

Petersen v Borrok

2012 NY Slip Op 30078(U)

January 3, 2012

Sup Ct, Suffolk County

Docket Number: 05-30513

Judge: Thomas F. Whelan

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-----X	
ANDREASSON & BULGIN CONSTRUCTION, INC.,	:
	:
Third Third-Party Plaintiff,	:
	:
- against -	:
	:
ALEXANDER PETERSEN CARPENTRY,	:
	:
Third Third-Party Defendant.	:
-----X	
ANDREASSON & BULGIN CONSTRUCTION, INC.,	:
	:
Fourth Third-Party Plaintiff,	:
	:
- against -	:
	:
MICHAEL CUNNINGHAM CARPENTRY, INC.,	:
	:
Fourth Third-Party Defendant.	:
-----X	
JEFFREY D. GAGLIOTTI and EMINENCE ENTERPRISES	:
	:
Third-Party Defendant/Second Third-Party Plaintiff;	:
	:
- against -	:
	:
MICHAEL CUNNINGHAM CARPENTRY, INC.,	:
	:
Fifth Third-Party Defendant.	:
-----X	

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Upon the following papers numbered 1 to 40 read on these motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 16 - 25; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26 - 28; 29 - 31; 32 - 33; Replying Affidavits and supporting papers 34 - 36; 37 - 40; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of determination; and it is further,

ORDERED that the motion by the plaintiffs for summary judgment on the issue of liability, is granted; and it is further;

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ORDERED that the motion by third third-party defendant Alexander Peterson Carpentry for summary judgment dismissing the third third-party complaint is granted.

In this action the plaintiffs seek to recover damages for personal injuries, and derivatively, sustained by plaintiff Alexander Peterson (hereinafter the injured plaintiff) from his fall from a scaffold at premises located at 315 Rose Hill Road in Watermill, New York. The subject premises were owned by Andrew S. Borrok. Borrok contracted with a general contractor, Andreasson Bulgin Construction, Inc. (hereinafter Andreasson), for the construction of a new home on the premises. Andreasson subcontracted the job site supervision to Align Construction, Inc., a company owned by Tom Hatzel. Andreasson subcontracted the carpentry work to Jeffrey D. Gagliotti and Eminence Enterprises (hereinafter referred to collectively as Eminence). The plaintiff was hired by Eminence to work as a finish carpenter at the subject premises.

The plaintiff commenced the instant action against the defendants, Borrok and Andreasson, pursuant to Labor Law §§ 200, 240, and 241, and for common-law negligence. Andreasson commenced (1) a third-party action against Eminence for, *inter alia*, contribution and indemnification; (2) a second third-party action against Align for, *inter alia*, contribution and indemnification; (3) a third third-party action against Alexander Petersen Carpentry for, *inter alia*, contribution and indemnification; and (4) a fourth third-party action against Michael Cunningham Carpentry, Inc. for contribution and indemnification. Eminence commenced a fifth third-party action against Michael Cunningham Carpentry, Inc., for, *inter alia*, contribution and indemnification.

By order dated September 10, 2010, this Court granted summary judgment in favor of defendant Borrok dismissing the complaint and any claims asserted against him. The fourth third-party complaint and the fifth third-party complaint, which were asserted against defendant Michael Cunningham Carpentry, Inc., were voluntarily discontinued by way of a stipulation of discontinuance.

The plaintiffs now move for summary judgment on the issue of liability on the grounds that the remaining defendant, Andreasson, is statutorily liable pursuant to Labor Law § 240 (1). Alexander Peterson Carpentry moves for summary judgment dismissing the third third-party complaint asserted against it on the grounds that such action is barred.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

