

Balliu v 627 Greenwich Owner LLC
2022 NY Slip Op 30030(U)
January 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 504114/2017
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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RAMADAN BALLIU and FLORIJE BALLIU,

Index No.: 504114/2017
Motion Seq. Nos.: 15 & 16

Plaintiffs,

- against -

627 GREENWICH OWNER LLC n/k/a 90 MORTON
OWNER LLC, BRACK CAPITAL REAL ESTATE, LTD.,
8885 3RD AVENUE REALTY OWNER LLC, INTEGRITY
CONSULTING SERVICES, ECOSAFETY
CONSULTANTS, INC., and B&D RESTORATION CORP.,

DECISION AND ORDER

Defendants.

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627 GREENWICH OWNER LLC n/k/a 90 MORTON
OWNER LLC, BRACK CAPITALREAL ESTATE, LTD,
and BCRE SERVICES LLC,

Third-Party Plaintiffs,

-against-

B&D RESTORATION CORP. and IBF CONSTRUCTION
CORP.,

Third-Party Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of
the defendants’ motions for summary judgment and for renewal and reargument.

The following e-filed documents, listed by NYSCEF document numbers (Motion 15) 475- 484,
515-517, 529-536 were read on defendant Ecosafety Consultants, Inc.’s motion for summary
judgment and document numbers (Motion 16) 487-512, 522-526, 538 and 540 were read on the
motion to renew and reargue of defendants 627 Greenwich Owner LLC n/k/a 90 Morton Owner
LLC, Brack Capital Real Estate Ltd. and BCRE Services LLC.

Defendant Ecosafety Consultants, Inc. (EcoSafety) moves to renew its motion for
summary judgment (Motion 15), as permitted by Justice Bruce M. Balter’s written decision
dated November 23, 2020, following the deposition of Ecosafety’s witness, Luis Enchauntegui.
The defendants, 627 Greenwich Owner LLC n/k/a 90 Morton Owner LLC (627 Greenwich) and
Brack Capital Real Estate, Ltd. (Brack) and BCRE Services, LLC (BCRE), move to renew
and/or reargue Justice Balter’s decision (Motion 16), pursuant to CPLR § 2221(e) and CPLR §
2221(d). After oral argument, and upon careful consideration of the parties’ submissions, the
motions are denied for the reasons set forth below.

On December 28, 2016, plaintiff, an employee of a third-party defendant subcontractor, was injured at a construction work site when, during his participation in the demolition of the interior steel columns, one of the columns estimated to weigh at least 1000 pounds fell on him as his coworkers, using ropes, were lowering it from its initial standing position to its intended horizontal position resting on the floor. 627 Greenwich was the property owner, BCRE was the general contractor and EcoSafety was the safety consultant of the construction project. Plaintiff, Florije Balliu, is the wife of Ramadan Balliu, and sues derivatively (collectively referred to as plaintiffs).

In its initial motion, Ecosafety argued that it was not a proper statutory defendant under Labor Law §§ 240(1) and 241(6), and that it did not direct, supervise or control, or have the authority to direct, supervise or control the work that led to the plaintiffs' injuries. Justice Balter's decision granted plaintiffs' motion as to Labor Law § 240(1), but denied it as to § 241(6). The Court rejected defendants' "same level" argument, finding that based upon its height and weight, and the force that it was able to generate during its fall, the column should have been properly secured. The Court also rejected the argument that Labor Law § 240(1) did not apply merely because the goal of the work had been to lower the column, noting that the purpose of the rope was to lower the column safely. Justice Balter also specifically found that the defendants failed to raise an issue of fact as to the absence of a statutory violation, and as to whether the plaintiffs' own conduct was the sole proximate cause of the accident.

