

Koutsogiannis v Woodhull School

2011 NY Slip Op 33065(U)

November 16, 2011

Sup Ct, Suffolk County

Docket Number: 11-15024

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-3-11
ADJ. DATE 8-4-11
Mot. Seq. # 001 - MD

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EFSTATHIOS KOUTSOGIANNIS AND	:	BOURNAZOS & MATARANGAS, P.C.	
SYLVIA KOUTSOGIANNIS,	:	Attorney for Plaintiffs	
	:	111 Broadway, Suite 1801	
	:	New York, New York 10006	
	:		
Plaintiffs,	:	AHMUTY, DEMERS & MCMANUS	
	:	Attorney for Defendant Fire Island UFSD	
	:	200 I.U. Willets Road	
	:	Albertson, New York 11507	
	:		
- against -	:	SINNREICH KOSAKOFF & MESSINA, LLP	
	:	Attorney for Defendant BBS Architects	
	:	267 Carleton Avenue, Suite 301	
	:	Central Islip, New York 11722	
	:		
THE WOODHULL SCHOOL, FIRE ISLAND	:	THE WOODHULL SCHOOL	
UNION FREE SCHOOL DISTRICT, AND BBS	:	P.O. Box 428	
ARCHITECTS & ENGINEER, P.C.,	:		
	:	Ocean Beach, New York 11770	
	:		
Defendants.	:		
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Upon the following papers numbered 1 to 24 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 17; 18 - 19; Replying Affidavits and supporting papers 20 - 24; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant BBS Architects & Engineer, P.C., for dismissal of plaintiffs' complaint pursuant to CPLR 3211(a) (1) and (a) (7) is decided as follows:

Plaintiff Efstathios Koutsogiannis commenced this action to recover damages for personal injuries he allegedly sustained at a construction site on October 18, 2010, when he fell from a ladder he had placed on the surface of a scaffold. The construction site allegedly was owned by defendants Fire Island Union Free School District and the Woodhull School (hereinafter "the School District"). At the time of the alleged accident, plaintiff was an employee of nonparty AMB Construction Inc. (hereinafter "AMB"), the general contractor for the construction project. Defendant BBS Architects & Engineer, P.C. (hereinafter "BBS") was hired as the architect to design and oversee the renovation of existing buildings located on the premises of the Woodhull School. Plaintiff's first three causes of action allege violations of Labor Law §§ 200, 240

(1), and 241(6). Plaintiff's fourth cause of action asserts claims premised upon common-law negligence and premises liability. The fifth cause of action asserts defendants were negligent, reckless and careless in hiring AMB, whose violations of the New York Industrial Code and OSHA ordinances allegedly precipitated his accident. The sixth and final cause of action asserts a claim by plaintiff's wife, Sylvia Koutsogiannis, for loss of consortium and reimbursement of medical expenses.

BBS now moves to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1) and (a)(7), arguing that it did not hire AMB, and that it did not own, direct or control the construction site. In particular, BBS asserts that its contractual agreement with the School District was solely for architectural services and specifically excluded it from responsibility for supervision of work or the implementation of safety precautions. In opposition, the School District asserts that BBS's motion should be denied, as plaintiff's 50-h testimony, wherein he testified that BBS's employees gave him orders with respect to the construction of the school's roof and forbade workers from securing scaffolds to the wall of the building, raises significant triable issues. Plaintiffs also oppose the motion and adopt the arguments and exhibits submitted by the School District.

Section 2.6.2.1 of the architectural services contract between the School District and BBS states, in pertinent part, as follows:

The architect, as a representative of the Owner, shall visit the site once per month as specifically required only to inspect the site and Work: (1) to become familiar with and to keep the Owner informed about the progress and the quality of Work, (2) to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with Contract Documents and Construction Schedule. The architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, except to ensure that the Work is in accordance with the Contract Documents, since these are the Contractor's rights and responsibilities under the contract documents.

The contractor bid proposal form, which is incorporated in the Contractor Agreement executed by AMB and the School District, also provides that AMB will be responsible for the delivery of "all materials, supplies, apparatus, goods, wares, merchandise, services or labor" necessary for the completion of the construction of the school's new roof. Further, Article 10.2 of the Contractor Agreement also states that "[t]he contractor hereby agrees that . . . [it] is solely responsible for compliance with all . . . laws and regulations imposed for the protection of persons performing the Contract."

In his affidavit in support of the motion, BBS's president, Roger Smith, states that BBS did not exercise any supervisory control over the work at the construction site, and that it was only required to visit once per month to inspect the progress of the work, to evaluate whether the work was consistent with the architectural designs, and to report all of its observations to the School District. Smith also states that AMB was responsible for the execution of all work and the implementation of safety procedures, including providing the workers with all tools and safety equipment. Smith further opines that none of BBS's employees were at the work site on the day of the accident, and that, as a supervisor, plaintiff was responsible for his own safety.

During his 50-h hearing, plaintiff testified that the accident occurred when he fell from a ladder while working on the roof of the school building. He testified that the ladder tipped over when the scaffold on which it had been standing unexpectedly shifted from the wall of the school and collapsed. Plaintiff testified that representatives from BBS and the School District told him during a meeting held at the school that he should not build a higher scaffold or secure it to the school's wall, because erecting the scaffold was too noisy and they did not want him to make any holes or patches on the surface of the wall. He further testified that during the project BBS representatives directed him to speed up his performance and to work on specific areas of the roof, and that the directions they gave him did not merely relate to the design of the roof. Plaintiff also testified that with the exception of the scaffold and ladder from which he fell, he was not provided with any safety devices such as harnesses, ropes, straps or helmets.

