| **Lozano v Bovis Lend Lease LMB, Inc.** |
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| 2009 NY Slip Op 33374(U) |
| November 30, 2009 |
| Supreme Court, New York County |
| Docket Number: 111393/06 |
| Judge: Louis B. York |
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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FERNANDO LOZANO and RUBY LOZANO,

Plaintiff,

Index No. 111392/06

-against-

BOVIS LEND LEASE LMB, INC. and 1180 ASTRO INVESTORS, LLC.,



Defendants.

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BOVIS LEND LEASE LMB, INC.,

Index No.:111392/06

Defendant/

Third-Party Plaintiff

-against-

AZTEC METAL MAINTENANCE CORP. d/b/a

AZTEC SERVICE GROUP,

Third-Party Defendants.

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LOUIS B. YORK, J.:

Defendant Bovis Lease LMB, Inc., (hereinafter "Bovis"), moves for an order, pursuant to CPLR § 3212, granting summary judgment against the plaintiffs Fernando Lozano and Ruby Lozano on their Labor Law § 240(1) claim and that New Jersey Law should control this issue before the court. For the reasons discussed infra, New Jersey law applies which results in this action being dismissed.

Defendant Bovis was hired by co-defendant 1180 Astro Investors ("Astro"), as the construction manager for a project at 1180 Raymond Boulevard, Newark, New Jersey, County of Essex. Astro was, during the pertinent time periods, the owner of the building at 1180 Raymond. Plaintiff Fernando Lozano ("Lozano") is an employee of third-party defendant Aztec Metal Maintenance Corp. ("Aztec"), which was a trade contractor working at the previously mentioned construction project. All parties involved are domiciled in the State of New York aside from Astro, which is a New Jersey corporation.

Lozano had been working for Aztec for eleven years as a "journeyman", and is currently employed by non-party Signature Metal Company, which, according to Lozano's deposition, had bought out Aztec. Lozano's primary job duties included the finishing of various metals.

The underlying facts of the case begin on April 3, 2006, where Lozano reported to work at the job site at 1180 Raymond Boulevard, in Newark. He arrived at the site about or around 6:45 A.M., and began to prepare for the day's work. The preparation included putting on a white work suit, which went over his clothing, and also to put on a safety harness, which was a belt that

served to hold a person's arms and legs, and prevented falls. The suit and the harness were both provided to the plaintiff by Aztec. Plaintiff was instructed by his Aztec supervisor to go to the fourth floor for his day's work. Lozano grabbed his tools, which were also provided by Aztec and went to the scaffolding outside the fourth floor of the building. Plaintiff searched for an outlet to plug his power tools into, but there was not an active one where he was located. According to plaintiff's deposition, it was common for some of the building's outlets to be non-functional, and when this occurred, it was necessary to find an outlet on another floor. Plaintiff proceeded to go to the third floor. Plaintiff did not reenter the building and use the interior stairs, but instead climbed down a section of scaffolding outside the building. Plaintiff asserts that this was common practice among the workers, as it took a notably longer period of time to go through the interior of the building. Plaintiff found a functioning outlet, plugged in, and proceeded to return to the fourth floor, the same way he came down, by climbing the scaffolding outside. It was during this attempt to ascend the scaffolding that plaintiff lost his grip and fell through the bars, and down to a scaffolding bridge outside the first floor of the building. Plaintiff was not secured by his safety harness at the time, as it was not possible to move vertically while hooked on.

Plaintiff asserts in his deposition that the practice of using the scaffolding as a means of moving in between floors or levels was instructed by his Aztec foreman. Plaintiff asserts that the foreman instructed the workers to take these measures to save time. The particular area where plaintiff was assigned was equipped with flooring planks, but the tower frame which he used to ascend and descend levels was not prepared with planks for the workers to use. All of the building exterior work, including that done on scaffolding was at the direction and under the

supervision and control of Aztec supervisors.

As a result of the fall, plaintiff sustained injuries which required medical care and attention, as well as physical therapy.

Plaintiff's filed their Second Amended Verified Complaint against Bovis and Astro on October 9, 2006, alleging that defendants negligently failed to maintain the building site in a safe condition for the workers. The plaintiffs further alleged that this failure resulted in the injuries that Lozano sustained. The plaintiffs also filed their Verified Bill of Particulars on this date. On December 13, 2006, defendant Bovis served its Verified Answer on plaintiff, asserting several defenses including; 1) contributory negligence on the part of the plaintiff; 2) any fault or negligence should be attributed to a third-party (Aztec); and 3) Labor Law of the State of New York is not applicable to the action. Astro filed its answer as well on January 11, 2007. On July 19, 2007, a stipulation was filed with the Court wherein the plaintiff asserted that all claims under New York Labor Law §§ 200, 240(1) and 241(6), are withdrawn without prejudice and costs. On January 14, 2008, Plaintiff Lozano was deposed. This motion for summary judgment was filed by the defendant Bovis on June 26, 2009, the plaintiff's affirmation in opposition was filed on August 11, 2009, and the defendant's affirmation in reply was filed on September 19, 2009.

ANALYSIS

Movant Bovis claims entitlement to summary judgment because they owe no duty of care to the plaintiffs. It urges that New Jersey law be applied to the action, claiming that New Jersey commands the greatest interest in the regulating of conduct on construction sites in its

jurisdiction.

