Villasenor v Sivan Consulting, LLC
2020 NY Slip Op 34893(U)
July 27, 2020
Supreme Court, Rockland County
Docket Number: Index No. 035845/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
HECTOR MEDINA VILLASENOR,

Plaintiff

DECISION AND ORDER

(Motion #3)

-against-

Index No.: 035845/2018

SIVAN CONSULTING, LLC, and JOSEPH A. PRIMIANO d/b/a DESIGN BUILD PLANNERS,

Defendants.
---X
SIVAN CONSULTING, LLC,

Third-Party Plaintiffs,

-against-

JBO CONTRACTOR ONE, INC.

Third-Party Defendant.
---X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 6, were reviewed in connection with Defendant Sivan Consulting LLC's ("Sivan") Notice of Motion for an Order pursuant to *Civil Practice Law and Rules* § 3212, granting it summary judgment and dismissal of the Complaint against it:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-L	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS A-C/AFFIDAVIT OF WILLIAM MIZEL/AMENDED AFFIDAVIT OF WILLIAM MIZEL	3-5
AFFIRMATION IN REPLY	6

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Procedural History

This is an action commenced by Plaintiff on October 1, 2018, seeking damages for personal injuries sustained by him as a result of a fall from a ladder on June 14, 2017, at a construction site located at 1 John F. Kennedy Blvd., Somerset, New Jersey. Issue was joined as to Defendant Sivan on January 15, 2019 by service of an Answer. Defendant Joseph A. Primiano d/b/a Design Build Planners motion to dismiss the Complaint for lack of jurisdiction was granted by Order dated January 15, 2019. Defendant Sylvan commenced a third-party action on March 8, 2019 against Plaintiff's employer. Third-party Plaintiff Sylvan was granted a default judgment against third-party defendant JBO Contractor One, Inc. ("JBO") by Order dated December 9, 2019. Discovery proceeded between Plaintiff and Sylvan and a Note of Issue was filed on November 21, 2019. The instant motion for summary judgment was timely made within 60 days thereafter.

Factual Allegations

Plaintiff testified that on the date of his accident, he was employed by JBO primarily performing exterior work, including the installation and removal of exterior siding. Plaintiff would solely report to Jamil, who was the nephew of the Oscar, the owner of JBO, and would receive directions from him. Plaintiff's accident occurred on June 14, 2017, at the subject premises in Somerset, New Jersey, which consisted of numerous rental apartment buildings. Plaintiff testified that JBO was hired to do "designs around the windows and doors," removal of existing siding and the installation of new exterior siding. All tools and equipment for the job were supplied by JBO, including multiple ladders. While JBO workers were performing work at the various buildings, the workers were assigned apartments provided by the owner of the complex, which they would reside in during the on-going work. Plaintiff had never heard of Sivan and testified that he was not aware of ever seeing any person that works for Sivan at the job site. He testified that there was a "big boss" who would supervise and see how the work was going but could not say who that person worked for.

Plaintiff testified that prior to the date of his accident, he noted that legs on some of the ladders were a little loose and that he had told this to Jamil, but that Jamil just laughed at him and did not fix the issue. Approximately two weeks before his accident, Plaintiff requested that Jamil provide rubber protectors for the top of the ladders so that they do not slip when leaned on a wall; however, these were never provided. There was no specific safety system in place when utilizing ladders and it was not the practice to use a spotter or to have someone hold the ladders.

On the date of the accident, Plaintiff was installing new siding from the bottom of the building to the top. Plaintiff, and a co-worker Geraldo, would take turns cutting the siding and then climbing the ladder to install it. The siding was purchased by JBO from a vendor and brought by JBO to the premises. The ladder Plaintiff was using at the time of the accident was a 22-foot aluminum extension ladder, which was extended 19 feet, and leaned against the building with the bottom of the ladder on the grass. The ladder had been set up that morning by Plaintiff and his co-worker. Mr. Villasenor testified that the ladder had "little defects" but that he had no problem using it prior. Plaintiff climbed up the ladder in order to place the final piece of siding using a nail gun. Geraldo had left the area to obtain more material. As Plaintiff began to descend down the ladder, and when he was a distance of approximately 5-6 rungs up from the bottom, the ladder moved towards the left, causing him to lose his balance, resulting in his right foot getting stuck between two rungs and causing his left foot to strike the ground. The ladder itself did not fall.

