Griffin v Davinci Dev., LLC
2009 NY Slip Op 33410(U)
December 7, 2009
Supreme Court, Suffolk County
Docket Number: 05-1427
Judge: Jr., John J.J. Jones
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[* 1]

PUBLISH

SHORT FORM ORDER

INDEX No. 05-1427

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-18-08
ADJ. DATE 3-11-09
Mot. Seq. # 009 - MotD
010 - MotD
011 - XMotD

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BRIAN GRIFFIN,

Plaintiff,

- against -

DAVINCI DEVELOPMENT, LLC and ARTIE CIPOLETTI,

Defendants.

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SIBEN & SIBEN, LLP
Attorney for Plaintiff
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Bay Shore, New York 11706

STEPHEN GERARD GORRAY, LLC
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DAVINCI DEVELOPMENT, LLC and ARTIE CIPOLETTI,

Third-Party Plaintiffs,

- against -

ACTION SIDING, INC., RMS INSURANCE BROKER LLC and R&W BROKERAGE, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 65 read on the motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 49; Notice of Cross Motion and supporting papers 50 - 58; Answering Affidavits and supporting papers 59 - 60; 61 - 63; Replying Affidavits and supporting papers 64 - 65; Other plaintiff's and defendants' memoranda of law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the Court, *sua sponte*, recalls and vacates its prior order dated July 7, 2009 and issues the following order in its place and stead; and it is further

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#009) by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment as to the defendants' liability pursuant to Labor Law § 240 (1) is granted as to defendant DaVinci Development, LLC, and is otherwise denied; and it is further

ORDERED that the motion (#010) by third-party defendant Action Siding, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the first, third, and fourth causes of action asserted in the third-party complaint or, alternatively, severing the first cause of action and joining same with previously severed claims, and granting summary judgment in its favor on its counterclaim, is granted to the extent of granting summary judgment dismissing the claims for common-law indemnification and contribution asserted in the third and fourth causes of action, and granting summary judgment in its favor on the counterclaim, and is otherwise denied; and it is further

ORDERED that the cross motion (#011) by defendants/third-party plaintiffs which, in effect, seeks an order pursuant to CPLR 3212 granting Artie Cipoletti summary judgment dismissing the complaint as against him is granted to the extent that the complaint is dismissed as against Artie Cipolettie, and is otherwise denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered in a fall from a scaffold. The property owner and developer, defendant DaVinci[1] Development, LLC ("DaVinci"), contracted with third-party defendant Action Siding, Inc. ("Action") to install vinyl siding on new single-family homes being constructed on Gibbons Court in Sayville, New York. Defendant Artie Cipoletti (Cipoletti) was the "managing member" of DaVinci.

The plaintiff testified at his deposition that he was an experienced siding mechanic and was employed by Action. On the day of the accident, he was directed by his foreman, Mike, to install capping for the headers, where the gutters would be placed (soffits). The plaintiff and another Action employee, Eddie Olsen, used two ladders supplied by Action, and planks already at the construction site, to construct a makeshift scaffold. The ladders were free standing in the dirt, about 10 feet apart, and two feet from the building. The plaintiff and Olsen suspended a 15-foot wooden plank on equivalent rungs between the ladders, to act as a platform. The plaintiff testified that as he was standing on the scaffold, installing the capping, when he felt the plank drop or give way and he fell to the ground sustaining the injuries alleged herein.

Olsen testified at his deposition that he had been working at the site for a few months and would often put the equipment away at the end of the day. Olsen stated that he was directed to install the soffits, that he decided to use the ladders and the board for the makeshift scaffold, and that he enlisted the plaintiff's help in constructing the scaffold. The plaintiff would bring him the cut soffit and the

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[1] Sued herein as "Davinci" Development, LLC.

plaintiff would then climb onto the scaffold so that they could install it together. On the plaintiff's last climb to the scaffold, Olsen felt the ladders kick back and both he and the plaintiff fell to the ground. Olsen testified that he was able to jump backward onto the ground without injury, but that the plaintiff fell forward and was injured. He testified that he does not recall if the whole scaffold fell. Martin Burkhardt, Action's president, testified at his deposition that Olsen was Action's lead mechanic.

Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor, or agent who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240 (1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). Specifically, Labor Law § 240 (1) requires that safety devices be "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). A violation of this duty will result in strict liability where the violation was the proximate cause of the accident (*see* ***Crespo v Triad, Inc.***, 294 AD2d 145, 742 NYS2d 25 [2002]) and an injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240 (1) (***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]).

Here, the uncontroverted facts established that the scaffold failed to protect the plaintiff from a specific gravity-related accident, the precise harm the statute is intended to prevent (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison,*** *supra*). Where, as here, a scaffold fails to perform its function of safely supporting the worker, a statutory violation, and thus *prima facie* entitlement to summary judgment, has been established (*see* ***Dowling v McCloskey Community Servs. Corp.***, 45 AD3d 1232, 847 NYS2d 249 [2007]; ***O'Connor v Enright Marble & Tile Corp.***, 22 AD3d 548, 802 NYS2d 506 [2005]; ***Morin v Machnick Bldrs.***, 4 AD3d 668, 772 NYS2d 388 [2004]). "Once the plaintiff makes a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 298, 771 NYS2d 484 [2003]; *see* ***Montgomery v Federal Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]; ***Bonilla v State of New York***, 40 AD3d 673, 835 NYS2d 690 [2007]; ***Florio v LLP Realty Corp.***, 38 AD3d 829, 833 NYS2d 148 [2007]).

