

Fotiadis v Jamestown Corp.

2014 NY Slip Op 30858(U)

March 31, 2014

Sup Ct, New York County

Docket Number: 107739/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

CARMEN FOTIADIS, Individually and as
Administratrix of the Estate of PETER
FOTIADIS, Deceased,

Plaintiff,

Index No.: 107739/06

Motion Date: 03/22/13

- v -

JAMESTOWN CORPORATION, J.C. PENNEY
CORPORATION, INC., JAMESTOWN ONE TIMES
SQUARE LP, JAMESTOWN COMMERCIAL MANAGEMENT
COMPANY, LLC, KAYSON 42 OPERATING COMPANY,
LLC, and DDB CHICAGO, INC.,

Motion Seq. No.: 02

Motion Cal. No.: _____

Defendants.

JAMESTOWN CORPORATION, JAMESTOWN ONE TIMES
SQUARE LP, JAMESTOWN COMMERCIAL MANAGEMENT
COMPANY, LLC, KAYSON 42 OPERATING COMPANY,
LLC,

Second Third-Party Plaintiffs,

- v -

EMPIRE ERECTORS AND ELECTRICAL CO., INC.,
Second Third-Party Defendant.

FILED

APR 07 2014

COUNTY CLERK'S OFFICE
NEW YORK

DDB CHICAGO, INC.,
Fourth-Party Plaintiff,

- v -

EMPIRE ERECTORS AND ELECTRICAL CO., INC.,
Fourth-Party Defendant.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1, 2	
3 - 6	
7 - 9	

Cross-Motion: Yes No

Upon the foregoing papers,

Defendant J.C. Penney Corporation, Inc., (JCP) moves for
summary judgment dismissing the complaint in this personal injury

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SETTLE/SUBMIT ORDER/JUDG.

* 2]

action based upon negligence and alleged violations of the Labor Law (Motion Sequence No. 2). Defendant DDB Chicago, Inc., (DDB) cross-moves for summary judgment for contractual defense and indemnification from JCP and in opposition to the relief sought by JCP against it. Plaintiff cross-moves against defendants for summary judgment on the issue of defendants' liability. By separate motion (Sequence No. 5) DDB moves for summary judgment dismissing all claims and cross-claims against it in this action. Finally, Empire Erectors & Electrical Co., Inc. (EEE) moves for summary judgment dismissing the plaintiff's complaint and related cross-claims (Sequence No. 3). The parties have informed the court that the plaintiff has settled its claims against Jamestown Corporation, Jamestown One Times Square, LP, Jamestown Commercial Management Company, LLC and Kayson 42 Operating Company, LLC (the "Jamestown defendants").

Deceased plaintiff Peter Fotiadis was an employee of EEE and was working as a sign hanger on the date of the accident, May 16, 2006, at 1 Times Square. Plaintiff was deposed prior to his death following the commencement of this action. On the date of the accident plaintiff was working on a scaffold to assist in the installation of a vinyl roll sign on the side of the building. The scaffold was then raised by electric motors and wires so that the plaintiff and his co-workers could attach the vinyl signage to the glass windows on the exterior of the building. The height

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of the sign ranged from 15 to 40 feet above the ground. Plaintiff testified that initially while performing this operation he was attached to the ropes holding the scaffold by a lanyard that was connected to a rope grab whose purpose was to prevent a worker from falling. However, in order to complete the installation of the edge of the sign plaintiff testified that he had to disconnect the lanyard in order to reach the edge of the glass by utilizing the far end of the scaffold. As the plaintiff was attaching a piece of the vinyl sign to the glass plaintiff states that the platform shook and moved away from the glass causing him to fall off the scaffold to the ground 25 feet below.

JCP entered into a subsequently amended license agreement dated January 11, 2006, to utilize premises at One Times Square, owned by the Jamestown defendants, for a pop-up store and advertising appurtenant thereto. The agreement specifically stated that "Use of the space by Penney and the rights granted herein shall not constitute and shall not give rise to a lease or landlord-tenant relationship between the parties, but shall constitute only a license to use the Space as provided herein for the period stated above." The license agreement also provided that JCP "shall pay all costs and expenses for production and installation of replacement signage at the end of the term." Pursuant to a further letter agreement dated March 31, 2006, (the "extension agreement") Jamestown and JCP agreed to extend the

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agreement until April 30, 2006, only with respect to that portion of the agreement that permitted JCP to install signage on the building. The extension agreement further provided that "Penney shall, at its sole cost and expense, remove all its signage from the Building no later than 5:00 p.m. on April 30, 2006." There is conflicting deposition testimony about the interpretation of the extension agreement as to whether JCP's obligation to replace the original "For Rent" signage was extended.

JCP was a client of DDB, an advertising agency, pursuant to an Advertising Agency Services Agreement dated May 1, 2000. DDB contracted with EEE, plaintiff's employer, for the erection and removal of the exterior signage at the time of plaintiff's accident.

Plaintiff's administratrix brings this suit alleging defendants' negligence caused injury to the plaintiff and violated Labor Law Sections 200, 240 and 241 (6).

JCP argues that it should be granted summary judgment because the Labor Law does not apply to activity plaintiff was engaged in at the time of the accident and that JCP was not negligent because there is no proof that it had notice of any defective condition causing the accident. JCP also seeks common law and contractual indemnification from DDB Chicago.

The court agrees with plaintiff that the activity that led to the accident, that of affixing a sign to the building,

constitutes the type of work governed by the protections of the Labor Law. The First Department has held, where a worker was engaged "in the installation of the subject sign," that

Since plaintiff's decedent was working on a ladder at the time of the incident and was thus exposed to an "elevation-related hazard", he comes within the protection of Labor Law § 240 (1) if his death was proximately caused by such risk.

Gregorio v Getty Petroleum Corp., 201 AD2d 278 (1st Dept 1994).

The Court of Appeals considering similar facts has stated

the Appellate Division held--Labor Law § 240 (1) should not have been charged at all since the electric sign was not a part of a "building or structure." We disagree and instead adopt the conclusion of the trial court, implicit in its decision to charge Labor Law § 240, that the sign, which was extended across the facade of the premises . . . at a height of 15 feet and was affixed so as to be held flat against the building wall, was part of the building for purposes of the statute.

Izrailev v Ficarra Furniture of Long Is., Inc., 70 NY2d 813, 815

(1987); see also Neville v Deters, 175 AD2d 597 (4th Dept 1991)

("at the time of the accident, plaintiff was engaged in replacing a sign which was affixed to a building . . . a claim pursuant to section 240 (1) of the Labor Law . . . Plaintiff was engaged in an activity entitling him to the protection of the statute");

Lawyer v Rotterdam Ventures Inc., 204 AD2d 878, 879 (3d Dept

1994) ("There is little question that [plaintiff]'s activity at the time of the accident (standing on a ladder to install a sign on defendant's building) is the type of work contemplated by Labor Law § 240 (1)."). The Court observed that "[t]hese

precedents do not rest on a distinction between a permanent and temporary sign and clearly refute the dissent's position that the act of climbing a ladder to install a sign on an elevated part of a building does not fall within the purview of Labor Law § 240 (1)." Buckley v Radovich, 211 AD2d 652, 655 (2d Dept 1995). Defendants' reliance upon the Court of Appeals decision in Munoz v DJZ Realty, LLC. (5 NY3d 747, 748 [2005]) is misplaced as in that case "[p]laintiff was injured in a fall while applying a new advertisement to the face of a billboard that sat atop a building owned by defendant" and the Court held that such work did not constitute "altering" in contrast to a sign that was part of the building as cited in the precedents above.

Although plaintiff has established that the activity he was engaged in at the time of the accident was covered by the statute, the court finds that there is still an issue of fact as to whether adequate safety devices were provided. The deposition testimony is that although the scaffold lacked side rails and end caps that may have prevented plaintiff's fall, there was also evidence that plaintiff was provided with and utilized a full body harness which was attached to a rope grab on a safety line by a lanyard and that at the time of the accident the plaintiff had disconnected the lanyard in order to prevent the line from becoming entangled with the motor. Therefore, this is not a case where no safety device was provided, rather there is an issue of

fact as to whether given the nature of the work to be performed was the safety device adequate to protect the plaintiff.

As it is undisputed that the Jamestown defendants were the owners of the premises and EEE was the contractor on the jobsite, liability can only be imposed upon the other defendants if they were statutory agents of the owner. As stated by the Court,

Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.

Russin v Louis N. Picciano & Son, 54 NY2d 311, 317-18 (1981)

(citations omitted).

The Jamestown defendants argue that JCP and DDB should be found liable as they were statutory agents based upon the fact that DDB contracted with EEE to perform the work and DDB was under contract. However, JCP has established that at the time of the accident it neither leased or licensed the premises, contracted to have the work performed or otherwise directed the

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work related to sign. JCP's use of the space expressly disclaimed any leasehold interest and the replacement of the "For Rent" signs on the premises as performed by the plaintiff could not be said to be for its benefit. See Crespo v Triad, Inc., 294 AD2d 145, 147 (1st Dept 2002) ("a party . . . who is not the fee owner, but an out-of-possession sublandlord who neither contracted for nor benefitted from the work, and who had no authority to exercise any control over the site of the work, cannot be held liable under" the Labor Law). JCP's license expressly ended prior to the date of plaintiff's accident. Neither Plaintiff nor the Jamestown defendants has presented any evidence that JCP acted as an agent for the Jamestown defendants under any implicit or explicit agreement or otherwise had any control over plaintiff's work. Similarly, there is no evidence that DDB was acting as an agent for Jamestown, acted as general contractor, or otherwise directed the work plaintiff's jobsite. "Accordingly, these defendants were never delegated the general construction work in which plaintiff was engaged at the time of his injury and therefore were in no way responsible for the work giving rise to the duties referred to in and imposed by sections 240 and 241 of the Labor Law." Russin, 54 NY2d at 318.

Therefore, the court shall grant the motions and cross-motions of JCP and DDB dismissing the complaint against them.

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EEE also cross-moved for summary judgment dismissing plaintiff's complaint as it was entitled to do as a third- and fourth-party defendant (CPLR 1008), and that application is mooted as this court's decision resolves this action as to defendants JCP and DDB and the Jamestown defendants have settled the plaintiff's claims against them.

Accordingly, it is

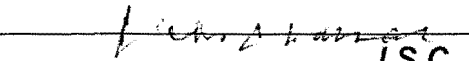
ORDERED that the motion of JCP for summary judgment dismissing the complaint and cross-claims against it is GRANTED; and it is further

ORDERED that the cross-motions of the plaintiff and DDB are DENIED.

This is the decision and order of the court.

Dated: March 31, 2014

ENTER:


DERRA A. JAMES
J.S.C.

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