Fred Brinn, the President and sole owner of Sivan, testified that his company bid to do exterior work and then was retained by Franklin Greens Owner, LLC, the property manager of the Premises which consisted of 55 residential buildings. Sivan does not perform any construction work itself and sub-contracts out the labor. He testified that he relies upon the

individual owners' architects or engineers to supervise the jobs if Sivan's proposals are accepted and if the work requires obtaining permits, Sivan will do so.

Sivan contracted with JBO to perform the exterior work but the contract did not require JBO to install exterior siding or replace any exterior siding. Brinn testified that it is possible that at some point the property manager wanted such work done and a change order was written up for JBO to perform that work or it could have been per a casual oral agreement between Sivan and the property manager to perform the additional work. Brinn testified that while there was additional construction for the renovation work occurring at the property by different trades, Sivan did not have any role in retaining those contractors. Sivan claimed to be a "paper General Contractor" regarding the other trades simply because it had a general contractor license, and Brinn testified that Sivan did not contract with, retain, supervise, control or direct their work. Sivan did, however, secure permits for the construction work on the project and is listed as the "Principle Contractor" on the permit application.

At the subject job, the owner of the premises paid for and provided all materials for the job to JBO and the tools and equipment used for JBO's work were all supplied by JBO. Brinn testified that he visited the property approximately once per week to check on the progress of JBO's work and would usually speak to Jamil, the leasing agent, and the property manager. Brinn testified that he observed JBO workers use ladders for their work which were placed on a grassy frontage. Sivan did not perform any type of inspection of the JBO-owned ladders; did not inspect them to make sure the ladders were on a safe surface or that the surface was not slippery or uneven and testified that he never met Plaintiff or any of the JBO employees. Additionally, Brinn testified that his company was not responsibility for site safety and that no safety manuals were available and/or utilized.

The Parties' Contentions

As an initial matter, the parties agree that because this construction accident occurred in the State of New Jersey, the substantive law to be applied in the instant matter is

New Jersey law. Marchevka v. DeBartola Capital Partnership, 3 A.D.3d 477, 771 N.Y.S.2d 524 (2d Dept. 2004). Defendant asserts that it is entitled to summary judgment because in New Jersey, a general contractor enjoys broad immunity from liability for injuries to an employee of a subcontractor resulting either from the condition of the premises or the manner in which the subcontract work was performed. It contends that none of the three exceptions to this general rule apply. It further asserts that no duty is owed to Plaintiff under common law negligence principles, as there is no close and substantial relationship between Plaintiff and Sivan, and Sivan did not have the opportunity and capacity "to exercise authority and control over the equipment" owned by Sivan's subcontractor. Lastly, Sivan contends that no OSHA violations were issued against Sivan and in any event, violations of OSHA regulations alone do not provide for a tort remedy.

In opposition, Plaintiff submits an expert affidavit from William Mizel, a board certified safety professional. Mr. Mizel opines within a reasonably degree of professional site safety certainty, that Sivan breached its duty as a general contractor to provide Mr. Villasenor with a safe working environment when he was forced to perform the work of installing siding while standing on an extension ladder that was neither tied off or held/secured by another person, and where the feel of the ladder were resting on an uneven and unstable surface. He further opines that Defendant violated OSHA regulation 29 CFR Sec. 1926.1053(b)(c) that requires ladders to be used only on a stable and level surface unless secured to prevent accident displacement and 29 CFR Sec. 1926.1053(b)(7) which requires that ladders not be used on slippery surfaces. It is Mr. Mizel's opinion that these violations were direct and proximate causes of Plaintiff's accident and injuries. Plaintiff argues that Defendant owed a duty to him as the general contractor and that Sivan's blatant violations of the OSHA provisions require denial of the summary judgment motion.

