Andreas v Catskill Mtn. Lodging, LLC

2007 NY Slip Op 33012(U)

September 10, 2007

Supreme Court, Queens County

Docket Number: 0011667/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

CHRISTOS ANDREAS,	Index No. 11667/05
Plaintiff, -against-	Motion Date May 29, 2007
CATSKILL MOUNTAIN LODGING, LLC, CATSKILL RESORT BUILDERS, LLC, YAKOV BLETNITSKY, JEFF PRINCE AND JEFF PRINCE REAL ESTATE, INC.,	Motion Cal. No. 1
	Motion Seq. No. 2
Defendants.	

	PAPERS NUMBERED
Notice of Motion-Affid-Exhib........	1-4
Cross-Motion-Ans. Affid-Exhib.......	5-8
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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on March 7, 2005 when he fell from a scaffold during construction work at lot #4 Plateau Mountain Estate on Plateau Mountain Road, in Greene County, State of New York.

Plaintiff moves for an order granting summary judgment in his favor on the issue of liability only as against defendants Yakov Bletnitsky and Catskill Mountain Lodging, LLC.

Defendants Catskill Mountain Lodging, LLC (Lodging) and Yakov Bletnitsky (Bletnitsky) cross-move for an order striking the note of issue.

Although served with the motion and cross-motion, none of the other defendants have submitted any papers in response thereto.

Plaintiff asserts that he was injured while working at the construction site of a new house owned by defendant Lodging and its sole shareholder and president defendant Bletnitsky. Plaintiff, an employee of Eleos Construction Company (Eleos) a non-party to this action, asserts that he was installing decorative beams on the ceiling of the living room of the subject premises and intermittently plastering holes in the ceiling. Eleos had been engaged by the defendants to conduct interior decoration work on a one-family home that had been constructed on one of four lots owned by defendants.

Plaintiff testified in his deposition that the scaffold collapsed as he stood on it and was applying a nail gun to a nail on the ceiling. Plaintiff alleges that the defendants failed to provide adequate safety measures at the construction site and also failed to provide appropriate support equipment for the three-tiered scaffold in violation of Labor Law §§ 200, 240, 240(1) and 241(6).

Plaintiff contends that the defendants are not entitled to the exception from strict liability carved out for owners of one and two-family dwellings who contract for but do not direct or control the work under Labor Law § 240 because defendants intended to sell the building rather than reside in it as required to qualify for the exception. Plaintiff, therefore, urges this court to find defendants strictly liable for violating the scaffolding law and to grant his motion for summary judgment as to liability.

Defendants oppose plaintiff's motion and cross-move to vacate the note of issue. Defendants contend that the note of issue was filed because of the mandates of the Compliance Conference Order and not because the case was ready to go to trial. Defendants seek to vacate the note of issue in order to complete all outstanding discovery and deposition. In any event, defendants assert that the building was for residential use and not for a commercial purpose as plaintiff alleges. Defendants claim entitlement to the homeowners' exception. Defendants urge the court to deny plaintiff's summary judgment motion.

Courts have repeatedly held that summary judgment is a drastic remedy that deprives a litigant of his day in court and should only be employed when there is no doubt as to the absence of triable issues. Andre v. Pomeroy, 35 NY2d 361 at 364; Kolivas v. Kirchoff, 14 AD3d 493; Doize v. Holiday Inn Ronkonkoma, 6 AD3d 573. It is well settled that, on a

motion for summary judgment, the court's main function is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. Scott v. Long Is. Power Auth., 294 AD2d 348; Anyanwu v. Johnson, 276 AD2d 572; Omrami v. Socrates, 227 AD2d 459; Rebecchi v. Whitmore, 172 AD2d 600.

The movant must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 NY2d 557 at; Sillman v. Twentieth century-Fox Film Corp., 3 NY2d 395. Where a movant fails to make such a showing the motion should be denied regardless of the sufficiency of the opposing papers. Gstalder v. State, 240 AD2d 541. Conversely, once the movant makes a prima facie showing, the burden shifts to the non-moving party to produce competent evidence demonstrating the existence of triable issues of fact. Zuckerman v. City of New York, 49 NY2d 557.

It is undisputed that the building is a one-family house owned by the defendants Lodging and Bletnitsky. The crux of this motion is whether the building in question was for residential or commercial use by defendants. If it was for residential use, the defendants will be entitled to the exception reserved for owners of one-family dwellings. Cannon v. Putnam, 76 NY2d 644. The reverse is true if the building was entirely and solely for their commercial purposes. Lawless v. Kera, 259 AD2d 596.

Here, although plaintiff alludes to "documentary testimonial evidence" in his moving papers to show that defendants' "intention in constructing the residence was purely for commercial gain" so as to deny them the benefit of the exception, plaintiff fails to support such allegation with proper evidence. Plaintiff merely presents inadmissible hearsay statements made by his boss at Eleos that the house was for sale. Plaintiff also alleges that defendant Jeff Prince, purported to be the defendants' real estate agent commissioned to sell the property, visited the premises several times with persons plaintiff believed were potential buyers. Plaintiff surmises from the snippets of conversations he overheard Mr. Prince having with those persons, when they came by to inspect the premises, that they were discussing the sale of the property. Plaintiff's allegations are unsupported by any evidence in the record other than these clearly inadmissible hearsay statements.

Plaintiff has, therefore, failed to make a prima facie showing that the defendants intended to use the building for commercial purposes in order to establish his entitlement to summary judgment as a matter of law. When a party does not meet his initial burden, the court need not consider whether the opposition papers were sufficient to raise a triable issue of fact. Sayers v. Hot, 23 AD3d 453. The court, therefore, need not consider that part of defendants' opposition papers that addresses the issue of liability.

Accordingly, plaintiff's motion for summary judgment is denied. Further, defendant's cross-motion to vacate the note of issue is moot in light of the order dated May 8, 2007 (Schulman, J.), which struck the action from the calendar due to plaintiff's pending knee surgery.

Dated:September 10,2007 ....

HON. DAVID ELLIOT