

Hackert v Emmanuel Cong. United Church of Christ
2011 NY Slip Op 34211(U)
July 11, 2011
Supreme Court, Saratoga County
Docket Number: 20093430
Judge: Stephen A. Ferradino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT
STATE OF NEW YORK

COUNTY OF SARATOGA

CARL HACKERT and CATHERINE HACKERT,

Plaintiffs,

- against -

EMMANUEL CONGREGATIONAL UNITED
CHURCH OF CHRIST and RIVERCREST
ENTERPRISES, INC.,

Defendants.

DECISION and ORDER

RJI # 45-1-2011-0754

Index #20093430

RIVERCREST ENTERPRISES, INC.,

Third-Party Plaintiff,

- against -

CLYDE WILSON, INDIVIDUALLY AND D/B/A
WILSONS CONSTRUCTION and
WILSONS CONSTRUCTION, INC.

Third-Party Defendants.

2012 JUL 17 AM 10:32
SARATOGA COUNTY
CLERK'S OFFICE
BALISTON SPA, NY

FILED

CLYDE WILSON, INDIVIDUALLY AND D/B/A
WILSONS CONSTRUCTION,

Fourth-Party Plaintiffs,

- against -

ERIE INSURANCE COMPANY and
ERIE INSURANCE COMPANY OF NEW YORK,

Fourth-Party Defendants.

APPEARANCES

Anderson, Moschetti & Taffany, PLLC
Attorneys for the Plaintiffs
26 Century Hill Drive, Suite 206
Latham, New York 12110

Burke, Scolamiero, Mortati & Hurd, LLP
Attorneys for the Defendants
437 East Allen Street
Hudson, New York 12534

Flink Smith LLC
Attorneys for the Third Party Defendants/Fourth Party Plaintiffs
449 New Karner Road
Albany, New York 12205

STEPHEN A. FERRADINO, J.

The plaintiffs have requested an order of this court pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability as it applies to their NYS Labor Law § 240(1) claims against the defendants, Emmanuel Congregational United Church of Christ and Rivercrest Enterprises, Inc. (hereinafter, the defendants). The defendants have opposed the motion and have moved for an order of this court pursuant to CPLR § 3212 granting partial summary judgment dismissing the plaintiffs' NYS Labor Law §§ 200, 240(1) and 241(6) claims. The plaintiffs have opposed this motion.

In order to succeed in obtaining summary judgment, the moving party must establish his cause of action or defense "sufficiently to warrant the court as a matter law in directing judgment" in his favor. CPLR § 3212(b). To prevail on the motion, the moving party must offer evidentiary proof in admissible form. *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]. The party opposing the motion must demonstrate upon admissible evidence the existence of a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The evidence presented must be viewed in the light most favorable to the nonmoving party. See, *Sutherland v Thering Sales & Serv., Inc.*, 38 AD3d 967, 968 [2007]; *De Cicco v Longendyke*, 37 AD3d 934, 936 [2007]. Summary judgment

should be granted only in the absence of any material or triable issue of fact. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]. The Court should not employ this drastic remedy and deny a party their day in court if there is any doubt as to whether such issues exist or if the issue is "arguable". *Id.*, citing *Barrett v Jacobs*, 255 NY 520, 522 [1931].

In the instant action, the plaintiff, Carl Hackert (hereinafter, the plaintiff) seeks to recover damages for personal injuries sustained as a result of a fall through an opening in unfinished plywood flooring during the reconstruction of a church on July 15, 2009. At the time of the accident, the plaintiff was the president and sole employee of Church Organ Sales, Inc., and had entered into a contract with the Emmanuel Congregational United Church of Christ (hereinafter, the defendant church) for the sale and installation of an organ and related equipment. The plaintiff hired Darrell Helms (hereinafter, Mr. Helms), owner of Creative Electronics, to install the organ and related equipment.

On July 15, 2009, the plaintiff delivered an amplifier rack and a spool of wire to the church. Certain individuals who were at the church assisted the plaintiff in bringing the amplifier rack into the church and putting it in the location where it was to be installed. The plaintiff could not specifically identify these individuals and could not identify with whom the individuals were associated or for whom they worked. Mr. Helms arrived sometime after the plaintiff. That day, the plaintiff assisted Mr. Helms in pulling wire through already existing conduit. At the end of the day, the plaintiff was taking certain measurements to ensure that there was enough wire for Mr. Helms to complete the installation of the organ and equipment. According to the plaintiff, Mr. Helms was to complete the wiring. The plaintiff testified that, after this day, he did not intend to return to the church location until sometime in November.