In support of the motion for summary judgment, the plaintiff submits, his own deposition testimonies, the deposition testimonies of Tom Hatzel, and the deposition testimony of Edward Bulgin. As is relevant to the motion, the plaintiff testified that he was hired by Jeff Gagliotti of Eminence Enterprises to provide carpentry work at the premises. He was performing work at the premises for approximately three weeks or one month prior to the date of the incident. Tom Hatzel was his foreman at the work site. He was unaware of the identity of the general contractor at the work site, and did not know who Hatzel was employed by. The plaintiff reported to Hatzel and Hatzel instructed him on what to do and when to do it. At the time of the incident the plaintiff was installing crown molding around the roof of the house, which the plaintiff estimated was approximately 40 feet from the ground. He was utilizing a scaffold to perform his work. The plaintiff testified that he and his helper constructed a portion of the scaffold being utilized approximately one week prior to the incident. The material he used to build the scaffold was present at the site. He did not know who the scaffold, or the materials utilized to construct the scaffold, belonged to. The scaffold he constructed did not have railings. He had never constructed a scaffold with railings although he had seen other workers do so. He had constructed more than 100 scaffolds prior, and none of these prior scaffold had ever collapsed. According to the plaintiff the incident occurred as he was installing trim on the right side of the peak of the premises. He was standing on the wooden platform of the scaffolding and the scaffolding suddenly collapsed, causing him to fall to the ground. He did not know what caused the scaffold to fall. There was no warning that the scaffold might fall. He worked on that section of the scaffold the day prior without incident. He did not observe any portion of the scaffold to be broken or defective prior to the incident. The structure of the scaffold, including its supports, was complete. According to the plaintiff, Hatzel observed the scaffold and him working on the scaffold. The plaintiff testified that no one instructed him to use any type of device or harness to protect him from falling, and that he had not observed other workers using such a device. There were no netting, harnesses, lanyards or safety ropes at the job site that he observed, and he did not own any. The plaintiff did not attend any safety meetings at the job site.

Thomas Hatzel testified that at the time of the incident he had a business, second-third party defendant Align Construction, Inc., that was employed by Andreasson to provide supervision at the subject job site. As project foreman at the job site, his duties included insuring quality control, scheduling, and adherence to specifications and plans issued by the architect. Hatzel testified that he did not know who was officially in charge of site safety, but that he did have a role in it. Hatzel testified that he would oversee the project and if he saw something he deemed to be unsafe, he would bring it to the attention of Bulgin and the workers. According to Hatzel, Andreasson provided safety glasses, hard hats, and railings for the scaffolding, but there were no man lifts, safety nets, lanyards, or safety belts or ropes at the site. Hatzel directed the carpenters present at the job site, including the plaintiff and gave them instructions each morning. He had been acting as foreman for approximately five months prior to the accident and was present on the date of the accident. During that time, he did not conduct any safety meetings at the job site. Hatzel was supervised by Ed Bulgin of Andreasson, who was on the job site approximately once daily. Hatzel did not know the plaintiff prior to his arrival at the job site approximately one week prior. To his knowledge, the plaintiff was employed by Eminence. On site, Eminence workers were supervised by either him or Bulgin. On the date of the accident, the plaintiff was

performing exterior trim work on a scaffold. The platform of the scaffold was approximately 23 feet above the ground. Hatzel did not know if the scaffold had safety railings. It was his understanding that the plaintiff fell because the braces holding the platform of the scaffold fell. Upon viewing photographs of the subject scaffold following the accident, Hatzel testified that it appeared to depict a fallen brace. Hatzel did not know who constructed the scaffold, but he believed that the materials for the scaffold were owned by Andreasson. Hatzel did not know how long the scaffold had been present at the location of the accident. He was not aware of any problems with the scaffold or platform prior to the accident and had not received any complaints about the scaffold. He did not know, officially, whose job it was to inspect the braces and scaffold, but he testified that, practically, the person using the scaffold should inspect it for safety. Hatzel testified that on the date of the accident he cautioned the plaintiff about the unsafe manner in which he was accessing the platform. He admitted, however, that he did not caution the plaintiff in any manner with respect to the safety of the platform itself.

