

Viera v Eldorado Constr. Corp.

2011 NY Slip Op 30225(U)

January 10, 2011

Sup Ct, Nassau County

Docket Number: 8449/09

Judge: Anthony L. Parga

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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT: HON. ANTHONY L. PARGA

JUSTICE

-----X PART 8

MARIO CESAR VIERA,
Plaintiff,

INDEX NO. 8449/09

-against-

MOTION DATE: 11/24/10
SEQUENCE NO. 01,02,03,
04,05

ELDORADO CONSTRUCTION CORP., 5 PINE TREE
DRIVE LLC, J. KARMILY LLC, JACOB KARMILY,
SHARON KARMILY, and SCOTT SOUCY CONSTRUCTION
CORP.,

Defendants.

-----X

5 PINE TREE DRIVE LLC, J. KARMILY LLC,
JACOB KARMILY and SHARON KARMILY,
Third-Party Plaintiffs,

-against-

SCOTT SOUCY CONSTRUCTION CORP. and
VANDERLUCIO ALVES d/b/a MP4 CONSTRUCTION
CO.,

Third-Party Defendants.

-----X

ELDORADO CONSTRUCTION CORP.,
Second Third-Party Plaintiffs,

-against-

VANDERLUCIO ALVES d/b/a MP4 CONSTRUCTION
CO.,
Second-Third Party Defendants.

-----X

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Upon the foregoing papers, it is ordered that:

1. The motion brought by the Plaintiff, Mario Cesar Viera, for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment on liability in favor of the Plaintiff against the Defendants, Eldorado Construction Corp. and Scott Soucy Construction Corp., pursuant to Labor Law § 240(1) is granted (motion sequence No. 1).
2. The motion brought by the Defendant/Second Third-Party Plaintiff, Eldorado Construction Corp., for an order of this Court:
 - (a) Granting summary judgment and dismissing Plaintiff's Labor Law § 200 and common-law negligence claims;
 - (b) Granting summary judgment on its Third-Party claim for common-law indemnity, including indemnity for all legal fees and defense costs, against Third-Party Defendant Vanderlucio Alves d/b/a/ MP4 Construction Co.;
 - (c) Granting summary judgment on its cross-claim for contractual indemnity, including indemnity for all legal fees and defense costs, against Defendant Scott Soucy Construction Corp.

is denied (motion sequence No. 2).
3. The motion brought by the Defendant/Third-Party Defendant and Third-Party Plaintiff, Scott Soucy Construction Corp., for a conditional order of summary judgment, pursuant to Rule 3212(e) of the CPLR, that Defendant/Third-Party Defendant and Third Third-Party Plaintiff, Scott Soucy Construction Corp., is entitled to common-law indemnification from Third Third-Party Defendant Vanderlucio Alves, d/b/a MP4 Construction Corp. in the event that a judgment is entered in favor of Plaintiff or any other party as against Scott Soucy Construction Corp. is denied (motion sequence No. 3).
4. The motion brought by the Defendant/Third-Party Defendant and Third Third-Party Plaintiff Scott Soucy Construction Corp. for an order of this Court granting partial summary judgment, in favor of this movant, dismissing the Plaintiff's causes of action as against Scott Soucy Construction Corp. based upon Labor Law § 200 and Common Law Negligence is denied (motion sequence No. 4).
5. Motion brought by the Third-Party Defendant/Second Third-Party Defendant/Third Third-Party Defendant, Vanderlucio Alves d/b/a MP4 Construction Co., for an order of this Court, pursuant to CPLR §§ 3101(a)(3) and 3102(a) compelling the oral deposition of Jocelli Menezes-DeOliveria, a non-party eye witness to the incident which is the subject matter of the instant action

and whose oral deposition may be used pursuant to Rule 3211(a) 3 (ii) (iv) of the CPLR is denied (motion sequence No. 5).

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The incident which is the subject matter of the instant action occurred on January 26, 2009 during the construction of a one (1) family dwelling located at 5 Pine Tree Drive, Kings Point, New York.

The subject premises was owned, at the time of the said incident, by the Defendants/Third-Party Plaintiffs, 5 Pine Tree Drive, LLC; J.Karmily, LLC; Jacob Karmily and Sharon Karmily.

Prior to the date of the subject incident, the aforesaid Defendants/Third-Party Plaintiffs had contracted with the Defendant/Second Third-Party Plaintiff, Eldorado Construction Corp., to demolish an existing house and construct a new one (1) family dwelling at the subject premises.

Prior to the date of the subject incident, the aforesaid Defendant/Second Third-Party Plaintiff had subcontracted out the framing of the new dwelling to the Defendant/Third-Party Defendant/Third Third-Party Plaintiff, Scott Soucy Construction Corp.

