

Tuccillo v Bovis Lend Lease, Inc.

2010 NY Slip Op 33726(U)

February 18, 2010

Supreme Court, New York County

Docket Number: 105551/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ANTHONY TUCCILLO, JR., and MARIA TUCCILLO,
Plaintiffs,

Index No.: 105551/06
~~105551/06~~

Motion Date: 09/29/10

- v -

Motion Seq. No.: 04

BOVIS LEND LEASE, INC., BOVIS LEND LEASE
INTERIORS, INC., BOVIS LEND LEASE LMB,
INC., and ADT SECURITY SERVICES, INC.,
Defendants.

Motion Cal. No.: _____

ADT SECURITY SERVICES, INC.,
Third-Party Plaintiff,

FILED

- v -

FEB 25 2011

PETROCELLI ELECTRIC CO.,
Third-Party Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

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, 4

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment as against defendant ADT Security Services, Inc. (ADT) on the issue of liability on their cause of action based on a violation of Labor Law § 240 (1). ADT cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as

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):

against it.

This is an action to recover damages for injuries sustained by Anthony Tuccillo (Tuccillo) on January 31, 2006, when he was working on a ladder that allegedly shifted, causing him to fall to the floor. At the time of the occurrence, Tuccillo was an journeyman electrician employed by third-party defendant Petrocelli Electric Co. (Petrocelli), and was installing cables for a security system at the U.S. Post Office at 271 Cadman Plaza, Brooklyn, New York, which was undergoing renovation.

According to Tuccillo, at the time of the accident, he had been working at the job site for approximately three months and, in order to perform his work, Petrocelli provided him with an A-frame wooden ladder, bearing the name "Petrocelli" on its side. Tuccillo testified that, during the time that he was working at the job site, he observed other trades working there, including ADT, which was supplying and installing security cameras and control boards which Petrocelli workers connected by running cables throughout the job site.

Tuccillo's supervisor on the project was Robert Guarino (Guarino). Tuccillo stated that, on the day of the accident, Guarino advised him that he would be running cable between the third and fourth floors. The height of the ceiling on the third floor where Tuccillo was working was approximately 10 feet, and Tuccillo is 5 feet 11 inches tall. Tuccillo brought an eight-

foot ladder, consisting of eight steps, with him to the third floor, along with a metal snake used to pull the cable, and he set up the ladder in the third-floor hallway, which, he said, was approximately five feet wide. The metal snake was approximately 50 feet long. Tuccillo also had his personal hand tools and three boxes of 18 gauge jacketed copper wire.

After Tuccillo set up his ladder, Guarino proceeded to the fourth floor in order to send the snake down through a conduit pipe to a junction box on the third floor where Tuccillo was to retrieve it and pull the cable through. When Tuccillo heard the snake stop its descent through the pipe, he climbed the ladder to look for it, reaching the fifth or sixth step before he felt the ladder wobble. When Tuccillo reached for the snake inside the junction box, he lost his balance and fell off the ladder to the floor, landing on his head. At the time of the accident, Tuccillo leaned his body approximately 15 degrees to the left to reach for the snake, had at least one of his arms above his head, and his head was about one foot below the ceiling.

Tuccillo testified that he was not aware of anyone having a problem with the ladders at the job site, nor did he observe any defects in the ladder. Further, Tuccillo stated that ADT never gave him any instructions on how to do his job during his entire time on the project.

Jimmy Rodriguez (Rodriguez), the installation manager for ADT, testified on behalf of ADT. Rodriguez testified that ADT was hired to install closed-circuit televisions, access controls, an intercom system, and a burglar alarm by the Post Office and U.S. Attorney's Office. Rodriguez also stated that the general contractor for the project was the General Services Administration. According to Rodriguez, ADT's work consisted of running wire throughout the building, installing main controls and power systems, plus installing other security devices. ADT engaged Petrocelli to perform the wire installations.

Rodriguez stated that Petrocelli was ADT's contractor for installation of wire and electrical cable, and that Petrocelli's work was extensive. ADT supplied Petrocelli with the wire that was to be installed at the job site, but, as far as Rodriguez knew, ADT provided no other equipment to Petrocelli. *Id.* at 50-51. In addition, Rodriguez said that ADT had no site safety personnel on this job, that it did not have any person or department to oversee safety at the project, and that it had no role in supervising the safety practices of Petrocelli employees at the job site. Further, Rodriguez stated that ADT had no authority to stop Petrocelli workers from working if ADT observed an unsafe work condition.