On a motion to dismiss pursuant to CPLR 3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*see Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Where evidentiary material is considered on a motion to dismiss pursuant to CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see Bodden v Kean*, 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011]; *Rietschel v Maimonides Med. Ctr.*, 83 AD3d 810, 921 NYS2d 290 [2d Dept 2011]). "To dismiss a cause of action based upon CPLR 3211(a)(1),

defendants must show that the documentary evidence that forms the basis of this defense must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (*Vanderminden v Vanderminden*, 226 AD2d 1037, 1039, 641 NYS2d 732 [3d Dept 1996]; *see Fernandez v Cigna Prop. & Cas. Ins. Co.*, 188 AD2d 700, 702, 590 NYS2d 925 [3d Dept 1992]).

"Labor Law §§ 240 and 241 expressly exempt[s] from the liability thereunder architects who do not direct or control the work for activities other than planning and design" (*Boyd v Lepera & Ward P.C.*, 275 AD2d 562, 564, 712 NYS2d 659 [3d Dept 2000]; *see Fernandez v CMB Contr.*, 487 F. Supp.2d 281 [E.D.N.Y. 2007]; *Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 826 NYS2d 94 [2d Dept 2006]). "Cases involving Labor Law §200 fall into two broad categories: namely those where workers are injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed. . . . When a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it

is shown that the party to be charged had the authority to supervise or control the performance of the work” (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). A cause of action alleging negligent hiring and supervision requires that the employer knew or should have known of the employee’s propensity for the conduct which caused the injury (see *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 654 NYS2d 791 [2d Dept 1997]), or that the employer committed some affirmative act of negligence, or maintained control over the work performed by the independent contractor (see *Sanchez v United Rental Equip. Co., Inc.*, 246 AD2d 524, 667 NYS2d 410 [2d Dept 1998]; *Staten Island Univ. Hosp.*, 252 AD2d 534, 675 NYS2d 621 [2d Dept 1998]).

Initially, the Court notes that plaintiff’s claim against BBS based on the theory of negligent hiring and retention is dismissed as a matter of law, as plaintiff’s complaint is devoid of any allegations that BBS either retained AMB, or knew or had reason to know that AMB would engage in the conduct that allegedly caused plaintiff’s injuries (see *Sandra M. v St. Luke’s Roosevelt Hosp. Ctr.*, 33 AD3d 875, 823 NYS2d 463 [2d Dept 2006]; *Gomez v City of New York*, 304 AD2d 374, 758 NYS2d 298 [1st Dept 2003]; *Sato v Correa*, 272 AD2d 389, 707 NYS2d 371 [2d Dept 2000]). Additionally, BBS established, prima facie, that it did not have contractual authority to direct and control the work at the construction site and, therefore, is exempt from liability for claims under Labor Law §§ 240 and 241 (see *Gonzalez v Pon Lin Realty Corp.*, supra; *Boyd v Lepera & Ward P.C.*, supra). The lack of authority to control or direct the manner in which the work was performed further established BBS’s prima facie entitlement to dismissal of the claims under Labor Law §200 and common law negligence (see *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]; *Ortega v Puccia*, supra). BBS also correctly argues that plaintiff’s claim under Labor Law §241(6) is deficient, as he failed to allege a violation of a specific and applicable provision of the Industrial Code (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495, 601 NYS2d 49 [1993]).

However, in opposition, plaintiff raised significant triable issues as to whether BBS exceeded its contractual role at the work site by directing plaintiff’s work and preventing him from erecting a taller scaffold and securing it to the wall of the school. The existence of these triable issues also warrants denial of the portion of BBS’s motion seeking dismissal of plaintiff’s claim for damages based on ordinary common law negligence, as a premises liability claim may be predicated upon, among other things, control or special use of the subject property (see *Bruhns v Antonelli*, 255 AD2d 478, 478 [2d Dept 1998]).

Further, dismissal of plaintiff’s Labor Law claims is inappropriate, particularly, where, as in this case, there has been little or no discovery regarding BBS’s alleged direction and control at the work site (see CPLR 3212[f]; *Jones v Town of Delaware*, 251 AD2d 876, 674 NYS2d 499 [3d Dept 1998]; *DeVito v Silvernail*, 239 AD2d 824, 658 NYS2d 500 [3d Dept 1997]; *Urcan v Cocarelli*, 234 AD2d 537, 651 NYS2d 611 [2d Dept 1996]; *Grossman v Pharmhouse Corp.*, 234 AD2d 918, 651 NYS2d 797 [4th Dept 1996]). In light of plaintiff’s testimony regarding BBS’s alleged control at the work site, including alleged instructions by BBS’s representatives that plaintiff was not permitted to use screws or straps to secure the scaffold to the walls of the school, dismissal of plaintiff’s claim under Labor Law §241(6) is denied. Indeed, the mere failure to identify the violation of a specific Industrial Code provision in the complaint is not fatal to a claim under Labor Law §241(6) (see *D’Elia v City of New York*, 81 AD3d 682, 916 NYS2d 196 [2d Dept 2011]), as a plaintiff may be granted “leave to amend the pleadings . . . to identify a specific applicable provision where the plaintiff makes a showing of merit and the amendment involves no new

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factual allegations, raises no new theories of liability, and causes no prejudice to the defendant” (*D’Elia v City of New York*, *supra* at 684; *see Galarraga v City of New York*, 54 AD3d 308, 863 NYS2d 47 [2d Dept 2008]).

Finally, considering BBS’s failure to sustain its entitlement to dismissal of plaintiff’s Labor Law claims, the portion of its motion seeking dismissal of the derivative claims of plaintiff’s spouse for loss of consortium and reimbursement of medical expenses, also is denied (*see Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 [4th Dept 1998]; *cf Daniels v Zelco, Inc.*, 159 AD2d 538, 552 NYS2d 403 [2d Dept 1990]).

Dated: November 16, 2011



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION