

Naughton v City of New York

2011 NY Slip Op 30882(U)

April 11, 2011

Supreme Court, New York County

Docket Number: 104026/2005

Judge: Martin Shulman

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

PRESENT: SHULMAN
Justice

PART 1

NAUGHTON, JR, PATRICK

INDEX NO. 104026/05

- v -
THE CITY OF N.Y., ET AL.

MOTION DATE _____

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>1-4</u>	<u>1</u>
Answering Affidavits — Exhibits	<u>2, 3, 4</u>
Replying Affidavits — <u>Exhibits 5-6</u>	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED

APR 12 2011

NEW YORK COUNTY CLERK'S OFFICE

MARTIN SHULMAN J.S.C.

Dated: APR 17, 2011

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 1

-----X
Patrick Naughton, Jr.,
Plaintiff,

Index Number 104026/2005

-against-

The City of New York and Petrocelli Construction, Inc.,
Defendants.

-----X
Petrocelli Construction, Inc.,
Third-Party Plaintiff,

FILED

-against-

W & W Glass Systems, Inc. and Metal Sales Co., Inc.,
Third-Party Defendants.

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Martin Shulman, J.:

Plaintiff moves to reargue the court's order dated November 30, 2010 (the "November 2010 Order") which denied his motion for partial summary judgment on liability on his Labor Law § 240 (1) ("Scaffold Law") claim, dismissed his claims under Labor Law § 241 (6), granted Petrocelli Construction, Inc.'s ("Petrocelli") cross motion for summary judgment dismissing plaintiff's complaint and dealt with cross motions for indemnification between Petrocelli and third-party defendants W & W Glass Systems, Inc. ("W & W") and Metal Sales, Inc. ("Metal"). In his motion, plaintiff asserts that the court erred in denying his motion for summary judgment on liability against Petrocelli, in granting Petrocelli's cross motion for summary judgment dismissing his claim under the Scaffold Law and in dismissing his claim under Labor Law § 241 (6) based upon 12 NYCRR 23-6.1 (h) (the "Tag Line Rule") (Julian affirmation, ¶¶ 4-6). The parties'

allegations are set forth in detail in the November 2010 Order at pages 2-5 and consequently, need not be repeated.

Reargument

"A motion for rearargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law [and] ... is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or] ... to provide a party an opportunity to advance arguments different from those tendered on the original application" (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]; *see also, McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

The Scaffold Law Claim

In the November 2010 Order, this court denied plaintiff's motion for partial summary judgment on liability under the Scaffold Law and granted Petrocelli's cross motion dismissing this claim, since Petrocelli presented evidentiary proof that: E & F Walsh ("Walsh") was the general contractor with overall authority for the renovation of the facade and lobby of the Family Court, New York County; Petrocelli was subordinate to Walsh (Weber EBT, at 9-10); and Petrocelli did not direct or supervise the hoisting operation Metal performed (Stone EBT, at 107, 110).

Plaintiff noted that Petrocelli was referred to as the general contractor but "[t]he label of construction manager versus general contractor is not necessarily determinative ... [A party will be considered the agent or the owner or general contractor

if it is the] coordinator and overall supervisor for all the work being performed on the job site" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

Generally, "a separate prime contractor is not liable under [the Scaffold Law] ... for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" (*Barrios v City of New York*, 75 AD3d 517, 518 [2d Dept 2010]). In this case, plaintiff was supervised solely by Metal's foreman, Jose Garcia, and not by Petrocelli (plaintiff EBT, at 17). A prime contractor who has "the authority to supervise and control the particular work in which the plaintiff was engaged at the time of his injury" (*Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569-570 [2d Dept 2010]) may be held liable as the statutory agent of the owner or general contractor. However, Petrocelli has established its lack of "authority to supervise and control the particular work" (*id.* at 569-570) [the hoisting] that plaintiff was involved in at the time of the accident.

Therefore, Petrocelli was not a Scaffold Law defendant with absolute liability due to the fact that it was neither the owner nor general contractor nor their agent, since it was not the "overall supervisor for all the work being performed at the job site" (*Walls*, 4 NY3d at 864). Consequently, plaintiff has failed to show that the court overlooked or misapprehended controlling principles of law or relevant facts on his Scaffold Law claim.

Labor Law § 241 (6)

To establish a claim under Labor Law § 241 (6), a plaintiff must show a violation of a specific, rather than a general, safety standard under a rule of the New York State Industrial Code (the "Code") (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]). The Tag Line Rule provides:

[h] Tag line. Loads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines.

Plaintiff asserts that the court erred in dismissing his claim under the Tag Line Rule since a purportedly similar Code section has been held to be sufficiently specific (Julian affirmation, ¶ 27). However, the Tag Line Rule has been held to be "insufficient to establish a violation ... [under] Labor Law § 241 (6) since it only sets forth a general safety standard and not a concrete specification" (*Smith v Homart Dev. Co.*, 237 AD2d 77, 80 [3d Dept 1997]). Moreover, tag lines were used in this case (November 2010 Order, at 6). Consequently, plaintiff has not established that the court either misapprehended or overlooked the controlling law or relevant facts on this claim.

Denial of plaintiff's motion for summary judgment on liability follows from the court's granting of Petrocelli's application to dismiss. Since plaintiff has not established that the court erred, reargument should be denied. However, in the exercise of discretion, the court grants reargument and adheres to its prior decision in all respects. Accordingly, it is hereby

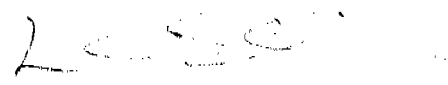
ORDERED that the plaintiff's motion for leave to reargue the portion of the court's order dated November 30, 2010, which denied plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1) and granted Petrocelli's cross

motion to dismiss plaintiff's claims under Labor Law § 240 (1) and under Labor Law § 241 (6) as to 12 NYCRR 23-6.1 (h), is granted; and it is further

ORDERED that, upon reargument, the court adheres to its Decision and Order dated November 30, 2010 in its entirety.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
April 11, 2011



HON. MARTIN SHULMAN, J.S.C.

FILED
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