The first issue of discussion must be to determine which state's law will apply to the matter at hand. As already noted, the defendant's position is that New Jersey law should apply to this case because New Jersey commands the greatest interest in the outcome of this litigation. The Court of Appeals has addressed this choice-of-law issue in a similar situation, and has held that in circumstances like this, the proper choice of law is that of the state where the offending acts or omissions took place. *Padula v. Lilarn Properties,* 84 N.Y.2d 519, 522, 620 N.Y.S.2d 310, 311-312 (1994). The Court further articulated the general rule that "[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Id.* at 522, 620 N.Y.S.2d at 311. It has been well-established that New York Labor Law is a conduct-regulating statute. *Id.; Florio v. Fisher Dev., Inc.,* 309 A.D.2d 694, 696, 765 N.Y.S.2d 879, 881 (1st Dept. 2003);

*Clarke v. Sound Advice Live,* 221 A.D.2d 227, 633 N.Y.S.2d 490, 491 (1st Dept. 1995). The burden is high to demonstrate that a state's laws apply where the tort or conduct at issue did not occur, especially when dealing with a conduct-regulating statute such as this. *See Schultz v. Boy Scouts,* 65 N.Y.2d 189, 198, 491 N.Y.S.2d 90, 95 (1985) (indicating that when the rules involve conduct-regulation, the law of the place of the tort will usually have a predominant, if not exclusive, concern). Accordingly, it is the opinion of this court that New Jersey does command the greatest interest in the matter, and its laws should apply to this matter.

The plaintiffs assert that New York law should apply and not the applicable New Jersey law. They rely on the First Department decision in *Calla v. Shulsky,* 148 A.D.2d 60, 543

N.Y.S.2d 666 (1st Dept. 1989). In *Calla*, the court determined that New York Labor Law applied to a case where a New York resident, working for a New York corporation, working on a New York corporation owned property, fell from a ladder and injured himself while performing work. The facts of this case are distinguishable from the facts before us today. The most glaring difference is that Astro, who has a significant interest in the outcome of the proceedings, is a New Jersey corporation, and its principle place of business is New Jersey as well. Whereas in *Calla,* all significant domiciliaries were from New York, and New York therefore had a significant interest in its laws governing its own citizens, that is not the case here. Additionally, the situs, and the context of the accident are not similar. In *Calla,* the accident was the result of a New York resident performing heating and cooling repairs for the New York corporation in New Jersey. This is a far cry from a construction project that is, and will continue to be a New Jersey interest. New Jersey has a significant interest in being able to have its laws apply to major construction projects in its state. In construction accident cases, nearly all result in the law of the state where the accident occurred being applied. *See Zangiacomi v. Hood,* 193 A.D.2d 188, 603 N.Y.S.2d 31, (1st Dept. 1993); *Salsman v. Barden & Robeson Corp.,* 164 A.D.2d 481, 564 N.Y.S.2d 546 (3rd Dept. 1990).

Because New Jersey law applies to the issue in question, a different standard will apply from that required from New York Labor Law. The standard is much more deferential to the general contractor, Bovis, in this case. To be liable for negligence, the standard set forth in New Jersey cases demand only that the general contractor exercise reasonable care in making their work sites safe for the employees of subcontractors. *Wolczak v. Nat'l Elec. Prods.,* 66 N.J.Super. 64, 70, 168 A.2d 412, 414-415 (1961). Further, "absent control over the job location or direction

of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed." *Id.* at 71, 168 A.2d at 415.

Plaintiff has made crystal clear from his testimony at deposition that Aztec, alone, controlled the manner in which tasks were to be carried out. Aztec supplied the tools, and other necessary work gear. Aztec supervisors directly instructed plaintiff's work, and even more, directly instructed plaintiff and others to ascend and descend the scaffolding in a foreseeably dangerous manner. Bovis never controlled the manner in which the work was done by plaintiff, and had only tenuous contacts with him or the other Aztec workers at all. Bovis supplied the expected work areas with walkway boards for safety, but could not have foreseen the need for additional safety devices among the scaffolding towers. Accordingly, Bovis has shown that they fulfilled the duty of reasonable care, and cannot be found liable for plaintiff's injuries under a negligence claim.

Perhaps the most notable aspect of the entirety of the plaintiff's claim comes from the fact that it is based almost entirely on New York Labor Law § 240(1). It is of great importance that this be recognized, considering that in a stipulation dated July 19, 2007, both of the parties agreed that all claims asserted by the plaintiffs under New York Labor Law §§ 200, 240(1) and 241(6) would be withdrawn. It logically follows that plaintiffs, in their reply to the motion, have relied almost exclusively on a claim which they have already stipulated to have withdrawn. As such, even if New York law were to apply to this case, the plaintiffs do not have a cognizable claim on which to move forward, as it was already withdrawn.

The only defense that the plaintiffs raise that concern or anticipate the application of New

Jersey law is that the motion should be denied because Bovis is not prejudiced due to their impleading of Aztec. Whether or not Bovis owed a duty of care to the plaintiff, which is the underlying issue in this case, has absolutely nothing to do with whether defendant has sought indemnification from a third-party.

It is the opinion of this court that New Jersey law be applied to the matter at issue. Consequently, the standard of review concerning Bovis as a general contractor in a negligence case such as this is reasonable care. *Schwartz v. Zulka,* 70 N.J. Super. 256, 261, 175 A.2d 465, 467 (App. Div. 1961). Bovis neither directed the plaintiffs work, nor supervised it in any capacity. Bovis did make the appropriate work areas reasonably safe, and fulfilled their duty of reasonable care. In any event, plaintiff's have almost solely relied on New York Labor Laws, which they have already stipulated to be withdrawn. Ultimately, this court grants the defendants motion for summary judgment.

Based on the above, therefore it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly with costs and disbursements.

Dated: 11/30/09

FILED
DEC 02 2009
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

LOUIS B. YORK
J.S.C.