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

In New Jersey, at common law, a general contractor enjoyed broad immunity from liability for injuries to an employee of a subcontractor resulting from either the condition of the premises or the manner in which the hired work was performed. Tarabokia v. Structure Tone, 429 N.J. Super. 104, 112-113, 57 A.3d 25 (2012). The premise underlying that approach is that a general contractor "may assume that the independent contractor and her employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety." Id. at 113. There are, however, certain exceptions to this general principle where a general contractor may be liable for a

subcontractor's negligence where he retains control of the manner and means of doing the work contractor for; where it knowingly engages an incompetent subcontractor; or where the work contracted for constitutes a nuisance per se, namely, is inherently dangerous. Majestic Realty Assocs. Inc. v. Toti Contracting Co., 30 N.J. 425, 431, 153 A.2d 321 (1959).

The more modern approach to the traditional common law rule is for courts to identify, weigh and balance a combination of factors in determining the existence of a general contractor's duty of reasonable care, a major consideration being the foreseeability of the injury, both its nature and severity. Alloway v. Bradlees Inc., 157 N.J. 221, 723 A.2d 960, 965 (1999); Tarabokia, 429 N.J. Super at 113-114. Foreseeability is generally measured by the general contractor's actual knowledge of dangerous conditions. Tarabokia, 429 N.J. Super at 114. "Although a foreseeable risk is the indispensable cornerstone of any formulation of a duty of care, not all foreseeable risks give rise to duties." Dunphy v. Gregor, 136 N.J. 99, 108 (1994).

Additional considerations in determining the existence of such a duty include "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Id. "In the end, '[t]he analysis leading to the imposition of a duty of reasonable care...must satisfy an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" Id. While OSHA regulations are pertinent to determining the nature and extent of any duty of care, violation of OSHA regulations without more does not constitute the basis for an independent or direct tort remedy. Alloway, 157 N.J. at 236.

In Alloway, the court found that the general paving contractor owed a duty to the subcontractor's employee who was injured as the result of a defective mechanical component of a subcontractor's dump truck as she attempted to unload crushed stone at the work site. In reaching this conclusion, the court noted that the plaintiff had previously

experienced problems with the lifting mechanism which, the day before the accident, was brought to the attention of her supervisor, who was also an employee of the general contractor. Id. at 226-227. The truck was driven to the general contractor's garage where the general contractor's superintendent and another employee tried to correct the problem and the superintendent used a piece of steel to manually move a lever to make it work. Id. In finding that the general contractor had a duty to ensure the subcontractor's employee's safety, the Court noted that there was "actual knowledge" on the part of at least three of the general contractor's employees that the truck was defective; there was a substantial and close relationship between the contractor and subcontractor in that the principal of the subcontractor was also one of the general contractor's employees; and the relationship gave the general contractor both the opportunity and capacity to exercise authority and control of the equipment of the subcontractor if safety concerns were implicated. Id. at 233.

In Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 675 A.2d 209 (1996), the court held that an engineer owed a duty of care to the employee of a sub-contractor when a trench collapsed on him. In finding that a duty of care existed, the court noted that previous trench collapses had occurred on the project of which the engineer was aware, such that it was foreseeable that a harm could occur. Id. at 572. Additionally, the engineer, who was contractually required to be present at the site daily, was aware that a "trench box" was not present, which would have eliminated the risk of a trench collapse. Id. at 575. Lastly, the court noted that the engineer had authority to stop work at the job.

