

Finamore v Hardesty & Hanover, LLP

2011 NY Slip Op 33387(U)

December 12, 2011

Sup Ct, NY County

Docket Number: 112848/2008

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 112848/2008
 FINAMORE, JOHN
 VS.
 HARDESTY & HANOVER
 SEQUENCE NUMBER : 004
 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

DEC 14 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/12/11

Saliann Scarpulla
SALIANN 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
JOHN FINAMORE,

Plaintiff,

- against-

Index No.: 112848/2008
Submission Date: 08/17/11

HARDESTY & HANOVER, LLP and "JOHN DOE,"
name being fictitious, real name being unknown, who
acted as inspector for HARDESTY & HANOVER, LLP,

Defendants.

----- X
HARDESTY & HANOVER, LLP.

Third-Party Plaintiff,

-against-

B & G Elevator, Inc.,

Third-Party Defendant.

----- X

FILED

DEC 14 2011

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COUNTY CLERK'S OFFICE

For Plaintiff:
Toberoff, Tessler & Schochet, LLP
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New York, NY 10001

For Defendant/Third-Party Plaintiff Hardesty & Hanover, LLP
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888 Seventh Avenue, Suite 3401
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For Third Party Defendant B & G Elevator, Inc.:
Gottlieb Siegel & Schwartz, LLP
180 East 162nd Street
Bronx, NY 10451

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Mem. Of Law in Support of Motion.	2
Aff in Partial Opposition.	3
Reply Aff	4

HON. SALIANN SCARPULLA, J.:

In this Labor Law and common law action to recover damages for personal injuries, defendant/third-party plaintiff Hardesty & Hanover, LLP (“Hardesty”) and third-party defendant B & G Elevator, Inc. (“B&G”) move for summary judgment pursuant to CPLR 3212. B&G moves to dismiss plaintiff John Finamore’s (“Finamore”) Labor Law cause of action against it and Hardesty moves to dismiss the complaint in its entirety.

This action arises from injuries Finamore, a B&G employee, sustained on August 24, 2007 while working on a project to repair and refurbish a traveler platform of the Verrazano Narrows Bridge (the “Project”). The injury occurred at B&G’s worksite in Bayonne, New Jersey. B&G had contracted with the Triborough Bridge & Tunnel Authority (“TBTA”) to perform construction on the Project, and was originally supposed to work on the bridge itself. However, B&G relocated the platform to their Bayonne, New Jersey yard as that worksite was more convenient.

Hardesty contracted with TBTA to provide consulting services on the Project. Under its contract, Hardesty was responsible for providing “comprehensive construction management, supervision, inspection, testing and other services required to administer and manage the project to ensure that the cost, schedule, quality, safety, and other criteria” of the construction contract were met. TBTA’s contracts with both Hardesty and B&G included choice of law provisions designating New York law as the contracts’ governing law.

In his deposition, Finamore testified that he was injured while attempting to remove a bolt with a grinder. According to Finamore, the bolt seized up and hit him in the face. Finamore also testified that Hardesty's resident engineer, Shanmugan Subramanian ("Subramanian") had directed him not to use a torch but that grinder. Finamore stated that the grinder lacked a guard over the blade and the moving slide handle, which allegedly contributed to his injury. Finamore testified that despite his reporting these deficiencies to Subramanian, Subramanian directed him to continue using the grinder.

Subramanian testified at his deposition that Hardesty was responsible for comprehensive construction management on TBTA property, including ensuring compliance with relevant safety regulations. However, Hardesty's role was limited to "quality assurance" at the Bayonne site. Subramanian testified that Hardesty did not direct B&G's means of construction, but confirmed that he had directed B&G not to use torches in its construction. Jeffrey Scott ("Scott"), B&G's General Manager, confirmed that Subramanian was not responsible for supervising the workers and was only at the worksite "to inspect completed work." Scott also testified that he, not Subramanian, decided which equipment the workers should use at the Bayonne site.

