

**Tuccillo v Bovis Lend Lease, Inc.**

2011 NY Slip Op 32763(U)

October 18, 2011

Sup Ct, NY County

Docket Number: 105551/06

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

ANTHONY TUCCILLO, JR., and MARIA TUCCILLO,  
Plaintiffs,

Index No.: 105551/06

Motion Date: 07/26/11

- v -

Motion Seq. No.: 06

BOVIS LEND LEASE, INC., BOVIS LEND LEASE  
INTERIORS, INC., BOVIS LEND LEASE LMB,  
INC., and ADT SECURITY SERVICES, INC.,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

ADT SECURITY SERVICES, INC.,  
Third-Party Plaintiff,

**FILED**

- v -

**OCT 25 2011**

PETROCELLI ELECTRIC CO.,  
Third-Party Defendant.

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 2 were read on this motion for renewal/reargument.

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,

Plaintiffs move, pursuant to CPLR 2221, for leave to renew and/or reargue their previous motion seeking partial summary judgment as against defendant/third-party plaintiff ADT Security Services, Inc. (ADT) on their Labor Law § 240 (1) claim and denying ADT's cross motion for summary judgment with respect to

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

plaintiffs' causes of action under Labor Law §§ 240 (1) and 241 (6).

This is a case involving an accident at a construction site. The underlying facts were detailed in this court's earlier decision, dated February 28, 2011, and will only be reiterated here as necessitated by the instant motion.

Plaintiffs' counsel confirms that he does not challenge the Order to the extent that it dismissed plaintiffs' causes of action based on a violation of Labor Law § 200 and breach of common-law duty of care.

In the court's previous decision, the court found that the contract between ADT and the General Services Administration, which, ADT maintains, indicates that the General Services Administration was the general contractor and/or statutory agent of the owner for the project, was not provided with the papers submitted on the motion. On the current motion, plaintiffs now provide a copy of this contract as the new evidence upon which that branch of their motion seeking leave to renew is based. However, though admitting that the contract was in their possession at the time of their initial motion, as their explanation for failing to include such contract in their motion papers at that time, plaintiffs state "that the contract...added nothing because it merely provided that ADT was responsible for

complying with the state, county and local laws that it would be required to comply with in any event".

With respect to their cause of action based on a violation of Labor Law § 240 (1), plaintiffs argue that ADT was initially hired to do the entire job at the project, which included the portion of the project dealing with cabling, that ADT subcontracted to Petrocelli Electric Co. (Petrocelli). Therefore, plaintiffs maintain that ADT remains liable as the general contractor for the project, since it was initially responsible for the totality of the project. Plaintiffs assert that this was established as a matter of law on the first motion, even without the inclusion of the contract between ADT and the General Services Administration.

In opposition ADT maintains that in the initial motion plaintiffs failed to establish that ADT had any supervisory control or authority over Anthony Tuccillo, Jr.'s (Tuccillo) work and, having failed to meet that burden, the court's previous conclusion was correct. In addition, ADT points out that testimony was provided with the initial motion evidencing that ADT was not the general contractor for the project.

ADT states that plaintiffs are relying on section 2.1 of the contract between ADT and the General Services Administration as evidence of ADT's supervisory authority over the work at the construction site. This section of the contract states:

The security contractor [ADT] assumes all responsibilities and liabilities involved in obtaining proper permits and obeying the state, county and local laws during the installation of security systems for the [owner].

In addition, section 3.1 of this contract provides that ADT will furnish and install all of the security equipment for the project. ADT contends that these provisions are insufficient to establish that ADT had supervisory authority over Tuccillo's work, which might engender its liability under Labor Law § 240 (1). Further, pursuant to the contract between ADT and Petrocelli, which was annexed to the initial motion and quoted in the court's earlier decision, all supervisory authority for the work was placed with Petrocelli, not ADT.<sup>1</sup>

In reply, plaintiffs state that the court need not look at the contract between ADT and the General Services Administration in order to grant the relief they request, because the fact that the court previously overlooked or misapprehended was that ADT was the only contractor for the project and, therefore, was acting in the position of a general contractor. Consequently, as the sole contractor, it was required to comply with the applicable provisions of Labor Law §§ 240 (1) and 241 (6), said

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<sup>1</sup> ADT also argues that plaintiffs' motion is procedurally incorrect, in that it does not identify which portion of the motion concerns the leave to renew and which portion concerns the leave to reargue. The court finds this argument unpersuasive, although technically correct, and will not otherwise address it in this decision.

obligations being non-delegable, whether or not it exercised supervisory control over the work being performed.