Edward Bulgin testified that he was vice president and owner of Andreasson on the date of the accident. Bulgin testified that he entered a written contract with the owner of the subject premises to act as the general contractor in the construction of a home. Bulgin was responsible for the jobs progress and to ensure that the work was being performed in accordance with the plans and specifications of the architect. Andreasson did not perform the work itself, but subcontracted the work to various subcontractors. Andreasson subcontracted with Tom Hatzel to act as a full-time supervisor and its representative at the job site. Andreasson subcontracted the carpentry work to Eminence, and dealt mainly with Jeff Gagliotti. Bulgin testified that he paid Eminence and that Eminence paid the plaintiff. Bulgin testified that he was informed that the plaintiff's accident occurred when a bracket holding the scaffold gave way causing the plaintiff to fall. The platform of the scaffold was approximately 20 to 25 feet high. Bulgin testified that the scaffold at issue was a fairly typical site-built scaffold constructed with two by fours that were nailed and/or screwed and planking. Bulgin testified that the wood used in the construction of the scaffold was purchased by Andreasson and that there may have been two or three different trades using the scaffold. He did not know who constructed the scaffold involved in the incident and did not know when the scaffold was constructed. Upon viewing photographs of the scaffold involved in the incident, Bulgin testified that, according to common practices, the scaffold was missing a brace. Bulgin testified that, at no point prior to the incident, did Hatzel convey to him concerns about the scaffold or its safety. Bulgin did not recall having any concerns about the scaffold based on his observations of it. Bulgin testified that Andreasson did not directly employ anyone for safety, but that it was part of Hatzel's duties. According to Bulgin, Hatzel told him that he had cautioned the plaintiff on the date of the incident about the scaffold, but Bulgin did not know the details of exactly what he said. Bulgin was not aware of the plaintiff having ignored any directive to use a piece of safety equipment prior to the accident.

Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner, general contractor or agent who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240 (1) is aimed at "special hazards" and is limited to such specific gravity-related

accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). Specifically, Labor Law § 240 (1) requires that safety devices be “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). A violation of this duty which proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner and general contractor strictly liable (*see Crespo v Triad, Inc.*, 294 AD2d 145, 742 NYS2d 25 [2002]; *Crawford v Leimzider*, 100 AD2d 568, 473 NYS2d 498 [2d Dept 1984]). It is not a defense to liability pursuant to Labor Law § 240(1) that the plaintiff’s fault contributed to the accident, unless it can be said that the plaintiff’s conduct was the sole proximate cause of the accident as a matter of law (*see Balzer v City of New York, supra*; *see also Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]). This is true even where the workman erected his own scaffold, the owner and contractor exercised no supervision, control or direction over the work being performed, and the workman was a self-employed independent contractor (*see Crawford v Leimzider, supra*).

To prevail on a claim under Labor Law § 240 (1), a plaintiff must prove that the statute was violated and that such violation was a proximate cause of the resulting injuries (*see Treu v Cappelletti*, 71 AD3d 994, 897 NYS2d 199 [2010]; *Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849, 889 NYS2d 630 [2009]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City, supra*). The evidence submitted by the plaintiffs, here, established a *prima facie* entitlement to summary judgment on the issue of Andreasson’s liability pursuant to Labor Law § 240 (1). In this regard, the evidence submitted established that Andreasson violated Labor Law § 240 (1) and that such violation was a proximate cause of the plaintiff’s injuries (*see Ortiz v 164 Atl. Ave.*, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; *Treu v Cappelletti, supra*; *Caballero v Benjamin Beechwood, LLC, supra*; *see also Tapia v Mario Genovesi & Sons*, 72 AD3d 800, 899 NYS2d 303 [2010]). Indeed, the uncontroverted facts establish that the scaffold failed to protect the plaintiff from a specific gravity-related accident, the precise harm the statute is intended to prevent (*Ross v Curtis-Palmer Hydro-Elec. Co., supra*; *Rocovich v Consolidated Edison Co., supra*). Where the scaffold fails to perform its function of safely supporting the worker, a statutory violation, and thus a *prima facie* entitlement to summary judgment has been established (*LoVerde v 8 Prince St. Assoc.*, 35 AD3d 1224, 1226, 829 NYS2d 300 [2006]; *Hanna v Gellman*, 29 AD3d 953, 815 NYS2d 713 [2006]; *O’Connor v Enright Marble & Tile Corp.*, 22 AD3d 548, 802 NYS2d 506 [2005]; *Vergara v SS 133 W. 21*, 21 AD3d 279, 800 NYS2d 134 [2005]).