In opposition to the plaintiff's *prima facie* showing, the defendants argue that the plaintiff was the sole proximate cause of his accident. They assert that, due to the plaintiff's weight,[2] he was employed only to perform siding work which could be performed on the ground, and that there were adequate safety devices available on site. However, Action's own employee, Olsen, testified that the

[2] The plaintiff testified that he weighed 290 pounds at the time of his accident.

plaintiff was at the site to assist him and that he decided to construct and utilize the makeshift scaffold. Moreover, the defendants have offered no evidence that the plaintiff was directed not to use the scaffold, or directed to use another safety device, and chose to disregard such instructions (***Robinson v East Med. Ctr.***, *supra* at 552; ***Montgomery v Federal Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]; ***Buckmann v State of New York***, 64 AD3d 1137. 881 NYS2d 760 [2009]; ***McCarthy v Turner Constr.***, 52 AD3d 333, 859 NYS2d 648 [2008]). Nor have the defendants presented admissible evidence to contradict the testimony of the plaintiff and Olsen as to how the accident happened. Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) is granted as against DaVinci.

Since Cipoletti acted only as the "managing member" of DaVinci, there is no basis to find him statutorily liable to the plaintiff pursuant to Labor Law §§ 240 (1) or 241 (6) in his individual capacity. Further, since he had no authority to and, in fact, did not supervise or control the plaintiff's work, there is no basis to find him liable to the plaintiff pursuant to Labor Law § 200 or for common-law negligence (***Domino v Professional Consulting***, 57 AD3d 713, 869 NYS2d 224 [2008]; ***Kajo v E. W. Howell Co.***, 52 AD3d 659, 861 NYS2d 105 [2008]). Accordingly, the complaint is dismissed as against Cipoletti and the plaintiff's request for summary judgment as to Cipoletti's Labor Law § 240 (1) liability is correspondingly denied.

Action, as the plaintiff's employer, seeks, *inter alia*, summary judgment dismissing the first, third, and fourth causes of action asserted in the third-party complaint. The first cause of action sounds in contractual indemnification based upon the parties' written agreements, the third cause of action sounds in common-law indemnification, and the fourth cause of action sounds in contribution. It is well settled that, pursuant to the amendment to Worker's Compensation Law § 11, the Omnibus Worker's Compensation Reform Act, an injured plaintiff's employer is exempt from claims for contribution or indemnity in the absence of plaintiff's "grave injury" (*see*, ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]) unless there is a specific contractual obligation for such. Here, there is no dispute that the plaintiff did not suffer a grave injury and, therefore, any claims for contribution or indemnification over and against Action are dependent upon contractual obligations. Accordingly, the third cause of action sounding in common-law indemnification is dismissed and so much of the fourth cause of action which purports to seek common-law contribution is also dismissed. However, Action has not established that it is entitled to summary judgment dismissing the first cause of action sounding in contractual indemnification (***Rodriques v N & S Bldg. Contr.***, 5 NY3d 427, 805 NYS2d 299 [2005]). Action has failed to establish, as a matter of law, that the "the course of conduct between [the parties], including their writings . . . was [in]sufficient to spell out a binding contract, notwithstanding the failure of the parties to sign [an] integrated agreement" (***Flores v Lower E. Side Serv. Ctr.***, 4 NY3d 363, 795 NYS2d 491 [2005]; ***Auchampaugh v Syracuse Univ.***, __ AD3d __, 2009 NY Slip Op [2009]; ***Staub v Willaim H. Lane, Inc.***, 58 AD3d 933, 807 NYS2d 630 [2009]).

Action also seeks, alternatively, in the event that the DaVinci's claims for contractual indemnification and/or contribution are not dismissed, that these claims are severed and joined with Action's claims against its insurance broker, RMS Insurance Brokerage, LLC, severed from the action by order of this Court dated September 26, 2006. While the general rule is that any claims dealing with

insurance coverage are not tried with the main negligence claims, to avoid any prejudice to the carrier (***Emmetsberger v Mitchell***, 7 AD3d 483, 775 NYS2d 876 [2004]), here, Action has not established any substantial prejudice in trying the third-party contractual indemnification claim with the main action (*see* CPLR 1010; ***Kelly v Yannotti***, 4 NY2d 603, 176 NYS2d 637 [1958]). Accordingly, this request is denied.

Lastly, as to Action's counterclaim against DaVinci for the sum of $24,415 based upon unpaid invoices, DaVinci does not dispute the amount demanded. Rather, DaVinci asserts that execution of any judgment in Action's favor should be stayed pending resolution of its indemnification claim over and against Action. In light of the fact that DaVinci assents to the amount owed, Action's submission of copies of the unpaid invoices demonstrates its prima facie entitlement to summary judgment on its claim based upon an account stated (*see* ***Yannelli, Zevin & Civardi v Sakol,*** 298 AD2d 579, 749 NYS2d 270 [2002]). Accordingly, so much of Action's motion which seeks summary judgment on its counterclaim for an account stated is granted. However, entry of judgment in its favor for the sum of $24,415, plus statutory interest of 9% per annum as of January 5, 2005, is held in abeyance pending resolution of the plaintiff's action and DaVinci's third-party claim for contractual indemnification (CPLR 3212 [e] [2]).

The claims resolved herein, limited to the dismissal of the plaintiff's claims against Artie Cipoletti and DaVinci's third-party claims for common-law contribution and indemnification are severed, and the remaining claims, including the counterclaim held in abeyance, shall continue.

Dated: 7 Dec. 2009

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**