Winklker v Halmar Intl., LLC
2020 NY Slip Op 34598(U)
January 4, 2020
Supreme Court, New York County
Docket Number: Index No. 150694/2014
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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DOREEN WINKLKER, as administratrix of the Estate of SCOTT S. WINKLER, deceased, and DOREEN ELLEN WINKLER, individually,

Plaintiff,

-against-

HALMAR INTERNATIONAL, LLC, HALMAR CONSTRUCTION CORP., HALMAR INTERNATIONAL CONSTRUCTION, LLC, HAKS GROUP, INC, HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JA UNDERGROUND PROFESSIONAL CORPORATION d/b/a JACOBS ASSOCIATES,

Respondents.

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DECISION AND ORDER

Index Number

150694/2014

Mot. Seq. 012

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Third-party plaintiffs,

-against-

PRECISION CONCRETE PUMPING, INC.,

Third-party defendant.

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Third-party
Index Number
595096/2015

HAKS GROUP, INC., and HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.,

Second-third-party plaintiffs,

-against-

JA UNDERGROUND PROFESSIONAL CORPORATION d/b/a JACOBS ASSOCIATES,

Second-third-party defendant.

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Third-party
Index Number
595523/2015

FRANK P. NERVO, J:

On this motion (Sequence No. 12), defendant HAKS seeks exoneration from any responsibility for the deaths and injuries of December 2, 2013 at Maybrook, N.Y. which form the basis of this complaint. HAKS avers there are neither laws nor facts upon which it could be found to be a statutory agent of the owner (City) or the general contractor (Halmar) and, thus, it is not subject to the Labor Law of the State of New York.

This action arises from a tragic series of events on December 2, 2013 during the construction of a public works project. The events forming the basis of the complaint resulted in the deaths of two people and serious injuries of a third. The project entailed the connection of the Delaware and Catskill aqueducts. While the connection of the aqueducts took place on a New York City-owned property in Gardiner, New York, the particular work that is the subject of this action took place on property owned by defendant, Halmar International ("Halmar") in nearby Maybrook, New York. Participating in the work at the Maybrook site were the City of New York, general contractor Halmar, safety engineering firm movant-HAKS Engineers, Architects and Land Surveyors, P.C. ("HAKS"), and HAKS' sub-consultant, JA Underground Professional Corporation ("JA"). Mr. Scott Winkler, plaintiff's decedent, was one of the workers

killed that day. Mr. Winkler was employed by non-party Precision Concrete Pumping, Inc.

At the time of this readily avoidable tragedy, Scott Winkler was operating a concrete pump truck, transferring concrete into the forms of a model aqueduct. This process is known as a concrete placement or concrete pour. Scott Winkler was standing atop a scaffold that was either part of or adjacent to the form constructed to receive the wet cement that he was delivering. At that time, Scott Winkler was approximately twelve feet from the ground (Rafael Zakota Deposition, NYSCEF DOC. 666 p. 143-145). The form was constructed by defendant general contractor Halmar. Halmar employee Rafael Zakota was also standing on the scaffold observing the concrete placement (NYSCEF DOC. 666 p. 145). Timothy Lang, another employee of non-party Precision Concrete Pumping, Inc., was some four feet off the ground, standing on already existing concrete (NYSCEF DOC. 666 p. 145). At approximately 12:30p.m a sudden POP was heard, and the wall of the form collapsed nearly instantaneously, throwing Scott Winkler to the ground. The structure of the scaffolding, the formwork, and its wet cement contents cascaded down on top of Mr. Zakota, Mr. Lang and Mr. Winkler.

Scott Winkler was eventually extracted from under this cataclysmic mass of bone-crushing wood, metal, concrete and wet

cement and transported by Medivac to Westchester Medical Center. The undoubtedly heroic efforts of Medivac EMTs, hospital physicians and other medical personnel to put the crushed and fractured pieces of Scott Winker's skull, spine and internal organs back together ultimately failed. After eight days of hospitalization, he succumbed to his physical destruction resulting from the forces of gravity. The Court's examination of the record established in this matter thus far (including Decisions and Orders previously entered) inescapably reveals that Scott Winkler was also killed by the forces of complacency, inertia, greed, and a shocking callous indifference to human life by all those charged with constructing this aqueduct mockup, securing the safety of this concrete placement, and maintaining a safe worksite.

Timothy Lang was also crushed. Timothy Lang was pronounced dead at the scene, succumbing to injuries caused by the momentum of overpowering weight and/or a nightmarish engulfing suffocation by wet cement.

