

Fernandez v Stockbridge Homes, LLC

2011 NY Slip Op 30423(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 402886/08

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

JULY FERNANDEZ,
Plaintiff,

Index No.: 402886/08

- v -

Motion Date: 09/21/10

STOCKBRIDGE HOMES, LLC, STRATIS BUILDERS,
LLC and HARC MAINTENANCE & CONTRACTING
CORP.,

Motion Seq. No.: 02

Motion Cal. No.: _____

Defendants.

STRATIS BUILDERS, LLC,
Third-Party Plaintiff,

- v -

ROGER & SONS CONCRETE INC.,
Third-Party Defendant.

FILED

FEB 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

STOCKBRIDGE HOMES, LLC i/s/h/a
STOCKBRIDGE BUILDERS, LLC,
Second Third-Party Plaintiff,

- v -

SANITA CONSTRUCTION COMPANY, INC.,
Second Third-Party Defendant.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 3 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

Cross-Motion: Yes No

Upon the foregoing papers,
Defendant/third-party plaintiff Stratis Builders, LLC
(Stratis) moves, pursuant to CPLR 3212, for summary judgment

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

dismissing plaintiff's complaint and all cross claims asserted as against it. Plaintiff cross-moves, pursuant to CPLR 3126 and 3124, to strike the answer of third-party defendant Sanita Construction Company, Inc. (Sanita), and to deny the motion made by Stratis to dismiss the complaint as against Stratis.

Plaintiff was injured at a job site located at 96-108 Stockbridge Road, Yonkers, New York, on November 1, 2005. At the time of the occurrence, the property was owned by defendant Stockbridge Homes, LLC (Stockbridge), which was constructing four single-family homes at the site. Stockbridge contracted directly with Sanita, plaintiff's employer, to excavate and construct the buildings. Stockbridge entered into a contract with Stratis to do "all work necessary to erect 4 single family homes on Stockbridge Rd. and to schedule/coordinate concrete work w/ Sanita Construction."

At the time of the accident, plaintiff was in the process of moving wooden forms that he and his co-workers had used to construct a retaining wall. According to his testimony at his examination before trial (EBT), plaintiff was lifting the forms from one side of the building to the other. Plaintiff stated that, while standing on top of the wall, he was using a rope to lower the form down to the ground, and the rope became dislodged from the form, causing him to fall backwards to the ground.

Stratis asserts that it had no involvement with plaintiff's work, that it did not contract with plaintiff's employer, and that it did not direct, supervise or control plaintiff's work.

According to Stockbridge's contract with Sanita,

"The Contractor [Sanita] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters."

The court notes that the same provision appears in Stockbridge's contract with Stratis.

According to the testimony of Emmanuel Stratis, the sole member of Stratis, Stratis had no responsibilities with respect to Sanita other than scheduling and coordinating Sanita's work activities. However, Mr. Stratis affirmed that Stratis was acting as the general contractor for the project.

In the complaint, plaintiff is alleging common-law negligence, as well as violations of Labor Law §§ 200, 240 (1) and 241 (6). It is noted that neither the complaint nor the verified bill of particulars indicates any provision of the Industrial Code that plaintiff alleges to have been violated.

In plaintiff's cross motion, plaintiff asserts that Sanita's answer should be stricken because Sanita has failed to produce requested witnesses for deposition. The court notes that no discovery orders have been issued by the court in this matter.

In addition, in opposition to Stratis' motion, plaintiff argues that the motion should be denied because, since discovery is incomplete, it is premature. Further, plaintiff contends that Stratis was acting as the agent of the owner, Stockbridge, and, therefore, is liable pursuant to Labor Law § 240 (1).

In reply, Stratis states that plaintiff has failed to posit any allegation that would raise a triable issue of fact with respect to Stratis' motion.

"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).

That portion of Stratis' motion seeking to dismiss plaintiff's common-law and Labor Law § 200 causes of action asserted as against it 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).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 (2d Dept 2007).

