

Rodriguez v JMB Architecture, LLC

2010 NY Slip Op 33795(U)

February 1, 2010

Supreme Court, Suffolk County

Docket Number: 05-11393

Judge: Denise F. Molia

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This opinion is uncorrected and not selected for official publication.

accident, and the second contract was for construction management services for the initial construction phase.² The management contract states that it is applicable for a construction manager “where the Construction Manager is NOT a Constructor.”

The thrust of JMB’s motion is that it is not subject to the vicarious liability imposed by Labor Law § 241 (6) because it was merely the construction manager, *i.e.*, it was not an owner or general contractor, and was not an agent of either. A party is deemed to be an agent of an owner under the Labor Law when it has supervisory control and authority over the work being performed where a plaintiff is injured (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *Russin v Picciano & Son, supra*). To impose the vicarious liability imposed by § 241 (6), the defendant must have the authority to control the activity bringing about the injury so as to enable him to avoid or correct the unsafe condition (*Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2006]; *Natoli v City of New York*, 32 AD3d 507, 820 NYS2d 313 [2006]). It is not a defendant’s title that is determinative, but the amount of control or supervision exercised (*Bagshaw v Network Serv. Mgt.*, 4 AD3d 831, 772 NYS2d 161 [2004]; *Aranda v Park E. Constr.*, 4 AD3d 315, 772 NYS2d 70 [2003]). 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” (*Kenny v Fuller Co.*, 87 AD2d 183, 190, 450 NYS2d 551, *lv denied* 58 NY2d 603, 459 NYS2d 1026 [1982]). Here, however, the contract between JMB and the homeowners provides that JMB’s responsibilities for review and coordination of the various Contractors’ safety programs “shall not extend to direct control over or charge of the acts or omissions” of the Contractors and Subcontractors (paragraph 2.3.12) and that JMB “shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedure . . . or safety precautions . . . of the Contractors” (paragraph 2.3.15). “Similarly, a construction manager may not be held liable under Labor Law § 200 or for common-law negligence where the injuries arise from the manner in which the work was performed absent evidence that it ‘had the authority to supervise or control the performance of the work’ ” (*Domino v Professional Consulting*, 57 AD3d 713, 869 NYS2d 224 [2008] quoting *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2008]; see *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 727 NYS2d 37; *Delahaye v Saint Anns School*, 40 AD3d 679, 836 NYS2d 233 [2007]). Here, JMB did not possess the requisite authority to supervise or control the subcontractor’s work, and the owner of Builders Choice, Michael Casalini, testified at his deposition that he was the only person with authority to supervise his workers. Accordingly, the Court finds that JMB established, *prima facie*, that it lacked the requisite control over the work performed by Builders Choice.

The thrust of the plaintiffs’ opposition is that it was JMB which decided which contractors would be employed for the initial phase, including those for the excavation, foundation (Builders Choice), and steel delivery. However, even assuming that this were accurate, such decisions do not rise to the level of control which would make JMB the “coordinator and overall supervisor for all the work being performed on the job site” and, thereby, subject it to the vicarious liability imposed by Labor Law § 241 (6) (*compare, Walls v Turner Constr. Co., supra; see, Domino v Professional Consulting, supra; Delahaye v Saint Anns School, supra*). Here, the parties do not dispute that the homeowner took an active role in choosing the remaining contractors and assumed control over the finishing of the house. Therefore, JMB did not assume the role of a general contractor, and the plaintiffs have not successfully rebutted JMB’s showing as to its

² It appears that the homeowner managed the finishing phases of the construction.

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limited role. Accordingly, JMB is granted summary judgment dismissing the plaintiffs' complaint and any cross claims asserted against it.

Since the plaintiffs' claims against JMB are dismissed, JMB's claims for indemnification over and against Builders Choice are also dismissed (*Payne v 100 Motor Parkway Assoc.*, 45 AD3d 550, 554, 846 NYS2d 211 [2007]).³

Any remaining third-party claims are severed and shall continue.

Dated: 2/11/10

Hon Denise F. Molis

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

³ Moreover, since JMB has established that it was the construction manager, and not the general contractor or agent of the owners, it would not be entitled to contractual indemnification pursuant to the contract between Builders Choice and the owners.