Conversely, in Tarabokia, 429 N.J. Super at 117, the Court held that the general contractor did not have a duty to ensure an electrical subcontractor's employee's safe use of a tool and dismissed the action on summary judgment. In reaching this conclusion, the Court noted that the general contractor had not helped to create the dangerous condition and there was no proof that defendant knew the plaintiff was using the equipment improperly. Id. at 118. Additionally, the subcontractor supplied the plaintiff with that tool and the contractor had no

control of the choice of equipment selected by the subcontractor, nor did it involve itself in the means or methods by which the sub-contractor's employees performed their work. Additionally, the court further held that assuring compliance with OSHA regulations did not amount to the kind of control over the subcontractor's work which would implicate any duty on defendant's party to protect the sub-contractor's employees. Id at 120

Likewise, in Lata v. Loughlin, 2018 WL 6164789 (N.J. Super. Ct. App. Div. Nov. 26, 2018), the plaintiff, an employee of a subcontractor, sustained injuries after a fall on a construction site. In dismissing the case against the contractor for lack of a duty, the Court noted that the subcontractor provided its own tools and safety equipment and plaintiff testified his work was supervised only by the subcontractor who was responsible for safety and the hiring of its own employees. Moreover, the contractor had no special relationship with the sub-contractor; the general contractor was not involved in creating the dangerous condition and was unaware of the lack of a safety device. The court further noted that although OSHA cited the contractor for violations, that does not automatically impose a duty of care on the general contractor.

Similarly, in Nanguelu v. Rodriguez, 2014 WL 1796635 (N.J. Super. Ct. App. Div. May 7, 2014), the Appellate Division upheld the dismissal of an action against a contractor on the ground that it did not owe a duty of care to the employees hired by the sub-contractor. In reaching this conclusion, the court noted that the contractor did not supervise plaintiff's on-the-job performance, did not provide them with tools or equipment nor did it have any knowledge regarding the design or construction of the scaffold. Although the contractor and sub-contractor had a written contract, the contractor did not direct the use of the scaffolding and had no actual or constructive notice of any risk of harm.

Applying the relevant case law as cited herein to the facts present in the instant matter, the Court finds that Sivan did not owe a duty of care to Plaintiff and is therefore entitled

to summary judgment. In the instant matter, Plaintiff testified that he was exclusively supervised by his employer, JBO, who supplied all tools and equipment including ladders. There is no indication that Defendant Sivan directed the manner or means in which the work of the sub-contractor, JBO, was to be performed.

With regard to the issue of foreseeability, there is no evidence that Sivan had actual or constructive notice that ladders were being used in an unsafe manner. While Plaintiff made complaints to his supervisor, Jamil, about the condition of the ladders, the record is devoid of any evidence that Sivan itself was made aware of the prior complaints. Likewise, there is no evidence that similar prior accidents had occurred on this job which would have placed Sivan on notice of a problem. Moreover, while Brinn testified that he had on a prior occasion observed workers using ladders placed on grass, he was not asked, nor did he testify, as to whether or not the ladders were not secured against slippage or whether they were placed on a slippery or unlevel surface.

As to the relationship between the parties, although there was a contract between Sivan and JBO to perform the exterior work on the project, the contract itself places no obligation on Sivan to ensure the safety of the sub-contractors' employees; to conduct inspections of equipment; to develop or implement a safety plan; or to hold tool-box meetings. Nor is there any evidence that the contract between Sivan and the owner/manager of the property, imposed safety or inspection duties upon Sivan[1]. Lastly, the Court need not address the issue of whether there were violations of OSHA regulations. While no such violations were actually issued, assuming *arguendo* the alleged provisions were violated, the violations alone are insufficient in and of themselves to confer a duty upon Sivan in light of the other facts present in this matter.

Accordingly, it is hereby

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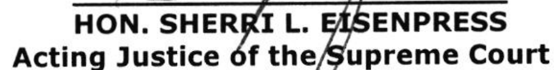
[1] In fact, no contract between Sivan and the owner/manager of the property was produced.

ORDERED that Defendant/Third-Party Plaintiff's Notice of Motion for an Order granting summary judgment, pursuant to CPLR Sec. 3212, is GRANTED in its entirety; and it is further

ORDERED that the action is dismissed in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motion # 3.

Dated: New City, New York
July 27, 2020



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing