Haskell v Amedore Land Developers, LLC

2011 NY Slip Op 32902(U)

November 2, 2011

Supreme Court, Albany County

Docket Number: 7352-08

Judge: Joseph C. Teresi

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[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN R. HASKELL
and CHRISTINA HASKELL,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 7352-08
RJI NO. 01-11-099272

AMEDORE LAND DEVELOPERS, LLC,
and AMEDORE HOMES, INC.,

Defendants.

AMEDORE LAND DEVELOPERS, LLC,
and AMEDORE HOMES, INC.,

Third Party Plaintiffs,

-against-

KEVIN CONWAY, individually and d/b/a,
CONWAY CONTRACTING & CONSTRUCTION,

Third Party Defendants.

Supreme Court Albany County All Purpose Term, October 13, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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[* 2]

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TERESI, J.:

On December 13, 2007 John Haskell (hereinafter "Haskell") was working as a framer for Kevin Conway (hereinafter "Conway"). Conway was the framing sub-contractor for Amedore Homes, Inc. in building a residential home on land owned by Amedore Land Developers, LLC[1] in Queesnbury, New York. When Haskell fell from the building's unfinished roof, he sustained significant injuries.

Haskell, with his wife derivatively, commenced this action against Amedore to recover his damages for the injuries he sustained. Amedore, in turn, brought this third party indemnification action against Conway. Issue was joined, discovery is complete and a jury trial date certain is set.

Amedore now moves for summary judgment dismissing the complaint, for summary judgment on its third-party complaint and to preclude/limit the testimony of certain witnesses Plaintiffs intend to offer at trial. Plaintiffs both opposed Amedore's motion and cross moved for partial summary judgment on their Labor Law §240(1) cause of action. Additionally, Plaintiffs move for an order precluding the testimony of an Amedore - Conway witness. Both Amedore and Conway oppose Plaintiffs' motions. Conway too cross moves to limit/preclude the testimony of Plaintiffs' witnesses, and for summary judgment dismissing Plaintiffs' complaint

[1] Amedore Land Developers, LLC (hereinafter "Amedore Land") and Amedore Homes, Inc. (hereinafter "Amedore Homes") will be collectively referred to as "Amedore."

and Amedore's third-party complaint. Plaintiffs and Amedore oppose Conway's motion.

On this record, Plaintiffs established their entitlement to summary judgment on Amedore's liability under Labor Law §240(1), rendering Amedore and Conway's summary judgment motions seeking dismissal of the complaint academic. Similarly, neither Amedore nor Conway demonstrated their entitlement to summary judgment granting or dismissing the third party complaint. Lastly, due to each parties' failure to comply with this Court's scheduling order, all motions seeking to limit/preclude testimony are denied.

Considering Plaintiffs' motion for summary judgment first, they bear the initial burden "to make a prima facie showing of entitlement to judgment as a matter of law" under Labor Law §240(1). (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316, 320 [2009], quoting Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). "Once the plaintiff makes a prima facie showing[,] the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence-enough to raise a fact question-that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." (Morin v. Machnick Builders, Ltd., 4 AD3d 668 [3d Dept. 2004], quoting Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 n.8 [2003][emphasis added]). Although "[t]he policy purpose underlying Labor Law §240 is to impose a flat and unvarying duty upon the owner and contractor despite any contributing culpability on the part of the worker" (Bland v Manocherian, 66 NY2d 452 [1985], quoting Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985][internal quotation marks omitted]; Morales v. Spring Scaffolding, Inc., 24 AD3d 42 [1st Dept. 2005]), "the evidence must be viewed in the light most favorable to the opponent of summary judgment." (Frisbee v 156 R.R. Ave. Corp., 85 AD3d

1258, 1260 [3d Dept. 2011]).

As is applicable here, "Labor Law § 240(1) mandates that building owners and contractors: 'in the erection... 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.'" (Wilinski v. 334 East 92nd Housing Development Fund Corp., __NY3d__ [2011]; Cody v State of New York, 52 AD3d 930 [3d Dept. 2008]). For Plaintiffs "[t]o prevail on [their] motion for partial summary judgment on [their] cause of action under § 240(1), the[y] must show both that the statute was violated and that the violation was a proximate cause of [Haskell's] injuries." (Auriemma v. Biltmore Theatre, LLC, 82 AD3d 1, 9-10 [1st Dept. 2011]; Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35 [2004]; Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]).

Here, Plaintiffs made a prima facia showing that the statute was violated. At his deposition and in his affidavit, Haskell alleged that he was provided "no safety device which would have prevented his fall." He explained how he was accessing the unfinished roof through the building's second floor interior, to install a safety "cleat" prior to sheathing one of the building's dormers. A "cleat" is the main protective device used by framers and is simply a varying length 2x4 or 2x6 piece of wood, nailed to the plywood of an unfinished roof. Haskell recalled that when he stepped out onto the roof and fell, he was protected by no safety device. No cleats were installed below where he was working. Rather, the only cleats previously installed on the roof were placed above him, "way up above." No ladder was placed, or could

[* 5]

have been placed, to prevent his fall either. Although there was scaffolding on site, it was not positioned to prevent a fall from the roof. Nor, as is uncontested, were any safety ropes, lines or belts provided.

Although this record contains differing versions of Haskell's fall, not one raises an issue of fact about the lack of any safety device. According to the statement Haskell made on the day of his fall, after he installed one cleat he "climbed down to set another cleat and... slipped off the roof to the ground below." He mentioned no installed safety device that would have prevented his fall. Alternatively, Conway recalled seeing Haskell on the roof just prior to his fall, with all of the installed cleats positioned above him. He did not tell Haskell to get off the roof, but rather twice old him to "get a cleat down." While Conway did not know what Haskell was doing on the roof, he stated that he believed Haskell "was going to get a cleat" when he fell. Importantly, at no point did Conway state that he provided Haskell with a protective device to prevent his fall. Moreover, Conway admitted that although a "California corner" was required to be installed prior to anyone being on the plywood roof, that it had not been installed (and could not have been installed) prior to Haskell going on the roof. Despite these varying version of events, the consistent thread throughout is the uncontroverted fact that Haskell was provided with no protective device to prevent this fall.

Because "[n]o safety devices were provided to guard against [the] hazards" that caused Haskell's injury, Plaintiffs "established a prima facie violation of Labor Law § 240(1)." (Kindlon v Schoharie Cent. School Dist., 66 AD3d 1200, 1202 [3d Dept 2009]; Landon v. Austin, __AD3d__ [3d Dept 2011]; Yost v Quartararo, 64 AD3d 1073 [3d Dept 2009]; Johnson v Small Mall, LLC, 79 AD3d 1240 [3d Dept 2010]; Zimmer v Chemung County Performing

Arts, supra).

With the burden shifted, neither Conway nor Amedore raised a triable issue of fact. Because Conway's "safety instructions [do not] constitute safety devices," he raised no issue of fact with his alleged direction that he "assumed" Haskell would not go on the roof. (Miranda v. Norstar Building Corp., 79 AD3d 42, 47 [3d Dept. 2010], citing Gordon v. Eastern Ry. Supply, 82 NY2d 555 [1993]). Moreover, even if Haskell's "carelessness... contributed to this fall... a worker's contributory negligence is irrelevant to Labor Law §240(1) liability and insufficient to defeat summary judgment." (Dalaba v City of Schenectady, 61 AD3d 1151, 1152 [3d Dept. 2009]). This record simply does not establish that Haskell "was solely to blame for the fall," because he fell while attempting to install a safety protection device without being provided the necessary safety equipment for such task. (Id.). Nor does this record demonstrate that Haskell was "recalcitrant in deliberately refusing to use available safety devices." (Id.; Gordon v Eastern Ry. Supply, supra; Morin v Machnick Bldrs., supra). Rather, assuming Conway instructed Haskell to "get a cleat down," because Haskell was in the process of doing so he did not refuse to use an available safety device. Although Conway now alleges that a ladder was available for Haskell to install a cleat, Conway does not allege that he specifically directed Haskell to use the ladder. As such, Haskell did not "deliberately refus[e] to use available safety devices." Moreover, "where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard... [to the] custom and usage" applicable, as alleged by Conway, to the framing industry. (Zimmer v Chemung County Performing Arts, supra at 523; Pichardo v. Urban Renaissance Collaboration Ltd. Partnership, 51 AD3d 472 [1st Dept. 2008]). "Finally, [Defendants'] contention that no other safety device was appropriate is unavailing;

[* 7]

plaintiff was not required to prove what additional safety devices would have prevented his injury." (Miranda v. Norstar Building Corp., supra at 48, quoting Cody v State of New York,supra, [internal quotation marks omitted]).