As he was measuring, the plaintiff was walking backwards. The plaintiff was not looking behind him as he was walking and measuring. The plaintiff fell through an opening in the plywood flooring and onto the basement floor, sustaining injuries.

The undisputed testimony established that the opening in the plywood flooring was not permanently covered because various contractors involved in the reconstruction of the church had requested that it be left open so that materials could be passed through. The record reveals some evidence that the plaintiff and Mr. Helms may have joined in this request to not permanently cover the opening so that they too could use the opening to pass materials through from the basement to the main floor of the church.

The evidence presented also established that the contractors were advised that when they were not using the opening to pass materials, the plywood cover was to be secured in place. In addition, the plywood cover was to be put in place at the end of each work day. It is undisputed that on the date of the accident, the plywood cover was not put back in place. Also undisputed is the fact that there were no barriers, tape or safety cones placed around the area of the opening to prevent someone from stepping in and falling through the opening.

NYS Labor Law § 200 is a codification of the common law duty on the part of landowners and general contractors to maintain a safe workplace. See, *Wojcik v 42nd Street Dev. Project, Inc.*, 386 F Supp 2d 442, 455-56 [2005]; *Ross v Curtis-Palmer Hydro-Elec. Co. et al.*, 81 NY2d 494, 505 [1993]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]. An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury." *Comes v New York State Elec. & Gas Corp.*, *supra* at 877, quoting, *Russin v Picciano & Son*,

54 NY2d 311, 317 [1981].

In the instant case, the evidence establishes that neither of the defendants had the authority to control the activity which brought about the plaintiff's injuries. The plaintiff was an independent contractor in a contractual relationship directly with the defendant church for the sale and installation of an organ. The plaintiff was not in a contractual relationship with the defendant, Rivercrest Enterprises, Inc. (hereinafter, the defendant Rivercrest). At the time of the accident, the plaintiff was conducting a series of measurements to see if there was enough wire to complete the installation of the organ and related equipment. The plaintiff's own testimony established that no one from the defendant church or the defendant Rivercrest was supervising or controlling his work. In fact, at the time of the accident, the plaintiff and Mr. Helms were the only individuals in the church building. Given that neither of the defendants supervised or controlled the manner or methods by which the plaintiff did his work nor did they exercise any direct supervision and control over the plaintiff's work at the time of the accident, there can be no liability imposed under NYS Labor Law § 200. *Ryder v Mount Loretto Nursing Home*, 290 AD2d 892, 893 [2002].

Based on the foregoing, it is concluded that the defendants are entitled to judgment as a matter of law regarding the plaintiffs' NYS Labor Law § 200 claims. There exists no material or triable issue of fact regarding these claims. The plaintiffs' causes of action as to their claims under NYS Labor Law § 200 are hereby dismissed.

NYS Labor Law § 240(1) provides that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a

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.

In order to prevail on a NYS Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his injuries. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]. In this case, NYS Labor Law § 240(1) is simply inapplicable.

At the time of the incident, the plaintiff was not involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. The plaintiff was contracted for the sale and installation of an organ and related equipment. It is significant that the plaintiff subcontracted the installation work to Mr. Helms. The plaintiff specifically testified that at the time of the accident, he was taking measurements for the work that would take place after he left. Notably, that work was to be performed by Mr. Helms, not by the plaintiff. According to the plaintiff's testimony, after July 15, 2009, he did not intend to return to the church until sometime in November.

The Court of Appeals has held that the question as to whether particular work falls within the scope of NYS Labor Law § 240(1) must be determined on a case by case basis, depending on the context of the work. *Prats v Port Auth. Of N.Y. & N.J.*, 100 NY2d 878, 883 [2003]. Here, the mere fact that the plaintiff may have assisted Mr. Helms with pulling wire through already existing conduit earlier in the day, does not change the general context of the plaintiff's work. The plaintiff sold an organ and related equipment. The plaintiff delivered certain equipment to the church location. Unlike the plaintiff in *Prats v Port*

Auth. Of N.Y. & N.J., the plaintiff herein did not work for a company that was carrying out a contract requiring construction and alteration activities covered by NYS Labor Law § 240(1). The plaintiff was not a member of a team that undertook an enumerated activity under a construction contract. The facts herein do not support the absolute liability imposed by NYS Labor Law § 240(1).