The burden thus shifts to Andreasson to raise a triable issue of fact as to whether there was a statutory violation or as to whether the injured plaintiff’s own acts or omissions were the sole proximate cause of the accident (*Blake v Neighborhood Hous. Servs. of N.Y. City, supra*; *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In opposition to the motion, Andreasson relies on the deposition testimony of Jeffrey D. Gagliotti, the owner of Eminence. Gagliotti testified that at the time of the incident, Eminence had no employees, and subcontracted out all of its work to independent contractors. According to Gagliotti, the injured plaintiff

had been performing subcontracting work for Eminence for approximately one to one-and-a-half years at the time of the accident. Gagliotti testified that the plaintiff was paid hourly through a check to his business, Alex Peterson Carpentry. It was Gagliotti's understanding that the plaintiff had one carpenter that worked for him. The plaintiff would provide Gagliotti a list of how many hours he and his helper worked and Eminence would pay them accordingly. With respect to the subject job site, Eminence provided carpentry labor to the job site. Gagliotti contacted the plaintiff and told him to report to Hatzel at the subject job site. To his knowledge, Hatzel was the foreman at the subject job site and directed the plaintiff's work. Gagliotti admitted that the plaintiff received workers' compensation benefits under a policy issued to Eminence.

Contrary to the defendant's contentions, the evidence does not raise an issue of fact as to whether the plaintiff's alleged actions were the sole proximate cause of his accident (*see Treu v Cappelletti, supra*). It is undisputed that the defendant failed to furnish the plaintiff with adequate safety devices (*see Di Vincenzo v Tripart Dev., Inc.*, 272 AD2d 904, 709 NYS2d 271 [4th Dept 2000]). Moreover, the failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate safety devices available, the worker knew both that they were available and that he was expected to use them, and he chose for no good reason not to do so (*see Gallagher v New York Post, supra; Ortiz v 164 Atl. Ave., LLC, supra; Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 871 NYS2d 26 [1st Dept 2008]). Here, the defendant neither instructed the plaintiff to use an available safety device nor instructed him to avoid using a particular unsafe device (*see Gallagher v New York Post, supra; Handville v MJP Contrs., Inc.*, 77 AD3d 1471, 908 NYS2d 799 [4th Dept 2010]; *Ortiz v 164 Atl. Ave., LLC, supra; Ritzer v 6 E. 43rd St. Corp., supra*).

In addition, assuming *arguendo*, as Andreasson contends, that the injured plaintiff was an independent contractor at the time of his accident and not an employee of Eminence, he is nevertheless entitled to recovery under Labor Law § 240 (1) (*see Di Vincenzo v Tripart Dev., Inc.*, 272 AD2d 904, 709 NYS2d 271 [4th Dept 2000]; *Karnes v Saratoga Pine Ridge*, 241 AD2d 810, 661 NYS2d 84 [3d Dept 1997]).

Based on the foregoing, the plaintiff's motion is granted to the extent that it seeks summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against the remaining defendant Andreasson Bulgin Construction, Inc.

The motion by third-third party defendant Alexander Peterson Carpentry for summary judgment dismissing the third third-party complaint asserted against it for common law contribution and indemnification is also granted. In support of the motion, Alexander Peterson Carpentry submits, *inter alia*, the plaintiff's affidavit and deposition testimony. As is relevant to this motion, the plaintiff testified that he was employed by Eminence at the time of the accident and had been employed by Eminence for approximately twelve months prior to the accident. He was hired directly by Jeff Gagliotti and considered himself a full-time employee of Eminence. The plaintiff admitted that he hired a helper for the work at the subject job site and paid him directly. The plaintiff testified that Gagliotti was not on the job site at all, and that he was unsure of who was in charge of Eminence on a day-to-day basis, but that Hatzel was

