

**Mayer v Conrad**

2013 NY Slip Op 33837(U)

April 3, 2013

Supreme Court, Erie County

Docket Number: 2011-1516

Judge: Shirley Troutman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

CHERYL D. MAYER,  
As Administratrix of the Est. of  
BRANDON M. ACKER, Deceased,

Plaintiff(s),

DECISION

v

Index No.:2011-1516

MATTHEW J. CONRAD and AMY M. CONRAD,  
Defendants.

-----  
MATTHEW J. CONRAD and AMY M. CONRAD,  
Third-Party Plaintiff(s),

FILED  
2013 APR 11 AM 11:00  
ERIE COUNTY  
CLERK'S OFFICE

v

FISHER CONCRETE, INC.,  
Third-Party Defendant(s).

TROUTMAN, J.

APPEARANCES

John A. Hsu, Esq., on behalf of Fisher Concrete, Inc.

Dale A. Ehman, Esq., on behalf of Matthew J. Conrad  
and Amy M. Conrad

R. Charles, Miner, Esq., on behalf of Cheryl D. Mayer

Third-Party Defendant, Fisher Concrete, Inc., [Fisher Concrete], by its attorney WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, John A. Hsu, Esq., of counsel, moves to dismiss the complaint and third-party complaint on the ground that the Defendants/Third-Party Plaintiffs, Matthew Conrad and

Amy Conrad, [Conrads] are entitled to the homeowner exemption found in Labor Law §§240(1) and 241(6) and on the ground that §§240 and 241 do not apply to the facts of this case.

The Conrads, by their attorney, the BOUVIER PARTNERSHIP, LLP, Dale A. Ehman, Esq., of counsel, move to dismiss on the same grounds as put forth by Fisher Concrete. They say it is undisputed that the house involved in this case is a one-family house and that the facts show they did not supervise or direct the employees of Fisher Concrete. In the alternative, they urge that they have the right of common law indemnification if they are found to have vicarious liability for any negligence of Fisher Concrete and ask the court to grant them a conditional judgment against Fisher Concrete for common-law indemnification.

Plaintiff, by her attorney, SMITH, MINER, O'SHEA, & SMITH, LLP, R. Charles Miner, Esq., of counsel, responds that she does not object to the defense motions regarding Labor Law §§240 and 241. As to her cause of action pursuant to Labor Law §200(1) and common law negligence she asserts that she has shown a question of fact on the issue of whether the Conrads controlled or supervised work the decedent was doing and on the issue of whether the Conrads had actual or constructive notice of the defective condition alleged to have caused the accident. She cites McNabb v Oot Bros., 64 AD3d 1237 (4<sup>th</sup> Dept., 2009); Riordan v BOCES, 4 AD3d 869 (4<sup>th</sup> Dept., 2004); and Konopczynski v. ADF Construction Corp., 60 AD3d 1313 (4<sup>th</sup> Dept., 2009). She points to testimony of Matthew Conrad and Kenneth Fisher, president of Fisher Concrete, that Mr. Conrad was routinely present on the job site during the course of the work, including on the morning of the accident, and that the trenches that collapsed had been dug several weeks prior to the date of the accident. Mr. Conrad discussed extending one of the trenches with Mr. Fisher. Under the holdings in Riordan, *supra* and Konopczynski, *supra*, Plaintiff argues that a question of fact exists as to actual or constructive notice to Mr. Conrad.

Fisher replies that the Plaintiff's concession of no liability under Labor Law §§240(1) and 241(6) requires a finding that there is no liability under Labor Law

§200(1) as well. Defendant argues that such cause of action cannot survive where liability under §§240 and 241 is not present and that Plaintiff has failed to show any evidence that the Conrads had either actual or constructive notice of the condition of the trench wall at issue. Defendant asserts that Plaintiff is relying on post-accident OSHA findings in an effort to impute knowledge to the Conrads. It alleges that Mr. Conrad's testimony that he was not an experienced excavator and had no training in excavation work refutes Plaintiff's position. Defendant further alleges that Mr. Fisher's testimony that he never expressed any concerns to Mr. Conrad also refutes Plaintiff's position. Additionally, there is no evidence of privity or legal relationship between the Conrads and Fisher Concrete that would cause knowledge to be imputed to the Conrads. The undisputed evidence shows that Fisher Concrete failed to do the work properly. It distinguishes the cases cited by Plaintiff as involving defendants who did not submit sufficient proof in support of their positions, unlike in the case at bar.

Fisher Concrete also opposes that part of the Conrads' motion that seeks common-law indemnity in the alternative. It avers that such indemnity is only appropriate where statutory or vicarious liability is found. Since the Plaintiff has conceded with respect to liability under Labor Law §§240 and 241, there is now no basis for indemnity. Defendant cites Siegel v New Plan Excel Realty Trust, Inc., 84 AD3d 1702 (4<sup>th</sup> Dept., 2011).

The Conrads reply that under the holdings in Lombardi v Stout, 80 NY2d 290 (1992) and Comes v New York State Electric and Gas Corp., 82 NY2d 876 (1993), they cannot be held liable under Labor Law §200 where they did not exercise supervisory control over the work and the dangerous condition was due to the contractor's methods. They aver that they have established that they exercised no control over the work and that they had no actual or constructive notice of the dangerous condition involved in the accident.

Upon listening to the arguments of counsel on February 1, 2013 and upon review of the submissions of the parties and the evidence in the case, the court

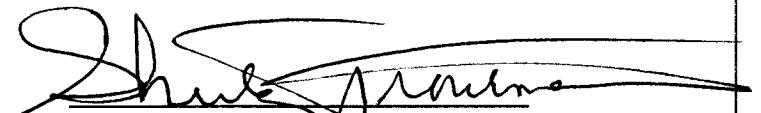
finds that questions of fact exist concerning notice to the Conrads and that, therefore, it has not been established by sufficient proof that the Conrads do not have common law liability or liability pursuant to Labor Law §200 to Plaintiff's decedent. The court notes the family relationship existing between Mr. Fisher and Mr. Conrad; the fact that Mr. Conrad owns an excavator of the type that Fisher Concrete used for the work in this case and offered it to Mr. Fisher for use in the work; and the frequent visits by Mr. Conrad to the site as the work proceeded. The Conrads have, therefore, not shown that they have a common law right to indemnification, as opposed to contribution, such that conditional summary judgment for indemnification is warranted. See DePillow v Greater Auburn Land Co., 236 AD2d 863 (4<sup>th</sup> Dept., 1997).

Accordingly, the court grants that part of the motions of the Conrads and Fisher Concrete seeking dismissal of Plaintiff's causes of action under Labor Law §240 and §241; does not reach that part of their motions seeking dismissal of the complaint and third-party complaint on the ground that the Conrads are entitled to the homeowner exemption found in §241; denies that part of their motions seeking dismissal of Plaintiff's cause of action under common law negligence and Labor Law §200; and denies the Conrads' motion for a conditional judgment against Fisher Concrete for indemnification.

Plaintiff's counsel is to submit an Order after circulating same to defense counsel.

Dated: April 3, 2013

Buffalo, New York



**Honorable Shirley Troutman**  
**Justice of Supreme Court**