Accordingly, Plaintiffs motion for partial summary judgment on Amedore's liability is granted. "[I]nasmuch as [Amedore is] liable to plaintiff under Labor Law § 240(1) for the only damages that plaintiff can recover, defendants' arguments concerning the validity of the other theories of liability contained in the complaint are academic" and their motions for summary judgment dismissing the complaint are denied. (Yost v Quartararo, supra at 1075, quoting Covey v Iroquois Gas Transmission Sys., 218 AD2d 197, 201 [3d Dept. 1996], affd 89 NY2d 952 [1997]; Torino v KLM Constr., 257 A.D.2d 541 [1st Dept. 1999]; Squires v Marini Bldrs., 293 AD2d 808 [3d Dept. 2002], lv denied 99 NY2d 502 [2002]).

Turning next to Amedore and Conways' cross-motions for summary judgment relative to Amedore's contractual indemnification claim, neither established their entitlement to judgment as a matter of law.

Despite Amedore's failure to produce a copy of the indemnity contract upon which it relies, "secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith. Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original." (Schozer v William Penn Life Ins. Co. of N.Y., 4 NY2d 639, 644 [1994][citations omitted]).

On this record, Amedore sufficiently established its unintentional loss of the indemnity contract and its right to submit secondary evidence of its content. Amedore Homes's general manager explained that he is the individual "in charge of the records." He stated that he personally witnessed Conway execute the standard indemnity contract Amedore Homes used in 2005, and attached a blank copy of it to his affidavit. He recalled holding Conway's signed indemnity contract in his hands at some point in time after Haskell was injured, believes he placed the contract in an envelope but now cannot find it. He described his thirty hour search for the missing contract, and alleged that his attorney spent three to four hours searching. On these uncontroverted allegations, Amedore demonstrated its entitlement to offer "secondary evidence of the contents" of its indemnity contract with Conway.

Amedore's proof of the indemnity contract's content, however, failed to demonstrate its entitlement to summary judgment. Amedore explained the missing contract's content by submitting an exemplar copy of the indemnity contract it used when Conway allegedly executed it. The contract specifically required Conway to indemnify and hold Amedore harmless for injury or destruction of property "caused in whole or in part by negligent acts or omissions of [Conway] the Subcontractor." Amedore, however, submits no proof that Conway was negligent. Arguing instead just the opposite, that Haskell is solely responsible for his injuries. Moreover, because Plaintiff's showing of Amedore's Labor Law §240(1) liability is not a negligence based finding, Amedore cannot rely on same to establish Conway's negligence. As such, Amedore failed to prove its entitlement to judgment as a matter of law and its motion for summary judgment granting its contractual indemnification cause of action is denied.

Conway too failed to demonstrate its entitlement to summary judgment dismissing

Amedore's contractual indemnification claim. Importantly, Conway does not unequivocally deny signing an indemnity contract. Instead, he acknowledges signing a contract with an Amedore entity but cannot remember its terms. His reliance on Amedore's failure to produce a signed contract, especially in light of his inconclusive allegations, is unavailing. As set forth above, because Amedore may prove the content of the indemnification agreement with secondary evidence, Conway did not demonstrate that there was no indemnity contract as a matter of law.

Nor did Conway demonstrate his entitlement to summary judgment dismissing Amedore's claim for indemnification pursuant to Worker's Compensation Law §11. As is applicable here, in the absence of a written indemnification agreement, Conway cannot be held liable to indemnify Amedore unless Haskell suffered a "grave injury... [which] includes amputation of an arm, leg, hand or foot." (Cullin v. Makely, 80 AD3d 1042 [3d Dept. 2011], quoting Workers' Compensation Law § 11 [internal quotation marks and citations omitted]). On this motion "for summary judgment dismissing [Amedore's] third-party complaint because the plaintiff did not sustain a grave injury, [Conway] is required to make a prima facie showing of entitlement to judgment as a matter of law." (Fitzpatrick v. Chase Manhattan Bank, 285 AD2d 487, 488 [2d Dept. 2001]; Bush v. Mechanicville Warehouse Corp., 79 AD3d 1327 [3d Dept. 2010; Way v. George Grantling Chemung Contracting Corp., 289 AD2d 790 [3d Dept. 2001]). Conway, however, failed to make such showing.

