

Miranda v Norstar Bldg. Corp.
2009 NY Slip Op 33412(U)
December 3, 2009
Supreme Court, Saratoga County
Docket Number: 2007-1298
Judge: Richard C. Giardino
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

JOSEPH MIRANDA III, by his Guardians, JOSEPH
MIRANDA, JR. AND PAMELA MIRANDA;

Plaintiff,

vs.

NORSTAR BUILDING CORPORATION; NORSTAR
DEVELOPMENT USA, L.P.; PINNACLE ROOFING, INC.;
SWAN STREET HOMES, LLC; SWAN STREET
HOUSING DEVELOPMENT FUND CORP. and
THE ALBANY HOUSING AUTHORITY;

Defendants.

NORSTAR BUILDING CORPORATION; NORSTAR
DEVELOPMENT USA, L.P.; and
THE ALBANY HOUSING AUTHORITY;

Defendants/Third-Party Plaintiffs,

vs.

JOSEPH RUSSO d/b/a NORTHERN CONSTRUCTION
TECHNOLOGIES;

Third-Party Defendant.

PINNACLE ROOFING, INC.,

Defendant/Third-Party Plaintiff,

vs.

NORTHERN CONSTRUCTION TECHNOLOGIES, INC.,

Third-Party Defendant.

DECISION AND ORDER

Index No. 2007-1298

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FILED

Third-Party Action No. 1

Third-Party Action No. 2

Appearances:**For Plaintiff:**

**David J. Pentkowski, Esq.
Pentkowski, Pastore & Freestone
Clifton Park, New York**

For Defendants:

**- Norstar Entities and
Albany Housing Authority**

**Matthew J. Kelly, Esq.
Roemer, Wallins & Mineaux, LLP
Albany, New York**

- Pinnacle Roofing, Inc.

**Denis R. Hurley, Esq.
Conway & Kirby, LLP
Latham, New York**

- Swan Street Entities

**Matthew B. Stein, Esq.
Faust, Goetz, Schenker & Blee, LLP
New York, New York**

For Third-Party Defendant:

**Melissa J. Smallacombe, Esq.
Ryan & Smallacombe, PLLC
Albany, New York**

Giardino, J.:

This matter comes before the Court on cross-motions by Plaintiff, the Norstar defendants and Pinnacle, all brought pursuant to CPLR Rule 2221, for leave to reargue their previous motions for summary judgment. Those prior cross-motions resulted in a Decision and Order entered on September 1, 2009 which, as relevant here, (a) denied Plaintiff's motion for summary judgment on the issue of liability under Labor Law §240(1), (b) denied Norstar's motion for summary judgment awarding contractual and common-law indemnification from defendant Pinnacle and third-party defendant Russo, and (c) denied Pinnacle's motion for summary judgment awarding it contractual and common-law indemnification from Russo.

Plaintiff's Motion. On this motion, Plaintiff argues that the Court misapprehended the meaning of the term "devices" as it is used in Labor Law §240(1), as well as overlooking case authority interpreting that term. The Norstar motion asserts that the Court misapprehended the sufficiency of an expert's affidavit submitted by defendant Russo on the question of "grave injury" under Workers' Compensation Law §11 and overlooked evidence establishing Norstar's entitlement to contractual indemnification. Pinnacle joins in Norstar's argument on the question of grave injury and re-asserts its original indemnification arguments.

Plaintiff's counsel has cited case authority, both in his memorandum of law and at oral argument, which he asserts as having been overlooked by the Court in deciding that a safety monitor functions as a device within the meaning of Labor Law §240(1). Contrary to Plaintiff's argument, the cited cases – and many more – were indeed read and considered by the Court in making its prior decision. Many of those cases were not specifically cited and discussed because the large volume of authority would have made for cumbersome reading. The result of the Court's prior research, however, actually lends weight to Plaintiff's statutory construction argument.

As noted in Plaintiff's memorandum of law, the primary source for deriving the legislative intent of a statute is the text of that statute. If the language is clear and unambiguous, then no further statutory construction is necessary and the courts are to give effect to the plain meaning of the statute's terms (*Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577). In the September 1 Decision and Order, the Court noted that extensive research had failed to reveal case authority squarely addressing the issue of whether the safety monitor system constitutes a device, save for *Kennedy v. Pine Hills Coffee Svc., Inc.* (4 Misc. 3d 351). The reason for this, which was not given sufficient consideration in the Court's prior decision, is the text of the statute.

