

Silverman v E.W. Howell Co., LLC
2015 NY Slip Op 30809(U)
May 1, 2015
Supreme Court, Suffolk County
Docket Number: 3662-11
Judge: Denise F. Molia
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Index No: 3662-11

SUPREME COURT - STATE OF NEW YORK I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

ROBERT SILVERMAN and KIMBERLY SILVERMAN,

Plaintiffs,

- against -

E. W. HOWELL CO., LLC, ELDOR ELECTRICAL CONTRACTING OF NEW YORK, INC., ELDOR CONTRACTING CORP. And J.M.R. CONCRETE CORP.,

Defendants.

E. W. HOWELL CO., LLC,

Third-Party Plaintiff,

- against -

DOVIN CONSTRUCTION CO., INC., and J.M.R. CONCRETE CORP.,

Third-Party Defendants.

CASE DISPOSED: NO
MOTION R/D: 12/13/13
SUBMISSION DATE: 11/7/14
MOTION SEQUENCE No.: 004 MG
005 XMG
006 XMG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated November 13, 2013 (004); Affirmation in Support dated November 13, 2013; Affidavit dated November 11, 2013; Exhibits A through N annexed thereto; Affirmation in Opposition dated March 26, 2014; Exhibits A through C annexed thereto; Reply Affirmation dated April 8, 2014; Notice of Cross Motion dated January 13, 2014 (005); Affirmation in Support dated January 13, 2014; Exhibits A through DD annexed thereto; Reply Affirmation dated April 8, 2014; Notice of Cross Motion dated March 5, 2014; Affirmation in

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Support dated March 5, 2014; Third-Party Defendant's Memorandum of Law; Affirmation in Opposition dated March 6, 2014; Reply Affirmation dated April 10, 2014; and upon due deliberation; it is

ORDERED, that the motion by defendant/third-party plaintiff, E.W. Howell Co., LLC (004), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of E.W. Howell Co., LLC, and dismissing the Complaint and all cross-claims asserted against movant, or in the alternative, granting summary judgment in favor of E.W. Howell Co., LLC, on its claim seeking contractual indemnity from third-party defendant, Dovin Construction Co., Inc., is granted; and it is further

ORDERED, that the cross motion by third-party defendant, Dovin Construction Co., Inc. (006), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of Dovin Construction Co., Inc., and dismissing the Third-Party Complaint and all claims and cross-claims asserted against cross moving third-party defendant, is granted inasmuch as the dismissal of the Complaint and all cross-claims asserted against E.W. Howell Co., LLC, have rendered the relief sought by the third-party plaintiff against Dovin Construction Co., Inc., in the Third-Party Complaint, as moot.

ORDERED, that the portion of the cross motion by defendant/third-party defendant, J.M.R. Concrete Corp. (005), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of J.M.R. Concrete Corp., and dismissing the Complaint and all cross-claims asserted against movant, is granted; and it is further

ORDERED, that the portion of the cross motion by defendant/third-party defendant, J.M.R. Concrete Corp., pursuant to CPLR, for an Order directing the entry of summary judgment in favor of J.M.R. Concrete Corp., and dismissing the Third-Party Complaint and all cross-claims asserted against J.M.R. Concrete Corp., is granted inasmuch as the dismissal of the Complaint and all cross-claims asserted against E.W. Howell Co., LLC, have rendered the relief sought by the third-party plaintiff against J.M.R. Concrete Corp., in the Third-Party Complaint, as moot.

On March 30, 2009 defendant/third-party plaintiff E.W. Howell Co., LLC, ("Howell") entered into a contract with the Stony Brook Foundation ("University") as the owner of the project known as the Simons Center for Geometry & Physics at Stony Brook, New York. Howell was not retained as the General Contractor, but served as a prime contractor for general contracting purposes. On the same date, the University entered into a contract with Eldor to act as the prime contractor for electrical contracting purposes. On August 4, 2009 Howell, as contractor, subcontracted with Dovin Construction Co., Inc., ("Dovin") to perform masonry work. Article 16 of this subcontract contained a contractual indemnity provision.

On November 6, 2009, the plaintiff Robert Silverman, an employee of third party-defendant Dovin, is alleged to have tripped and fallen over an electrical conduit "stub up" installed pursuant to the architectural drawings provided by defendant, Eldor Contracting Corp. ("Eldor"), the electrical prime contractor. Plaintiff commenced a direct action against Howell, Eldor and J.M.R. Contracting Corp. ("JMR"), alleging violations of Labor Law §§200, 240 and 241(6) as against the defendant owners and general contractor. Howell commenced a third-party action against Dovin for contractual indemnification.

