

Doto v Astoria Energy II LLC

2013 NY Slip Op 31857(U)

July 8, 2013

Sup Ct, Queens County

Docket Number: 6901/11

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

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VICTOR DOTO,

Plaintiff(s),

Index No.:6901/11

Motion Date:3/18/13

- against -

Motion Cal. No.: 34

Motion Seq. No: 2

ASTORIA ENERGY II LLC, SNC-LAVALIN
CONSTRUCTORS, INC., PETERSON INDUSTRIAL
SCAFFOLDING, INC.,

Defendant(s).

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ASTORIA ENERGY II LLC, SNC-LAVALIN
CONSTRUCTORS, INC.,

Third-Party Plaintiff(s),

- against -

NEWTRON HEAT TRACE, LLC,

Third-Party Defendant(s).

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The following papers numbered 1 to 25 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law §240(1) against defendants Astoria Energy II LLC ("Astoria Energy"), SNC-Lavalin Constructors Inc ("SNC-Lavalin"), Peterson Industrial Scaffolding, Inc. (Peterson); on the cross-motion by defendants Astoria Energy, SNC-Lavalin and Peterson pursuant to CPLR §3212 for summary judgment dismissing the Labor Law causes of action and for summary judgment against third-party defendant Newtron Heat Trace LLC ("Newtron Heat") for contractual indemnification; and on the cross-motion by third-party defendant Newtron Heat pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint.

| | <u>Papers</u> | |
|--|-----------------|------|
| | <u>Numbered</u> | |
| Notice of Motion - Affirmation-Affidavit-Exhibits-Service..... | 1 | - 5 |
| Notice of Cross-Motion - Affirmation-Exhibits-Service..... | 6 | - 9 |
| Notice of Cross-Motion-Affirmation-Exhibits-Service. | 10 | - 13 |
| Affirmation in Opposition - Exhibits-Service..... | 14 | - 16 |
| Reply Affirmations- Exhibits-Service..... | 17 | - 25 |

Upon the foregoing papers it is ordered that this motion and cross-motions are determined as follows:

This is an action to recover money damages for injuries allegedly suffered as a result of an accident at a work site. The accident occurred on February 17, 2011 at the Astoria Power Plant located at 17-06 Steinway Street, Astoria, New York. The defendant Astoria Energy is the owner of the site. The defendant SNC-Lavalin was the construction manager for the construction project. Astoria Energy contracted with non-party Atlantic Contracting & Specialties, LLC ("Atlantic Contracting")¹ for insulation and heat trace installation. Atlantic Contracting then subcontracted with Newtron Heat to work on the installation of heat trace. Astoria Energy also hired defendant Peterson to install, erect and maintain the scaffolding at the construction site.

The plaintiff, an electrician, was an employee of Newtron Heat. The plaintiff testified that on the day of the accident, he was working installing heat trace around conduit pipes. The plaintiff was instructed as to the general area where he would be working. The plaintiff testified that there were different ways of getting to every area. He further testified that he was given a harness by his supervisor. The plaintiff stated that he ascended the scaffold and noticed that there was a swing gate that did not open properly. The plaintiff then climbed over the swing gate and the adjacent railing to get to his work location. He testified that he did not notify his supervisor of this swing gate. After an hour of working he descended the scaffold in the same manner to take a coffee break. He testified that the accident occurred as the plaintiff was ascending the scaffolding in order to get back to his assigned work area. He stated that

¹It is noted that Atlantic Contracting & Specialties, LLC is listed as a defendant on the Notice of Motion. However, as the summons and complaint have not been properly amended to add this defendant, Atlantic Contracting & Specialties, LLC is not a party to this action.

once again he came to a swing gate that would not open all the way. Instead the gate only opened a few inches before it hit the railing that surrounded the catwalk. He then attempted to climb over the railing. He testified that the accident occurred when his leg got caught as he was swinging it over the railing causing him to fall down to the catwalk below the railing, about three feet below.

Charles Welda, of Peterson, testified at an examination before trial. He testified that the permanent catwalk had its own permanent ladder and swing gates. He testified that subject swing gate was not designed to provide access to the permanent catwalk. Mr. Welda also testified that the subject gate was designed to allow access for workers working on a board or platform that was attached to the temporary scaffold. The area where the plaintiff's accident occurred was not an access point to the permanent catwalk as it was surrounded by railings. The access point to the permanent catwalk would have a permanent gate access affixed to the catwalk and it would never be necessary to climb over a railing to access the catwalk. Mr. Welda further testified that to get to the proper access point to the catwalk, the plaintiff should have gone down the ladder he came up, walked around and come up the proper ladder which was part of the permanent catwalk.

First, the argument that the cross-motion by the defendants is untimely is without merit. The cross motion was served seven days in advance of the return day and thus was timely under CPLR §2215. The cross motion by the third-party defendant, though untimely, is made on nearly identical grounds as the timely cross-motion and will be considered (*see, Ellman v Village of Rhinebeck*, 41 AD3d 635 [2d Dept 2007]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]).

On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To impose liability for violations of the Labor Law and common-law negligence, the violations or negligence must be the proximate cause of the accident (*Negron v City of New York*, 22 AD3d 546 [2d Dept 2005]; *Capellan v King Wire Co.*, 19 AD3d 530 [2d Dept 2005]; *Misirlakis v East Coast Entertainment Props.*, 297 Ad2d 312 [2d Dept 2002]). A plaintiff cannot recover if the accident was caused by his or her own conduct (*Gittleston v Cool Wind Ventilation Corp.*, 46 AD3d 855 [2d Dept 2007]; *Plass v Solotoff*, 5 AD3d 365 [2d Dept 2004]).

In the instant case, the cross-moving defendants made a *prima facie* showing that the plaintiff was not injured in an accident that was caused by a violation of the Labor Law or

resulting from any negligence. This court hereby rules that the plaintiff was provided with adequate safety equipment to prevent any accident. The evidence submitted by the defendants, including the photographs established that the area where the plaintiff tried to access the permanent catwalk was surrounded by a safety railing. The plaintiff attempted to use a short cut to access his work station by utilizing the temporary scaffolding and swing gate instead of going through the permanent catwalk as he was supposed to do. The evidence thus established that the accident occurred due to the plaintiff's own unforeseeable actions of attempting to climb over the railing. In fact, the permanent platform did have proper access at one end, but the plaintiff chose to climb over the side railing. The issue of whether the gate opened properly or not does not change this fact. Even if the gate opened fully the plaintiff still would have had to climb over the railing of the permanent fixture. The plaintiff's accident did not occur because of an improper gate as the accident was unrelated to any deficiency in how the gate operated. The expert affidavit submitted by the plaintiff was conclusory and failed to raise any issue of fact. The plaintiff's actions were, thus, the sole proximate cause of his injuries and the Labor Law causes of action are dismissed (*Serrano v Popovic*, 91 AD3d 626 [2d Dept 2012]; *Urias v Orange County Agric. Socy.*, 7 AD3d 515 [2d Dept 2004]; *Plass*, 5 AD3d at 367; *Misirlakis*, 297 AD2d at 312-13). Additionally, in light of the determination that the plaintiff's own action were the sole proximate cause of the accident, and the evidence submitted by the defendants that established that they did not supervise or control the plaintiff's work, the common law negligence cause of action must be dismissed as well (see *Capellan*, 19 AD3d at 532).

Finally, the court will turn to the branch of the defendants/third party plaintiffs' cross motion for summary judgment for indemnification and the cross motion by the third-party defendant for summary judgment dismissing the third-party complaint. The contract between Astoria Energy and Atlantic has an indemnification provision which states that the subcontractor Atlantic has to indemnify for claims "**arising out of any act or omission of the Trade Contractor and/or Subcontractors....**" (Emphasis added).

In its subcontract with Atlantic, Newtron Heat agreed to be bound all provisions of the contract between Atlantic and Astoria Energy. Furthermore, under the subcontract between Newtron Heat and Atlantic, Newtron Heat agreed to indemnify for any loss, liability, claim or expense that were "**caused by any act or omission of the Subcontractor, its agents, employees, or subcontractors....**" (Emphasis added).

Under these indemnification clauses, the third-party defendant is only obligated to indemnify for its own negligence. In light of the determination that the plaintiff's action were

the sole proximate cause of the accident, the cause of action for indemnification must be dismissed as it was not due to any act or omission of the subcontractor Newtron Heat (*Spence v Islands Estates at Mt. Sinai II, LLC*, 79 AD3d 936 [2d Dept 2010]; *DePascale v E&A Constr. Corp.*, 74 AD3d 1128 [2d Dept 2010]). Therefore, the branch of the cross motion by the defendants/third-party plaintiffs is denied and the cross motion by the third-party defendant dismissing the third-party complaint is granted.

Accordingly, the motion by the plaintiff for summary judgment on the issue of liability under Labor Law § 240(1) is denied.

The branch of the cross-motion by the defendants/third party plaintiffs for summary judgment against the plaintiff is granted and the complaint is dismissed. The branch of the cross motion for contractual indemnification is denied. The cross motion by the third-party defendant is granted and the third-party complaint is also dismissed.

Dated: July 8, 2013

JANICE A. TAYLOR, J.S.C.

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