Such was the overwhelming bulk and burden of the material that crushed these two men that a forklift truck and its operator were required to extricate Scott Winker and the crushed corpse of Timothy Lang.

Rafael Zakota was seriously injured; he was extracted "By the DEP guy and my partner then" without the assistance of the forklift. (NYSCEF DOC. 666 p. 137).

Summary judgment has been previously entered against the owner, the City of New York as constructive owner of the premises, and general contractor and title owner of the premises at Maybrook Halmar pursuant to Labor Law §§240(1) and 241(6), by the October 1, 2019 Order of the Hon. Justice Margaret Chan, and affirmed by the Appellate Division, First Department (2021 NY Slip Op 06569).

This Court on June 23, 2021 entered summary judgment under the same sections of the Labor Law against movant's sub-consultant, JA.

HAKS' presence and responsibilities at the site result from its contract with the owner, City of New York Department of Environmental Protection (DEP), to provide what has been designated "resident engineering/construction management" professional services. Those responsibilities are set forth in the contract and include engineering inspection of ". . . all general construction and incidental work" being provided by other construction vendors on the project. It is undisputed the construction and utilization of the formwork at Maybrook was incidental to the public works project ongoing at Gardiner. In further accordance with this contract, movant HAKS was

responsible to determine, upon its expert engineering inspection, "whether the construction conforms to the plans, specifications and requirements of the construction contract documents and good construction practice." No party asserts the architectural plan or design of this formwork was in any manner deficient.

To sustain defendant HAKS' primary liability under the Labor Law as a statutory agent of either the owner or the general contractor, it must be shown that HAKS had the authority to supervise and control the injury-producing work. The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right. Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the labor law, that third party becomes the statutory agent. (*See Santos v. Condo 124 LLC,* 161 A.D.3d 650 [1ST Dept 2018] and cases cited therein.)

For all the reasons hereafter set forth, and based upon a review of the parties' contract and the testimony of HAKS' own personnel, the Court finds HAKS a statutory agent of the owner and the general contractor as a matter of law and fact and that, therefore, HAKS is obligated to comply with all sections of the Labor Law, including §§200, 240(1) and 241(6).

New York State Labor Law § 240 provides in pertinent part:

SCAFFOLDING AND OTHER DEVICES FOR USE OF EMPLOYEES

1. All contractors and owners and their agents. . .in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish such labor, scaffolding, hoists, stays, ladders, slings, hangers, block pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to any person so employed.

New York State Labor Law § 241 provides in pertinent part:

CONSTRUCTION, EXCAVATION AND DEMOLITION WORK

All contractors and owners and their agents . . .when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . .shall comply therewith.

Industrial Code § 23-2.2(b) provides: "Inspection. Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately."

Section 200 of the New York Labor Law reads, in pertinent part:

GENERAL DUTY TO PROTECT HEALTH AND SAFETY OF EMPLOYEES, ENFORCEMENT

"1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices

in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

The collapse of the formwork and scaffold establishes, *ipso facto,* the manner in which it was constructed failed to conform to plans or good construction practice. HAKS inspection of this formwork, with its engineering expertise, inarguably detected the deficiencies in its construction, and rather than immediately stop the concrete placement and remedy the deficiencies HAKS opted to, literally and figuratively, go to lunch.

HAKS argues, in effect, that when assessing its responsibility here, the contract must be read in emphasis of certain provisions and in deliberate ignorance of others, thus shielding it from any liability for the events of December 2, 2013.

HAKS' preferred reading of its contract of December 28, 2010 begins and ends with "[HAKS] will not supervise, direct, control or have authority over, or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto or, for any failure of a contractor to comply with laws or regulations applicable to a contractor's performance of work." Thus, HAKS' argues that because this provision prohibits

its control or authority of other contractors as noted, it does not bear the characteristics of a statutory agent of the owner or general contractor as envisioned by the Labor Law, and, therefore, is not answerable for any violation(s) of that law. HAKS fails to recognize this provision does not vitiate its own responsibilities pursuant to contract or law. HAKS preferred reading would result in HAKS having responsibility for nothing in exchange for some $5,200,000.00, a conclusion which is entirely without merit.