The theme running through the cases cited by Plaintiff on this motion, as well as in others previously considered by the Court, is that people simply are not devices. The holdings were made in a variety of factual settings not involving the safety monitor system, but they are equally applicable if proper attention is given to the actual text of §240(1). By conducting a largely fruitless search for finer interpretation, the Court engaged in a labored analysis and reached a conclusion which, upon reflection, was incorrect. The plain language of the statute is sufficient to determine that a safety monitor is not a "device" that can be "constructed, placed and operated" as required by §240(1). On the record developed on this motion, therefore, Plaintiff was not supplied with a safety device, in violation of Labor Law §240(1), so that Plaintiff is entitled to summary judgment establishing the liability of all defendants.

Norstar's Motion. The Norstar defendants' cross-motion asserts two arguments. First, Norstar re-asserts its argument that the materials submitted by third-party defendant Russo did not raise an issue of fact as to whether Plaintiff suffered a "grave injury" as that term is used in the Workers' Compensation Law. Specifically, Norstar points to the Affidavit of Dr. James Story as being speculative and thus insufficient to raise an issue of fact. Norstar is correct that an expert's affidavit should not simply be taken at face value. If they are speculative or unsupported by any evidentiary foundation, they are insufficient to withstand summary judgment (*Gray v. South Colonie Cent. School Dist.*, 64 AD3d 1125).

Dr. Story's opinion, however, has an evidentiary foundation in his own independent medical examination of Plaintiff and the various reports and records that he reviewed. Also, given Dr. Story's initial opinion that Plaintiff's condition was improving and would likely continue to improve for up to four years, as well his use of activities being pursued by Plaintiff as a gauge for the types of employment he is capable of pursuing, Dr. Story's affidavit does not appear to be speculative. While Norstar questions the timing of Russo's efforts to assemble this evidence and the motivation behind at least some of the sources that were used, these questions go to weight and credibility determinations to be made by the finder of fact.

Norstar's second argument is that the Court's September 1 Decision and Order itself contains a sufficient basis to grant its original motion for summary judgment awarding contractual indemnification. Norstar asserts that it cannot be held to be negligent if the safety monitor system is a safety device that was supplied to Plaintiff and if Russo followed the mandates of that system. Given the Court's holding on reargument that the safety monitor system is not a device within the meaning of §240 (1), Norstar's argument loses its foundation. Moreover, even assuming that the Court were to adhere to its original holding that the safety monitor system constituted a device under §240(1), Norstar's argument overlooks the question of its adequacy for the job being done by Plaintiff, a question which was also stated in the September 1 Decision and Order. Norstar's motion thus fails to identify factual or legal matters which were overlooked or misapprehended by the Court.

Pinnacle's Motion. Pinnacle's cross-motion as to grave injury, which joins in the motion made by Norstar, must fail for the reasons set forth above relative to Norstar's motion. Pinnacle's remaining arguments, which call the Court's renewed attention to its original arguments in support of summary judgment, do not reveal factual or legal matters either misapprehended or overlooked by the Court. While the Court is now granting Plaintiff's motion for summary judgment on liability

under Labor Law §240(1), the presence or absence of negligence on the part of each defendant, and the apportionment of fault among them, must be decided by the jury in order to determine whether Pinnacle or the other defendants are entitled to indemnification, and if so, the extent to which they will receive it.

Therefore, given all the foregoing, it is hereby

ORDERED, that Plaintiff's motion seeking leave to reargue its prior motion for summary judgment as to liability under Labor Law §240(1) is GRANTED, and upon such reargument, Plaintiff's motion for summary judgment establishing the Labor Law §240(1) liability of all defendants is GRANTED; and it is further

ORDERED, that the motion by the Norstar defendants seeking leave to reargue their prior motion for summary judgment awarding contractual and common-law indemnification is DENIED; and it is further

ORDERED, that the motion by defendant Pinnacle seeking leave to reargue its prior motion for summary judgment awarding contractual and common-law indemnification is DENIED.

Dated: 12-3-09

ENTER.

Richard C. Giardino
Richard C. Giardino
Acting Supreme Court Justice

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