An addendum, dated December 9, 2008, to the contract between Eldorado Construction Corp. as "General Contractor" and Scott Soucy Construction Corp. as "Subcontractor" provided:

INDEMNIFICATION:

"To the fullest extent permitted by law, Subcontractor agrees to indemnify, defend and hold harmless General Contractor from and against any and all suits, actions, liabilities, damages, professional fees, including attorneys' fees, costs, court costs, expenses, disbursements or claims of any kind or nature for injury to or death of any person or damage to any property (including loss of use thereof) arising out of or in connection with the performance of the work of the Subcontractor, its agents, servants, subcontractors or employees, or the use by Subcontractor, its agents, servants, subcontractors or employees, of any premises or facilities, or part thereof, occupied by the General Contractor. This agreement to indemnify specifically includes full indemnity in the event of liability imposed against the General Contractor without any negligence or fault on the part of General Contractor and solely by reason of statute, operation of law or otherwise. In the event any negligence or fault is assigned or apportioned to the General Contractor, this agreement specifically includes partial

indemnity of General Contractor, but limited to any liability imposed over and above that percentage attributed to the General Contractor.”

The aforesaid Defendant/Third-Party Defendant/Third Third-Party Plaintiff in turn subcontracted out the sheathing portion of the framing work, i.e., installation of the plywood on the exterior walls and roof, to the Third-Party Defendant/Second Third-Party Defendant/Third Third-Party Defendant, Vanderlucio Alves d/b/a MP4 Costruction Corp.

At the date, time and place of the subject incident, the Plaintiff, Mario Cesar Viera, had been employed by the Third-Party Defendant/Second Third-Party Defendant/Third Third-Party Defendant, Vanderlucio Alves d/b/a MP4 Construction Corp. (“MP4”), full time for approximately one (1) month.

At the date, time and place of the subject incident, it was the Plaintiff’s first day on this particular job site.

At the time of the subject incident, the aforesaid Third-Party Defendant/Second Third-Party Defendant/Third Third-Party Defendant MP4 was in the process of installing plywood on the roof of the dwelling under construction. During this process, the Plaintiff began to bring a four (4) foot by eight (8) foot, five-eighths (5/8) of an inch thick, piece of plywood board to the roof of the dwelling by climbing up an extension ladder, which was placed and leaning against the exterior of the dwelling.

This extension ladder was provided at the job site by the Plaintiff’s employer, Vanderlucio Alves d/b/a MP4 Construction Co.

At some point in time on the date of the accident, the Plaintiff fell from the aforesaid extension ladder, fourteen (14) to fifteen (15) feet to the ground. As a result of the fall, the

plaintiff has been rendered permanently paraplegic. Accordingly, it is undisputed that Plaintiff sustained a “grave injury” as defined by Workers’ Compensation Law Section 11.

At the time of the described incident, the Plaintiff was not provided with any safety device other than the above-noted extension ladder. There was no scaffolding, safety net, lifeline, lift, forklift or crane at the location of this ladder.

The parties dispute whether Plaintiff’s fall occurred on his first ascent of the aforesaid extension ladder, as he was handing the board to a co-worker on the roof, or during upon his descent on the ladder after handing the board to a co-worker on the roof. The opposition argues that said dispute creates a question of fact sufficient to warrant the denial of summary judgment to plaintiff pursuant to Labor Law §240(1), however, even where there is no defect, per se, with the ladder, where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to summary judgment as a matter of law under Labor Law §240(1). (*Cruz v. Turner Construction*, 279 A.D.2d 322 (1st Dept. 2001); see also, *Montalvo v. J. Petrocelli Construction, Inc.*, 8 A.D.3d 173 (1st Dept. 2004); *Quackenbush v. Gar-Ben Associates*, 2 A.D.3d 824 (2d Dept. 2003); *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533 (1st Dept. 2009); *Callan v. Structure Tone, Inc.*, 52 A.D.3d 334 (1st Dept. 2008)). The overwhelming evidence contained within the record before the court indicates that the ladder being used was inadequate for the job of carrying large (96" long x 40" wide and 5/8" thick) plywood boards to the roof of the dwelling being constructed. The availability of a particular safety device will not shield the owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices. (*Nimirovski v. Tornado Realty Trust Co.*, 29 A.D.3d 762 (2d Dept. 2005)).

Accordingly, summary judgment is granted to plaintiff as against defendants Eldorado Construction Corp. and Scott Soucy Construction Corp., pursuant to Labor Law §240(1).

At the date, time and place of the subject incident, representatives of Eldorado Construction Corp. and/or Scott Soucy Construction Corp. had supervisory authority to and could stop the work being performed at the job site if they observed, *inter alia*, work being done in an unsafe manner.

At the time of the subject incident, Jocelli Menezes-DeOliveria, a co-employee of the Plaintiff, was positioned on the roof of the subject dwelling under construction and was the intended recipient of the plywood board to the delivered to the roof by the Plaintiff. Mr. Jocelli Menezes-DeOliveria presently lives in San Paulo, Brazil, having returned to Brazil in 2009 after the subject incident. Mr. Jocelli Menezes-De-Oliveria is the sole identified witness to the subject incident.

Based upon the foregoing, there exists questions of fact as to the extent and nature of the supervision of the job site by Eldorado Construction Corp. and Scott Soucy Construction Corp. Accordingly, their applications for summary judgment pursuant to Labor Law §200 are denied.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v Equitable Land Services, Inc.*, 207 AD2d 880, 881 [2nd Dept. 2994]:

“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 (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). 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 (*State Bank v McAuliffe*, 97 AD2d 607 [3rd Dept. 1983]), 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 total of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York*, *supra*, at p. 562).”

Furthermore, General Obligations Law § 5-322.1 applies to the instant action and prevents a party to a construction contract from exempting itself from liability for negligence and purporting to require indemnification from another for its own negligence. Where there are questions of fact, as set forth hereinabove, as to whether the one seeking indemnification was free from negligence with regard to the underlying accident, summary judgment on the cause of action for contractual indemnification is not warranted (see *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, [2nd Dept. 2009]).

Until the relative responsibility of Eldorado Construction Corp. and Scott Saucy Construction Corp. is determined by the trier of fact, no determination can be made as to the right of one to recover from the other, or from MP4, pursuant to Common Law and/or contractual indemnification. The determinative factor is not whether either exercised control over the Plaintiff’s work, but whether they had the authority to control the activity which caused the condition resulting in the Plaintiff’s injury (see *Farducchi v United Artists Theatre Circuit, Inc.*, 23 AD3d 610 [2nd Dept. 2005]).

While it is true that the Court of Appeals has recognized the concept of partial indemnification, adopting as the sounder course a rule allowing an indemnitee to recover from its indemnitor the damages attributable to the indemnitor’s own negligence, notwithstanding the General Obligations Law’s apparent prohibition against such agreements (see *Brooks v Judlau Contracting, Inc.*, 11 NY3d 204 [2008]), recovery is dependent upon a finding of negligence on the part of the prospective indemnitor. Until the relative responsibility of the various parties is determined by the trier of fact, no determination can be made as to the right of one party to recover from the other pursuant to a contractual indemnification agreement.

Accordingly, Defendant/Second Third-Party Plaintiff, Eldorado Construction Corp.’s application for summary judgment upon its claim for common law indemnity against MP4 and

contractual indemnity against Scott Soucy Construction Corp., and Defendant/Third Party Defendant/Third Party Plaintiff Scott Soucy Construction Corp.'s applications for summary judgment upon its claim for common law indemnity against MP4, are denied.


With respect to the motion brought by the Third-Party Defendant/Second Third-Party Defendant/Third Third-Party Defendant, MP4, for an order of this Court, pursuant to CPLR §§ 3101(a)(3) and 3102(a) compelling the oral deposition of Jocelli Menezes-DeOliveria, a non-party eye witness to the incident, same is also denied. Non-party, Jocelli Menezes-DeOliveria, was an employee of movant MP4 at the time that the accident occurred. On the date of the accident, the owner of MP4, Vanderlucio Alves, spoke with Jocelli Menezes-DeOliveria about plaintiff's accident. Accordingly, movant, MP4, was aware that Jocelli was working with plaintiff on the date of the accident and was a witness to the occurrence herein. Accordingly, there is no evidence within the record before the court that supports movant's argument that MP4 was trying to obtain an affidavit from Jocelli prior to taking his deposition in order to determine whether or not he had personal knowledge of the accident.

As a certification conference was held on May 20, 2010, at which counsel for all parties agreed that discovery was complete and the case could be certified for trial, as the Note of Issue was filed on May 25, 2010, and as this action has already appeared on the DCM trial calendar on September 21, 2010, November 1, 2010, November 29, 2010, and January 10, 2010, the Court will not issue an order compelling the deposition of non-party witness Jocelli Menezes-DeOliveria. The affidavit of Jocelli Menezes-DeOliveria that MP4 purports to have needed to determine the materiality of said witness could have been obtained earlier in the litigation so that his deposition could have been held prior to this action appearing on the trial calendar. The filing of a note of issue denotes the completion of discovery, and there is no longer any basis for judicial intervention to allow further pretrial proceedings absent unusual or unanticipated circumstances. (22 N.Y.C.R.R. 202.21(d)). In the case at hand, movant, MP4, has not demonstrated that unusual and unanticipated circumstances developed *subsequent* to the filing of the note of issue which requires the Court to compel the non-party deposition to prevent substantial prejudice. (*See, Audiovox Corp. V. Benyamini*, 265 A.D.2d 135 (2d Dept. 2000); *Tirado v. Miller*, 75 A.D.3d 153 (2d Dept. 2010)). Accordingly, MP4's motion for an order compelling the deposition on non-

party witness, Jocelli Menezes-DeOliveria, is denied.

This constitutes the decision and order of this Court. Counsel for the Plaintiff is directed to serve a copy of this order upon the attorneys for all parties within ten (10) days of the date hereof.

Dated: January 10, 2011


Anthony L. Parga, J.S.C.

cc: Goldberg Segalla, LLP
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ENTERED

JAN 19 2011

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