In *Everitt v Nozkowski*, 285 AD2d 442 (2d Dept 2001), the Court denied a subcontractor's motion for summary judgment, holding that the defendant failed to meet its burden of establishing, prima facie, that it was not the statutory agent of the general contractor. The Court relied on deposition testimony that the movant was on the site daily to check on the work and instructed the injured plaintiff and his co-employees concerning the work being performed. In *Valdez v Turner Constr. Co.*, 171 AD3d 836 (2d Dept 2019), the owner retained the defendant (Skidmore) to provide architectural, engineering and construction management services at the project, who in turn retained a co-defendant (Turner) as construction manager. Both defendants' motions for summary judgment were denied. Skidmore's motion was denied because as a contractor it remained responsible for coordinating and supervising the project, and was vested with concomitant powers to enforce safety standards and to hire responsible subcontractors. Turner was found to also be subject to Labor Law liability as an agent of the owner since "it functioned as the eyes, ears and voice of the owner" and had broad safety responsibilities, including the ability to control the work. *Id.*, 171 AD3d at 839, quoting *Walls v Turner Constr. Co.*, 4 NY3d 861(2005) (internal quotation marks omitted). Notably, in *Valdez*, the Appellate Division, Second Department held that the existence of a general contractor at the site does not preclude a finding that another contractor can be a statutory agent.

In *Barrios v City of New York*, 75 AD3d 517 (2d Dept 2010), the Court held that "[a]s a general rule, a separate prime contractor is not liable under Labor Law § 240 or § 241 for injuries

caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker... However, where a separate prime contractor has been delegated the authority to supervise and control the plaintiff's work, the contractor "becomes a statutory 'agent' of the owner or general contractor," quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311(1981). See also *Walls v Turner Constr. Co.*, 4 NY3d 861. In *Barrios*, the movant was required to inspect the site, report safety issues to the resident engineer and owner, develop a quality control plan taking into account safety aspects of the work to be performed, and to meet with the contractors and discuss their individually developed safety plans for compliance with, among other things, state law. There was also testimony that it employed safety officers who had the authority to bring safety concerns to individual contractors' foremen. The court noted that the defendant's label as a "construction manager versus general contractor is not necessarily determinative" as to whether a party is responsible under Labor Law § 240(1). See *Barrios*, 75 AD3d at 519.

The basis for the plaintiffs' claim that Ecosafety was a statutory agent subject to Labor Law liability is the deposition testimony by the general contractor's assistant project manager, Christian Saguay, who was present at the site daily. He testified that Ecosafety not only had the authority to stop the work, but had stopped the work when necessary. Both he and Thomas Houtas, Ecosafety's site safety person, would walk the site two to three times daily, and Mr. Houtas would point out safety concerns. Mr. Houtas was also present at weekly safety meetings to address safety issues and provide orientation to new employees. Moreover, BCRE hired Ecosafety as its site safety coordinator. The plaintiffs argue that based on the testimony, Ecosafety was in fact the eyes and ears of the owner, and was relied upon by the general contractor, whose representative testified that if the plaintiffs' employer's practice for lowering columns was acceptable to Ecosafety, it was acceptable to him.

The recent deposition testimony of Ecosafety witness, Luis Enchauntegui, merely creates additional issues of fact. He testified that he was employed by the New York City Health and Hospitals Corporation, and would on occasion, take vacation days to do side projects for Ecosafety. He had never spoken to or met with Thomas Houtas. He did not receive any written instructions or conduct any safety meetings, and he never met with the general contractor. Mr. Enchauntegui also testified that he did not believe he was authorized to stop the work, but his belief was not based on a specific instruction provided to him by Ecosafety.

Additionally, Mr. Saguay's testimony raises issues of fact as to whether Ecosafety was involved in the means and methods of the work being performed by plaintiffs' employer at the site, which resulted in the plaintiffs' accident. He testified that he deferred to Ecosafety on these matters.

