

Yip v Kit Tzing Lee Kuan Realty, Inc.

2007 NY Slip Op 32605(U)

July 31, 2007

Supreme Court, Queens County

Docket Number: 0028647/2004

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

DAVID YIP x Index
Number 28647 2004
Motion
Date May 9, 2007

-against-

KIT TZING LEE KUAN REALTY, INC.,
et al. Motion
Cal. Number 53
Motion Seq. No. 1
_____ x

KIT TZING LEE KUAN REALTY, INC.

-against-

HSU & ASSOCIATES, INC., et al.
_____ x

The following papers numbered 1 to 15 read on this motion by Kit Tzing Lee Kuan Realty, Inc. (Kit), for summary judgment in its favor dismissing all claims and cross claims against it, and cross motion by The Plumbing Company, Inc. (Plumbing), to dismiss the complaint and all cross claims against it pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits-Exhibits	5-10
Answering Affidavits - Exhibits	11-13
Reply Affidavits	14-15

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Plaintiff in this action seeks damages for personal injuries sustained in an accident on December 20, 2003, while using a power saw to secure a staircase handrail. The accident occurred at

101-105 Lafayette Street, in New York City (premises). Kit owns the premises which was being renovated for opening as a Chinese restaurant. The record indicates that plaintiff and the owner of the restaurant, Mr. Tam, were longtime friends and Tam asked and/or hired plaintiff to assist in completing the renovations after the previous general contractor, HSU & Associates (HSU), left the job unfinished following a dispute by Tam. Plumbing was the plumbing contractor hired by HSU to upgrade the plumbing at the premises. Kit moves for summary judgment in its favor on several grounds. Plumbing moves for summary judgment in its favor on the ground that it did not exercise supervision and control over the activity which caused plaintiff's accident; that it performed only plumbing work on the job and did not use a power saw in doing so, and significantly, that it had completed its part of the renovation project and removed all of its tools from the work site prior to plaintiff's work on the premises. Plaintiff opposes the branch of Kit's motion which seeks dismissal of its claims under Labor Law § 241(6), and does not oppose the cross motion.

Motion

It is well settled that the proponent of a motion for summary judgment has the initial burden of submitting competent evidence eliminating any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). In support of the motion, Kit submitted, inter alia, a certified transcript of the examination before trial testimony of plaintiff. Plaintiff testified, in substance, to the following: He was asked by his friend and former business associate to assist with the completion of a renovation project that had been started and abandoned by HSU. On the date in question, he was attempting to cut down a piece of wood to secure the wooden handrail which had been installed by HSU. In order to make the smaller piece of wood, plaintiff chose to use a power saw that was present at the location. Plaintiff described the saw as the kind where the arm would be pulled down in order to cut the wood while the arm was in the down position. Prior to using the saw, plaintiff did nothing to secure the base of the saw and did not check the saw to determine if it was safe to use except to check to see that the saw was plugged in and that the blade was not loose. Plaintiff did not know who owned the saw but believed that the prior contractor, HSU, had left it. Plaintiff was injured when he pulled the blade down into the cutting position; the blade got stuck in the wood, and pulled the wood along with plaintiff's hand. There was no blade guard on the saw. Plaintiff further testified that Kit did not exercise supervision and control over the work site and that Kit merely made general requests that

certain walls not be taken out and complained about noise and a water leak.

A landowner will be liable for violation of Labor Law § 200 and common-law negligence when the injuries complained of are caused by a dangerous condition at a work site only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the dangerous condition (see Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Rosemin v Oved, 254 AD2d 343 [1998]; Akins v Baker, 247 AD2d 562 [1998]). Specifically, for liability to be imposed, the owner must direct and control the manner in which the work is performed, not merely possess general supervisory authority (see Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Haghighi v Bailer, 240 AD2d 368 [1997]; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311 [1997]). Moreover, the phrase "direct or control" is to be construed strictly (see Siconolfi v Crisci, 11 AD3d 600 [2004]; Mayen v Kalter, 282 AD2d 508 [2001]), and neither retention of inspection privileges nor a general right to supervise alone constitutes control sufficient to impose liability (see Wendell v Pillsbury Corp., 205 AD2d 527 [1994]). In the case at bar, there is no evidence that Kit exercised direction or control over the manner in which the plaintiff performed the assigned task. Therefore, the branch of the motion which seeks to dismiss the claims based upon common-law negligence and violation of Labor Law § 200, is granted on the merits and as otherwise unopposed.

The branch of the motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 240(1), is also granted. Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail, in accordance with the statute, to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (see Misseritti v Mark IV Constr. Co., 86 NY2d 487 [1995]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]). The statute is designed to protect workers from gravity-related hazards such as falling from a height (see Ross v Curtis-Palmer Hydro-Elec. Co., supra), and is liberally construed to accomplish its purpose (see Rocovich v Consolidated Edison Co., supra). Here, it is undisputed that plaintiff's accident did not occur as a result of an elevation-related hazard. Therefore, the branch of the motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 240(1), is granted on the merits and as otherwise unopposed.

The branch of the motion which seeks dismissal of plaintiff's claims pursuant to Labor Law § 241(6), is denied. Labor Law § 241(6) mandates that owners and contractors provide reasonable

and adequate protection and safety for workers by requiring them to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor, as opposed to general safety standards regulations (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The Commissioner's rules, known as the State Industrial Code, are contained in Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR). In order to recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (Dooley v Peerless Importers, Inc., 2007 NY Slip Op 04781). This duty is nondelegable, and the injured party need not show that the owner exercised supervision and control over the work site (Long v Forest-Fehlhaber, 55 NY2d 154 [1982]). Additionally, a plaintiff must establish that the violation of the specific safety regulation was a proximate cause of the accident (Ares v State of New York, 80 NY2d 959 [1992]).

In the case at bar, plaintiff alleges that Kit violated § 23-1.12 of the Industrial Code. This section, entitled "guarding of power-driven machinery" states, in relevant part, that "every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth." In moving to dismiss plaintiff's claims under § 241(6) of the Labor Law, Kit contends that the absence of the blade guard was not the proximate cause of the accident based upon how plaintiff described the happening of the accident. In opposition, plaintiff submits evidence to the contrary and argues that the absence of the guard on the saw was indeed the proximate cause of his injuries. Given the conflicting evidence on this issue, summary judgment dismissing plaintiff's claim pursuant to Labor Law § 241(6), is denied (see Danton v Van Valkenburg, 13 AD3d 931 [2004]).

Cross Motion

Plumbing cross-moves to dismiss all claims and cross claims against it on the ground that it did not supply the saw used and indeed had completed its part of the project prior to plaintiff appearing to work on the site. In support of the motion, Plumbing submitted undisputed evidence as follows: It was the plumbing contractor on the restaurant renovation project and its duties were limited to general plumbing work. Plumbing did not hire any subcontractors for the project, and in performing its duties it did not use any power saws. Further, Plumbing completed its work on the project, left the job site and took all of its tools from the premises. Indeed, Plumbing only became aware of plaintiff's work on the project upon receipt of documents pertaining to the instant

suit. Based upon this undisputed evidence that Plumbing was not a general contractor or statutory agent of HSU and did not have the authority to direct, supervise, or control plaintiff's work, Plumbing's cross motion to dismiss the complaint insofar as asserted against it, is granted on the merits (see Linkowski v City of New York, 33 AD3d 971 [2006]), and as otherwise unopposed.

Conclusion

The branch of the motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 241(6), is denied. The branch of the motion which seeks to dismiss plaintiff's remaining claims under the Labor Law is granted.

The cross motion by Plumbing to dismiss the claims and cross claims against it is granted.

Dated: July 31, 2007

J.S.C.