Accordingly, the plaintiffs' motion for partial summary judgment on the issue of liability as it applies to their NYS Labor Law § 240(1) claims, is denied. That branch of the defendants' motion seeking to dismiss said claims is granted.

Pursuant to NYS Labor Law § 241, all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The defendants argue that the provisions of NYS Labor Law § 241(6) are not applicable to the facts herein because the plaintiff, himself, was not performing construction, excavation or demolition work. The defendants argument is unpersuasive. The statute specifically applies to contractors and owners and their agents involved in the construction of a building. The statute specifically protects persons employed therein or, "lawfully frequenting such places". Although the plaintiff may not have been employed to

perform the construction work, he certainly was lawfully on the premises and therefore, is entitled to the protections afforded under the statute.

In order to prevail on a cause of action under Labor Law § 241(6), the plaintiff must demonstrate that the defendants violated an applicable rule or regulation of the New York Industrial Code, which sets forth a specific standard of conduct, and not merely a general reiteration of common law principles. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]. In this case, the plaintiff has cited certain regulations which may be sufficient to sustain a cause of action under Labor Law § 241(6).

In the plaintiffs' verified bill of particulars, the plaintiff specifically recites violations of 12 NYCRR § 23-1.7 (b)(1)(I) and 12 NYCRR § 23-1.7 (b)(1)(ii), as giving rise to a cause of action pursuant to Labor Law § 241(6). Pursuant to 12 NYCRR § 23-1.7 (b)(1)(I), "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Pursuant to 12 NYCRR § 23-1.7 (b)(1)(ii), "Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for the entry and exit."

These provisions are applicable to the facts herein. As noted above, it is undisputed that the plaintiff fell through the opening in the floor that was left uncovered. Also undisputed is the fact that there were no barriers, tape or safety cones placed around the area of the opening to prevent someone from stepping in and falling through the opening. It is noted, however, that a breach of the duty imposed by a regulation promulgated under

NYS Labor Law § 241(6) is merely some evidence of negligence and issues of contributory and comparative negligence may be properly considered by the jury. *Long v Forest-Fehlhaber*, 55 NY2d 154, 161 [1982]. As there exists material and triable issue of fact regarding the plaintiffs' NYS Labor Law § 241(6) claims, the defendants are not entitled to judgment as a matter of law as to these claims.

The plaintiffs' motion for partial summary judgment on the issue of liability as it applies to their NYS Labor Law § 240(1) claims is denied. The defendants' motion for partial summary judgment as to the plaintiffs' causes of action pursuant to NYS Labor Law § 200 and NYS Labor Law § 240(1) is granted. The defendants' motions for partial summary judgment as to the plaintiffs' causes of action pursuant to NYS Labor Law § 241(6) is denied.

Any relief not specifically granted herein is denied. This decision shall constitute the order of the Court. No costs are awarded to any party. The original decision and order shall be forwarded to the attorney for the defendants for filing and entry. The underlying papers will be filed by the court.

Dated: July 11, 2011
Malta, New York

ENTERED
Kathleen A. Marchione
Kathleen A. Marchione
Saratoga County Clerk

Stephen A. Ferradino
STEPHEN A. FERRADINO, J.S.C.

2012 JUL 17 AM 10:33
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPAAN

ENTERED

Papers Received and Considered:

- Notice of Motion for Summary Judgment, on behalf of the Plaintiffs, dated May 4, 2012
- Affirmation of Attorney, Jeffrey K. Anderson, Esq., dated May 4, 2012, with Attached Exhibits A-M

Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, dated May 4, 2012

Affirmation in Opposition to Plaintiff's Motion for Partial Summary Judgment of Melissa J. Smallacombe, Esq., dated May 18, 2012, with Attached Exhibit A.

Notice of Motion for Summary Judgment, on behalf of the Defendants/Third-Party Plaintiff, dated May 4, 2012

Affirmation of Melissa J. Smallacombe, Esq., in Support of Defendants' and Third-Party Plaintiff's Motion for Partial Summary Judgment, dated May 4, 2012, with Attached Exhibits A-L

Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment, dated May 4, 2012

Affirmation of Jeffrey K. Anderson, Esq., in Opposition to Defendants' Motion for Summary Judgment, dated May 31, 2012

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated May 31, 2012

Affirmation of Robert H. Coughlin, Esq., dated June 1, 2012

Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment, dated June 1, 2012

Reply Affirmation of Melissa J. Smallacombe, Esq., dated June 7, 2012, with Attached Exhibit A

Reply Affirmation of Jeffrey K. Anderson, Esq., dated June 8, 2012