Guarino provided an affidavit as an eyewitness to the accident. Guarino averred that, after he fed the snake through

the conduit on the fourth floor, he went down to the third floor to see if Tuccillo had retrieved it. Guarino said that he saw Tuccillo on the ladder when the ladder shifted to the right, allegedly causing Tuccillo to fall. Guarino stated that the reason that the ladder did not fall over was because it was in a narrow corridor, and the corridor walls kept it from falling. Guarino further stated that the ladder was properly set up and that it was the wobbly condition of the ladder that caused Tuccillo to fall.

According to Article 3 of the contract between ADT and Petrocelli, Petrocelli, as the Contractor, agreed to

supervise and direct the work, using its best skill and attention. The Contractor will be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

* * *

The Contractor will be responsible for the acts and omissions of all its employees, and all Subcontractors, their agents and employees and all other persons performing any of the Work under a contract with the Contractor.

* * *

The Contractor assumes full responsibility for all injuries to, or death of any persons and for damages to property and for all claims, losses or expenses which may in any way arise out of or result[ing] from the Contractor's performance of this Contract, whether caused by negligence or otherwise. The Contractor will indemnify and save ADT and the owner or lessee of the work site harmless from all claims, losses, or suits for injuries, death or damage

* * *

Contractor shall be responsible for securing and protecting its Work, materials, equipment, tools and property, and shall be liable for any and all loss or damage of any kind or nature to such Work, materials, equipment, tools

and property.

Tuccillo has provided an affidavit with his motion, in which he asserts that he was not provided with any safety belts to protect him from falling, nor was he provided with a scaffold, either one of which would have prevented his fall.

In opposition to plaintiffs' motion, and in support of its cross motion, ADT asserts that it was not the general contractor at the job site because it was not responsible for the coordination and execution of all of the work under the subcontracts, and that, therefore, it cannot be held liable for Tuccillo's injuries as a general contractor. ADT maintains that it only contracted with the owners of the property to install a security system, and that it had no other responsibilities with respect to construction or renovation of the project. However, the court notes that ADT has failed to provide a copy of its contract with the General Services Administration, which, it maintains, was the general contractor.

In reply, Tuccillo avers that ADT was Petrocelli's general contractor for the project and, therefore, is held to a standard of strict liability under Labor Law §§ 240 (1) and 241 (6). However, the court notes that in the verified complaint, Tuccillo states that Bovis Lend Lease, Inc., Bovis Lend Lease Interiors, Inc. and Bovis Lend Lease LMB, Inc. (collectively, Bovis) was the

general contractor for the project, and that ADT contracted with Bovis to install a security system at the job site.

In the verified bill of particulars, Tuccillo alleges violations of Labor Law §§ 240 (1), 241 (6) and 200, as well as violations of sections 23-1.16 and 23-1.21 (b) of the Industrial Code.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

Plaintiffs' motion seeking partial summary judgment as against ADT on the issue of liability on their cause of action based on a violation of Labor Law § 240 (1) is denied, and that portion of ADT's cross-motion seeking to dismiss plaintiffs'

cause of action based on a violation of Labor Law § 240 (1) is granted.

Section 240 (1) of the New York Labor Law states, in pertinent part:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

As stated by the Court in Rocovich v Consolidated Edison Company (78 NY2d 509, 513 [1991] [internal quotation marks and citations omitted]),

It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as imposing absolute liability for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) is nondelegable and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control.

Plaintiffs rightly contend that the fact that the ladder wobbled and was not being held in place constitutes a prima facie showing that Labor Law § 240 (1) was violated. Hernandez v Bethel United Methodist Church of New York, 49 AD3d 251 (1st Dept 2008); Osario v BRF Construction Corp., 23 AD3d 202 (1st Dept

2005); Montalvo v J. Petrocelli Construction, Inc., 8 AD3d 173 (1st Dept 2004). However, in order to prevail on his summary judgment motion, pursuant to Labor Law § 240 (1), Tuccillo must make a prima facie showing that ADT was either the owner, general contractor or agent of the owner or general contractor. This he has failed to do.

Liability for violations of Labor Law § 240 (1) and § 241 (6) may be imposed against contractors and owners, as well as parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors. A construction manager charged with the duty of coordinating all aspects of a construction project is a contractor with nondelegable duties under sections 240 and 241 of the Labor Law [internal quotation marks and citation omitted].

Nienajado v Infomart New York, LLC, 19 AD3d 384, 385 (2d Dept 2005).

