

**Munerapineda v CMC Bldrs., Inc.**

2010 NY Slip Op 32360(U)

August 23, 2010

Sup Ct, Nassau County

Docket Number: 17158/04

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY  
Justice

MoD, MG, MoD,  
MD, MoD, MoD

RAMIRO MUNERAPINEDA,

Motion Sequence #005, #6,  
#8, #9, #10, #11  
Submitted July 1, 2010

Plaintiff,

-against-

INDEX NO: 17158/04

CMC BUILDERS, INC., CMC CONTRACTORS,  
RICHARD SULENSKI, CASTLE ROCK  
CONTRACTING, LTD., JAMES GILLIGAN,  
SHELLS ONLY OF SUFFOLK, INC., HOWARD  
FEINGOLD and JILL FEINGOLD,

Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs (Seq. #5).....	1-3
2 <sup>nd</sup> Notice of Motion and Affs (Seq. #6).....	4-6
Notice of Cross-Motion and Affs (Seq.#7).....	7-9
2 <sup>nd</sup> Notice of Cross-Motion and Affs (Seq. #8).....	10-12
3 <sup>rd</sup> Notice of Cross-motion and Affs (Seq. #9).....	13-15
4 <sup>th</sup> Notice of Cross-Motion and Affs (Seq. #10).....	16-20
3 <sup>rd</sup> Notice of Motion and Affs (Seq. #11).....	21-23
Affs in Opposition.....	24-27
Affs in Reply.....	28-31
Memorandum of Law.....	32

This motion by defendant Shells Only of Suffolk, Inc. ("Shells Only") for an order pursuant to CPLR 2201 granting a stay of the within action pending a final resolution by the

Workers' Compensation Board is granted and then vacated as a result of the final determination of the Workers' Compensation Board.

The motion by defendant Shells Only for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing all claims and cross-claims asserted against Shells Only in their entirety is granted.

The motion by Castle Rock Contracting, Ltd. ("Castle Rock") and defendant James Gilligan ("Gilligan") for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the plaintiff's complaint against Castle Rock and Gilligan is granted to the extent that the plaintiff has reached a settlement with defendants Castle Rock and Gilligan only as to defendants Castle Rock and Gilligan.

The motions by defendants Richard Sulenski ("Sulenski") and CMC Builders, Inc. and CMC Contractors ("CMC" collectively) for an order pursuant to CPLR 3212 granting summary judgment in their favor of dismissing the plaintiff's complaint as to Sulenski on the ground that he was a corporate officer not personally liable for the alleged conduct of CMC, dismissing plaintiff's claims (except for plaintiff's Labor Law 240(1) claim) against defendant CMC, directing the entry of a judgment in favor of defendant CMC against defendant Castle Rock on its cross-claim for failure to procure liability insurance naming CMC and its officers and employees, insured parties, directing the entry of a judgment in favor of defendants CMC and Sulenski dismissing plaintiff's claims pursuant to General Obligations Law § 15-108, on the ground that plaintiff's release to defendants Castle Rock and Gilligan affords these moving defendants entitlement to judgment as a matter of law, or in the alternative, if the court believes an amendment to the Answer is necessary to allege the defense of General Obligations Law § 15-108, then granting such leave on the

ground that leave is to be fully given pursuant to CPLR 3025, there being no prejudice to plaintiff in granting same, and if the Complaint is not dismissed, then directing plaintiff to submit to a further medical examination by CMC on the ground that the prior examinations occurred more than four years ago and plaintiff's current physical condition is at issue, are determined as hereinafter set forth.

The motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff and against defendant CMC pursuant to Labor Law § 240(1) is denied.

Plaintiff alleges that on November 27, 2004 while working at a construction site he fell from a ladder and sustained personal injuries. The premises was owned by defendants Howard and Jill Feingold ("Feingold"). A stipulation of discontinuance has been filed as to Feingold. The Feingolds shall be deleted as parties to the action. Defendant CMC had an oral agreement with the Feingolds to act as general contractor. CMC entered into a written contract with defendant Castle Rock to perform construction work including framing at the subject premises. Defendant Sulenski was the president and owner of CMC. Defendant Gilligan was the president and owner of Castle Rock.

The State of New York Workers' Compensation Board ("WCB") determined the plaintiff sustained work-related injuries, found that the plaintiff was an employee of Castle Rock; CMC was the general contractor and Castle Rock the subcontractor. The WCB also found that Castle Rock was uninsured on the date of the accident. In the event that an employer (Castle Rock) fails to procure Workers' Compensation Insurance, the employee (plaintiff) may nevertheless elect to claim compensation or at his option maintain a plenary action for damages. (See, Workmen's Compensation Law § 11; *O'Rourke v Long*, 41

NY2d 210; 2A Larsen Workmen's Compensation law § 67.22). Since the plaintiff was employed by Castle Rock and received benefits from the Uninsured Employee's Fund, plaintiff elected the remedy to receive workers' compensation benefits.

Plaintiff reached a settlement with defendants Castle Rock and Gillian which would be subject to a "set-off" pursuant to GOL § 15-108 if a jury apportions some culpability against the settling defendants.

Castle Rock interposed a cross-claim against defendants CMC, Sulenski and Feingold for contribution and/or indemnification.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.*, 207 AD2d 880:

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue, but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action.  
(internal citations omitted)

The evidence demonstrates and is not refuted that Shells Only was never hired as either a general contractor or a subcontractor; never engaged in construction work at the Feingold residence, nor did it supervise or control any construction work. Plaintiff's first cause of action for common-law negligence, the second cause of action pursuant to Labor Law § 200, and all cross-claims based upon theories of common-law negligence and contribution are dismissed in their entirety as to Shells Only. Plaintiff's claims and co-

defendants' cross-claims under Labor Law §§ 240(1) and 241(6) against Shells Only are also dismissed. Both of those statutes, by their express terms, apply only to "contractors and owners." With respect to the work in which plaintiff was engaged at the time of his accident, Shells Only was neither a contractor nor an owner under the Labor Law. Summary judgment is granted in favor of Shells Only dismissing the complaint and all cross-claims against Shells Only. The latter shall be deleted as a party defendant.

Sulenski's assertion that he had no relationship with an entity styled "CMC Contractors" is not refuted. The entity plaintiff dealt with was CMC Builders, Inc. "CMC Contractors" shall be deleted as a party defendant.

Plaintiff argues that the corporate veils of CMC and Castle Rock should be pierced and their respective principals, Sulenski and Gilligan, be held personally liable. The Court disagrees. Sulenski and Gilligan signed all corporate documents in their representative capacities. Generally, piercing the corporate veil requires a showing that: (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked, and (2) such dominion and control was used to commit a fraud or wrong against a plaintiff which resulted in that plaintiff's injury (*see, Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135; *Hyland Met Co. v Tsagarakis*, 202 AD2d 552). There is no evidence that the dominion and control was used to commit a fraud or wrong against the plaintiff that resulted in plaintiff's injury. (*Seuter v Lieberman*, 229 AD2d 386; *Aetna Electrical Distributing Co. v Homestead Electric*, 279 AD2d 541). Sulenski and Gilligan shall be deleted as party defendants. (Compare *Clark v Pine Hill Homes*, 112 AD2d 755).

The remaining parties in the action are the plaintiff and defendants, CMC Builders, Inc. and Castle Rock Contracting, Ltd. When CMC is used hereinafter it shall refer only to **CMC Home Builders, Inc.**

“Labor Law § 240(1) imposes a nondelegable duty upon owners, contractors, or their agents to provide proper protection to a worker performing certain types of construction work” (*Aversano v JWH Contr., LLC*, 37 AD3d 745, 746). “A general contractor will be held liable under Labor Law § 240(1) if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors.” (*id.*). In order to hold a contractor such as CMC Builders, Inc. “absolutely liable for violations of Labor Law §§ 240, there must be a showing that [it] had the authority to supervise and control the work giving rise to these duties” (*Kehoe v Segal*, 272 AD2d 583, 584). The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed” (*Id.*; see also *Everitt v Nozkowski*, 285 AD2d 442, 443).

In support of the motion plaintiff argues that the evidence demonstrates that Castle Rock was hired by CMC to assist with the construction. Castle Rock claims that CMC was on site performing work and the ladders present at the job site belonged to CMC. Further, CMC asserts that Castle Rock hired laborers for Castle Rock to help with the project, one of whom was the plaintiff.

Sulenski testified at his deposition that the ladders belonged to Castle Rock. (Suleski deposition, p. 46). CMC as general contractor supplied lumber, nails and plywood

for the construction of the extension. Sulenski testified that he did not supervise or direct any of Castle Rock's employees, but rather all supervision of the Castle Rock employees was done by Gilligan.

Issue finding, rather than issue determination, being the key to summary judgment (in *re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583), the court should refrain from making credibility determinations (see *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *Greco v Posillico, supra*; *Petri v Half Off Cards, Inc.*, 284 Ad2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 AD2d 428). Plaintiff's motion for summary judgment against CMC on the Labor Law § 240(1) claim is denied. There are questions of fact as to whether CMC controlled the work and had the authority to insist that proper safety practices be followed. (*Everitt v Nozkowski, supra*; *Zuckerman v City of New York*, 49 NY2d 557).

CMC's motion for summary judgment pursuant to CPLR 3212(a) dismissing the plaintiff's claims pursuant to GOL § 15-108 on the grounds that plaintiff's release to defendants Castle Rock and Gilligan affords CMC entitlement to judgment as a matter of law is denied.

In *Whalen v Kawasaki Motors*, 92 NY2d 288 at pgs. 291-292, the Court of Appeals stated that:

New York's comparative fault rules are codified in CPLR 1411, which provides for the discounting of a plaintiff's damages in proportion to his or her equitable share of blame in causing injury. In tort actions involving multiple defendants where a

plaintiff settles with one or more defendants before trial, and proceeds to trial against the remaining defendants, General Obligations Law § 15-108(a) permits nonsettling defendants a monetary offset against the amount of a verdict. The permitted reduction is the greatest of three items: (a) the amount stipulated as consideration for the release; (b) the amount actually paid for the release; or (c) the settling tortfeasor's equitable share of plaintiff's damages (General Obligations Law § 15-108[a]). The purpose of the statute is to encourage settlement, although the statute is also concerned with ensuring equity. Plaintiffs should be fairly compensated, but nonsettling defendants should not bear more than their fair share of a plaintiff's loss. Moreover, the possibility of double recovery should be avoided (see, *Williams v Niske*, *supra*, 81 NY2d, at 442-444; accord, *Dudick v Keene Corp.*, 82 NY2d 821, *affg* for reasons stated at 188 AD2d 214, 218; *Didner v Keene Corp.*, 82 NY2d 342, 351; *Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332).

There is no legal basis to support CMC's assertion that because the plaintiff and Castle Rock settled the case between them (allegedly for the sum of \$12,500) GOL § 15-108 can be the basis of granting summary judgment in favor of CMC against the plaintiff on the issue of liability at this time. CMC has failed to demonstrate the merits of its claim based on GOL § 15-108. (See, *Fromme v Lamour*, 292 AD2d 417). Notwithstanding anything to the contrary, defendant CMC's application to serve an amended answer alleging the defense of GOL § 15-108 is granted.

CMC's inartfully drawn cross-motion for an order "dismissing plaintiff's claims (except for the Labor Law § 240(1) claim)" is denied. The complaint sets forth eight (8) causes of action in 98 numbered paragraphs. The first to fourth causes of action refer to defendant CMC and allege failure of CMC to provide a safe workplace and violations of Labor Law § 241. Defendant CMC in its supporting papers fails to specify what cause of action and section of the Labor Law it seeks dismissal of other than repeatedly stating

“except for Labor Law § 240(1) claim.” Moreover, Gilligan testified at his deposition that Sulenski was on the site performing work and the ladders present at the job site belonged to CMC not to Castle Rock, contradicting the testimony of Sulenski and creating an issue of credibility. (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, *supra*). CMC has failed to make *prima facie* showing of entitlement to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320; *Smith v Merrill Lynch Co.*, 69 AD3d 843).

Castle Rock denies it ever received a copy of an insurance certificate naming CMC as an additional insured under Castle Rock’s insurance policy. The affidavits submitted by CMC and Castle Rock are both direct and unevasive in contradicting each other, raising issues of fact precluding the granting of summary judgment. CMC’s motion for summary judgment on its cross-claim against Castle Rock for allegedly failing to name CMC as an additional insured on Castle Rock’s insurance policy is denied. All motions for summary judgment dismissing any remaining cross-claims by and between Castle Rock and CMC as against each other are denied.

On February 7, 2006, plaintiff appeared for a physical examination by Neil S. Roth, M.D., an orthopedic surgeon designated to examine plaintiff by defendants . Dr. Roth opined that the plaintiff was able to perform his pre-accident status level of living activities with no restrictions. Plaintiff also appeared for a physical examination on February 3, 2006, by Robert Madison, D.D.S. Designated to examine the plaintiff by defendants. Dr. Madison opined that there was no dental disability related to the teeth as a result of the accident. CMC’s attorney asserts the case was certified over his objections pending a further medical examination of the plaintiff. He argues an additional medical exam is necessary as to the plaintiff’s present physical condition, anticipated need for future

medical treatment and indications for future pain and suffering. In light of the fact that the last medical exams were conducted over four (4) years ago and there is no showing of prejudice, the plaintiff is directed to appear for a further medical examination by a physician designated by defendants, with an office in Nassau County, provided the Notice to Appear for same is served no later than 30 days after service of a copy of this order.

Dated: August 23, 2010

  
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UTE WOLFF LALLY, J.S.C.

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**ENTERED**  
**AUG 26 2010**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE