Pulitano v. Thayer Street Associates, Inc., et al., No. 407-9-06 Wmcv (Howard, J., Apr. 30, 2008)

STATE OF VERMONT
WINDHAM COUNTY

DOMINIC M. PULITANO,
Plaintiff,

v. **WINDHAM SUPERIOR COURT**
DOCKET NO. 407-9-06 Wmcv

THAYER STREET ASSOCIATES, INC.; BRIAN MCGUIRE; CASTLE HILL CONSTRUCTION CORP.; MARTEN HOEKSTRA; VALERIE HOEKSTRA; JOHN REDD; AUSTIN DESIGN, INC.; and ALLEN JACKSON,
Defendants.

ORDER ON AUSTIN DESIGN'S MOTION FOR SUMMARY JUDGMENT

While working on a residential construction project, Plaintiff Pulitano was seriously injured when a temporary staircase erected to work on an actual planned staircase at the worksite collapsed. After collecting workers' compensation through his employer, he brought this suit seeking additional compensation from various companies and individuals involved with the project – including, specifically, the owners, the owners' agent, the construction manager, and the architect, as well as the parties more directly responsible for building the temporary staircase.

Currently pending is a motion for summary judgment filed by the architect, Austin Design, Inc. ("Austin"), in which it argues that as a matter of law, it owed no duty to workers employed at the worksite to ensure the safety of the worksite. A motion for summary judgment should be granted if, viewing the record evidence favorably to the

non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); see also *State v. Delaney,* 157 Vt. 247 (1991). Concluding that there is no genuine issue of material fact with respect to Austin's duty and that it is entitled to judgment as a matter of law, the Court **GRANTS** Austin's motion for summary judgment.[1]

Background

The following reflects evidence that is undisputed or, if disputed, is viewed favorably to Pulitano as the non-moving party.

The case arises from the construction of a multi-million dollar home for the Hoekstras, a couple who live (or lived at the time of the construction project) primarily in Switzerland. The Hoekstras hired Castle Hill Construction as their construction manager, John Redd as their owner's agent, and Austin as their architect.

In addition to Austin's pre-construction work to design the home and prepare the construction documents, Austin agreed to a final phase of "Construction Observation": "We will visit the site on an 'as needed' basis during the course of construction to observe the progress and quality of the work. We will determine, in general, if the work is progressing according to the plans, and help resolve any problems that may arise during the course of construction. We bear no responsibility for any work that is not observed." The "Construction Observation" visits were also addressed in the appendix section of the agreement: "While the intent of these visits is to guard the client from

[1] Austin had asked the Court to delay ruling on its motion pending resolution of an ongoing dispute regarding mischaracterizations of the evidence on the part of Plaintiff's counsel. Plaintiff then filed an amended rule 56(c)(2) statement of facts. The Court sees no reason to delay its decision, however; as usual, it bases its decision on the record evidence itself, not any party's characterization of it. Even considering the amended statement of facts, the court finds the outcome in favor of Defendant Austin.

defects and deficiencies in the work, it is the (sub)contractor(s), not Austin Design, that are responsible for the construction of the Project. *We will not be responsible for the acts or omissions of any contractor or sub-contractor, safety programs or enforcement, construction means, methods, techniques, sequences and procedures employed by the (sub)contractor(s).*" (Emphasis added.) Austin's pre-construction design and document-production work was to be billed as a percentage (9%) of construction costs, but the "as needed" visits were to be billed on an hourly basis.[2]

By contrast, in Castle Hill's agreement with the Hoekstras, it agreed to "supervise and manage all phases of the construction." As Construction Manager, it broadly agreed to "provide full time construction management, budget management, quality control, accounting and all other tasks related to supervising the construction." In return, its fee was 15% of all labor and material invoices.

In practice, Bill Austin was at the construction site to check on progress of the work at least once a week, and two of his employees also visited the site. There is no evidence that any of them had anything to do with the temporary stairs that collapsed, or that they were aware of any safety issue regarding these temporary stairs.

Allen Jackson, Pulitano's employer, was apparently resentful that Thayer Street Associates had been hired to do the interior finish work instead of Jackson's company, and expressed his resentment in nasty and sarcastic remarks on the worksite. Having noticed this, on one occasion Bill Austin pulled Jackson aside and advised him to "chill out," since negativity at the worksite was not good for anyone.

