

Urquiza v Park & 76th St. Inc.
2018 NY Slip Op 30994(U)
May 22, 2018
Supreme Court, New York County
Docket Number: 158295/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

ANTONIO URQUIZA a/k/a ANTONIO PELAGIO URQUIZA CARDENAS by MARTHA PARADA ARDAYA and STIVENS A. SANQUINO, as Co-Administrators of the Estate of ANTONIO PELAGIO URQUIZA a/k/a ANTONIO PELAGIO URQUIZA CARDENAS, Deceased,

INDEX NO. 158295/13 MOTION DATE 04-25-18 MOT. SEQ. NO. 028 MOTION CAL. NO.

Plaintiffs,

-against-

PARK AND 76TH ST. INC., MARY L. CARPENTER & EDMUND M. CARPENTER, NORDIC CUSTOM BUILDERS INC., MITCHELL STUDIO, LLC, GUMLEY-HAFT LLC, CUMMINS PAINTING SPECIALISTS INC., ARTHUR C. KLEM, INC., ALKLEM PLUMBING, INC., AA SERVICES LLC, GT CARPENTRY, LLC, CONNECTICUT THERMOFOAM LLC a/k/a CONNECTICUT THEROFOAM LIMITED LIABILITY COMPANY, ERIN CUSTOM INTERIORS, INC., W.M. SANFARDINO ELECTRIC LTD., and PLASTER WORKS INC., Defendants.

and five other related third-party actions.

The following papers, numbered 1 to 13 were read on this Motion pursuant to CPLR §3212 for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Nordic Custom Builders, Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the plaintiffs causes of actions asserted against it pursuant to Labor Law §240[1], §241[6] and §200, and for common law negligence, granting common law indemnification against Stephen Gamble Inc., and dismissing all cross-claims asserted against Nordic Custom Builder's Inc., is denied.

Martha Parada Ardaya and Stivens A. Sanquio, as Co-Administrators of the Estate of Antonio Urquiza a/k/a Antonio Pelagio Urquiza Cardenas, deceased (hereinafter referred to as "plaintiffs") commenced this wrongful death and Labor Law §200, § 240[1] and §241[6] action to recover damages as a result of the personal injuries and death of Antonio Pelagio Urquiza Cardenas (hereinafter referred to individually as "decedent") on May 24, 2012, during a duplex renovation project, when he suddenly fell from a third floor window as he was staining an exterior wooden window jamb, in a cooperative apartment located at 840 Park Avenue, Apartment 3/4A, New York, New York (hereinafter referred to as the "premises").

Plaintiffs allege that decedent was performing work in the course of his employment with Stephen Gamble, Inc., as directed by defendant Nordic Custom Builder's Inc., through its site supervisor and agent Declan O'Meara and his company Euro Wood Trim Inc.. It is further alleged that Declan O'Meara acting on behalf of all of the defendants, directed the decedent to stain the exterior wooden window jambs while standing on a piece of plywood wrapped in construction paper, during a rainstorm, to protect a bronze grill on the radiator box. Plaintiffs claim that no adequate safety devices were provided by any of the defendants, all of whom retained supervision and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

control over the work site. Instead the defendants relied on the inadequate and improper protection of a decorative rail outside the window to prevent the decedent from falling.

The premises are located in a building owned by Park and 76th Street, Inc. Gumley-Haft, LLC was the property manager. Mary L. Carpenter and Edmund M. Carpenter (hereinafter referred to jointly as "Carpenters") are the tenants, owning the shares of stock for the two apartments that make up the premises. Mitchell Studio, LLC (hereinafter referred to individually as "Mitchell") is the architecture firm retained by the Carpenters to design the interior renovation. Nordic Custom Builder's, Inc. (hereinafter referred to individually as "Nordic") was retained as the general contractor for the renovation project. Nordic hired Grace Ryan Magnus Millwork, LLC (hereinafter referred to individually as "GRMM") as a subcontractor to perform millwork and woodwork. GRMM subcontracted interior wood staining work to Stephen Gamble Inc., plaintiff's employer. Nordic also hired as a subcontractor, Euro Wood Trim, Inc., a company solely owned by Declan O'Meara, to act as a site supervisor.