Hardesty and B&G now move for summary judgment pursuant to CPLR 3212 dismissing the Labor Law causes of actions against them. They argue that New York Labor Law does not apply to this action because the accident occurred in New Jersey.

Hardesty also moves to dismiss the negligence cause of action, maintaining that it did not exercise sufficient control over Finamore's worksite to be liable under common law negligence.

In opposition, Finamore withdraws his Labor Law §§ 240 and 241 claims, but maintains that Labor Law § 200 applies here because New York law governs TBTA's contracts with Hardesty and B&G. Finamore further argues that Hardesty exercised control over Finamore's worksite, thus, it may be held liable under common law negligence.

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).

Here, B&G and Hardesty are entitled to summary judgment on the Labor Law §200 claims. Where an accident occurs outside New York State and the plaintiff sues in tort, New York courts apply the rules of the jurisdiction where the injury occurred if those rules are "conduct-regulating." *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 522 (1994). As it is a "conduct-regulating" statute, Labor Law § 200 does not apply to

* 6]
injuries, such as Finamore's, that occur outside New York State. *See Florio v. Fisher Dev., Inc.*, 309 A.D.2d 694, 696 (1st Dept. 2003).

Finamore argues that Labor Law § 200 should nevertheless apply here because, under the choice of law provisions in their contracts with TBTA, the parties agreed that New York law governs. However, the choice of law provisions in the TBTA contracts with Hardesty and B&G relate to interpretation and application of those contracts, not to tort claims brought by nonparties under New York statutes. In any event, as Finamore was not a party to either of those contracts, their choice of law provisions do not extend to the claims he makes in this action.

However, there are triable issues of fact that preclude summary judgment on the common law negligence cause of action against Hardesty. Because negligence law is conduct-regulating, New Jersey common law governs here. *See Marchevka v. DeBartola Capital P'ship*, 3 A.D.3d 477, 477-78 (2d Dept. 2004); *Carvalho v. Toll Bros. & Developers*, 143 N.J. 565 (1996).

In *Carvalho v. Toll Bros. & Developers*, 143 N.J. 565 (1996), the New Jersey Supreme Court addressed whether a project engineer owed a duty of care to a subcontractor employee under facts analogous to those here. The plaintiff in *Carvalho* was an employee of a subcontractor hired to do excavation work. After the plaintiff died in a workplace accident, his estate brought a common law negligence action against the general contractor and the project engineer. Under its contract with the owner, the project

engineer was responsible for monitoring the work's progress but not for controlling the construction methods or overseeing worksite safety procedures.¹ Nevertheless, the Court held that the project engineer owed a duty to the plaintiff to avoid the risk of harm at the worksite. *Carvalho*, 143 N.J. at 575.

Similarly, it is undisputed that Hardesty was responsible for quality control at the B&G worksite. Hardesty argues that it is not liable because it did not have the requisite oversight or control over Finamore's work. But Hardesty's quality assurance responsibilities imposed on it a duty to ensure that adequate safety procedures were followed at the Project worksite even if it did not directly control construction. *See Carvalho*, 143 N.J. at 575 ("Matters of construction-site safety...bear indirectly on the engineer's contractual responsibility for supervising the progress of the work."). Further, Finamore testified that Subramanian directly instructed him to use a tool that contributed to his injury after receiving notice that the tool was defective. Thus, whether Hardesty breached its common law duty is an issue of fact that a jury must resolve.

In accordance with the foregoing, it is hereby

ORDERED that defendant/third-party plaintiff Hardesty & Hanover, LLP's and third-party defendant B & G Elevator, Inc.'s motions for summary judgment are granted only to the extent that plaintiff John Finamore's Labor Law claims asserted against

¹Though the *Carvalho* court did not directly address the issue, it does not appear that the project engineer had a direct contractual relationship with the plaintiff's employer.

defendants Hardesty & Hanover, LLP and B & G Elevator, Inc.'s are dismissed and the remaining common law claims are severed and shall continue.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 12, 2011

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.
FILED

DEC 14 2011

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