Firmly establishing the issue of HAKS' status as statutory agent of the owner and/or general contractor are a number of contract terms, to wit:

With respect to HAKS' responsibility to develop, institute and enforce a quality control plan, the DEP/HAKS contract required HAKS to:

- Establish and implement inspection guidelines for monitoring the quality assurance of the construction contractor's work [p. SR-15 "§2.1C. Quality Assurance"];

- Take all responsibile precautions to protect all persons from damage and injury resulting from the contractors' and subcontractors' operations. [App. A, Art. 8 §8.01, p.23]; and

- Safeguard the City against defects and deficiencies in its work, and use reasonable care and powers of observation and detection in determining that the work conforms to the Construction Contract Documents [Attachment No. 1, Task 2, p. SR-12].

(NYSCEF DOC. No. 531)

Acknowledging these contractual responsibilities, HAKS entered a subcontract with safety consultant Bidwell Environmental LLC, (Bidwell) delegating to Bidwell authority to perform "environmental health and safety inspection services" at the Aqueduct Project. Substantively, that contract reads: ". . .[T]he Prime [HAKS] and the Subconsultant [Bidwell] desire that the Subconsultant provide environmental health & safety inspection services for the New York City Department of Environmental Protection ("Client") for which the Prime [HAKS} agreed to perform pursuant to the terms and condition of the 'Prime Agreement' [i.e., that agreement between DEP and HAKS]." (NYSCEF DOC. 693, p.1). Ultimate responsibility for safety inspection, however, remained with HAKS pursuant to its prime contractual obligation to DEP.

The delegation of authority to oversee and control the activities of the injured worker has been held to establish statutory agency for the imposition of Labor Law liability on a prime contractor not in privity of contract with plaintiff's employer. (See *Barrios v. City of New York*, 75 AD3d 517 [2nd Dept., 2010]).

Further, HAKS' liability is also vicarious to that of its sub-consultant JA. This Court previously found JA subject to Labor Law liability for its acts, or failures to act, with respect to the subject formwork and concrete pour of December 2, 2013 (see Motion Sequence No. 10). There is, however, no shortage of additional bases subjecting HAKS to the provisions and mandates of the Labor Law.

HAKS' own evidence as provided by its Construction Inspector Craig Morgans and its licensed P.E. and Civil Engineer Charles Bunyaviroch, Columbia 1988, (NYSCEF DOC 587) further acknowledges - if not independently establishes - its authority and responsibility at this job site.

Factually illuminating and legally inculpating is the presence of HAKS' Construction Inspector Craig Morgans at the very time and location of this fatal cement placement, and Morgans' self-professed expert determination to prioritize money over the lives of others. As quoted *infra*, Morgans is thoroughly confident and comfortable with his affirmative determination to do nothing, while looking squarely in the face of danger, as supported by some "gray area" recognized in the construction industry when an undetermined amount of money is at stake should a project be delayed for mere safety reasons. Stated differently, Morgans proffers an on-site cost-benefit analysis in which gross construction costs take precedence over

any unknown number of people's lives as an acceptable basis for failing to stop the work in the presence of obvious danger. A more concrete foundation for the legislative formation of Labor Law §§200, 240(1) and 241(6) is entirely inconceivable. That any party at a construction site would aver its immunity from liability for the rather horrific deaths of two people, and the serious injuries of another, because it exercised some institutional option to dismiss those deaths as the cost of doing business, is as repugnant to civil order as it is to the common laws of decency. To reference a common colloquialism invoked when pointing out overt admission of wrongdoing, it appears Morgans has "said the quiet part out loud." However, whether such an institutionally-recognized option to wager lives in the interest of profit is limited to HAKS' business plan or applies to the greater construction industry is properly examined by other means before other tribunals.

The Court refers to the sworn deposition testimony of Mr. Morgans. Morgans testified that he became alarmed after hearing a creaking or groaning noise coming from the formwork (NYSCEF DOC. NO. 641 at 445-47), and at the very time of this concrete placement observed two sides of the formwork - including the side that collapsed - lacked external braces, recognizing this as a red flag because it could cause the form to crack and allow concrete to leak out (NYSCEF DOC. 641 at 338-39); that upon this

observation and suspecting that the formwork had shifted, Morgans further recognized the impending danger and he immediately called JA inspector Mike Hadley to request a drawing of the formwork so he could verify the bracing was assembled correctly (NYSCEF DOC. 641 at 373-75, 441-45, 109-10). Notwithstanding these defects and concerns, Morgans permitted the cement placement to continue unabated while he and Hadley discussed the safety issues (NYSCEF DOC. 641 at 446). The defect was never corrected, the work was not stopped, and the formwork collapsed shortly thereafter while Morgans was in his car eating a granola bar (NYSCEF DOC. 641 at 104-05). In recognition of the importance of safety inspections and appropriate actions to ensure that safety at this critical stage of construction, Morgans acknowledges that "[i]t wouldn't be customary to take a coffee break in the middle of a [cement] placement" (NYSCEF DOC. 641 at 104). However, in this circumstance evincing cavalier indifference to the safety and lives of others, Morgans conceded he, in fact, "was in the process of [his] lunch break when the accident occurred." (NYSCEF DOC. 641 at 103-04). The granola bar apparently constituted part of Morgans' lunch as opposed to his coffee break, the distinction of which is as admittedly academic to the Court as it is to plaintiff's decedent.

Morgans confirmed that he had the authority to stop work if he believed there was sufficient evidence of an imminent safety hazard (NYSCEF DOC. 641 at 449). When asked why he did not stop the work after hearing the disconcerting noises and even noting the lack of external bracing on several sides of the formwork, Morgans replied, "there was a gray area if in terms of whether or not you stop this concrete placement that's scheduled where you have thousands of dollars in - I mean I could have stopped - I don't feel that I had enough evidence to stop the work at that point" (NYSCEF DOC. 641 at 447). When confronted with the incongruity of his failing to stop the concrete placement into a form that he recognized as presenting danger while concurrently calling for the architectural drawings of the formwork to determine its construction is proper and safe, Morgans merely continues to protest, unable to construct any exculpatory, or minimally logical, explanation. When asked, "Well, how long would you have expected Mike Hadley to have taken to review the drawings and get back to you. . .?" Morgans replied, "Again I wasn't in a position to really stop the work as - I'm having trouble -- could you -- I'm sorry, could you repeat the question?" In a valiant effort to avoid inculpating himself and his employer, movant HAKS, by conceding his failure to act directly contributed to the collapse of the formwork and the tragedies that followed, Morgans is constrained - when

confronted with indisputable evidence against him - to invoke the never successful defense of "hummina, hummina, hummina".

HAKS' other engineer, Bunyaviroch, confirms HAKS' authority to stop any work in view of a clearly unsafe condition, without limitation by any cost-benefit analysis as proffered by his subordinate Morgans. (NYSCEF DOC. 587 at 102-103, 107)

In addition, the Court is constrained to note the dispositive concession of movant's counsel within paragraph 4 of an affirmation, to wit, "The City's counsel has merely established that HAKS' responsibilities were limited to construction inspection services, documentation, *and authority to stop the work. . .due to the observation of an imminent danger*." (NYSCEF DOC. 622.)(Emphasis supplied.)

The Court finds it irrefutable that defendant HAKS had the requisite level of supervision and control over the work that was being done at the time of this catastrophe to invoke liability under the Labor Law. Further, and by the testimony of its own Mr. Morgans, not only did HAKS have notice of the condition that caused this tragedy (including the lack of sufficient external bracing of the formwork), but at a most critical time aborted its own efforts to remedy that condition in the candidly articulated interests of profit and a snack.

Further, and pursuant to Labor Law § 241(6), HAKS' violation of Industrial Code § 23-2.2(b) is indisputable inasmuch as HAKS' Craig Morgans inspected the form involved as well as its shores, braces and other supports during the placing of the concrete, was acutely aware of the unsafe condition that it presented, and rather than immediately remediate that problem as required by this industrial code, chose instead to engage in an instantaneous, singularly cerebral, cost-benefit analysis gambling the lives of at least three people that the unsafe condition would timely and spontaneously remedy itself. Mr. Morgans lost that bet that he placed on the lives of Scott Winkler and Timothy Lang, a bet placed in the interest of his employer's profitability and, apparently, an overwhelming urgency to enjoy his granola bar a safe distance away.

Thus, HAKS' motion seeking an Order of Summary Judgment in its favor and dismissing plaintiff's Second Amended Complaint and all cross-claims and third-party claims for common law indemnification or contribution is DENIED. HAKS' own claims for contractual indemnification and/or the failure to procure insurance are reserved for trial.

Inasmuch as the Court, by this Decision and Order, has determined HAKS' (and, by prior Decision and Order, by contractual extension JA's) status as statutory agent of the owner and general contractor, plaintiff's cross-motion for

summary judgment against HAKS for liability pursuant to Labor Law §§240(1) and 241(6) must necessarily be, and hereby is, GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York
January 4, 2020

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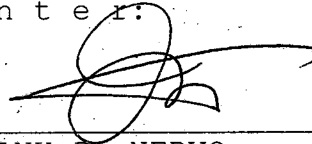

FRANK P. NERVO,
Justice Supreme Court