

Thomas v Metropolitan Trans. Auth.

2011 NY Slip Op 32668(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 110519/2010

Judge: Saliann Scarpulla

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

PRESENT: _____

PART _____

Justice

Index Number : 110519/2010

THOMAS, MICHAEL

VS.

METROPOLITAN TRANSIT AUTHORITY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance

with the accompanying memorandum decision

FILED

OCT 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/8/11

Patricia Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
MICHAEL THOMAS,

Plaintiff,

- against-

Index No.: 110519/2010
Submission Date: 07/20/11

METROPOLITAN TRANSIT AUTHORITY,
NEW YORK TRANSIT AUTHORITY,
SCHIAVONE CONSTRUCTION CO. LLC
SKANSKA USA CIVIL INC., J.F. SHEA
CONSTRUCTION, INC., KS ENGINEERS, P.C.,
KLEINBERG ELECTRIC, INC.

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

----- X

For Plaintiff:
Fabiani, Cohen & Hall LLP
570 Lexington Ave
New York, NY 10022

For Defendant Kleinberg Electric, Inc.:
Sills, Cummis & Gross
One Rockefeller Plaza
New York, NY 10020

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support of	
Summary Judgment	2
Aff in Opposition	3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Kleinberg Electric, Inc. ("Kleinberg") moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and cross claims against it.

This action arises from injuries plaintiff Michael Thomas ("Thomas") sustained on May 12, 2009. Thomas alleges that he was electrocuted while working as an electrician

in a tunnel of the Number 7 Flushing Line Extension Project. The project's general contractor is S3II Tunnel Constructor, a Joint Venture between defendants J.F. Shea Construction, Inc., Skanska USA Civil Inc. and Shiavone Construction Co. LLC.

Kleinberg is the project's electrical subcontractor. Thomas seeks damages from the Joint Venture and Kleinberg, alleging both common law negligence and Labor Law violations.

Though the subcontract agreement between Kleinberg and the Joint Venture does not specify Kleinberg's responsibilities under the subcontract, both parties agreed in open court on July 20, 2011 that Kleinberg was not responsible for overseeing the project's below ground tunnel work. An affidavit from Kleinberg's President, Carol Kleinberg, confirms the company's subcontractor status. Furthermore, Kleinberg's General Foreman, Peter Dosso ("Dosso"), stated in a sworn affidavit that Kleinberg contracted to provide above grade [ground] electrical work and that Kleinberg "did not direct, supervise or control the work of Michael Thomas."

Dosso's affidavit also stated that Paul McNally ("McNally"), the Joint Venture's Superintendent, informed him that Thomas was injured while working on one of the tunnel boring machine's [TBM] transformers. Further, the affidavit acknowledged that Kleinberg provided high voltage electricity to the TBM, but did not do so until receiving McNally's authorization.

Kleinberg now moves for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims against it. Kleinberg argues that it is not liable under either

the Labor Law or common law negligence because it did not direct or control the work that led to Thomas's injury.

In opposition, Thomas argues that material issues of fact exist as to whether Kleinberg supervised and controlled Thomas' work and was therefore liable under the Labor Law. Thomas also argues that questions of fact remain as to Kleinberg's common law negligence claim. Thomas claims that because he was injured in an electrical accident and Kleinberg supplied the project with "high voltage electricity," it is possible that Kleinberg's negligence caused his injuries.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The Labor Law imposes strict liability on owners, contractors or their agents for failing to furnish or erect necessary safety devices. *Rodriguez v. New York City Hous. Auth.*, 194 A.D.2d 460, 461 (1st Dept. 1993). To be liable under the Labor Law as a "contractor," an entity must have the duty and power to choose subcontractors and enforce a project's safety standards. *Nowak v. Smith & Mahoney, P.C.*, 110 A.D.2d 288,

289-90 (3rd Dept. 1985). “When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor.” *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981).

Kleinberg has made a *prima facie* showing that it is not a “contractor” or an “agent” under the Labor Law. The subcontract agreement shows that Kleinberg was a subcontractor, not a “contractor,” and thus did not have the authority to choose the project’s subcontractors. Thomas does not present any evidence to the contrary. Further, both parties agreed in open court that Kleinberg was not responsible for overseeing below ground work where Thomas was working. Thomas’s response that the Joint Venture may have delegated to Kleinberg its authority to oversee Thomas’s work site is purely speculative and fails to demonstrate a triable issue of fact as to whether Kleinberg was an “agent” under the Labor Law. *See Voyages v. Roger's Pharm., Inc.*, 1 A.D.3d 352, 353 (2nd Dept).

However, because very little discovery has taken place, issues of fact remain as to Kleinberg’s potential common law negligence liability. It is undisputed that Kleinberg was providing the project’s electricity when Thomas was electrocuted. Though Kleinberg submitted evidence that the New York Electrical Power Services had tested and certified its equipment on April 20, 2009, it is impossible without further discovery to determine whether the injury resulted from an equipment problem or a separate negligent act. *See*

Smith v. Johnson Products Co., 73 A.D.2d 906, 906 (1st Dept. 1980) (denying summary judgment as premature where movant relied solely on an affidavit stating that it did not manufacture the allegedly defective product and plaintiff had not yet deposed the third-party defendant). Kleinberg argues that negligence liability attaches only if it controlled Thomas's work. However, if Thomas's injury resulted from Kleinberg's negligence, then it would be liable whether or not it controlled Thomas's work. *See Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d 553, 554 (1st Dept. 2009).

In accordance with the foregoing, it is hereby

ORDERED that defendant Kleinberg Electric, Inc.'s motion for summary judgment dismissing the complaint is granted only to the extent that plaintiff Michael Thomas's Labor Law claims asserted against defendant Kleinberg Electric, Inc. are dismissed and the remaining claims are severed and shall continue.

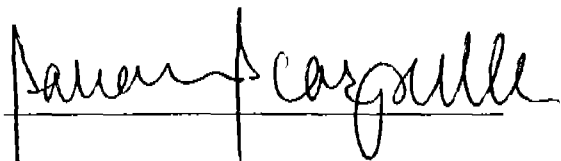
This constitutes the decision and order of the Court.

FILED

Dated: New York, New York
October 7, 2011

OCT 12 2011

ENTER: NEW YORK
COUNTY CLERK'S OFFICE



Saliann Scarpulla, J.S.C.