar's work (*id.*, ¶ 7).

Plaintiff has stated that the motion is premature and that he needs discovery. However, issue was joined with Casino over a year ago and the preliminary conference order of May 29, 2009 set out a comprehensive discovery schedule. Plaintiff has had ample opportunity to obtain evidence in admissible form that would rebut Casino's showing that it had no authority to supervise and control Rebar's work. He has not presented such evidence and, therefore, he has failed to raise a material issue of fact (*see Umanzor v Charles Hofer Painting & Wallpapering, Inc.*, 48 AD3d 553 [2nd Dept 2008]).

Accordingly, Casino's cross motion for summary judgment dismissing plaintiff's complaint against it is granted. Intercity's cross motion for summary judgment dismissing the plaintiff's complaint against it is denied, without prejudice, since there is no complaint against it, in this case.

It is therefore

ORDERED that third-party defendant New York Rebar Installation, Inc.'s motion for summary judgment dismissing the third-party complaint is granted and the third-part complaint is dismissed and the Clerk is directed to enter judgment accordingly, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the cross motion of Intercity Concrete Structures, Inc for summary judgment dismissing the complaint against it is denied, without prejudice; and it is further

ORDERED that the cross motion of Casino Development Group, Inc. for summary judgment dismissing is granted and the complaint is severed and dismissed as against said defendant and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

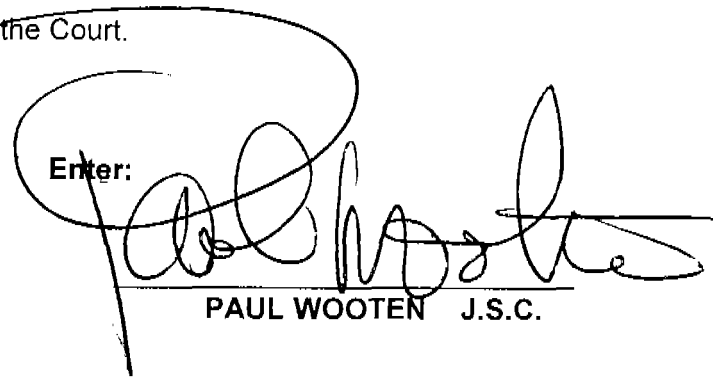
ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated:

8-5-2010

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE