Rodriguez v 1825 Brentwood Rd., Inc.
2010 NY Slip Op 32498(U)
September 10, 2010
Sup Ct, Suffolk County
Docket Number: 07-36347
Judge: Thomas F. Whelan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 07-36347
CAL. No. 10-00715-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1-29-10 (#005)
MOTION DATE 5-12-10 (#006)
MOTION DATE 6-21-10 (#007)
MOTION DATE 7-9-10 (#008)
ADJ. DATE 8-16-10
Mot. Seq. # 005 - MG
006 - MD
007 - MG
008 - MD

---X

ANDRES RODRIGUEZ,

Plaintiff,

- against -

1825 BRENTWOOD ROAD, INC., and PAINTING AND DECORATING, INC., and LA ESPIGUITA SOCCER, LLC,

Defendants.

---X

1825 BRENTWOOD ROAD, INC.,

Third-Party Plaintiff,

- against -

LA ESPIGUITA SOCCER, LLC.,

Third-Party Defendant.

---X

1825 BRENTWOOD ROAD, INC.,

Second Third-Party Plaintiff,

- against -

LA ESPIGUITA BAKERY, INC.,

Second Third-Party Defendant.

---X

CREEDON & GILL P.C.
Attorney for Plaintiff
24 Woodbine Avenue, Suite 14
Northport, New York 11787

LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorney for 1825 Brentwood Road, Inc.
199 Water Street, 25th Floor
New York, New York 10038

MORRIS DUFFY ALONSO & FALEY
Attorney for Painting & Decorating, Inc.
Two Rector Street, 22nd Floor
New York, New York 10006

LARRY M. SHAW, ESQ.
Attorney for La Espiguita Soccer, LLC &
La Espiguita Baker, LLC
24 Enchanted Forest Road
Kings Park, New York 11754

DEVITT SPELLMAN & BARRETT, LLP
Attorney for La Espiguita Soccer & Bakery
50 Route 111
Smithtown, New York 11787

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP
Attorney for La Espiguita Soccer & Bakery
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers numbered 1 to 81 read on these motions for summary judgment ;Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 23 - 34; 35 - 47; 48 - 60; Answering Affidavits and supporting papers 61 - 63; 64 - 66; 67 - 68; 69 - 71; 72 - 73; Replying Affidavits and supporting papers 74 - 75; 76 - 77; 78 - 79; 80 - 81; Other ________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#005) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue liability as to defendant 1825 Brentwood Road Inc., pursuant to Labor Law § 240 (1), is granted; and it is further

ORDERED that the motion (#006) by the second third-party defendant La Espiguita Bakery, Inc. for an order pursuant to CPLR 3212 and Limited Liability Company Law § 609 (a) granting summary judgment dismissing the third-party complaint, is denied; and it is further

ORDERED that the motion (#007) by defendant/third-party plaintiff 1825 Brentwood Road Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor on its cross claim for common-law indemnification over and against Painting and Decorating, Inc., and summary judgment dismissing any cross claims asserted against it, is granted; and it is further

ORDERED that the motion (#008) by defendant Painting and Decorating, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross claims asserted against it, is denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered when he fell through an unmarked and unsecured opening in a roof. Defendant 1825 Brentwood Road, Inc. (Brentwood) owned the subject property and leased it to defendant La Espiguita Soccer, LLC (Soccer), which was to renovate the vacant movie theater for use as a soccer academy. Soccer employed various contractors, including defendant Painting and Decorating, Inc. (P & D). Soccer and P & D were both solely owned by Miguel Garzon, who controlled and directed the renovation work.

The plaintiff testified at his deposition that he was an experienced HVAC technician employed by the HVAC contractor, nonparty Cool Air, hired by Garzon to upgrade the air conditioning units located on the roof. He had not been on the roof of the subject property before and, on the day of his accident, went to the roof for the first time to access the units. As he proceeded to the units, he saw two pieces of thin pink styrofoam lying on the roof but had no way of knowing that they covered openings for skylights. He testified that, as he stepped onto one piece of styrofoam, it collapsed and he fell to the floor, some 30 feet below. The openings were not marked or secured in anyway.

Garzon testified at his deposition, in relevant part, that he was experienced in construction projects, that he utilized his own company, P & D, to perform the renovation, and that he supervised the work. He hired Cool Air and unrelated electrical and plumbing contractors. He stated that P & D ordered the

skylights and stored them inside the building, that P & D hired "Victor" to cut the roof openings and to install the skylights, that he was aware that the openings had been cut and covered with the thin styrofoam to protect the floor below from rain, and that the skylights were to be installed the day of the plaintiff's fall.[1] The subject styrofoam was at the site for use in the outside renovations.

Labor Law § 240 (1) imposes absolute liability upon owners[2] and contractors, or their agent, who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 490-491, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). The statute is designed to protect workers from gravity-related hazards such as falling from a height (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501), and must be liberally construed to accomplish the purpose for which it was framed (*see,* ***Rocovich v Consolidated Edison Co.***, supra at 513). Therefore, an owner which breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*). In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 393, 658 NYS2d 97 [2d Dept 1997]). Here, the plaintiff established that Labor Law § 240 (1) is applicable to his fall through the unmarked or unsecured opening in the roof and, therefore, his entitlement to summary judgment (*see* ***Zong Mou Zou v Hai Ming Constr. Corp.***, 74 AD3d 800, 902 NYS2d 610 [2d Dept 2010]; ***Angamarca v Encolada***, 56 AD3d 264, 866 NYS2d 659 [1st Dept 2008]; ***Valensisi v Greens at Half Hollow***, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]; ***Brandl v Ram Bldrs.***, 7 AD3d 655, 777 NYS2d 511 [2d Dept 2004]) and defendant Brentwood did not rebut this with evidence to the contrary. Accordingly, summary judgment as to Brentwood's liability pursuant to Labor Law § 240 (1) is granted to the plaintiff.

P & D seeks summary judgment dismissing the plaintiff's complaint. P & D argues, *inter alia*, that it cannot be found strictly liable for the plaintiff's accident because it was neither a general contractor nor an owner. A party is deemed to be a contractor or an agent under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; ***Russin v Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). To impose the vicarious liability imposed by §§ 240 (1) and 241 (6),[3] 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 (***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; ***Natoli v City of***

---

[1] It also appears from Garzon's testimony that the openings for the skylights were done the day before the plaintiff's accident.

[2] A lessee, which contracts for work on the premises, is also an "owner" for the purposes of Labor Law § 240 (1) (***Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; ***Guerra v Port Auth. of N.Y. & N.J.***, 35 AD3d 810, 828 NYS2d 440 [2d Dept 2006]).

[3] To the extent that P & D appears to argue that the alleged violation of the Industrial Code at 12 NYCRR §§ 23-1.7 (b) (1) (i) and (iii) are inapplicable, the Court notes that an unmarked opening for a skylight is a "hazardous opening" as contemplated by this section of the Industrial Code.

New York, 32 AD3d 507, 820 NYS2d 313 [2d Dept 2006]). Here, P & D relies upon the deposition testimony of its owner, Garzon. However, Garzon's testimony established that P & D hired the subcontractor responsible for opening the roof and installing the skylights and, therefore, controlled and supervised that work. Thus, the Court concludes that P & D has not established that it was not a contractor or the agent of the tenant for the purposes of Labor Law §§ 240 (1) and/or 241 (6) (*see* ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; ***Soltes v Brentwood Union Free School Dist.***, 47 AD3d 804, 849 NYS2d 628 [2d Dept 2008]; ***Futo v Brescia Bldg. Co.***, 302 AD2d 813, 755 NYS2d 125 [3d Dept 2003]; ***Williams v Dover Home Improvement, Inc.***, 276 AD2d 626, 714 NYS2d 318 [2d Dept 2000]).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see* ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.,*** 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NYS2d 311, 318, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Further, a contractor may be held liable for negligence where the work it contracted for or performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work (*see* ***Tabickman v Batchelder St. Condominiums By the Bay***, 52 AD3d 593, 859 NYS2d 721 [2d Dept 2008]; ***Kelarakos v Massapequa Water Dist.***, 38 AD3d 717, 832 NYS2d 625 [2d Dept 2007]; ***Mendez v Union Theol. Seminary in City of N.Y.***, 17 AD3d 271, 793 NYS2d 420 [1st Dept 2005]). Since Garzon testified that P & D contracted for installation of the skylights and that he knew that the openings were covered with styrofoam, the Court finds that P & D has not established its entitlement to summary judgment dismissing the plaintiff's Labor Law § 200 or common-law negligence claims. Therefore, P& D's motion for summary judgment dismissing the complaint, or any cross claims asserted against it, is denied.

Brentwood seeks summary judgment it its favor on its cross claim for common-law indemnification over and against P & D and summary judgment dismissing any cross claims asserted against it. 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, had the authority to direct, supervise, and control the work giving rise to the injury (*see* ***Mendelshohn v Goodman***, 67 AD3d 753, 889 NYS2d 608 [2d Dept 2009]; ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 685, 790 NYS2d 25 [2d Dept 2005]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr***., 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]). Here, Brentwood has been found vicariously liable to the plaintiff pursuant to Labor Law § 240 (1) and Brentwood has established that it did not supervise or control the renovation work, that it did not have actual or constructive notice of the dangerous condition created by the unsecured and unguarded roof opening, and that P & D had supervision and control over the skylight opening. Accordingly, Brentwood is granted summary judgment in its favor on its claim for common-law indemnification over and against P & D, and is also granted summary judgment dismissing any cross claims asserted against it.

Lastly, is the motion by La Espiguita Bakery, Inc. (Bakery) for summary judgment (dismissing the second third-party complaint). The lease between Brentwood and Soccer is signed by Garzon as president of Bakery, the "sole member" of La Espiguita Soccer LLC. The gravamen of Bakery's motion is that it cannot be held liable for Soccer's liability based upon Limited Liability Company Law § 609 (a) which states that neither a member or manager of a limited liability company, nor an agent of a limited liability company is liable for the debts or obligations of such limited liability company. However, in opposition to Bakery's motion, Brentwood has submitted a copy of the proposal for HVAC services to be performed by Cool Air (the plaintiff's employer) at "1995 Brentwood Rd." on behalf of "La Espiguita bakery." Therefore, there is, arguably, a question of fact as to whether Bakery contracted for the HVAC services, and therefore, may have liability independent of its role as sole member of the limited liability company. Accordingly, the Court finds that Bakery has not established its entitlement to summary judgment as a matter of law and its motion is denied.

Dated: 9/10/10

THOMAS F. WHELAN, J.S.C.