

Mota v 129 Wadsworth Mgt. Corp.

2012 NY Slip Op 32067(U)

July 31, 2012

Supreme Court, New York County

Docket Number: 117556/2009

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 117556/2009
MOTA, MERILIO
vs.
129 WADSWORTH MANAGEMENT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

AUG 08 2012

**NEW YORK
COUNTY CLERK'S OFFICE**


HON. EILEEN A. RAKOWER J.S.C.

Dated: 7/31/12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MERILIO MOTA,

Plaintiff,

Index No.
117556-2009

-against-

**DECISION
and ORDER**

129 WADSWORTH MANAGEMENT CORP.,
ALMA REALTY CORP., VALCO BUILDING
& MAINTENANCE SUPPLY CORP.,

Motion Seq. 002,
003, 004

Defendant.

-----X
VALCO BUILDING & MAINTENANCE SUPPLIES
CORP.,

Third-Party Plaintiff,

-against-

HITACHI KOKI USA, LTD., ROBERTS TOOL AND
SUPPLY COMPANY, INC., AND HITACHI KOKI
CO., LTD.,

Third-Party Defendants.

FILED

AUG 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
129 WADSWORTH MANAGEMENT CORP.,
ALMA REALTY CORP., AND VALCO BUILDING
& MAINTENANCE SUPPLIES CORP.,

Second Third-Party Plaintiffs,

-against-

HITACHI KOKI USA, LTD., ROBERTS TOOL
AND SUPPLY COMPANY, INC., AND HITACHI
KOKI CO., LTD

Second Third-Party Defendants.

-----X
HON. EILEEN A. RAKOWER:

Plaintiff brings this action against 129 Wadsworth Management (“Wadsworth”), Alma Realty Corp (“Alma”) and Valco Building & Maintenance Supplies Corp. (“Valco”) for injuries which allegedly occurred when he was installing wood floors at 129 Wadsworth Avenue, New York, NY 10033. Plaintiff alleges that on November 29, 2009, he suffered severe injuries to his left thumb when it came into contact with the blade of a Hitachi Model 10 C10 FC compound saw, that was insufficiently guarded. Plaintiff claims that Wadsworth, Alma and Valco are responsible to compensate him for violations of New York State Labor Law §200 and §241(6), and based upon defective design and/or manufacture, breach of warranties and common law negligence with respect to the subject saw.

On January 3, 2011, Valco brought a third-party action against Hitachi Koki USA, Ltd and Hitachi Koki Co., Ltd (“Hitachi”) and Roberts Tool and Supply Co. Inc. (“Roberts Tool”), and on June 7, 2011, second third-party plaintiffs Wadsworth and Alma brought a second third-party action against Hitachi and Roberts Tool. Valco brings claims against Hitachi for negligent and defective design of the saw, defective manufacture of the saw, and inadequate label warnings. Valco’s third party claims against Roberts Tool sound in negligence, for selling Valco a saw with design and manufacturing defects, and negligent distribution to Valco of the subject saw. Alma and Wadsworth’s causes of action against Hitachi are based on negligent design, defective manufacture of the product and its cause of action against Roberts Tool is for negligent distribution of a defective product.

However, a “Stipulation of Discontinuance as to the Product Liability Claim Against Valco” dated June 4, 2010, signed by attorneys for plaintiff, Valco, Wadsworth and Alma, states,

All claims asserting defect in design and/or manufacture of the subject miter saw (including failure to warn claims or the retail sale of a defective product) brought by plaintiff MERILIO MOTA against defendant VALCO BUILDING & MAINTENANCE SUPPLIES CORP., including more specifically, i.e., the Third and Fourth Causes of Action in plaintiff’s January 22, 2010 Amended Verified Complaint (20-24) are hereby discontinued without prejudice without costs to any party against the other. All cross-claims to the same effect are also dismissed with the execution of this stipulation.

It is further stipulated and agreed, that the remaining negligence claims brought by plaintiff MERILIO MOTA against defendant VALCO BUILDING & MAINTENANCE SUPPLIES CORP., i.e.,

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the Fifth Cause of Action in plaintiff's January 22, 2010 Amended Verified Complaint (25-27), are not affected by the discontinuance of the aforesaid products liability claims.

Hitachi manufactured two Hitachi C10FC miter saws in October 1997. Hitachi then sold the saws to Roberts Tool, a wholesale distributor of construction tools and equipment in late 1997 or early 1998. The Hitachi saws sat in the Roberts Tool warehouse for about eleven years. While Roberts Tool does not concede that it sold the Hitachi saw which injured Plaintiff to Valco, an invoice dated July 30, 2009, provided by Valco, indicates that it received two Hitachi C10FC miter saws from Roberts Tool on July 30, 2009. In November 2009, Valco's employee Sofronis Vlahos sold the Hitachi saw to Plaintiff. Plaintiff testifies that when he received the saw, it appeared used in that it was missing a manual, a table insert, the blade looked used, and the blade guard was not attached.