It is plaintiffs' contention that, even though there were other companies performing work at the location as part of a major, overall renovation, ADT was the only company installing a security system and, hence, was acting as the statutory agent of the owner or general contractor. Moreover, according to plaintiffs, the contract between ADT and Petrocelli, in which Petrocelli assumed all supervisory obligations, indicates that ADT had supervisory obligations that it was delegating to Petrocelli.

That portion of plaintiffs' motion seeking leave to renew is denied.

CPLR 2221 (e) states:

A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

As stated by the Court,

Renewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. It is statutorily decreed that a renewal motion shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] such treatment is available only in a rare case.

Henry v Peguero, 72 AD3d 600, 602 (1<sup>st</sup> Dept 2010) (internal quotation marks and citations omitted).

By the admission of plaintiffs' counsel in his affirmation in support of the motion, plaintiffs were in possession of the contract which they allege is a new fact not previously offered, but failed to provide that contract because they thought that it was not necessary for the court's deliberations. Therefore, by their own admission, this contract is not new evidence upon which such motion can be based. Hence, this portion of plaintiffs' motion which seeks renewal is denied.

That portion of plaintiffs' motion seeking leave to reargue is granted and, upon reargument, the court's earlier decision is modified.

CPLR 2221 (d) (2) permits a party to move for leave to reargue a decision of a court upon a showing that the court misapprehended the law in rendering its initial decision.

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.

William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 (1<sup>st</sup> Dept 1992) (internal citations and quotation marks omitted).

It is plaintiffs' contention that ADT is liable, pursuant to

Labor Law §§ 240 (1), because it was acting either as the general contractor or statutory agent of the owner and, as such, has a non-delegable statutory obligation under this section of the Labor Law. See Nienajadalo v Infomart New York, LLC, 19 AD3d 384 (2d Dept 2005).

Since the court rejects plaintiffs' proffer of the contract between the General Services Administration and ADT as new evidence, and that contract was not provided in the previous motion, the court's determination must be based on the evidence originally presented. Moreover, neither the provisions of that contract indicated by the parties, nor the entire contract as read by the court, conclusively supports plaintiffs' contention regarding ADT's status at the job site.

However, plaintiffs argue that the subcontract between ADT and Petrocelli, previously submitted, provides the evidence that ADT was acting as the statutory agent of the owner. In a recent appellate decision, rendered after this court's initial determination, the First Department stated that:

"To be treated as a statutory agent, the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury.'

\* . \* . \*

Subcontractors have been held to be the statutory agents of general contractors in situations in which provisions of the subcontracts explicitly granted supervisory authority, and those in which evidence showed that the subcontractors actually exercised supervisory authority. Additionally, evidence that a subcontractor delegated the requisite supervision and control to another

subcontractor has been cited as forming part of the proof that the first subcontractor formerly possessed that authority, and may justify imposing Labor Law liability on the first subcontractor as a statutory agent of the general contractor."

Nascimento v Bridgehampton Construction Corp., 86 AD3d 189, 193

(1<sup>st</sup> Dept 2011) (internal citations omitted, emphasis added).

Therefore, the provisions of the subcontract between ADT and Petrocelli, which stated that Petrocelli supervise and control the work, provide some, although not conclusive, evidence that ADT may have been acting as the statutory agent of the owner. As a consequence, it was inappropriate for this court to grant that portion of ADT's cross-motion to dismiss plaintiffs' Labor Law § 240 (1) cause of action. However, since a question exists as to whether ADT was the owner's statutory agent, plaintiffs' motion for partial summary judgment was properly denied.

In addition, plaintiffs have failed to provide any new argument regarding their Labor Law § 241 (6) cause of action which would warrant the court changing its previous conclusion on that point.

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiffs' motion seeking leave to renew its prior motion is denied; and it is further

ORDERED that the portion of plaintiffs' motion seeking leave to reargue its prior motion is granted; and it is further

ORDERED that, upon reargument, the court's earlier decision, dated February 28, 2011, is hereby modified to deny that portion of ADT Security Services, Inc.'s cross-motion to dismiss plaintiffs' causes of action based on Labor Law § 240 (1), but is otherwise confirmed.

This is the decision and order of the court.

Dated: October 18, 2011

ENTER:

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**DEBRA A. JAMES** J.S.C.

**FILED**

**OCT 25 2011**

NEW YORK  
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