the person who told him what to do. The plaintiff testified that, following his accident, Gagliotti filled out workers' compensation paperwork for him and that he was currently receiving workers' compensation. Eminence was listed as his employer on the workers' compensation forms. The plaintiff admitted that Alexander Peterson Carpentry and Finishing came into existence eight years prior. He was the only owner of this company, which he believed was a d/b/a. According to the plaintiff, this company was no longer in existence on the date of the accident, although he admitted that it was never formally dissolved. According to the plaintiff, this company had no insurance, no bank accounts, no officers, and no employees other than himself. The plaintiff testified that at the time of the accident Eminence paid him by check. He admitted that he did not know if the checks were made out to him or his business. He testified that Eminence provided him with a 1099 tax form at the end of the year.

In his affidavit, the plaintiff avers that approximately nine years prior he had created an entity known as Peterson Carpentry and Finishing, not Alexander Peterson Carpentry. The entity was not incorporated nor were any steps taken to incorporate. The company did not have a president, vice president or any officers and he was the only employee. It did not have a bank account or accountant and did not file tax returns. The plaintiff averred that he ceased using the name Peterson Carpentry and Finishing approximately one year prior to the accident and was hired by Jeffrey Gagliotti to work for his company Eminence. He worked for Eminence full time and received a 1099. On the date of the accident he was employed by Gagliotti and Eminence and was paid by check from Eminence. After the accident, he began to collect workers' compensation benefits from Eminence's insurance policy.

The evidence submitted on behalf of Alexander Peterson Carpentry was sufficient to establish that it was entitled to summary judgment dismissing the third third party complaint brought against it by Andreasson for common law contribution and indemnification. In this regard, the evidence submitted demonstrated that Alexander Peterson Carpentry was a non-existent legal entity. In any event, to the extent that the injured plaintiff was self-employed by his own business as an independent contractor, the evidence submitted establishes that the business was a sole proprietorship with no distinct existence apart from the injured plaintiff (*see Rose v Mt. Ebo Assoc., Inc.*, 170 AD2d 766, 565 NYS2d 578 [3d Dept 1991]; *compare Bieber v Tower Builder & Contractor Corp.*, 216 AD2d 431, 628 NYS2d 368 [2d Dept 1995]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Quinlan v Eastern Refractories Co.*, 217 AD2d 819, 629 NYS2d 819 [3d Dept 1995]). Under such circumstances, to allow a claim for common law contribution and indemnification would vitiate the purpose of Labor Law § 240 (1), (*see Rose v Mt. Ebo Assoc., Inc.*, *supra*; *see also Di Vincenzo v Tripart Dev., Inc.*, 278 AD2d 903, 718 NYS2d 544 [4th Dept 2000]) as regardless of the titles used, Andreasson's third-party action is impermissibly predicated solely on plaintiff's culpable conduct (*see Crawford v Leimzider*, *supra*; *Linzy v Christa Constr.*, 238 AD2d 936, 661 NYS2d 150 [4th Dept 1997]; *see also Haimes v New York Tel. Co.*, 46 NY2d 132, 412 NYS2d 863 [1978]; *Karnes v Saratoga Pine Ridge*, *supra*).


Moreover, the Court agrees with the contention made by counsel for Alexander Peterson Carpentry that, under the circumstances of this case, the injured plaintiff's sole proprietorship would not be liable for contribution or indemnification to the general contractor pursuant to Workers' Compensation Law § 11 (*see Handville v MJP Contrs., Inc.*, *supra*).

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In opposition to the motion, Andreasson relies on the deposition testimony of Jeffrey D. Gagliotti. This evidence fails to raise a triable issue of fact as to the viability of its third third-party action against Alexander Peterson Carpentry for common law indemnification or contribution. In this regard, the evidence submitted fails to establish the existence of a legal entity, with a distinct existence from the injured plaintiff, which can be held liable to Andreasson for common law indemnification or contribution.

Dated: _____

1/3/12



THOMAS E. WHELAN, J.S.C.