Conway acknowledged, as alleged in Plaintiffs' bill of particulars, the possibility that Haskell may "require future amputation of his right lower extremity." In light of such acknowledgment, while Conway's submission of medical records indicate Haskells' recent improvement, they do not specifically and conclusively establish, as a matter of law, that Haskell

is no longer in danger of amputation. As such, Conway did not demonstrate his entitlement to summary judgment dismissing Amedore's claim under Worker's Compensation Law §11. (Miranda v. Norstar Building Corp., 79 AD3d 42 [3d Dept. 2010]).

Accordingly, both Amedore and Conway's motions for summary judgment relative to their respective indemnification obligations are denied.

Turning next to the parties' motions to preclude / limit trial testimony, each is defective and denied. Paragraph 11 of this action's Preliminary Conference Stipulation and Order, dated March 29, 2010, sets forth the specific procedures this Court requires of litigants when engaged in a discovery dispute. The procedure is mandatory. After complying with 22 NYCRR 202.07, parties are required to telephone chambers, set up a conference, provide the court with a statement outlining the dispute and engage in a discovery dispute conference. All such steps must be taken "before filing any discovery motion." Here, although each motion is based upon unresolved discovery disputes relative to each challenged witness, not one party complied with 22 NYCRR 202.07. "Where, as here, a party fails to comply with a discovery order, CPLR 3126 authorizes the court to fashion an appropriate remedy, the nature and degree of which is a matter committed to the court's sound discretion." (Pierson v. North Colonie Cent. School Dist., 74 AD3d 1652, 1653 [3d Dept. 2010], quoting Pangea Farm, Inc. v. Sack, 51 AD3d 1352 [3d Dept. 2008]). As such, in an exercise of discretion, the parties' motions seeking to limit / preclude trial testimony are all denied and no discovery conference will be entertained.

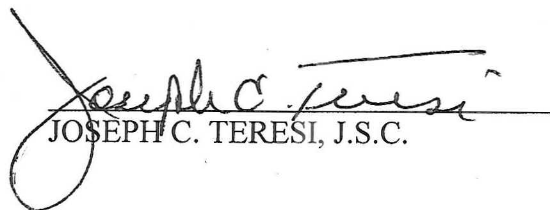
This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

[* 11]

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 2, 2011
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 5, 2011; Affidavit of Mark Donohue, dated July 5, 2011, with attached Exhibits A-D; Affidavit of Paul Amedore, dated July 5, 2011, with attached Exhibits A-D.
2. Notice of Cross Motion, dated August 31, 2011; Affidavit of Robert Stockton, dated September 8, 2011; Affidavit of Ernest Gailor, dated August 29, 2011, with attached unnumbered exhibit; Affidavit of Kevin Conway, dated August 26, 2011;
3. Notice of Cross Motion, dated September 9, 2011; Affirmation of David Rowley, dated September 7, 2011, with attached Exhibits A-U; Affidavit of John Haskell, dated September 8, 2011, with attached Exhibits A-B; Affirmation of Jennifer Zegarelli, dated September 9, 2011, with attached Exhibits A-C(8).
4. Affidavit of Mark Donohue, dated September 30, 2011, with attached Exhibits A-F; Affidavit of Bradley Byer, dated September 30, 2011.
5. Affirmation of Robert Stockton, dated October 7, 2011, with attached Exhibits A-B.
6. Affidavit of Mark Donohue, dated October 13, 2011, with attached unnumbered exhibits.
7. Affirmation of Robert Stockton, dated September 30, 2011.
8. Affirmation of David Rowley, dated September 23, 2011, with attached Exhibit A.
9. Notice of Motion, dated August 22, 2011; Affirmation of David Rowley, dated August 22, 2011, with attached Exhibits A-L.
10. Affirmation of Robert Stockton, dated October 6, 2011.
11. Affirmation of David Rowley, dated October 13, 2011.