---

[2] Pulitano points out that the agreement between the Hoekstras and Austin was set out in a series of emails that were apparently never reduced to a single, formally executed document. He acknowledges, however, that the parties to the contract treated the emails as a contract, and he does not really argue that the Court should not do the same.

On another occasion Bill Austin was at the site after working hours, and noticed Allen Jackson and his crew smoking pot and drinking beer. Austin asked them if they ever smoked pot during the work day. They assured him they did not, and he did not pursue it further.

Analysis

Negligence is breach of a duty owed another, and an architect's duties with respect to a building project are essentially those it agrees to by contract. See *Howard v. Usiak,* 172 Vt. 227, 234-35 (2001). In this case, the architect agreed to visit the site periodically to make sure the progressing work was in accordance with the designs it had prepared for the various contractors and subcontractors to use. Nowhere does the architect accept responsibility for worksite safety, and nowhere does it accept responsibility for the safety of things used by contractors and subcontractors to produce the final work product which are not part of the final work product. And just in case this was not clear enough, it went on to expressly disclaim such responsibility for both workplace safety and the manner and means utilized by contractors and subcontractors to do their work: "*We will not be responsible for the acts or omissions of any contractor or sub-contractor, safety programs or enforcement, construction means, methods, techniques, sequences and procedures employed by the (sub)contractor(s).*"

Nonetheless, Pulitano suggests that Austin's agreement to "observe the progress and quality of the work" and "guard the Client from defects and deficiencies in the work" should be read to include responsibility for the quality of not only the final work product, but everything done at the worksite for the purpose of producing that final work product. Although such a reading might be remotely plausible if we look at the words in isolation,

that is not the way contracts are read. Cf. *In re Stacey,* 138 Vt. 68, 72 (1980) (contract provisions must be read in overall context, to give effect to all parts of contract and form a harmonious whole). And the contract as a whole unambiguously disclaims the duty Pulitano would have to prove to succeed on his claim against Austin.

Moreover, this conclusion is further strengthened by consideration of the overall context of the construction project and the contracts between the owners and others – particularly the contract with the Construction Manager, who provides full-time management and supervision and expressly assumes responsibility for workplace safety.

Those involved in the building trades have learned through experience that construction projects are fraught with risk, resulting in tremendous uncertainty about how much profit participants can really expect to make on the project, and how much they could possibly lose. As a result, repeat players have developed contracts that govern the inter-relationships between the parties and set out their roles and responsibilities as specifically as possible. And since the parties then rely on these contractual risk allocations in setting the prices for their services and securing necessary insurance, courts should not lightly sweep them aside.

Pulitano also argues that even if Austin did not contractually assume the duty to provide a safe workplace, it undertook such a duty by its actions at the worksite. See *Schaad v. Bell Atlantic NYNEX Mobile, Inc.,* 173 Vt. 629, 630 (2002); Restatement (Second) of Torts, § 324A. However, the only actions Pulitano can point to are those noted in the Background section above (i.e., advising Jackson to "chill out" and asking if he smoked pot on the job). In light of the explicit contractual allocation of responsibility and the lack of any evidence that Castle Hill or others contractually responsible for

workplace safety lessened their guard in reliance on Austin's actions, these two incidents simply cannot constitute the kind of general undertaking which could expand Austin's duty and provide a basis for liability. Cf. *Northern Indiana Public Service Co. ("NIPSCO") v. East Chicago Sanitary Dist.,* 590 N.E.2d 1067, 1074 (Ind. Ct. App. 1992) (liability for accident on construction site could not be imposed based on undertaking theory unless it could be shown that the general contractor/construction manager relinquished control over workplace safety as result of alleged undertaking). In NIPSCO, the appellate court held that the trial court had properly rejected the undertaking theory and granted summary judgment for the architect, even though the architect noticed and reported unsafe situations on four occasions, stating that "[a]ll persons on the construction site should be encouraged to report or act upon any observed hazards without the apprehension that if they do so, they will have assumed safety duties relative to the whole job site." *Id.* at 1077. This Court agrees, and concludes that there is no genuine issue of material fact with respect to the architect's duty here and its motion must be granted.

ORDER

Defendant Austin's motion for summary judgment is therefore **GRANTED**.

Dated at Newfane, Vermont, this _____ day of _____ 2008.

_____
David Howard
Presiding Judge