

Altunga v Barry Worthen, LLC
2016 NY Slip Op 30229(U)
January 15, 2016
Supreme Court, Bronx County
Docket Number: 307951/09
Judge: Norma Ruiz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 307951/09

JAVIER ALTUNGA,

Plaintiff,

-against-

Decision and Order
HON. NORMA RUIZ

BARRY WORTHEN, LLC and GOURMET GURU, INC.
and DISTRIBUTEK ACQUISITIONS, LLC, d/b/a
DISTRIBUTEK, LLC

Defendant.

BARRY WORTHEN, LLC and GOURMET GURU, INC.

Third Party Plaintiffs

-against-

Third Party Index
No.: 84224/09

GOLDEN TOUCH CONSTRUCTION CORP.,

Third Party Defendant

BARRY WORTHEN, LLC and GOURMET GURU, INC.

Second Third Party Plaintiff

-against-

Second Third Party Index
No.: 83912/10

DISTRIBUTEK ACQUISITIONS, LLC, d/b/a
DISTRIBUTEK, LLC

Second Third Party Defendant

The following papers numbered 1 to 17 Read on this motion SUMMARY JUDGMENT
Noticed on 7/23/14 and duly submitted as No. 3&4 on the Motion Calendar of 1/26/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion
to: Papers Numbered
Notice of Motions and Affidavits Annexed..... 1-4

Notice of Cross Motion and Answering Affidavits.....	5-11
Replying Affidavits	12-14
Memorandum of Law	15-17
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Plaintiff Javier Altunga (“Altunga”) moves for partial summary judgment on the issue of liability pursuant to Labor Law section 240(1). Defendant/second third party defendant Distributek Acquisitions, LLC, d/b/a DISTRIBUTEK, LLC (“DISTRIBUTEK”) moves for summary judgment dismissing the plaintiff’s action and the second third party action. Defendants Barry Worthen, LLC (“Worthen”) and Gourmet Guru, Inc. (“Gourmet Guru”) cross moves for summary judgment. Upon a review of the moving papers and opposition submitted thereto, the motions are decided as set forth below.

In this labor law action, the plaintiff seeks damages for injuries he allegedly sustained in a work related accident. The construction project known as the Office Renovation & Refrigeration Warehouse Project was taking place in the building located at 1123 Worthen Street, in the Bronx. The owner of the subject property was defendant Worthen, the general contractor was Gourmet Guru and the construction manager was Distributek. Distributek hired plaintiff’s employer third party defendant Golden Touch Construction Corp (“Golden Touch”) to perform general construction work, including demolition. The plaintiff was employed by Golden Touch as a laborer.

According to the plaintiff, at the time of the accident he was working with his co-worker Manuel Fuentes (“Fuentes”) also employed by Gourmet Guru. They were in the process of lifting a large “rolling” door they just removed from the door frame and were placing the heavy (about 400 pounds) door on dollies which were spaced about 16 feet apart. Plaintiff alleges he was standing on unsecured pieces of plywood which were placed on top of each other over a 2 x 4 which covered a hole in the concrete floor. That plywood broke causing him to fall down approximately 12 feet from the first floor to the basement level.

William Torres Jarequi, also employed by Gourmet Guru, testified at plaintiff’s Workers Compensation hearing and averred in subsequent affidavits that he was sweeping in an area

located near where the plaintiff was working and he saw when the plaintiff fell through a hole down to the basement level.

In contrast, Fuentes averred in his affidavit that he, the plaintiff, co-workers Jaregui and Darryl El Grande were in the process of moving steel I-beams from the floor of the loading dock to a raised storage area to be welded into place. He described the I-beams as 16 feet long and 10 inches wide, weighing approximately 450 to 500 pounds. Fuentes further averred that they were working in an area consisting of two loading docks along Worthen Street which contained bays 10 feet wide by 10 feet long for trucks to back in to make deliveries. The loading docks were 3 feet above the street level with an opening into the building. Fuentes maintained that the plaintiff placed a 2x8 piece of wood that was about 12 feet long across the bay in the loading dock so the beam could be lifted without having to walk around the bay of the loading dock. According to Fuentes, no one directed the plaintiff to do such. Sometime after lunch, they were standing on the 2x8 when plaintiff slipped off it and landed on his feet. Thereafter, plaintiff walked out of the bay of the loading dock, onto the sidewalk and left the work site by ambulance.

Israel Edery ("Edery"), the owner and President of Golden Touch, testified at a deposition and executed an affidavit. In his affidavit, Edery stated that he assigned 4 employees to remove a garage door. However, the plaintiff was not one of the employees asked to complete this job. Edery contends that the plaintiff was hired as a cleaner and a helper. To remove the garage door, the workers used a rope and a winch.

Edery further averred in his affidavit that the first floor was a concrete floor, to which Golden Touch added more concrete. However, access to a stairwell leading down to the basement-by way of a thick wooden door which was located on the floor-was the only surface area which was comprised of wood. This access to the stairwell was surrounded by "semi-permanent" three foot steel rails. Edery opined that due to the thickness of the wooden door and the railings, it was impossible to fall through the closed wooden door on the first floor down to the basement level. Moreover, there was no reason for the plaintiff to be in that area since the area where he was removing the garage doors was not near the basement staircase.

Distributor's president Michael Coughlin ("Coughlin") averred in his affidavit that in his weekly visits to the job site he observed the floors of the building to consist entirely of concrete. There were two areas of the floor that were covered with wood without a concrete underlay. One was the fastened wooden door which lead to the basement staircase and the other was a small

hole which had wood laid across. He claimed the wooden door with the three foot high steel railings around it and the small hole had several horse barricades surrounding it. The barricades were allegedly placed by GoldenTouch.

Plaintiff's Motion

Plaintiff now moves for partial summary judgment pursuant to Labor Law section 240(1) and section 241(6).

In opposition, Worthen, Gourmet Guru and Distributek argue that the motion must be denied because the plaintiff never fell through a hole down to the basement level. In support they submit the sworn testimony of Fuentes and Edery, as well as a copy of the plaintiff's emergency room medical records where they point to the doctor's initial note that the complaint made by plaintiff at triage was "backache due to lifting (lower back area after lifting heavy objects an hour ago)." Also noted in the out-patient department referral request is the allegation that plaintiff had claimed that he lifted a heavy object that weighed more than 500 pounds (*see O'Halloran v. City of New York*, 78 A.D.3d 536, 537 [1st Dept.2010] ["Hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition"]).

Defendants urge this court to accept their witness' account and find the plaintiff never fell. However, that would require this court to make a credibility assessment which is not the court's function on a motion for summary judgment. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment . . ." *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

The plaintiff's motion for partial summary judgment is denied on the grounds the court finds there is an issue of fact as to how the accident happened and whether plaintiff's Labor Law § 241(6) - based upon a violation of 12 NYCRR § 23-1.7(b)(1)(hazardous openings)- is applicable to this case.

Defendant/Second Third Party Defendant Distributek's motion

Distributek also moves for summary judgment to dismiss the plaintiff's action and the second third party action and any and all cross claims.

With regard to plaintiff's Labor Law §§ 240(1) claims movant argues § 240 is not applicable since the plaintiff never fell and his conduct was the sole proximate cause of his injuries. With respect to § 241(6), Distributek contends that the alleged violation of Industrial Code regulations § 23-1.2(b) and 23-1.5(a) are too general and Industrial Code regulations § 23-1.7(b)(falling hazards), § 23-2.1 (maintenance and housekeeping); § 23-3.2 (demolition operations - general requirements); and § 23-3.3 (demolition by hand) are inapplicable. Thus the plaintiff's Labor Law § 240(1) claim and the § 241(6) claim predicated on the aforementioned Industrial Code regulation must be dismissed.

The court having found there was an issue of fact with regards to whether or not Labor Law § 240(1) and § 241(6) based on a violation of Industrial Code regulation § 23-1.7(b)(falling hazards) was applicable to the case at bar, this branch of the motions are denied. The court notes that in the plaintiff's opposition papers, plaintiff did not oppose the arguments to dismiss the allegations that defendants violated Industrial Code regulations § 23-1.2(b); 23-1.5(a); § 23-2.1; § 23-3.2; and § 23-3.3. Accordingly, the plaintiff's allegations that the defendants violated § 23-1.2(b); 23-1.5(a); § 23-2.1; § 23-3.2; and § 23-3.3 are dismissed.

Distributek also argues that with respect to Labor Laws § 240 (1) and 241(6) it may not be held liable because it was merely the construction manager and not an owner, nor was it a statutory agent of the owner for the purpose of New York Labor Law vicarious liability. As movant correctly notes, a construction manager is not generally considered a contractor or owner within the meaning of Labor Law § 240(1) or § 241 (*Walls v. Turner Const. Co.*, 4 N.Y.3d 861 [2005]). However, the label attributed to a defendant, whether "construction manager" or "general contractor" is not determinative (*see Walls, supra*). A construction manager may "be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (*Walls supra* at 863-64, [internal citations omitted]). Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is

no statutory agency conferring liability under the Labor Law (*see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 293 [2003])

In support, movant annexed Coughlin's affidavit who averred that pursuant to the Construction Management Agreement, Distributek's duties were to coordinate and schedule the work and provide administrative support. Coughlin further averred that Distributek did not have the ability to shut down the project, nor did it have full time access to the facility. It visited the job site approximately once a week and attended meetings every two weeks. Distributek did not supervise or control the work of Golden Touch, it did not furnish any tools, equipment or workers to Golden Touch, or any other contractors at the site. Coughlin contends the only purpose of Distributek was to see how the job was progressing with the projected timeline.