In the instant matter, the accident occurred because of the means and methods of operation, i.e., the way in which plaintiff lowered the forms. In such circumstances, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. Comes v New York State Electric & Gas Corp., 82 NY2d 876 (1993); McFadden v Lee, 62 AD3d 966 (2d Dept 2009).

[T]here is no evidence in the record that [Stratis] actually directed, controlled or supervised plaintiff's work or was responsible for doing so. Nor was there any proof that [Stratis] was on notice of any dangerous condition regarding the use of the [ropes] or that it supplied the [ropes] in question. Rather, the record shows that [Sanita] was contractually obligated to supply the necessary equipment for the ... work and it was plaintiff's employer ... that actually directed its use.

Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 (1st Dept 2005) (internal citations omitted).

[*6]
The Labor Law § 200 and common-law negligence claims [are] properly dismissed as against the general contractor, [Stratis, because the evidence that [Stratis]'s project superintendent coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition is insufficient to raise a triable issue whether [Stratis] exercised the requisite degree of supervision and control over the work to sustain those claims."

Geonie v OD & P NY Limited, 50 AD3d 444, 445 (1st Dept 2008)

(internal citations omitted).

Furthermore, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of . . . actual control." Brown v New York City Economic Development Corp., 234 AD2d 33, 33 (1st Dept 1996).

In the case at bar, no evidence has been submitted to indicate that Stratis, as the general contractor, exercised any supervision or control over plaintiff's work. As a consequence, that portion of defendants' motion seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 claims as Stratis is granted.

Similarly, the court grants that portion of Stratis' motion seeking to dismiss the complaint with respect to the cause of action based on a violation of Labor Law § 241 (6) asserted as against it.

Labor Law § 241 (6) provides

Construction, excavation and demolition work. All

[* 7]

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).

Neither the complaint nor the bill of particulars alleges any violations of the Industrial Code, and, in the cross motion and opposition, plaintiff does not assert any opposition to this portion of Stratis' motion. As a consequence, the portion of Stratis' motion seeking to dismiss plaintiff's Labor Law § 241 (6) cause of action asserted as against it is granted.

That portion of Stratis' motion seeking to dismiss plaintiff's Labor Law § 240 (1) cause of action asserted as against it is denied.

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.

As Stratis has conceded that it is the general contractor of the project, it may be held liable under the absolute liability provisions of Labor Law § 240 (1) (Serpe v Eyrig Productions, Inc., 243 AD2d 375 [1st Dept 1997]), even if other prime contractors may share in that liability under an agency theory. Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981). Stratis has failed to demonstrate that there is no issue of fact as to the adequacy of the safety devices provided and therefore has not demonstrated a prima facie entitlement to judgment.

Lastly, plaintiff's cross motion to strike the answer of Sanita, based on Sanita's alleged failure to produce a witness with knowledge of the facts for deposition, is denied.

CPLR 3126 allows the court to strike the pleading of a party who has failed to comply with a court-ordered discovery request. The appropriate prerequisite to request this sanction from the court is that a party whose discovery demand has gone unheeded is to seek court intervention by conference or motion pursuant to CPLR 3124. This plaintiff has failed to do.

Since Sanita has not disobeyed any order of this court, plaintiff's motion to strike Sanita's answer must be denied.

Based on the foregoing, it is hereby

ORDERED that the portion of Stratis Builders, LLC's motion for summary judgment dismissing the causes of action asserted as against it in the complaint based on common-law negligence and violation of Labor Law §§ 200 and 241 (6) is granted; and it is further

ORDERED that the portion of Stratis Builders, LLC's for summary judgment dismissing the cause of action asserted as against it in the complaint based on violation of Labor Law § 240 (1) is denied; and it is further

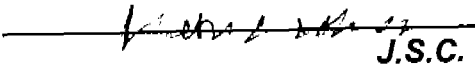
ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the parties are directed to attend a status conference on April 5, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 2:30 P.M.

This is the decision and order of the court.

Dated: FEB 18 2011

ENTER:


J.S.C.

DEBRA A. JAMES

FILED

FEB 25 2011

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