Ecosafety has failed to sustain its prima facie burden of establishing that it was not the statutory agent of the general contractor with respect to the plaintiffs' Labor Law claims. The

evidence, in the form of deposition testimony of Mr. Saguy on behalf of the general contractor, and Mr. Houtas, Ecosafety's site safety person, as well as that of Mr. Enchauntegui, create issues of fact as to whether Ecosafety had the authority to supervise and control the manner in which the plaintiffs' work was being performed as the statutory agent of the owner and general contractor. As such, Ecosafety's summary judgment motion is denied.

Turning to the motion of 627 Greenwich, Brack and BCRE (Motion 16), the motion seeking reargument pursuant to CPLR § 2221(d), is denied. Likewise, the prong of the defendants' motion seeking renewal of Justice Balter's decision, pursuant to CPLR § 2221(e), is denied. The movants argue that their motion to renew should be granted based on the deposition testimony of Mr. Enchauntegui, which had not yet taken place when Justice Balter granted summary judgment to plaintiffs on their Labor Law claims as against these defendants. They contend that Mr. Enchauntegui's deposition established that there are questions of fact concerning whether the methods and means used by the plaintiffs' employer to demolish the steel beam were safe, and whether the injured plaintiff was the sole proximate cause of the accident. The movants assert that Mr. Enchauntegui testified that he had conducted two or three inspections of the floor where plaintiff and his co-workers had been performing their work and did not observe any safety issues that needed to be addressed, including the manner in which the beams were being lowered. Moreover, none of the witnesses he interviewed told him that the accident occurred as a result of the failure of the demolition process of the beam, but rather because the plaintiff did not move when he was told to do so. According to the movants, these "new" facts should change the court's prior determination on their motion.

The movants also maintain that they should be granted leave to reargue because "Justice Balter's decision both overlooked and misapprehended the law and facts in reaching the determination on plaintiffs' motion." They contend that "although, the beam that was being demolished by plaintiff and his co-workers appears to have fallen, plaintiff is unable to provide anything more than speculation that the subject beam fell as a result of absent or inadequate devices. The mere fact that plaintiff incurred a worksite accident does not warrant a finding that Section 240 applies."

The movants contend that Justice Balter misapprehended the law, asserting that the grant of summary judgment in favor of the plaintiffs was premised on cases that are distinguishable from the instant case, in that they were based on undisputed evidence of inadequate equipment that caused the accidents. They argue that in the case at bar there is no evidence to establish what caused the beam to fall.

The movants' argument that the subsequent deposition testimony is a basis for renewal is without merit. Justice Balter's decision makes clear that "the defendants have failed to raise a triable issue of fact as to whether the outstanding depositions could change the outcome insofar as defendants were concerned" and that "[d]efendants have failed to demonstrate that discovery might lead to relevant evidence insofar as they are concerned, or that the facts essential to justify

their opposition to plaintiffs' motion are exclusively within the latter's knowledge and control." Mr. Enchauntegui's testimony that he did not observe any safety issues while the plaintiff was performing the demolition work does not alter the analysis correctly utilized by Justice Balter in determining that the plaintiffs were entitled to summary judgment on their Labor Law claims. Further, the decision also unequivocally states that the defendants failed to raise a triable issue of fact as to whether "the injured plaintiff's own conduct was the sole proximate cause of the accident." Even assuming that the plaintiff did not "move" when told to do so, this amounts to comparative negligence at best, which is insufficient to preclude a finding of a statutory Labor Law violation under § 240(1). The subsequent deposition testimony of Mr. Enchauntegui does not present new "facts" as contemplated by CPLR §§ 2221(e) supporting renewal of the movants' motion.

Likewise, the movants' contention that Justice Balter misapprehended the law must be rejected. The movants' arguments fail to provide a basis to find that the law relied upon by the Court in reaching the decision was incorrectly applied to the facts involved in the instant matter.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that Ecosafety's summary judgment motion (Motion 15) is DENIED in its entirety; and it is further

ORDERED, that the motion of defendants 627 Greenwich, Brack and BCRE (Motion 16) is DENIED in its entirety.

This constitutes the decision and order of the Court.

Dated: January 6, 2022


HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.