Movant also refers the court to Coughlin's deposition testimony in which he testified that it never supervised Golden Touch's work, or the work of any contractor/trade. Also annexed to the moving papers was the plaintiff's deposition testimony. Of note was the plaintiff's testimony that he had never even heard of Distributek.

The plaintiff, defendants Worthen and Gourmet Guru opposed this branch of the motion by arguing that Distributek did in fact have the requisite authority to deem it a statutory agent and as such it may be held vicariously liable. The opposition papers point to the terms in the agreement between Distributek and Gourmet Guru that state, in the section entitled "Scope of Work", as follows: (1) "Provide on-site supervision of trades work including full time construction superintendent," and (2) "Supervision of the work as described in the Construction Documents. Under the section entitled "General Provision", the following terms were also noted: (1) "The Construction Manager shall supervise and direct the work, and all work will be completed in a workmanship like manner, with non-union labor when applicable . . ." and (2) "The Construction manager will enforce discipline and good order among the contracts, vendor's and sub-contractor's employees and to the extent required by law, all work will be performed by individuals duly licensed and authorized to perform said work."

Plaintiff also referred the court to the deposition testimony of Jeffrey Lichtenstein ("Lichtenstein") who testified on behalf of Worthen. Lichtenstein testified that it retained Distributek as the general contractor but, on the parties agreement, Gourmet Guru changed Distributek's title to "construction manager" at the suggestion of Distributek, to save money on the insurance costs.

The court notes that “[t]he key criterion is ‘the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or non-exercise of control’ ” (*Bart v. Universal Pictures*, 277 A.D.2d 4, 5 [1st Dept 2000][internal citation omitted]). The right to control the work site may be proved by contractual or statutory provisions granting such right (*Bart supra*). The court finds that the contract between Distributek and Gourmet Guru clearly conferred the right to exercise the requisite control to be deemed a statutory agent of the owner. Accordingly, this branch of the motion is denied.

Turning now to the portion of the motion to dismiss the plaintiff’s common law negligence and Labor Law §200 claims against movant, the court finds that Distributek failed to meet its initial burden in establishing that it did not have knowledge of the hazardous condition that allegedly caused the plaintiff’s injuries. This court is not allowed to assess credibility on this motion. If the jury were to believe the plaintiff’s version of events, Coughlin’s concession that it knew of a second hole covered by plywood might allow a jury to conclude that Distributek had knowledge of the hazardous condition that allegedly caused the plaintiff’s injuries. As such, this branch of the motion is denied.

The remaining portion of the motion seeks to dismiss the second third party action on the grounds that there was no indemnification clause, or a clause requiring it to procure insurance, is granted in part to the extent that the causes of action for contractual indemnification and failure to procure insurance is dismissed. Indeed, the parties’ contract does not contain an indemnification clause, nor is there a clause requiring that Distributek obtain insurance naming Gourmet Guru and/or Worthen as additional insureds.

Accordingly, Distributek’s motion is granted only to the extent that the plaintiff’s allegations that the defendants violated §§23-1.2(b); 23-1.5(a); 23-2.1; 23-3.2; and 23-3.3 are dismissed. In addition, also dismissed are the second third party causes of action for contractual indemnification and for failure to obtain insurance.

Gourmet Guru and Worthen's Cross Motion

Gourmet Guru and Worthen cross move essentially adopting all the arguments made by defendant Distributek in its motion. The court has already ruled on Distributek's motion, supra. The only issues not resolved here by the decision in Distributek's motion are the plaintiff's common law negligence and Labor Law § 200 claims as against Gourmet Guru and Worthen. The court notes that movants failed to dispute the existence of the second hole on the first floor that Coughlin described as covered with unsecured wood. If the jury chooses to believe the plaintiff, as opposed to the defendants, movants should have established in their summary judgment motion that they did not create, or have any notice of, the alleged hazardous condition that allegedly caused the plaintiff's injury. As such that branch of that motion to dismiss the plaintiff's claim for common law negligence and Labor Law § 200 is denied.

This constitutes the decision and order of the Court.

Dated: 1/15/16

Bronx, New York



HON. NORMA RUIZ, J.S.C.