The plaintiff testified at his deposition that the accident occurred on the second floor of

the subject building known as the Simons Center. Plaintiff was a certified scaffold builder, but on the date of the accident he was instructed by Dovin Foreman Alan Crews to lay out brick for the masons. He testified that he received no instructions on how to lay brick. He further testified that he had made thirty to fifty trips with bricks prior to the accident, and was carrying two tongs of brick at the time of the occurrence. The plaintiff contends that while carrying the bricks, he tripped over a gray electrical stub pipe that was sticking out of the floor, causing him to fall on the right side of his face. While most of the stubs were painted orange, Silverman described the offending stub as unsprayed and unprotected. He acknowledged that the floor was clear of debris, dirt, water, oil, and other similar items. He further testified that Howell did not instruct him as to how to do any part of the job, and that there was nothing to have prevented his seeing the stub, he just didn't look down in front of him. Silverman also testified that prior to his accident he had made no complaints, and that following the incident he got up and continued working.

At his deposition, Michael Aniano, a Field Supervisor for Dovin, testified that Howell did not supervise or direct how to do work, construct scaffolding, or use brick. He also testified that Dovin employees were directed by foreman Alan Crews in how to take down scaffolding, gather bricks, move materials from one side to the other side, and identify the area within which to walk with materials. Aniano stated that he observed electrical stubs painted orange protruding out of the floor in November 2009. He further testified that the stub up over which the plaintiff tripped was an integral part of the work, and that the location of plaintiff's accident was not a passageway as defined by Labor Law 241(6).

Eldor's Project Manager, Stephen Daresta, testified at his deposition that Eldor was a prime contractor with the University. He stated that for purposes of the subject project, Eldor was not a subcontractor of Howell and had no contract with Howell. No person associated with Howell chose the manner, method or means in which Eldor would do conduit work. The witness further testified that stub-ups were an integral part of the construction work for Labor Law §241(6) purposes. Daresta stated that he oversaw the installation of conduits in the corrugated steel of the floor stubbing.

The Project Manager for Howell, Daniel Navarro, testified that Eldor was a separate prime contractor performing electrical work at the site. Dovin was the mason on the project and was subcontracted by Howell. URS was the construction manager on the project. The deponent testified that Howell was notified of Silverman's accident the week following its occurrence. Eldor would have been responsible for hanging the temporary lighting in the subject area. Howell had no authority to direct Eldor in performing its contractual duties. Howell was a separate prime contractor charged with performing general contracting and sub-contacting out work. The area where the plaintiff fell was not a passageway for construction workers and not subject to Industrial Code §23-1.7(e)(1). All electrical conduits were installed by Eldor.

Alan Crews, who served as the Labor Foreman at the site for Dovin, testified at his deposition that he was in charge of all mason tenders, including the plaintiff. He instructed Silverman to load the scaffold with brick tongs. The deponent was on the second floor with the plaintiff at the time of the accident, and testified that Silverman was not wearing a harness, carrying bricks, or have anything in his hands at the time he fell. He stated that the ground was smooth and that the plaintiff appeared to trip on an electrical pipe stub that was protruding from the ground. Crews further testified that there was no reason that the pipe should not have been at the subject location.

A cause of action under Labor Law §240, commonly known as the “scaffolding law”, requires that protective devices be made available to persons working at heights to prevent them from falling. Tsatsakos v. City Corp., 295 A.D.2d 500. A violation of this statute calling for a prescribed safeguard in the construction of a building does not establish liability if the statute is intended against a particular hazard, and a hazard of a different kind is the occasion of the injury. Hargobin v. K.A.F.C.I. Corp., 724 N.Y.S.2d 155. “Workers” whose on-the-job injuries neither involve elevation related hazards nor resulted from inadequate scaffold, hoist, stair, or ladder or other protective devices designed to shield workers from harm flowing from the application of the force of gravity to object or person cannot recover under this statute. Pisciotta v. St. John’s Hosp., 268 A.D.2d 465. There can be no liability under the scaffolding law unless a worker’s injury actually resulted from the kind of risk that brought about the need for a protective device in the first instance. Soto v. Crew, Inc., 21 N.Y.3d 562, 998 N.E.2d 1045, 976 N.Y.S.2d 421. Here, Silverman was walking on a flat surface at the time of the accident. There is no evidence that the plaintiff’s injuries arose from the special elevation related hazards against which the law was intended to provide protection.

The evidence is clear that Howell was not retained as the General Contractor on the subject project. The documentary and testimonial evidence has sufficiently established Howell’s status as a prime contractor with no authority to supervise, direct or control the work of Eldor, the entity that installed the allegedly unmarked stub-up over which he tripped. Prime contractors have no liability under Labor Law §241(6), unless they are acting as agents of the owner and have been given authority to supervise and control the work being performed. Decotes v. Merritt Meridian Corp., 245 A.D.2d 864; see also, Hornick v. William H. Lane, Inc., 265 A.D.2d 631. Such is not the case here and liability does not attach to Howell under these circumstances.

With regard to the Labor Law §200 claim, it has been established that the offending stub-up was installed by Eldor, a subcontractor over which Howell had no authority to supervise, direct, or control its work. Nor has there been any evidence adduced to establish that Howell had notice of the condition of which the plaintiff complained, which is a condition precedent to liability under Section 200 of the Labor Law. Accordingly, Howell is entitled to summary judgment on this claim also.

Inasmuch as the Complaint and cross-claims asserted against Howell have been dismissed, the Third-Party Complaint against Dovin and J.M.R. for indemnification has been effectively rendered as moot and the third-party claims are hereby dismissed.

Defendant J.M.R., the concrete subcontractor, was responsible for, among other things, the pouring of the floors. Based upon the records supplied by Howell, the area where plaintiff’s accident occurred was poured by J.M.R. on September 25, 2009, approximately six weeks prior to the plaintiff’s fall. Between the date that the floor was poured and the date of the accident, no evidence has been submitted to demonstrate any complaints concerning the area where the accident eventually occurred.

The testimony resulting from the depositions indicates that prior to the time that J.M.R. would pour the concrete on any floor, metal decks would be laid down by a steel subcontractor and then the electrical conduits (stub-ups) laid out by the electrical prime contractor, Eldor. The electrical conduits installed by Eldor would have cement poured over them with an extension of the conduits coming up out of the ground above the cement. J.M.R. did not move the conduits prior to pouring cement. The placement of the conduits, stub-ups and the actual cement pour were in accordance with plans created by the architects and engineers. Thereafter when the

cement had cured, the floor would be released to Eldor, who was responsible for painting the conduits orange. J.M.R. was not responsible for the marking or painting of the conduits.

“Unless a defendant had supervisory control and authority over the work being done when the plaintiff is injured, there is no supervisory agency confirming liability under the Labor Law.” Walls v. Turner Construction, 4 N.Y.3d 861, 864. If there is no responsibility for general site safety, or the means, manners or method of the work of the plaintiff, a construction manager is not a statutory agent and nondelegable duties of the Labor Law do not apply. Delahaye v. Saint Anns School, 40 A.D.3d 679.

J.M.R. was a subcontractor to Howell with responsibility to pouring cement floors in accordance with plans and specifications prepared by others. There were no complaints concerning the condition of the floor from the time of pouring to the time of the accident, with plaintiff and his eyewitnesses confirming that the floor was smooth and level. The plaintiff and other witnesses confirmed that J.M.R. did not direct, control or supervise the work of the plaintiff or any other Dovin employees. There is no testimony to dispute that once the floor was toured and released, J.M.R. had no further responsibilities on the project. Since J.M.R. did not have the authority to oversee the work of the plaintiff or the electrical contractor Eldor, and was without any general site safety obligations, it cannot be held liable for violations of Labor Law §240 or §241(6).

Where a plaintiff’s injuries arise not through the manner in which the work was performed, but from an alleged dangerous condition on the premises, a defendant will be liable under Labor Law §200 if the defendant either created the condition that caused the accident, or had actual or constructive notice of the dangerous condition and the obligation to correct the condition. Giovanniello v. E.W. Howell, 104 A.D.3d 812, 813; Sotomayer v. Metropolitan Transp. Auth., 92 A.D.3d 862, 864. All parties have acknowledged that the concrete poured by J.M.R. approximately six weeks prior to the accident created a smooth, level surface. There were no complaints about the condition of the floor between the time of the pouring and the accident. There is no testimony to contradict the fact that J.M.R. did not have responsibility for the safety of any employee other than its own. Finally, J.M.R. did not lay the conduit that is alleged to have caused the plaintiff’s accident, and was not permitted to move the conduits in any manner. If there was a dangerous or defective condition at the site, it has not been demonstrated to have been created by J.M.R., and J.M.R. had no duty to correct such condition. The Labor Law §200 claim is dismissed as against J.M.R.

The foregoing constitutes the Order of this Court.

Dated: May 1, 2015

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.