Plaintiffs commenced a second action in Supreme Court New York County under Index Number 153715/2014 the actions were consolidated. This Court Amended the caption of the consolidated actions by Decision and Order dated December 12, 2016. Third-party actions were commenced by defendants Park and 76th St. Inc. and Gumley-Haft, LLC, the Carpenters, Nordic and Mitchell against the decedent's employer Stephen Gamble, Inc.. Stephen Gamble Inc., commenced the fifth third-party action against Declan O' Meara and Euro Wood Trim, Inc..

Nordic seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiffs causes of actions asserted against it pursuant to Labor Law §240[1], §241[6] and §200, and for common law negligence, granting common law indemnification on the claims asserted in the third third-party complaint against Stephen Gamble Inc., and dismissing all cross-claims asserted against Nordic.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [1st Dept., 2003]). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command" (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [1st Dept., 2007]). Comparative negligence applies to Labor Law §241[6] claims (Dwyer v. Central Park Studios, Inc., 98 A.D. 3d 882, 951 N.Y.S. 2d 16 [1st Dept., 2012]).

Nordic is not entitled to summary judgment on the Labor Law §241[6] cause of action asserted in the complaint.

Industrial code §23-1.7 [d] titled "Slipping hazards" states, "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded, sanded or covered to provide safe footing." There remain issues of fact as to whether there was water on either the radiator cover or plywood covered in paper due to the heavy rain and whether the decedent slipped. There remains an issue of fact as to whether the paper wrapped around the plywood constitutes a "foreign substance" further warranting denial of summary judgment to Nordic under Industrial code §23-1.7 [d] (See

Lopez v. Edge 11211, LLC 150 A.D. 3d 1214, 56 N.Y.S. 3d 187 [2nd Dept. 2017] citing to Johnson v. 923 Fifth Ave. Condominium, 102 A.D.3d 592, 959 N.Y.S. 2d 146 [1st Dept., 2013]).

Nordic is not entitled to summary judgment on the Labor Law §240[1] cause of action asserted in the complaint.

Defendants bear the burden under Labor Law §240[1] to provide evidence establishing a suitable safety device was readily available, plaintiff was instructed to use it, and acted either as a recalcitrant worker or was the sole proximate cause of the accident (Gutierrez v. 451 Lexington Realty LLC, 156 A.D. 3d 418, 66 N.Y.S. 3d 463 [1st Dept., 2017]).

David Gamble testified on behalf of Stephen Gamble Inc. that the employees on the premises consisted of three brothers:(1) The decedent, (2) Marcelo Urquiza, (3) Jesus Urquiza, and Carlo Maldonado (Mot. Exh. V pg. 24). He testified that the employees brought step ladders and a baker's scaffold solely for interior work at the premises (Mot. Exh. V, pgs. 32-33). David Gamble further testified that exterior work would have required a harness on site, a temporary barricade in front of the window such as two by fours, and possibly a spotter for the guy who has to work in an open window. He further testified that interior work requiring harnesses had been performed at a different worksite and that Marcelo Urquiza was familiar with that equipment (Mot. Exh. V, pgs. 86-89). Carlo Maldonado testified at his deposition that the Stephen Gamble Inc. employees decided to use the radiator grate for convenience because it was difficult to place the ladder in the space (Mot. Exh. X, pg. 107).

Declan O'Meara the site supervisor testified at his deposition that he was unaware whether Stephen Gamble Inc. employees were provided with an anchor, safety belts or harnesses to prevent them from falling and that he watched their progress and directed the employees as to the schedule for completion of the work (Nordic in Opp., Exh. E pgs. 21-23). Declan O'Meara further testified that he told the Stephen Gamble Inc. employees to cover the grate with paper (Mot. Exh. R, pgs 39-40, 50). Eamonn Ryan testified on behalf of Nordic that he would not have had the employees stand on the radiator cover, it was not intended to have a person stand on it (Mot. Exh. W pgs. 55-56, 132-133). Mr. Ryan testified that alternatively he would have called Stephen Gamble Inc. and ask for the safety equipment that was needed (Mot. Exh. W pgs. 141-142).