In the case at bar, plaintiffs have stated in their verified complaint that Bovis was the construction manager for the project, and they have provided no evidence whatsoever that either Bovis, or the General Services Administration - which ADT states was the project's general contractor, ever delegated supervisory authority to ADT. In fact, the only time that plaintiffs assert that ADT stood in the place of a construction manager was in their reply to ADT's opposition to the instant motion.

Conversely, ADT has made out a prima facie case for entitlement for dismissing plaintiffs' cause of action asserted

as against it based on a violation of Labor Law § 240 (1). Tuccillo, in his deposition, said that ADT never supervised his work. At his EBT, Rodriguez averred that ADT had no authority to supervise Tuccillo's work, and that ADT had no authority with respect to safety procedures or enforcement at the job site. Further, the contract between ADT and Petrocelli specifically states that Petrocelli had exclusive control over the means and methods of operations for its workers at the job site.

Tuccillo's basic support for his contention is Russin v Louis N. Picciano & Son (54 NY2d 311 [1981]), a case that is almost 30 years old, which interprets the term "agent" of an owner or contractor to be a person who was delegated, by a specific agency, to be responsible for job safety. However, in order for the Russin case to be applicable to the case at bar, it must be evidenced that ADT was "invested with a ... power to enforce safety standards and to hire responsible contractors [internal quotation marks omitted]." Aversano v JWH Contracting, LLC, 37 AD3d 745, 746 (2d Dept 2007). "[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law." Walls v Turner Construction Co., 4 NY3d 861, 864 (2005).

Plaintiffs have failed to provide any evidence that ADT was delegated supervisory control over Tuccillo's work (D'Amico v New

York Racing Association, 203 AD2d 509 [2d Dept 1994]), whereas ADT has provided sufficient evidence to make out a prima facie case that it lacked such supervisory authority.

The plaintiffs failed to establish, prima facie, their entitlement to judgment as a matter of law on the issue of liability pursuant to Labor Law § 240 (1). Labor Law § 240 (1) imposes liability only on contractors, owners, or their agents. For purposes of establishing liability pursuant to Labor Law § 240 (1), an agency relationship arises only when work is delegated to a third party who obtains the authority to supervise and control the work being performed.

The plaintiffs failed to establish, as a matter of law, that the defendant was an owner, contractor or statutory agent of an owner or contractor subject to liability under Labor Law § 240 (1).

Ficano v Franklin Stucco Supply, Inc., 72 AD3d 1018, 1018-1019 (2d Dept 2010) (emphasis added, internal citations omitted).

Based on the foregoing, plaintiffs' motion is denied and the portion of ADT's motion seeking summary judgment dismissing the cause of action based on a violation of Labor Law § 240 (1) asserted as against it is granted.

That portion of ADT's motion seeking to dismiss the causes of action asserted as against it based on violations of Labor Law §§ 200 and 241 (6) is granted.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494 (1993). For

the reasons stated above, ADT is not an owner, contractor or agent subject to liability under Labor Law § 200.

Labor Law § 241 (6) states:

Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998). Plaintiffs have alleged violations of 12 NYCRR 23-1.16, concerning the use of harnesses and safety belts, and 23-1.21 (b), requiring all ladders to be capable of sustaining a minimum weight. However, as under Labor Law §§ 240(2) and 200, "only upon obtaining the authority to supervise and control the work does the [subcontractor] fall within the class of those having nondelegable liability as an 'agent'" for violations of Labor Law § 241(6). Russin, at 318.

In the case at bar, Tuccillo has failed to come forward with admissible evidence that ADT was an owner, general contractor or agent, and so ADT has no liability under Labor Law § 241(6).

Since it has been determined that ADT is not liable to plaintiffs because it was not an owner, contractor or agent under the Labor Law, the court need not address the arguments concerning plaintiff allegedly being the sole proximate cause of his injuries.

Therefore, based on the foregoing, the portion of ADT's motion seeking to dismiss plaintiffs' causes of action based on violations of Labor Law §§ 200 and 241 (6) is granted.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion seeking partial summary judgment as against ADT Security Services, Inc. on the issue of liability pursuant to Labor Law § 240 (1) is denied; and it is further

ORDERED that ADT Security Services, Inc.'s cross-motion, seeking summary judgment dismissing the complaint as against it is granted and the complaint is dismissed in its entirety as against such defendant, with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

This is the decision and order of the court.

Dated: February 18, 2010

ENTER:

J. S. C.
J.S.C.

FILED

FEB 25 2011

**NEW YORK
COUNTY CLERK'S OFFICE**