Defendants Hitachi, Roberts Tool, and Valco now bring motions for summary judgment, to dismiss all causes of action against them. While Valco and Roberts Tool claim that Hitachi placed the saw into the stream of commerce without the blade guard attached, such a claim of defect in manufacture was specifically discontinued in the stipulation of discontinuance. A claim of defective manufacture requires Plaintiff to show the existence of a defect at the time the product left the hands of the manufacturer as part of the case. That fact may be proven by circumstantial evidence, especially when the product was sealed. A long lapse of time between making the product and the occurrence of the mishap may create difficulty of proof but does not bar liability.

Here, the stipulation of discontinuance specifically eliminates all claims asserting a defect in manufacturing of the subject saw. The record is replete with challenges to the "new" condition of the saw. However, a jury need not consider circumstantial evidence in this regard because no claim for defective manufacture is asserted, by Plaintiff, the user of the saw, against Valco. Rather, the negligence claim against Valco, the remaining claim, arises from its selection of the subject saw for the work Plaintiff described he needed it for.

With regard to Roberts Tool, Alma and Wadsworth have no surviving claims after the stipulation of discontinuance. The only remaining claim against Roberts Tool is Valco's third party cause of action for negligent distribution of the subject saw. In support of its motion for summary judgment, Roberts Tool provides the affidavit of Steven B. Sherman, President of Roberts Tools, which indicates that Roberts Tools never sells secondhand, refurbished, reused or

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anything other than new products. However, Sherman concedes that in 2004 all items in the warehouse were moved to a different facility by Roberts employees. Plaintiff provides deposition testimony that when he purchased the saw it appeared used. Inasmuch as Plaintiff provides evidence that he received the saw in less than marketable condition, a question of fact exists as to whether Roberts Tool negligently sold a product that was in disrepair, and failed to maintain the product while in its possession for over ten years. Roberts Tool provides nothing more than a conclusory statement that it does not sell used goods, and as such, summary judgment is denied.

Furthermore, Valco moves for summary judgment on Plaintiff's remaining causes of action pursuant to Labor Law §200 and §241(6) and for negligence. As the company which sold the saw to plaintiff, Valco asserts that the Labor Law claims cannot go forward against them, as they are not the owner or general contractor. Labor Law §200 is a codification of the common law duty of owners and general contractors to provide construction site workers with a safe place to work. (*See, Jock v. Fien*, 80 NY2d 965, 605 NE2d 365 [1992]). In order for someone other than an owner to be held liable under Labor Law 200, it must control or direct the plaintiff's work (*See, Vasiliades v. Lehrer McGovern & Bovis, Inc.* 3AD3d 400, 771 NYS2d 27.) Labor Law §241(6), also applies to general contractors and owners, and their agents. A seller and/or supplier cannot be held liable under the Labor Law (*See, Noah v. 270 Lafayette Associates, L.P., et al.* [1st Dept 1996]). As Valco is neither an owner nor general contractor of the premises, it cannot be held liable for plaintiff's alleged injuries pursuant to Labor Law §200 or §241(6). The relationship between Valco and Plaintiff's union does not compel a different result. While Plaintiff contends he had no choice about where he purchased the saw and the condition of the saw sold, and that his Union directed him to Valco, there is no evidence that Valco controlled the work or the work site.

In relation to Plaintiff's negligence claim against Valco, Valco's manager, Sofronis Vlahos testified that he sold the saw in a new, sealed box to Plaintiff, and Socratis Foradoulas, the managing agent of Wadsworth, states that all the equipment sold by Valco is new and the room where the saw is kept is locked. Regardless of such affirmations, Plaintiff's deposition testimony, as stated above, alleges that when he opened the box, it was missing a manual, a table insert, the blade looked used and the blade guard was not attached, as it usually is when sold by the manufacturer. Plaintiff testifies that he told Vlahos that the saw appeared used, and Vlahos responded that it was the way that the saw comes. As Plaintiff has provided opposition testimony to rebut Valco's claims that the saw was sold as new, a question of fact exists as to whether Valco was negligent in providing the saw to Plaintiff.

Wherefore, it is hereby,

ORDERED that Second and Third Party Defendants Hitachi Koki USA, Ltd, and Hitachi Koki Co., Ltd's motion for summary judgment is granted in its entirety and the Clerk is directed to enter judgment in favor of Second and Third-Party Defendants Hitachi Koki USA Ltd, and Hitachi Koki Co., Ltd.; and it is further,

ORDERED that Second and Third Party Defendants Roberts Tool's motion for summary judgment is denied; and it is further,

ORDERED that Defendant Valco Building & Maintenance Supply Corp.'s motion for summary judgment is granted only to the extent that Labor Law §200 and §241(6) are dismissed as against Valco Building & Maintenance Supply Corp. and the Clerk is directed to enter judgment in favor of Valco Building & Maintenance Supply Corp. on the Labor Law §200 and §241(6) claims.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 31, 2012



EILEEN A. RAKOWER, J.S.C

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