Nordic has not made prima facie case for summary judgment under Labor Law §240[1]. A safety device in the form of a harness or safety belt with an anchor to prevent the decedent from falling out of the window while he worked on the exterior jamb, was not provided to the decedent. Deposition testimony establishes that the work involved a height related risk that required at least a harness or safety belt to provide adequate protection. Nordics arguments that decedent was the sole proximate cause of his injuries lack an evidentiary basis and are unavailing.

Labor Law § 200 imposes a common law duty on an owner or contractor and applies to two categories of claims: (1) Those arising from the manner of performance of the work which includes the equipment used and (2) those arising from a dangerous condition on the premises (Cappabianca v. Skanska USA Bldg. Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1st Dept., 2012]). A precondition to liability under Labor Law § 200 claims arising from the manner of performance of the work is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury (Mutadir v. 80-90 Maiden Lane Del LLC , 110 A.D. 3d 641, 974 N.Y.S. 2d 364 [1st Dept., 2013] and In re 91st Street Crane Collapse Litigation, 133 A.D. 3d 478, 20 N.Y.S. 3d 24 [1st Dept. 2015]).

David Gamble testified that the decedent's foreman, his brother Marcelo Urquiza, was told not to have Stephen Gamble Inc. employees perform the exterior work that the site supervisor - Declan O'Meara - wanted them to complete, but the employees did it anyway (Mot. Exh. V, pgs. 58-60 and 62). There is other deposition testimony from Carlo Maldonado that Mr. Gamble did not call the employees back to tell them not to complete

the exterior jamb work Declan O'Meara wanted done (Mot. Exh. X pgs. 45-48 and 79-80). Marcelo Urquiza testified at his deposition that David Gamble, translated through Carlo Maldonado, told his employees to do the exterior work if that's what Declan O'Meara told them to do (Mot. Exh. Z pgs. 23-24). Jesus Urquiza testified that he saw the decedent standing on the plywood on top of the metal grade prior to the accident and that Declan O'Meara was the manager of the job telling the Stephen Gamble Inc. employees what they were doing and he saw him everyday (Mot. Exh. Y, pgs. 17-18, 27). Declan O'Meara testified at his deposition that David Gamble suggested that the exterior jambs needed to be stained, and that he did not request that work (Mot. Exh. R, pg. 91).

Summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansh v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). "It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]).


The conflicting testimony and evidence presented in opposition to Nordic's motion raises credibility issues and issues of fact as to whether Nordic, through Declan O'Meara as an agent, supervised the manner of performance of decedent's work, warranting denial of summary judgment on the Labor Law §200 and common law causes of action.

A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily, and that the proposed indemnitor's negligence is the cause of the accident, or that it exclusively exercised supervision and control over the plaintiff's work (McCarthy v. Turner Construction, Inc., 17 N.Y. 3d 369, 953 N.E. 2d 794, 929 N.Y.S. 2d 556 [2011]). A party can only be liable under common-law indemnification when it exercises "actual supervision of the injury producing work." Mere authority to supervise the work and implement safety procedures is not enough (See Naughton v. City of New York, 94 A.D. 3d 1, 940 N.Y.S. 3d 21 [1st Dept., 2012] citing to McCarthy v. Turner Construction, Inc., 17 N.Y. 3d 369, supra at pgs. 376 and 378, and Ortiz-Cruz v. Evers, 150 A.D. 3d 622, 56 N.Y.S. 3d 71 [1st Dept., 2017])

Issues of fact and credibility issues remain on both Nordic and Stephen Gamble Inc.'s negligence, and whether supervision and control over the work on the exterior jamb was exercised exclusively by Stephen Gamble Inc. In light of the conflicting testimony as to the decedent being directed and supervised by Declan O'Meara as site supervisor and potential agent of Nordic, summary judgment must be denied. The conflicting testimony warrants denial of summary judgment to Nordic on the cross-claims and on Nordic's third third-party claims for common law indemnification against Stephen Gamble Inc.

Accordingly, it is ORDERED that Nordic Custom Builders, Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the plaintiffs causes of actions asserted against it pursuant to Labor Law §240[1], §241[6] and §200 and for common law negligence, granting common law indemnification against Stephen Gamble Inc., and dismissing all cross-claims asserted against Nordic Custom Builder's Inc., is denied.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

Dated: May 22, 2018

MANUEL J. MENDEZ
J.S.C.

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